

**Access to Procedures
'Safe Third Countries', 'Safe Countries of Origin' and
'Time Limits'¹**

Joanne van Selm, 2001²

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Introduction

1. This paper seeks to stimulate discussion on a number of issues related to Access to Asylum Procedures. The intent in this paper is to provide an analysis that is valid globally, although particular attention will be paid to European States, and most specifically the Member States of the European Union. This is due to the fact that the major developments in two of the three aspects of concern with regard to the seeming restriction of access to asylum procedures have been most elaborate, and originated, in the EU. The paper will not be exhaustive on access issues: indeed it will only deal with three of them, namely the notions of 'safe third countries', 'safe countries of origin' and 'time limits'.³ Other issues including carrier sanctions; airline liaison officers; visa policies; border control issues; admissibility procedures; expedited removals and the notion of manifestly unfounded claims, will not be dealt with in detail in this paper.⁴ However, reference to the matters of admissibility procedures and manifestly unfounded claims or accelerated procedures cannot be avoided in considering the 'safe third country' and 'safe country of origin' concepts.

2. Following this introduction, the paper will be divided into three parts. First there will be a description of 'safe third country' rules including Dublin and readmission agreements; description of the 'safe country of origin' notion; and a description of time limits States impose for requesting asylum. This first part will include an overview of the critical analyses made of these notions by various academics and NGOs, as well as some relevant legal opinions. The second part will involve a comparison of the practices described in the first part and the principles listed in the Convention. This will be chiefly concerned with how these notions may or may not deny protection (rather than only access to protection), and will be linked to the critical points of discussion raised in the first part. In the third part some ideas and recommendations of whether and how in fact 'safe third country' 'safe country of origin' and time limits can be implemented without damaging refugee protection or violating the Convention will be set out. These ideas will stem from the critical discussion, and links to the Convention set out in the earlier parts of the paper.

3. Access to fair, effective and efficient determination procedures for refugee status is not only in the interest of the individuals who make a claim to be seeking protection, but also in the interests of States. States have the right, as a matter of well-established international law, and subject to treaty obligations, to control the entry, residence and expulsion of aliens. That right is indeed subject to treaty obligations, and thus one held in the context of international agreements on human rights and refugee protection. Agreements on human rights and refugee protection are measures, agreed between States, which are about individual human lives. It is frequently noted that inter-State relations can be more important than individual-State relations for resolving the situation of refugees.⁵ While the

³ The focus of the paper was defined as part of the commissioning process.

⁴ Some of these issues will be dealt with in other papers produced for discussion and as background material in the Global Consultations Process.

⁵ Marx, R, 'Non-Refoulement, Access to Procedures and Responsibility for Determining Refugee Claims' in **International Journal of Refugee Law**, Vol7 No.3 (1995) pp.383-406 p. 389; Garvey,

measures may be agreed between States, and while they affect the political relations between States, they are not measures which affect only States. Rather they are measures in which States acknowledge that individuals have rights (as well as duties) which States must respect. In controlling entry, residence and expulsion, while living up to treaty obligations, it is in the interest of States to grant access to their determination procedures to all those seeking protection as refugees. Only in this way can States determine the validity of claims, the protection need, and whether they have a reason to reject a claim to residence and protection and to seek the expulsion of an alien who has arrived on their territory. Furthermore, it is only by granting access to procedures that States can uphold the system within which they themselves exist. The right and duties which States acknowledge individuals as having are facets of the understanding of the nature of statehood. States exist in part to bring individuals together in collective units. States are the key actors in the international system, acting to represent individuals and groups within their territory and/or jurisdiction. Put simply, refugee protection, as well as the resolving of the issue of statelessness, has as a goal the assurance that all individuals will be part of a State, be protected by that State against the actions of other States, and in return have duties to that State.

4. The three measures have differing origins, but all stem from a desire on behalf of States to ensure that the asylum systems they operate run efficiently. This means not only that national asylum systems run smoothly, but also that regional and global refugee protection should be a cooperative regime. While this desire is at the root of the measures, their outcomes have not always achieved the desired results. That is as much a problem for States as it is for individuals, because it means that policy makers have not achieved their goals.

5. The 'safe third country' principle, originating in Europe, evolved from a combination of goals. In trying to avoid 'asylum shopping', where asylum seekers might lodge claims, simultaneously or consecutively, in various States, seeking the best situation for themselves, States had not been assessing some claims, or permitting admission to the territory, leaving some asylum seekers 'in orbit'. A system whereby one State could be said by all to be the one responsible for assessing a claim would mean both that all other States would know where the asylum seeker 'should' be, and that all asylum seekers should be guaranteed that one State would assess their claim. This goal led to the Dublin Convention. Although that Convention has often been seen as a 'burden-sharing' tool, its goal is not to spread refugees 'evenly' around the continent, but to move asylum seekers to that country which, according to the rules of the agreement, should assess their claim. The 'safe third country' principle as a wider measure, going further than the States of the European Communities, stems from the Dublin Convention (as will be discussed below), but also from certain foreign policy or international relations goals. Once the countries of central and eastern Europe were 'liberated' from Communism, and no longer States from which refugees originated, there was a perception in western Europe that they should play their part in refugee protection, particularly as significant numbers of asylum seekers arriving in

J.I. 'Towards a Reformulation of International Refugee Law', **Harvard International Law Journal** Vol 26 (1985).

western Europe used travel routes which took them over land and through those States. However, rather than just being a 'selfish' measure, encouraging central and eastern European States to develop their refugee protection regimes would also be part of the creation of institutional and legal capacity: proof, one could say, that those States were also part of the system, and mature democracies. Over time, this goal might well be reaching fruition, but the creation of the 'safe third country' rules, and their development over time, has been accompanied by cynicism and has 'back-fired' in part because the countries in question may not have been ready for the label 'safe' when they received it, and in part because the implementation has given the appearance at least of western European States attempting to shift their burden eastwards, rather than them trying to include the eastern European States in the global refugee protection regime.

6. UNHCR takes the position that there is a clear distinction between a 'first country of asylum' and a 'safe third country' (the terminology is discussed further below). If someone has protection in a given State (a 'first country of asylum'), and has moved irregularly from that State to another State, where a further asylum application is lodged, then UNHCR takes the position that return may be acceptable, both conceptually and practically, so long as protection is still available and the conditions under which the person receiving protection lives are acceptable. This is as stated in EXCOM Conclusion 58. However, where a person has transited a State, or where there is simply a State where a person could have applied for protection (a 'safe third country'), then UNHCR sees considerably more safeguards as being necessary.⁶

7. The 'safe country of origin' principle was created likewise in the European context at a point at which there was an increasing perception of the asylum systems being abused. People wanting to move for primarily economic purposes, rather than in flight from persecution or harm, were using the asylum system in an attempt to obtain a legal status which immigration regulations denied them. One way for States to turn off that point of entry, that 'immigration back door' seemed to be to say that if a person came from a given State of origin then it was impossible for them to be a refugee, because that State did not produce refugees. As with 'safe third countries', the creation of the policy and its implementation has given rise to problems, while not resolving the situation it was created to avoid. UNHCR takes the position, as expressed in its paper *Asylum processes (fair and efficient asylum procedures)* that the 'safe country of origin' notion does not have, per se, to be a barrier to access to procedures.⁷ Its implementation prior to any further substantive determination of the asylum claim means it is perceived as a barrier. However, UNHCR suggests that if applied not to admissibility, but to the substantive determination of the claim, the principle would not necessarily be so problematic. During the substantive determination of the claim, the individual would have the opportunity to "rebut a general presumption of safety in his/her individual case."⁸

⁶ UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)* Global Consultations on International Protections, 2nd Meeting. EC/GC/01/12 31 May 2001.

⁷ *Ibid.*

⁸ *Ibid.*, para 40.

8. Where States institute time limits for the submission of asylum applications it is generally with the aim of avoiding abuse of their system, and maintaining efficient administrative procedures. Time limits have been introduced in many central and east European States, Turkey and the United States, among others. They vary in length between 24 hours and one year, and vary also, from State to State in the strictness of their implementation.

9. The goals of these three policy measures are not necessarily as objectionable in their origins as they are often portrayed to be. However, the implementation of the measures turns them into practices to which a range of objections can and must be raised, as they deny access to procedures for persons in need of protection, and may lead to *refoulement*. The goals are:

- to incorporate all States which are in a position to offer and guarantee refugee protection in the regime or system ('safe third country');
- to ensure that all persons seeking protection will have their claim assessed in a State which upholds the 1951 Convention relating to the status of Refugees ('safe third country');
- to guard against 'abuse' of the asylum system ('safe country of origin'/time limits);
- to run efficient procedures (all three).

A further aim, with regard to the spreading of the asylum 'burden' is clearly also to reduce, at least by deterrent, the number of asylum seekers arriving in EU States. All tables of statistics show in fact that the number of asylum seekers filing applications in EU States between 1990 and 2000 has fluctuated year on year. The fluctuations appear at first sight to correlate rather with crises in the Balkans than with any particular policy approaches drafted or implemented.⁹

10. The three measures, 'safe third country' rules, 'safe country of origin' rules, and time-limits on filing an asylum application after entry to the territory of States are measures which are based on a logical reasoning from the State perspective. As will be discussed further below, it is logical for States to seek means of defining which State is responsible for assessing an asylum claim, even if, as Marx states "This State practice has no real basis in international refugee law but has emerged from States' national legislation and administrative practice."¹⁰ If the 'safe third country' principle guaranteed that one State would certainly assess the claim, then it might also be logically in the interest of an asylum seeker (if protection is the sole aim of the asylum seeker). It is logical for authorities and individuals making assessments of asylum claims to be influenced by a knowledge of the general situation in a country of origin. It is also logical, from the point of view of a State, to think efficiency is assisted by stimulating asylum seekers to make their request for asylum known quickly. None of these measures is unthinkable.

11. The use to which the measures are put, however, raises other questions of logic as well as concerns about the connection to the treaty obligations which constrain the States' right

⁹ See eg UNHCR's tables of statistics at www.unhcr.org or those collated by the Inter-Governmental Consultations at www.igc.ch.

¹⁰ Marx, *op.cit.*, p.392.

to control entry and residence on its territory. These three measures therefore have come to be realistically viewed by advocates of human rights and refugee protection, as well as by those concerned with the integrity of inter-State relations on the matter of refugee protection, to be measures of restriction which limit the access to fair and efficient asylum procedures for many protection seekers, which limit States' ability to live up to treaty obligations and to control the residence and expulsion of aliens, and which can strain the relations between States. The three measures named are seen by the implementing States as restrictive measures which limit or reduce the number of asylum-seekers remaining, and even arriving, in European Union Member States and other (developed) States. In other words, States perceive these restrictive measures to be in their interest, in spite of the fact that they do not reduce the number of people in need of protection around the world, and the fact that all States, one way or another, will be called on to participate in the protection of those individuals who find themselves outside of the protection of any single State in the international system.

12. UNHCR has expressed concern on all three issues.¹¹

UNHCR is seriously concerned about the fact that access to asylum procedures has sometimes been denied on the grounds of nationality (based on the notion of 'safe country of origin') ...'.¹²

It is also a matter of concern that some States have introduced time limits for the filing of asylum requests, after which applications are not admitted to the asylum procedure. The use of time limits as a bar for a person to apply for asylum is contrary to accepted asylum and refugee protection principles.... [W]hile time limits may well be set for certain specific administrative purposes, the asylum-seeker's failure to submit the request within a certain time limit should not lead to the asylum request being excluded from consideration.¹³

13. Further, the same note explains how 'safe third country' concepts are often being inappropriately applied, leading to asylum-seekers being removed to territories where their safety cannot be ensured, which is clearly contrary to basic protection principles and may lead to violations of the principle of *non-refoulement*. The UNHCR Executive Committee has concluded that no asylum-seeker should be returned to a third country for determination of the claim without sufficient guarantees, in each individual case: that the person will be readmitted to that country; will enjoy there effective protection against *refoulement*; will have the possibility to seek and enjoy asylum; and will be treated in accordance with accepted international standards.¹⁴ A country may be safe for some

¹¹ *Note on International Protection* 4 June 1999 **Refugee Survey Quarterly** Vol. 18, No. 2 1999 pp.85-101

¹² **Ibid.**, p.88 para 17

¹³ **Ibid.**, p.88 para 18

¹⁴ **Ibid.**, para 19.

asylum-seekers, of certain origin, but unsafe for others of another origin. Whether it is safe can also depend on the individual's background and profile.¹⁵

14. All three measures described and analyzed in this paper entail that a person seeking protection has arrived on the territory of the State applying the relevant rule. These three concepts could be said to be restrictive measures which apply only if restrictions on arrival (including some of those listed in the opening paragraph) have failed. If the three measures described here imply that the asylum seeker has already achieved territorial access, then the next step for the individual concerned is gaining access to procedures.

1.A 'Safe Third Country'

15. A variety of terms are used as synonyms of what has become generally known as a 'safe third country'. These include 'country of first asylum'; 'host third country'; 'country responsible for examining the asylum application'. The terms are not perfectly interchangeable, and the vocabulary has been developing over the last decade of application and implementation of the principle. UNHCR sees a clear distinction between a 'first country of asylum' – a place where protection has been granted, and where the level of protection remains satisfactory – and a 'safe third country' – a place with which an asylum seeker has some connection, eg transit, and in which the State applying the principle believes the person could have requested protection. This implies that the 'first country of asylum' has accepted responsibility for the protection of the individual in questions, while a 'safe third country' has not done so.¹⁶

16. One discussion of the terminology is particularly interesting in the light of the European developments to be discussed below. In 1995 the United Kingdom Delegation in Geneva wrote a note explaining the terminology as follows:

'safe third country' – meaning a country other than the country of origin or the one where the applicant is seeking asylum which is 'safe' in that the applicant would not "face treatment contrary to article 33 of the 1951 United Nations Convention relating to the Status of Refugees, or other violations of human rights.";¹⁷

host third country (the term used in the London Resolution detailed below) entails the following: "The word 'host' means that the asylum applicant has been in a third country before arriving in the country in which he or she has applied for asylum."

¹⁵ **Ibid.**, para 20.

¹⁶ See in this regard the position states in *REVISITING THE DUBLIN CONVENTION Some reflections by UNHCR in response to the Commission staff working paper* which states (p.2)

"UNHCR considers that any analysis of the issue must be based on the understanding that the responsibility for examining an asylum request lies primarily with the State to which it has been submitted. While that State may be relieved from such responsibility if it ensures that another State will consider the request, it is essential that any arrangements that may be concluded to this end, be consistent with the imperatives of refugee protection."

¹⁷ **International Journal of Refugee Law** Volume 7 Issue 1 (1995) 'Sending Asylum Seekers to 'safe third countries'', p.120

17. A 'safe third country', the note says, is broader: the applicant does not have to have been in the 'safe' State in question – but can safely be sent there. The London Resolution was given the title of dealing with 'host third countries': in fact, as will be seen below, the development of the concept means it is actually about 'safe third countries' according to the above definitions.

18. The 'safe third country' concept is applied to allow the removal of asylum-seekers/refugees to countries where they have or could have sought asylum and where their safety would not be jeopardized, whether in that country or through return from there to the country of origin. While the concept is often presented as being something which would lead to a reasonable sharing of protection, its ultimate effect, if uniformly applied, would rather be for those States which are considered safe and which are closest to countries of origin to receive the maximum number of refugees – being relieved only by the generosity of more distant States which could, for example, organize resettlement or evacuation programs (to assist countries of 'first asylum'). As Noll has written, "Ultimately, it is a matter of taste whether such ['safe third country'] arrangements are considered measures inhibiting entry or speeding up exit. The decisive issue is that they impact the actual number of beneficiaries present in the host country."¹⁸ A further issue is that these arrangements can serve to convince States of their non-responsibility for refugees.¹⁹

19. In this section of the paper, Europe's leading role in the development of the 'safe third country' concept will be described, and then the practice of the various European States will be mentioned. In this context three key features will be highlighted:

- what makes a country 'safe' for these purposes;
- whether or not lists of such countries are maintained; and
- at which stage in an asylum procedure the 'safe third country' principle is employed.

20. The first point is essential to the description of the approach, and to the criticisms of it. If there is no consensus on what 'safe' really means, can one either talk of a harmonized European approach in particular, or of this principle as being compatible with international law and political practice on refugee policy in general? The matter of lists refers also to this second point: is it possible to talk of countries themselves as being safe for everyone who enters them, or will there not, in the relations between people and States, always be the possibility of some discrimination and friction, meaning an individual could in fact have a well-founded fear of persecution even in a State which in general is seen as

¹⁸ Noll, Gregor, *Negotiating Asylum: the EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (The Hague: Martinus Nijhoff, 2000) p.105

¹⁹ See Landgren, Karin, *Deflecting international protection by treaty: bilateral and multilateral accords on extradition, readmission and the inadmissibility of asylum requests* UNHCR: New Issues in Refugee Research, working paper No. 10 (June 1999).

persecuting no-one?²⁰ The question of the stage in the procedure is also highly important. The earlier the principle is employed, the less likely a State is to have considered an asylum application on the merits of its relevance to the Convention, meaning the assessment of another State as 'safe' for the individual concerned might not be based on the full facts of the individual case.²¹ If the principle is applied only later in procedures, more may be known of the individual circumstances. Non-European situations will also be briefly considered. After considering State practice, we turn to three major points of discussion and critique of the principle:

- the potential for a '*refoulement*-chain';
- the question of whether an asylum seeker should have some freedom in choosing the State in which he or she seeks protection; and
- the notion of 'refugees in orbit' and how 'safe third country' principles in practice are meant to avoid that.

21. Finally, we will turn to two matters intrinsically bound up in an assessment of 'safe third country' policies and practices: the Dublin Convention and Readmission agreements. While chronologically the Dublin Convention was *written* before the 'safe third country' principle was discussed and 'established', the implementation of the policies and agreements saw 'safe third country' rules taking effect before Dublin was ratified and entered into force. Readmission agreements, in fact key to the effective functioning of the whole process, have been the last area to be developed in reality.

1.A.1. Europe's leading role

22. UNHCR has pointed out that as Europe is a leader in the global refugee regime, how the countries in that region (and particularly in the EU) operate affects practice in the rest of the world. This is evidenced by the fact that, for example, some countries in Africa now apply the 'safe third country' rule (as well as 'first country of asylum' and 'safe country of origin'). This can mean that an asylum seeker is refused refugee status if he or she passed through another safe country and failed to apply for asylum there. Like other developments, this was borrowed from European practice.²²

23. In 2001, the South African Department of Home Affairs issued a policy circular (59 of 2000) ordering border guards to turn back asylum seekers arriving through 'safe' neighboring States.²³ Few of Africa's impoverished refugees arrive in South Africa by

²⁰ This point, of course, also brings us to questions about what persecution actually is. This is in no way irrelevant to the matter of what a 'safe third country' might be, however, it goes beyond the remit of this paper.

²¹ Case law relevant to this point, including Adan and reference to non-state actors will be discussed under the **Dublin Convention** below.

²² Rutinwa, Bonaventure, 'The end of asylum? The changing nature of refugee policies in Africa,' Working Paper No.5, UNHCR New Issues in Refugee Research, (May 1999). UNHCR sources indicate that Botswana applies the 'safe third country' policy consistently, while Tanzania applies the 'first country of asylum' approach.

²³ Jesuit Refugee Service, JRS DISPATCHES, No. 92, 2 May 2001.

plane, so the country would reduce its number of asylum seekers to almost zero if this policy were to be strictly enforced. In fact, the Department had to withdraw the circular following the ruling on an urgent application brought by the NGO Lawyers for Human Rights to the Transvaal Provincial Division of the High Court, challenging the legality of the move.

24. The United States and Canada looked likely to come to agreement on a similar distribution rule between themselves in 1997, although this did not become a reality.²⁴ Given that the development of standards in Europe has major repercussions in other regions, UNHCR does see a need for Europe-wide consensus on how to ensure protection *somewhere* while allocating responsibility for examining applications in a spirit of burden-sharing.²⁵ UNHCR also has seemed to sanction the use of the 'safe third country' concept.²⁶

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.

25. However, UNHCR insists that strict criteria are necessary, including notification to the 'safe third country' that a claim has not been examined on its merits; the need for consistency and guaranteed access to fair, effective and efficient procedure and appropriate reception conditions.

26. Given Europe's leading role on these issues, it is useful to look to the key point in the development of the notion of safe third countries, which was the Resolution agreed by the European Community in London on November 30 and December 1, 1992 on a Harmonized Approach to questions concerning host third countries.

27. In their *Resolution on a harmonized approach to questions concerning host third countries*, the Ministers of the Member States of the (then) European Communities, expressing their determination to harmonize asylum policies and their fidelity to the Geneva Convention, especially Articles 31 and 33, noted that they needed, in the light of article 3(5) of the Dublin Convention (which was not yet ratified by all) to agree on the principles defining a third country to which an asylum seeker could be sent.²⁷ Some seven years later the European Commission acknowledged that problems can arise in connection with Article 3(5) due to State discretion in applying it: "Problems can arise in cases where

²⁴ See United States Committee for Refugees, 'At Fortress Europe's Moat: the 'Safe Third Country Concept', (1997) p.3.

²⁵ UNHCR **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).

²⁶ **Ibid.**

²⁷ Article 3.5 of the Dublin Convention 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.

the Member State to which a transfer request is made would apply the ‘safe third country’ concept in a case where the requesting State would not do so because it does not consider that the third country can be regarded as safe for the applicant.”²⁸

28. According to the Resolution, the identification of a host third country

- would precede the substantive examination of the asylum application and its justification (1a);
- all applications would be subject to this identification, whether they appeared to be refugees or not (1b);
- if there is a host third country the request would not be examined and the applicant would be sent to that country (1c);
- if there was no host third country, then the next step would be to apply the Dublin Convention (1d).
- However, for humanitarian reasons, any Member State could choose not to remove an applicant (1e).

29. The requirements to be a ‘host third country’ were:

- (2a) life or freedom must not be threatened within the meaning of Article 33 of the Geneva Convention;
- (2b) there must be no exposure of the applicant to torture or inhuman or degrading treatment in the third country;
- (2c) applicant either has to have been protected there, 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.”
- The applicant must be afforded effective protection against *refoulement* in the host third country (2d) and use would be made of information available from UNHCR on practice in such countries.

30. Although consideration of the availability of a ‘host third country’ (or ‘safe third country’) precedes application of the Dublin Convention, a Member State may not refuse to examine a claim, if responsible, on the grounds that another State should have sent the applicant to a third State before making the Dublin claim, but it may itself apply the ‘third host country’ principle (3b and c). In other words, if the United Kingdom did not consider Poland an appropriate ‘host third country’, for example, and made a Dublin claim on Germany, Germany could not refuse to examine the claim because the UK should have sent the applicant to Poland, but could, if under its legislation Poland were considered an appropriate ‘host third country’ for that applicant, send the applicant to Poland.

²⁸ Commission of the European Communities, Commission Staff Working Paper **Revisiting the Dublin Convention: developing Community legislation for determining which Member State is responsible for considering an application for asylum submitted in one of the Member States**, SEC (2000) 522 Brussels, 21 March 2000 para 33. See further under ‘Dublin Convention’ below.

31. Lavenex has pointed out that many of the States designated 'safe third countries' by EU Member States had not participated in the international refugee regime before.²⁹ Some of them had, of course, been producers of refugees fleeing persecution by the communist governments of Central and Eastern European States during the Cold War decades. In fact, even by the late 1990s many of the CEECs were only starting to implement specific asylum regulations, often as part of the accession process for membership of the European Union. Indeed, in many cases, they only started implementing asylum regulations *after* they were designated safe by EU States.³⁰ The European Council for Refugees and Exiles has stated its "fear that EU States' keen interest in widening the circle of 'safe third countries' may lead to premature and overly optimistic assessment of the protection standards afforded to refugees in certain countries. These interests may override more objective evaluation in relation to the accession criteria."³¹ It has also stated the opinion (which is open to question) that it is because the countries of the region are not in fact (even if they are in theory) safe and durable destinations of asylum that refugees transit them rather than staying there.³²

32. In effect, the designation of a country in which it is safe for people to seek asylum can be considered a tool of foreign policy, as much as a tool for restricting access to procedures for internal control on the entry and residence of asylum seeking immigrants. In supporting new allies, recognizing emerging democratic authorities as well as acknowledging longer-term partners supporting human rights and democratic principles, the label 'safe' can be a vague but useful adjective. The fact that western European States, those in the regional organization membership of which would be an economic and political prize signaling the end of transition, call their country and government 'safe' can be a useful political support to reforming politicians playing to a nervous domestic audience. However, this label of 'safe' has repercussions beyond the relations between States, and if used too hastily could damage long-term relations, particularly if evidence of *refoulement* might occur. When EU governments are dealing with Central and East European partner States not only as partners in an emergent refugee regime, but also as potential partners in the deepening and widening European integration project, careful questions of political interest need to be posed in order to ensure that the international legal obligations of all the States involved, towards each other and towards refugees, are upheld. What is more, by simultaneously insisting on both the development of a refugee/asylum regime which makes them 'safe' and restrictions compatible with the European Union *acquis communautaire*, current EU Member States give CEEC States little choice but to be restrictive in their approach to the, in principle, humanitarian and human rights based area of refugee law and politics. As such the genuineness of the humanitarian claims of the CEEC States can be brought into doubt.³³ Indeed, the European Commission, on behalf of

²⁹ Lavenex, S., 'safe third countries': Extending the EU Asylum and Immigration Policies to Central and Eastern Europe (Budapest: Central European University Press, 1999) p.52.

³⁰ *Ibid.*, p.86.

³¹ ECRE Position on the Enlargement of the European Union in Relation to Asylum (September 1998) para.3.

³² *Ibid.* para 4.

³³ See eg. Lavenex, *op.cit.* p.89.

the European Union has expressed concern about 'deficiencies' where candidate States do not include the 'safe third country' concept.³⁴

33. Concern about the pressures on Central and Eastern European States, to be both 'safe' partners and the restrictive, potentially future EU, recipients of all westward heading asylum seekers has been clearly expressed in a recent Council of Europe recommendation on **Transit Migration in Central and Eastern Europe**. In the introductory text it is stated that:³⁵

There is pressure on central and east European governments from their western neighbours to make their refugee and immigration policies more restrictive. On the other hand, there are obviously concerns among central and east European countries that the European Union harmonisation process in the field of migration, and the restrictive measures it implies, will result in the shifting of the migration burden to their territories. Along with the implementation of readmission agreements, these concerns have proved to be largely justified. The provisions of the Schengen Agreement are having a considerable impact on the increase in pressure on central and east European countries' borders.

34. Within the recommendations themselves the Council of Europe's Parliamentary Assembly recommends that the Committee of Ministers "review their own immigration and asylum policies with a view to guaranteeing access to their territory and to their asylum procedures to all persons seeking international protection;"³⁶ and "re-examine readmission agreements with a view to guaranteeing access to the asylum procedure for every potential asylum seeker"³⁷ It also invites the European Union specifically to "refrain from legitimising regulations and practices that might increase the pressure of illegal migrants on the countries of central and eastern Europe".³⁸ While some eastern and central European States would be safe for some asylum seekers, and most would likely wish to fulfil their humanitarian obligation as well as satisfy the desires of their potential partners in EU integration, others appear to have taken the extension of the 'safe third country' concept as a slight, and an underhand way on the part of EU States of relieving themselves of any protection burden. Landgren notes, for example, that Russia angrily suggested that UNHCR's encouraging it to sign the 1951 Convention was a front for western Europe - to create the legal conditions in which EU countries could return asylum seekers to Russia if they had transited it. In many ways, there are clearly limits to how far the borders of 'safe' countries, and the EU's external frontiers, can be stretched. As has been noted, the political, social and economic circumstances in which Central and East European

³⁴ Poland: Commission Opinion on Poland's Application for Membership of the European Union (July 15, 1997). Online at:

http://europa.eu.int/comm/enlargement/poland/op_07_97/b37.htm

³⁵ Council of Europe, Parliamentary Assembly, **Recommendation 1489 (2001) Transit Migration in Central and Eastern Europe** (Adopted 22 January 2001) para. 5.

³⁶ Recommendation g.

³⁷ Recommendation h.

³⁸ para vi. a.

Countries, as well as Russia, have been pressed to assume the role of ‘safe third countries’ are often difficult, and cause domestic opposition to protection.³⁹

35. If international political interests give one non-asylum related reason for the development of the ‘safe third country’ concept in the European Union in the early 1990s, economics of a sort give another. One can see a measure of ‘procedural economy’⁴⁰ in the practice of the ‘safe third country’ principle, as its application generally precedes substantial procedures and is applied to all asylum seekers regardless of whether they might be refugees. If there is a ‘safe third country’ then there is no examination of the claim, but removal. If there is no ‘safe third country’ outside the Union, but a ‘Dublin claim’ then there is still no examination, but removal, unless that claim is not accepted or if humanitarian reasons justify non-removal (according to the 1992 London Resolution). Furthermore, the European Commission’s evaluation of the implementation of the Dublin Convention shows that the processing of claims between states can be costly, and adds to the ultimate costs, around the Union, of each claim actually being assessed on its merits, once it has been determined which State will carry out the substantive assessment.⁴¹

1.A.2. Practice in European States⁴²

36. Practice in the European Union States on the matter of ‘safe third countries’ is frequently cited as being very diverse.⁴³ Even proposals seeking to harmonize the practice note that State discretion in interpreting and applying the principle is to be expected, and permitted:⁴⁴

For example, if a Member State does not wish to apply the safe third-country concept to reject asylum applications, the measure will not oblige this Member State to adopt the concept. Moreover, all standards for operating a fair and efficient procedure are laid down without prejudice to Member States’ discretionary power to prioritise cases on the basis of national policies.

³⁹ *Report of the Symposium on North America and Western Europe (1997)* in **Refugee Survey Quarterly** Vol.18 No.2 (1999) pp6-33

⁴⁰ See Noll, **op.cit.** p. 200.

⁴¹ European Commission Staff Working Paper, **Evaluation of the Dublin Convention**, Brussels, 13 June 2001, SEC(2001)756 pp.19-20

⁴² Much of the information in this section is drawn from Danish Refugee Council, **Legal and Social Conditions for Asylum Seekers and Refugees in Western European Countries** (May 2000), as this is the most recent report on asylum practice generally in the EU and other western European states, although it is not specifically on ‘safe third countries’. The Danish Refugee Council also published a report **Safe Third Country - Policy in European Countries** in November 1997.

⁴³ See eg Lavenex,

⁴⁴ Commission of the European Communities, **Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status** Brussels (20 September 2000) COM (2000) 578 final.

37. The effect of the employment of the principle is also very different, dependent on the geographic location of the State. In effect, for an EU Member State surrounded by land borders, such as Austria, the admission to full procedures of an asylum applicant arriving by land is rare - all its neighbors being considered 'safe third countries',⁴⁵ according to the criteria set out in Section 4(2) of the Asylum Law.⁴⁶ In essence, the Austrian law says that a country is considered to be safe if in principle a person would or could be protected.⁴⁷ From 8 January 1999, Austria had the option under law of creating a list of 'safe third countries', but according to the Danish Refugee Council report on legal and social conditions of 2000, it did not yet have one.

38. Two areas for comparison can be drawn from this Austrian example: do the countries of Europe create lists of 'safe third countries', and what do they consider to be a 'safe third country'?

1.A.2.a Lists

39. In Denmark, administrative practise involves a certain set of countries being considered as 'safe third countries', even if there is no formal list.⁴⁸ Spain likewise has no formal list, although administrative practise entails western European States, Canada and the US being considered as safe.⁴⁹ Finland has no list but seeks an individual basis to judgements.⁵⁰ In the United Kingdom, the Secretary of State can designate countries other than EU Member States as 'safe third countries', subject to approval by both Houses of Parliament. The USA, Canada, Norway and Switzerland have been designated under this procedure.⁵¹ Germany lists by law those States which have signed and which it deems to implement the 1951 United Nations Convention relating to the Status of Refugees, and the European Convention on Human Rights and Fundamental Freedoms as 'safe third countries'. All of the nine States sharing its land borders as well as other EU Member States appear on that list.⁵²

1.A.2.b What is meant by safe?

40. According to Section 52 paragraph 1 of the Belgian Aliens Law, applications submitted at a border point may be deemed inadmissible:⁵³

⁴⁵ Except for Switzerland because the Swiss-Austrian readmission agreement is not functioning (Danish Refugee Council, **Western European Countries**, *op.cit.*, p. 12

⁴⁶ *Ibid.*, pp.11-12.

⁴⁷ *Ibid.*, pp.11-12.

⁴⁸ These are: Canada, USA, Iceland, Norway, Switzerland, Hungary, (in some case) and Poland (since 30 December 1999). *Ibid.*, p.44.

⁴⁹ *Ibid.*, p.259.

⁵⁰ *Ibid.*, <http://www.drc.dk/dk/publikationer/rapporter/legalandsocial/fi1/index.php#condi>

⁵¹ *Ibid.*, p.306.

⁵² USCR, **At Fortress Europe's Moat** (*op.cit.*) p.2

⁵³ *Ibid.*, p.28.

- (c) if the alien has resided for more than three months in one or more third countries which he/she left without being obliged to, since the date he/she left his/her country of origin;

41. The fact that States and others often use the term 'safe third country' to mean two different things is a cause of much confusion. While Landgren states that the concept originated in a desire to avoid the irregular movement of people who had already found protection, what she is referring to is what UNHCR defines as the 'first country of asylum' approach.⁵⁴ UNHCR's Executive Committee Conclusion No. 58 in 1989 on irregular movements dealt with this issue, calling for a remedy at source and the return of irregular movers to the country where they have protection. However, Landgren notes, the principle has developed to imply that simply the potential for protection elsewhere is enough to justify return to a transit State. This notion that even without protection having been considered or offered in another State, the individual can be returned there, is the 'safe third country' principle as understood here, and by UNHCR. In other words, the 'safe third country' principle has developed out of the 'first country of asylum' concept, to broaden application of the notion of protection elsewhere to States in which protection was never received.

42. An overview based on information in the Danish Refugee Council's 2000 report on asylum in Western European States shows that the terminology is often muddled, and that the two principles are applied by various States, in different ways, and under different headings. For some States, such as the Netherlands,⁵⁵ transit of another State and the simple fact of there being a readmission agreement in existence is indeed enough to activate the 'safe third country' principle. For others, such as Italy, transit alone is not enough.⁵⁶ For Italy it is a matter of whether or not the claimant already has refugee status elsewhere, and whether he or she is in fact fleeing the State in which refugee status was achieved – of whether there is a 'first country of asylum'. Ireland, however, sees a 'safe third country' involvement if the applicant has either lodged a claim elsewhere or already has refugee status elsewhere.⁵⁷ This is a mixing of the two concepts. Luxembourg, meanwhile, deems the 'safe third country' principle to come into effect if the applicant has protection or could have asked for it, and if they would also be protected from *refoulement* and not be persecuted in the country to which they would be returned for protection and assessment of the claim.⁵⁸ This again seems to mix the two notions. For Spain, again mixing the notions, a 'safe third country' exclusion comes into play if "the applicant has previously been recognised as a refugee by another State, or would have the right to reside or be granted asylum in another State."⁵⁹ For Sweden if the applicant can be returned to one of the Nordic countries in accordance with an agreement, or when, prior to arrival in Sweden, he/she has stopped in another country where he/she would have been protected against

⁵⁴ Landgren, *opcit.*

⁵⁵ Danish Refugee Council, *Western European Countries, op.cit.* p.205

⁵⁶ *Ibid.*, p. 166.

⁵⁷ *Ibid.*, p.157.

⁵⁸ *Ibid.*, p.182.

⁵⁹ *Ibid.*, p.259.

persecution or removal to his/her country of origin or another country where such protection is lacking then their application is deemed manifestly unfounded.⁶⁰ Sweden therefore uses both the 'first country of asylum' and the 'safe third country' notion. France, apparently, simply does not use the principle, on paper, though in practice it effectively does.⁶¹ In the case of all European Union Member States, if the Dublin Convention is relevant, that form of 'safe third country' rule applies. However, the Dublin Convention becomes applicable only if no other 'safe third country' is involved. It is clear from this overview, that there is no harmonization either of the definition of the principle, or of the terminology used to signify either approach.

43. In Norway, outside the EU, a country is considered to be a 'safe third country' alternative if the applicant was already granted asylum elsewhere. In practice all west European States are considered safe, although, until the parallel Dublin Convention entered in 2001, if a claim had been rejected in other country, Norway would have accepted to look into it.⁶²

1.A.2.c Stage of the procedure

44. In general the 'safe third country' principle is applicable both in (accelerated) procedures at the border and in (accelerated) procedures for in-country applications. So, for example, in France, the 'priority procedure', regulated by Section 10 of the Asylum Act, is applied to in-country applicants - and one of the situations in which provisional admission is not automatically granted by the prefecture is when another State is responsible for the examination of the claim for asylum under the Dublin Convention or under any similar agreements.⁶³

45. In the UK there is a specific Third Country Unit (TCU), to which all immigration staff must refer cases if they think the third country rule (Dublin or other) might be applicable. In such a situation staff are instructed to make no substantive consideration of the case. The rules to staff specify also that "returns to non-EU Member States on safe third country grounds are [normally] only attempted in port cases. This is because it is essential to return such cases

⁶⁰ **Ibid.**, p.31.

⁶¹ However, the practice regarding the 'safe third country' concept has changed following a decision "*Rogers*" of the Council of State dated 18 December 1996. In this decision, the Council of State, confirming a previous decision of 1981 ("*Conté*"), stated that the Geneva Convention did not contain any 'safe third country' principle, whereby an asylum seeker could be excluded from the benefit of the Convention. The fact that the asylum seeker could have applied for asylum in another country party to the Geneva Convention "*would not have in itself entitled the authorities to refuse the status of refugee and could not legally be justified by the Minister of Interior as a reason for the applicant's claim to be regarded as manifestly unfounded, therefore preventing his access to the territory for the examination of his claim*". Accordingly, French authorities no longer refuse entry into the country on 'safe third country' grounds, although in practice, applicants may still be returned to third countries if their application has been declared manifestly unfounded for other reasons. Danish Refugee Council **Ibid.**, p.88.

⁶² **Ibid.**, p.225.

⁶³ **Ibid.**, p.90.

quickly." In-country determination caseworkers are, it is suggested, unlikely therefore to come across active cases of this type. The TCU must be satisfied in each such case that an applicant:⁶⁴

- had an opportunity at the border or within the territory of a 'safe third country' to make contact with that country's authorities in order to seek protection; or
- that there is other clear evidence of the applicant's admissibility to a 'safe third country'.

46. In 1999, the UK refused 9% of applications for asylum on 'safe third country' grounds. In 2000, 1% of applications were refused on this basis.⁶⁵

⁶⁴ See 'How we Apply the Rules' (Immigration Rules: HC 395) at <http://www.ind.homeoffice.gov.uk/default.asp?PageId=798>

⁶⁵ Home Office, *Asylum Statistics: March 2001 United Kingdom*, <http://www.homeoffice.gov.uk/rds/immigration1.html>

TABLE 1: Summary of ‘safe third country’ principle and practice in the States referred to in this paper⁶⁶

STATE	LISTS?	DEFINING THE ‘SAFE THIRD COUNTRY’	STAGE OF PROCEDURE (AND OTHER RELEVANT INFORMATION)
Austria	May create under law, but has not	If a person would or could be protected	At the border: admissibility procedures.
Belgium	No list.	A place where the applicant has resided for three months or more, and which he or she has chosen, not been forced, to leave.	During the admissibility procedure (inside the country).
Denmark	No list, but practice gives the equivalent to a list		On the border.
Finland	No list.	Could or should have received protection	During substantive examination.
France	No list.	Does not apply the principle under law, but practice means that applicants are returned to countries if their claim is deemed 'manifestly unfounded' on other grounds.	In practice, once a claim has been deemed 'manifestly unfounded'.
Germany	Has a list.	States which have signed and implement 1951 Convention (also ECHR), in which an applicant has spent three months and could have received protection	At the border.
Greece		Where a person has been in a country and not been persecuted, and the 1951 Convention is signed and ratified.	Accelerated procedures (In practice 90% of asylum seekers seem to arrive via Turkey, with which Greece has no readmission agreement).
Ireland	No list.	If a claim has been lodged in the country in question, or the person has refugee status there.	During the substantive procedure.
Italy	No list.	Stay longer than transit: if the person has refugee status in the country in question, and is not fleeing that protection State.	At the border.
Luxembourg	No list.	If the applicant has protection in the State in question or could have requested it and been protected from	Admissibility procedure (substantive).

⁶⁶ Information from the Danish Refugee Council’s reports cited above and UNHCR.

		<i>refoulement.</i>	
Netherlands	No list.	Transit or protection already in another State, and the existence of a readmission agreement	Admissibility procedure within the country.
Portugal	No list.	Protection elsewhere.	Admissibility procedure.
Spain	No formal list, but western Europe, Canada and US are considered effectively 'safe'	If applicant is recognised as a refugee in the State in question or would have had the right to reside there or be granted asylum.	Admissibility within the country.
Sweden	No list.	Nordic countries and other States where protection could have been granted.	Accelerated procedure
United Kingdom	Countries designated by the Home Secretary, and approved by Parliament.	Transit.	Third Country Unit deals with claims referred by immigration staff. Generally, only 'port' cases are deemed returnable.
Norway	No list.	If the applicant was already granted asylum there.	Border
Belarus	All neighbouring countries	Transit or ability to ask protection in another state, regardless of presence there.	In country
Kazakhstan		Transit	
Kyrgyzstan	Iran, Pakistan and Tajikistan	Transit	
Russian Federation	No list	Transit (and further <i>ad hoc</i> applications)	(No readmission agreements)
Ukraine	Russia, Turkey, Central Asian States	Transit	(Return almost always impossible, so remain without status)
Botswana		Transit	(Magnet for Resettlement cases)

1.A.3. Beyond Europe

47. European States are by no means the only ones which has established ‘safe third country’ rules. As noted above, African States have looked into the concept. Some Central Asian States apply the principle also. Belarus defines all neighboring States as safe; Kazakhstan has denied a number of applications on the grounds of passage through a ‘safe country’. Kyrgyzstan defines Iran, Pakistan and Tajikistan as ‘safe third countries’. Russia uses the concept widely, including for Afghanis transiting Iran or Pakistan. Ukraine likewise uses the concept.⁶⁷

48. The United States also has provided that those people arriving from a ‘safe third country’ do not have the authority to apply for asylum.⁶⁸

Safe third country. - Paragraph (1) [granting authority to those on US territory to apply for asylum] shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.

However, no such agreements exist, so the provision is not implemented.

1.A.4. *Refoulement-chain*

49. In its report on the ‘safe third country’ practice in Europe, the United State's Committee for Refugees says that “[d]espite the bleak predictions, large-scale chain deportations resulting in *refoulement* have not taken place.”⁶⁹ However, all the NGO reports consulted do include individual examples of such cases and UNHCR also claims awareness of such instances:⁷⁰

UNHCR is aware of a number of instances where asylum-seekers have been refused admission and returned to a country through which they had passed, only to be summarily sent onwards from there, without examination of their claim, either to their country of origin or to another, clearly unsafe country. Where asylum-seekers are returned to third countries this needs to be implemented with due regard to the principle of non-refoulement. Without

⁶⁷ Information from UNHCR sources

⁶⁸ TITLE II – IMMIGRATION - CHAPTER 1 - Sec. 208.(a) Authority to Apply for Asylum.- para 2 exceptions. This is (A) – (B) is the time limit which is discussed later in this paper.

⁶⁹ USCR, *op.cit.* p.6.

⁷⁰ UNHCR, **Note on the Principle of *Non-refoulement*** – EU Seminar on the Implementation of the 1995 EU Resolution on Minimum guarantees for Asylum Procedures Nov. 1997

prior consent and the cooperation of the country to which an asylum-seeker is returned, there is a grave risk that an asylum-seeker's claim may not receive a fair hearing there and that a refugee may be sent on, directly or indirectly, to persecution, in violation of the principle of non-refoulement and of Article 33 of the 1951 Convention.

50. Case law consulted also makes clear that States cannot abrogate their responsibilities on the matter of *refoulement* by laying the responsibility for a case in the hands of a 'safe third country' alone: it still has a duty to ensure that the State to which it sends an applicant really will not send the person back to a situation where life and freedom could be threatened. In **T.I. v the United Kingdom**⁷¹ while the European Court of Human Rights found removal of the asylum seeker to Germany as a 'safe third country' to be permitted, due to assurances on *non-refoulement*, it stated in its assessment that:

The Court finds that the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention [European Convention on Human Rights and Fundamental Freedoms]. Nor can the United Kingdom rely automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims.

51. Landgren describes the crux of the legal matter of *non-refoulement* in safe country and readmission cases. *Non-refoulement* is, she explains, not only "a legal concept ... [or] principle ... , but has acquired the status of a norm of customary international law, that is, a general practice which States accept as law." Some authoritative sources have, Landgren notes, attributed higher standing, that of *jus cogens* to *non-refoulement*, meaning any treaty provision which is incompatible with it is void. This status of the norm of *non-refoulement* remains a subject of legal debate. However, there is no argument as to the standing of *non-refoulement* as a customary norm of international law, nor can there be any argument as to the political inappropriateness of any measure which would contravene this.

52. At present there is too little research into the movements and practice around 'safe third country' cases for us to know the extent to which 'chain-refoulement' is in fact taking place. Besides there being too little research, there is also too little access for independent overview of such cases, the legal and political sensitivity surrounding the issue being what it is. In the absence of documentation it is impossible to indicate the percentage of cases in which, after the person is sent to a 'safe third country', he or she is then ultimately returned to harm in the country of origin or habitual residence. The fact that NGOs and UNHCR say they have knowledge of some cases indicates that *refoulement* is the result of the application of 'safe third country' rules sometimes, and from all the countries which apply the principle. In fact many of the cases which are actually detailed in NGO reports are

⁷¹ EctHR 7 March 2000 Application no. 43844/98

those of people who manage either to avoid ultimate *refoulement* if that was the intention of authorities in the State to which they are returned for examination of their case, or who manage to flee again after *refoulement*. If people are returned to harm which causes loss of life, NGOs and the States which started the *refoulement*-chain might be less likely to hear of them. Not hearing about them cannot, however, be taken to mean that they do not happen.

1.A.4. Individual choice in where to seek asylum and reasons

53. One result of the 'safe third country' principle is that "A person's travel route into exile, rather than the reasons behind his or her flight, becomes the overriding factor in deciding whether protection will be granted."⁷² Regardless of whether a country is 'safe' in the sense that it generally applies the 1951 Convention, and generally does not return those it considers would come to harm in their country of origin or habitual residence, the fact remains that States have the right to control entry to and residence in their territory, and that the only restraint to that right is to be found in their treaty obligations, which each State interprets it in its own way. Decades of legal, political and cultural practice and experience with refugee determination issues have led to ever increasing differences in (nuanced) interpretation of the treaty obligations of States towards asylum seekers and refugees. In the European Union, some five years of negotiation resulted in a joint position on the interpretation of the definition of a refugee found in article 1 A of the 1951 Convention, which in turn is understood in 15 different ways. No-one can deny differences of opinion and practice in exactly how the Convention is interpreted and applied in different States.

54. Not all asylum seekers are likely to know the slight differences of application or interpretation of the Convention in different States. However, most will have a reason for making their application in a particular destination State. Often that reason will be linked to family connections, language, professional background and other 'networks'. Occasionally, it will be linked to knowledge of the asylum system. A person may have received information indicating they are more likely to receive protection in one State than another, given the particulars of their individual motive for seeking protection. The most widely known example would be where the persecution feared would be or has been perpetrated by non-State actors, and the State has failed or would fail to protect the individual from that actor. Some States would grant Convention status or at least a form of complementary protection under such circumstances, others would not.

55. A major criticism of the 'safe third country' principle is, then, that it implies that the person seeking protection should have no freedom of choice about where he or she would be protected and live. The notion is that as long as asylum can be sought ie as long as there is access to an asylum determination procedure in some given country, the applicant can have no problem.

⁷² USCR, *op.cit.* p.3.

56. Little account is taken of the motives the protection seeker had to seek protection where he or she did.⁷³ The underlying presumption also often appears to be that the individual's reason for applying for protection *here* rather than *there* is based on knowledge of the social and economic rights which accompany protection in the two places, but not on any knowledge of the reasons for granting that protection. The protection seeker is *here* because we are more generous than they are *there*. The notion of abuse of the system appears to be inherent. However the asylum seeker could well be *here* because he or she knows that the system for examining the claim to protection *here* will realize his or her protection need, whereas *there* while they may recognize other protection needs, they will not recognize this particular need. When so many protection seekers are forced to use assistance in either escaping their country of origin, making their journey or entering any State to seek protection, there is more likelihood than ever of advanced knowledge and information on the asylum claim examination system as well as any welfare or benefits system. What is more, with or without the assistance of 'smugglers' there is likely to be knowledge about cultural and social factors which will facilitate the protection seeker's integration once the protection need has been acknowledged.

57. In order to return an asylum seeker to a country in which they did not seek protection, there is a need for proof of the route the asylum seeker took. When knowledge about such State policies abounds, again most particularly, but not exclusively, linked to the use of smugglers, this surely encourages or in fact requires people to destroy their documents if they are to submit claim in the place in which they want to live. This has already been shown to be a difficult question in the area which has a more comprehensive 'safe country' network, namely the EU with the Dublin Convention (see below). Encouraging asylum seekers to tell the truth about their travel routes, in order then to use this against them, would seem to be common practice.⁷⁴

58. Finally, although the matter at hand is access to *procedures* there remains a question as to whether those procedures lead to protection or to a durable solution.⁷⁵ If the asylum seeker gains access to procedures and protection in a place in which he or she is motivated to establish a new life and from which he or she may emerge content enough to return to the country of origin if circumstances change, that protection is likely to contribute to a

⁷³ See Noll, **op.cit.** pp.110-111.

⁷⁴ The Netherlands Immigration and Naturalization Service (IND), for example, makes the following statement in its brochure for asylum seekers (English version):

When your asylum request is being dealt with, it is very important that you tell the truth and cooperate fully with the inquiries concerning your identity, nationality, travel route, your possible stay in any other country, and your reasons for requesting asylum. This means that you have to hand over all documents and papers that confirm your identity, nationality, travel route, and your reasons for leaving your country of origin. Doing this will have a positive effect on your request, and a decision can be made about your request much faster. If you do not cooperate fully, this can adversely affect the handling and assessment of your asylum request.

⁷⁵ See **Background Note on Safe Country Concept and Refugee Status** EC/SCP/68 26 July 1991 - EXCOM 42nd session (submitted by High Commissioner)

durable solution. If the procedure and potential protection are in a place not of the asylum seeker's choosing, there may be added barriers to integration in the short- to medium-term at least, and psychological barriers to well-being which preclude any potential return.

1.A.5 Orbit

59. The inception of the 'safe third country' concept in Europe was suggested by States to be aimed at ensuring that asylum seekers could not be left 'in orbit': one State would be determined as THE State which should process the claim in question. However, the result of the application of this concept, as manifest in the case of the EU's internally operating Dublin Convention, is to leave more asylum seekers without procedures for longer periods of time (see next sub-section). The process of claiming from one Member State to another that an application should be considered there and not here can take up to nine or ten months. Only between 25% and 50% of those who are accepted for transfer actually move, but in practice this is only approximately 1.7% of all asylum seekers in the EU Member States.⁷⁶ The other 50-75% of those who could be transferred (2.5% of all asylum seekers in the EU) are presumed to 'disappear' not into 'orbit' but into 'irregularity'. This means that a larger number of asylum seekers do not have their case examined at all as a result of the application of the workings of Dublin Convention, than are determined to be the responsibility of another state and actually move to that state for assessment of their asylum claim. If this is the case for Dublin claims, it can only be presumed, as no research or statistics are available, that a similar picture could be portrayed for the general application of the 'safe third country' principle. As EU Member States agree to agree with one another prior to transfer, whereas under readmission agreements no such system of agreement is in place, the picture is potentially much worse.

60. The US Committee for Refugees indicates that "[t]he danger for refugees then is that no so-called safe country will take responsibility for viewing their claim to refugee status but instead will deport them again, either to countries with no means to protect them adequately, or worse, to the countries where they were persecuted."⁷⁷ As long as policies about understanding, interpreting and applying the Convention remain different, orbit situations could remain. USCR gives the specific example of an Iraqi woman who applied for asylum in Germany. If the German authorities would apply the decision made to return her to Greece, which she traveled through, they would find that Greece only accepts those applicants arriving directly, so as she traveled through Turkey *en route* she would be returned there. Turkey does not accept applications of those originating from outside Europe – so the Iraqi woman would then likely have been returned to the 'safe haven' in northern Iraq.⁷⁸ An alternative individual solution would be that she wait in Turkey for a

⁷⁶ Statistics from Danish Refugee Council, **The Dublin Convention: Study on its implementation in the 15 Member States of the European Union**, (January 2001) and European Commission **Evaluation**, *op. cit.*. See below, paragraphs 66-69.

⁷⁷ USCR, *op.cit.* p.3.

⁷⁸ *Ibid.*, p.9.

resettlement opportunity, most likely to another EU State (the Netherlands, Denmark, Finland or Sweden) if not to Norway, the US, or Canada.

1.A.6 Dublin Convention

61. The Dublin Convention (Convention determining the State responsible for examining an asylum request) was signed in June 1990 and entered into force in September 1997.⁷⁹ The preamble of the Convention states the concern which Member States have to provide all applicants for asylum with a guarantee that their application will be examined by one of the Member States. However, in Article 3(5) as cited above, it becomes apparent that that is a guarantee only if no other State is considered a ‘safe third country’ to which the applicant could be returned. In some cases, eg Germany, the ‘safe third country’ procedure takes precedence over the procedure to determine whether there is a ‘Dublin claim’, in others, eg Denmark, there is no attempt to prioritise the two types of third country determination.⁸⁰

62. The criteria used to determine the Member State responsible are, in order of prioritised application:

1. Whether the applicant for asylum has a family member who has been recognised as having refugee status within the meaning of the Geneva Convention in a Member State, and is legally resident there. If so, that State will be responsible, provided the person concerned so desires (Article 4);
2. If the applicant is in possession of a valid residence permit, the Member State which issued it will be responsible for examining the application for asylum (Article 5(1));
3. If the applicant is in possession of one or more valid visas or visas that have expired, the Member State that issued it/them will be responsible for examining the asylum application (Article 5(2) to (4));
4. If it can be proved that the applicant for asylum irregularly crossed the border into a Member State by land, sea or air, having come from a non-member State, the Member State thus entered will be responsible, unless the applicant has been living in the Member State where the application for asylum was presented for at least six months before making the application (Article 6);
5. The Member State responsible for controlling the entry of the alien into the territory of the Member States will be responsible for examining the application for asylum unless the alien first entered a Member State where the visa

⁷⁹ OJ C 254, 19.08.1997, p.1. Denmark signed and ratified the Dublin Convention in June 1991. Austria, Finland and Sweden, which acceded to the EU in 1995, ratified the Convention as part of their accession agreements. For Austria and Sweden it entered into force on 1 October 1997 and for Finland on 1 January 1998.

⁸⁰ Danish Refugee Council, **Dublin, op.cit.**, p.28 (Denmark) and p.29 (Germany).

obligation is waived, before presenting an application for asylum in another Member State where the visa obligation is also waived (Article 7);

6. If none of the above criteria applies, the first Member State in which the application for asylum is lodged is responsible for examining it (Article 8);

63. All of the Member States, even those which under domestic legislation have a broader definition of the family than that in Article 4, apply the Dublin definition strictly in these cases, according to the Danish Refugee Council Study. Those States therefore use article 3(4) [allowing a Member State to assess a claim even if it is not responsible according to the Dublin Convention, as long as the applicant agrees] and Article 9 [allowing a Member State to request another Member State, even if it is not responsible, to examine a request on humanitarian, cultural and family grounds] to ensure families are not separated. Two Member States, the Netherlands and Denmark, have adopted clear guidelines on this, for the other 13 States there is a lack of transparency.⁸¹ The European Commission concludes in its evaluation of the working of the Convention that “the family members of refugees residing in the Member States go through the regular channels for bringing families together and that, where this is not the case, there are few who have to make out an application for asylum en route in a Member State other than where the refugee resides.”⁸²

64. On the visa and residence permit rules, Member States appear to concur that these are the easiest to apply, requiring only verification of the authenticity of the document concerned. The Danish Refugee Council’s study on the Dublin Convention indicates that this ease of application means that in practice the presence of a visa or residence permit in fact takes precedence over family unity as the criterion for determining where an application should be examined.⁸³ The European Commission’s evaluation of the working of the Dublin Convention, requested by December 1998 Vienna Action Plan, shows that Article 5 (valid or expired residence permit/visa) is the most frequently used, and accepted, ground.⁸⁴ Claims on the grounds of irregular entry are some of the most difficult to assess by States, as the matter of proof is most difficult to establish. Although the Committee set up under Article 18 of the Dublin Convention adopted guidelines on the type of evidence which could be appropriate, and ‘indicative elements’,⁸⁵ the implementation has proved very problematic.

65. Article 8 (that the Member State which first receives the claim, in the absence of the fulfillment of other criteria, examines it) is the second most frequently applied criterion. This indicates that secondary movements – irregular movements soon after the filing of an application – are rising.⁸⁶ A Member State that has received an initial application for

⁸¹ Danish Refugee Council, **Dublin, Ibid.**, pp.69-83.

⁸² European Commission, **Evaluation, op.cit.**, p.5.

⁸³ Danish Refugee Council, **Dublin, op.cit.**, pp.85-86.

⁸⁴ European Commission, **Evaluation, op.cit.**, p.4.

⁸⁵ Decision No. 1/97, 9 September 1997. OJ L 281, 14.10.1997, p.1-25.

⁸⁶ **Ibid.** p.4.

asylum is therefore taking back an applicant who has become known to authorities, and applied for asylum a second time, in another Member State.

66. The Commission's evaluation of the Dublin Convention in practice, based on answers coming directly from Member State authorities, shows that Dublin applications (ie an application by one Member State to another Member State concerning an asylum applicant on the grounds established by the Dublin Convention to determine the State responsible for assessing an asylum application) occur in only 6.0% (six per cent) of all asylum applications made in the whole European Union (39,521 claims out of the 655,204 received taken in one year as an aggregate of the years 1998 and 1999).⁸⁷

67. 69.80% of these claims to take charge of or take back an asylum applicant are accepted, ie in 4.2% of all asylum claims in the EU, a State other than the State where an application is made is determined to actually be responsible for the claimant. Of those only 27.8% are actually transferred. In other words, the Dublin Convention criteria in their full application over the period 1998-1999 caused the transfer of only 1.7% of all asylum applicants between Member States.⁸⁸

68. It must also be presumed from these statistics that 2.5% of all asylum applicants in the European Union effectively disappear – as they are not actually transferred to the State which has claimed, or agreed to, responsibility in their case – and do not have their case assessed in the State where they made the claim – but which was not determined responsible for them. The study notes that “Transfers under escort seem the surest way of guaranteeing the effectiveness of decisions ... However, their widespread use would require a high level of constraint on asylum seekers, especially on their freedom of movement, and greater use of administrative and police resources.”⁸⁹

69. As the evaluation states “in more than 95% of cases it is the Member State in which the asylum application is lodged which assumes responsibility for examining it.”⁹⁰ “[T]he Dublin Convention does not affect who takes responsibility for examining asylum applications very greatly, since it applies in less than 5% of cases ... the Convention's role as a measure that complements freedom of movement is limited.”⁹¹ ‘Taking back’ appear to happen far more often than retrospective determination that another State should in fact have been responsible for assessing a claim, demonstrating that evidence is the most vital feature of this type of inter-State claim to determine responsibility. As such, the “asylum seeker himself is fundamental to the ability of a Member State to determine that another Member State is responsible.”⁹² Applicants are, it seems, also more willing to cooperate in

⁸⁷ **Ibid.**, p.2. The Commission points out that the statistics cited are a question of the order of magnitude, not of precise data, due to differences in collection. In this case it can safely be concluded that the Dublin Convention has a very minimal impact on moving asylum seekers between EU States.

⁸⁸ **Ibid.**, p.2.

⁸⁹ **Ibid.**, p.17 (emphasis [underlining] in the original).

⁹⁰ **Ibid.**, p.2 (emphasis [underlining] in the original).

⁹¹ **Ibid.**, p.3 (emphasis [underlining] in the original).

⁹² **Ibid.**, p.6 (emphasis [underlining] in the original).

the actual transfer in cases where they are being taken back ie where they already had formed some link with the State in question, even if they chose to move on (irregularly) to another State.⁹³ However, the Evaluation also notes that many asylum seekers seem to put their network above their desire for a status: citing an Italian study the evaluation notes that many asylum seekers choose to try to go to another Member States where they have relatives, friends or compatriots, rather than applying for status where they first enter.⁹⁴

70. Access to detailed information about the workings of the Dublin Convention in practice is obstructed in most EU States.⁹⁵ Among the known facts are, for example, that France and the Netherlands are the only two States which exclude Dublin claimants (those people about whom they are making a 'Dublin claim' on a fellow Member State) from social rights. This means they have no (legal) means of support, as in both countries all asylum seekers are excluded, in the first instance at least, from the labor market. In the Netherlands this means also exclusion from the reception facilities which all asylum seekers otherwise enter. Dublin 'cases' consist of claims between States about asylum seekers. These claims can take up to 10 months to be decided.

71. Germany and Austria have proved to be the main net recipients of Dublin claimants, followed by Italy and France, and Denmark, the Netherlands, Sweden and the UK the main 'exporters'.⁹⁶ A key reason for the high rate of transfers between Denmark and Germany is the bi-lateral agreement between the two States.⁹⁷ Applicants can also have difficulty in getting their case examined if they are transferred (and that transfer is, one recalls, with agreement) as in some cases they already had an application which has been decided in absentia [and not being present sometimes has a negative impact on the asylum decision]. NGOs and advocates fear that the difficulties in opening and re-opening cases can lead to *refoulement*, although there is no proof of this. Correct information is not always sent back with transferred applicants, even though model forms for this were established and agreed.

72. It is suggested that the spirit of cooperation between EU States leads to the high number of transfer acceptances.

73. Seven States (Austria, Belgium, Denmark, Germany, Ireland Italy and UK) set up a centralized 'Dublin Unit'⁹⁸; three have taken a decentralized approach (France Netherlands Sweden) and the rest have not established separate units to deal specifically

⁹³ **Ibid.**, p.7.

⁹⁴ **Ibid.**, p.18. Cites, de Donato, Maria (ed.), *Odisseia project: a Research project on the influx of asylum seekers and displaced persons at the Italian borders and within the European Union; training of operators*, Consiglio Italiano per i Rifugiati, supported by the European Commission under the Odysseus Programme.

⁹⁵ Danish Refugee Council, **Dublin**, p.103.

⁹⁶ European Commission, **Evaluation**, p.3.

⁹⁷ Commission Staff Working Paper, **revisiting Dublin**, **op.cit.**, para. 51 and Danish Refugee Council **Dublin**, **op.cit.**, pp.118-119.

⁹⁸ In the UK this is part of the Third Country Unit mentioned above.

with Dublin claims.⁹⁹ Appeals are permitted in all Member States but Denmark.¹⁰⁰ Appeals have suspensive effect only in Austria, Greece, Ireland and Portugal; in some States a request for suspension is often granted although it is not automatic – Italy, Spain and UK. There has been limited success in appeal courts. The most notable successes of asylum seekers have been found in the UK, notably in the case of *Adan et al* – but also in the Netherlands and Sweden, on the issue of claims to Germany and minority returns of Bosnians.¹⁰¹ In the UK cases, doubt has been brought to the notion that each EU Member State can automatically consider each other EU Member State to be ‘safe’ in the sense of a place which will treat an asylum application in the same way as it would itself. A major point for consideration is that if that is the case between the EU Member States, is it not also likely to be the case beyond that relatively integrated area?

74. The cases of *Adan* and *Aitseguer* and judgements handed down on their appeal¹⁰² and the subsequent appeal in the House of Lords shook the foundations of the Dublin Convention, and thereby those of the 'safe third country' concept itself. The British Home Secretary had issued certificates permitting the removal of Ms. Adan (a Somali national) to Germany, and of Mr Aitseguer (an Algerian) to France. The Court of Appeal found that the removals should not take place as the British law required that certification by the Home Secretary could only occur if (Section 2(2)(c)) "the government of that country or territory would not send him to another country or territory otherwise than in accordance with the Convention". Germany and France apply what is termed the 'accountability theory' to the Convention definition, meaning they recognize as refugees only those who have a well founded fear of persecution by the State authorities. In the case of Somalia, there was no government to protect citizens, and the German authorities had thus taken the position that there was no State to which persecution could be attributed.¹⁰³ If Ms. Adan were to be sent to Germany, her claim would be rejected and she would be sent back to Somalia. It was also stated that "there is a real risk that the French authorities will take the view that there is no State toleration or encouragement of the violent activities of the Groupe Islamique Armé which Mr. Aiseguer fears, and therefore no persecution attributable to the Algerian State.... The French authorities ... would reject his claim for asylum and send him back to Algeria." The UK applies the 'persecution theory' meaning it recognizes someone as a refugee if they are persecuted by the government of if they are not protected by the government from persecution by others. The Lords judging the appeal in the House were at pains to stress that they were making no judgement as to the for the German and French positions, or their correctness: their judgement was that the Home Secretary would not be upholding British law if he removed these applicants, given the particulars of their cases, to those countries.

⁹⁹ Danish Refugee Council, *Dublin, op.cit.*, p.18.

¹⁰⁰ *Ibid.*, p.67.

¹⁰¹ See further Noll, Gregor, 'Formalism vs. Empiricism. Some Reflections on the Dublin Convention on the Occasion of Recent European Case Law' *Nordic Journal of International Law* Vol.70 No.1 (2001).

¹⁰² Court of Appeal, *R v Secretary of State for the Home Department ex parte Adan and others* (23 July 1999).

¹⁰³ UK, House of Lords, *Regina v. Secreatry of State for the Home Department ex parte Adan, ex parte Aitseguer* (19 December 2000) Lord Hutton.

75. The European Commission issued a Staff Working Paper in March 2000 entitled **Revisiting the Dublin Convention**.¹⁰⁴ The reason for drafting the paper was twofold: the Treaty of Amsterdam calls for the Dublin Convention to be replaced by a Community instrument¹⁰⁵ which is fortuitous given that there is “widespread agreement that it is not functioning as well as had been hoped.”¹⁰⁶ The paper sets out seven possible motives for having an instrument to determine which State is responsible to assess a claim and gives four alternatives to the current bureaucratic and inefficient system. The seven motives are:

- avoiding situations of doubt for asylum seekers;
- providing the guarantee that one Member State will *promptly* assume responsibility for assessing an asylum application;
- prevent multiple claims by asylum seekers;
- create a system of accountability for entry regulations and controls by forcing Member States which permit irregular entries to be responsible for dealing with the claims of those entrants;
- deterring abuse of the asylum system “by preventing applicants being able to choose in which Member State they seek asylum;
- maintain the unity of families; and
- ensuring an equal distribution of asylum applicants between Member States in proportion to capacity.¹⁰⁷

The Commission sets out, in other words, all the individual and State interests at hand, including the controversial ones to which States might not so openly allude, when considering a method such as the Dublin Convention to assign a State to an individual asylum seeker and vice versa. The objectives could not possibly all be met, as some are clearly incompatible. The four ‘solutions’ which it presents for discussion are:

- a system which would allocate responsibility to the State which it is known the applicant last transited in the EU;
- a system which would reflect an aspect of the applicant’s immigration history other than the place of entry to the EU;
- a system based on the country of origin of the applicant; and
- a system based on the allocation of responsibility to the State where the application is lodged.¹⁰⁸

The possible solutions are acknowledged to have problems, and not to satisfy, completely, all the motives for agreement previously set out (even the less controversial ones). The Commission appears to find the last option the most palatable and workable, as do many NGOs and other commentators.¹⁰⁹ The first three options (transit; immigration history; country of origin) are all a matter of the States deciding where the asylum seeker should

¹⁰⁴ Commission, **Revisiting Dublin**, *op.cit.*

¹⁰⁵ Treaty of the European Communities, amended by the Treaty of Amsterdam, Article 63(1)(a).

¹⁰⁶ Commission, **Revisiting Dublin**, *op.cit.*, para 1.

¹⁰⁷ **Ibid.**, paras 20-26.

¹⁰⁸ **Ibid.**, para 56.

¹⁰⁹ See eg AGIT, ‘Academic Group on [Im]migration – Tampere, *Efficient, effective and encompassing approaches to a European Immigration and Asylum Policy*’, **International Journal of Refugee Law**, Vol.9 No.2, 1999 pp.338-374.

be, which involves something inherently illogical when one is speaking of an area which upholds rights to freedom of movement (for the legally resident). The fourth option, in essence allowing the asylum seeker to choose where to lodge an application, appear the only logical one.

76. It is still thought that the entry of the fingerprinting and data system (EURODAC) might considerably alter the statistics with regard to the numbers 'taken back' (where responsibility can be proved).¹¹⁰ However, a system based on the travel route of the applicant remains one with severe draw backs, including the obvious incentive to destroy documentation which could be used as evidence for assigning State responsibility.¹¹¹ Furthermore, the lack of judicial oversight, which is a problem with regard to accountability in all 'safe third country' cases, will be problematic within the EU until a community legal instrument comes into place (based on the proposal which is expected to be tabled by the Commission in July 2001).¹¹²

1.A.7 Readmission agreements

77. If 'safe third country' principles are to be put into effect by asylum seekers actually being removed to a State in which they can seek protection, then readmission agreements between States need to be in place. Readmission agreements between EU Member States and third States have generally been concluded on a bi-lateral basis - only after Tampere (Oct. 1999) was there agreement for Community level, thus multi-lateral, agreements.

78. Classical or traditional readmission agreements were concerned with the readmission of nationals.¹¹³ In the 1990s, such agreements became increasingly used for the readmission of third country nationals. A 1998 EXCOM document states clearly that as classical bi-lateral readmission agreements were not about asylum seekers, but about nationals they needed restructuring when applied to asylum seekers, to ensure guarantees against *refoulement* are in place as well as the guarantee of access to procedures *which meet international standards*.¹¹⁴ However, readmission texts, including the EU model readmission agreement, fail to specify guaranteed access to status determination procedures, and fail to reiterate the obligation of *non-refoulement*.

79. For EU Member States, readmission agreements are, in effect, an extension of the Dublin redistribution system. As in other areas, the current EU States are encouraging, or even insisting on, candidate States following their lead by making readmission agreements where possible. EU States have agreements with the candidate States, as well as many

¹¹⁰ Commission, **Evaluation, op.cit.**, p.7.

¹¹¹ Commission, **Revisiting Dublin, op.cit.**, para 57.

¹¹² Commission, **Revisiting Dublin, op.cit.**, para 59.

¹¹³ Readmission agreements are therefore essential for the enactment of 'safe country of origin' principles too.

¹¹⁴ Executive Committee of the High Commissioner's Programme, Standing Committee, **Composite flows and the relationship to refugee outflows, including return of persons not in need of international protection, as well as facilitation of return in its global dimension** EC/48/SC/CRP 29 (25 May 1998) paras 18 and 19.(emphasis added).

other States and are also seeking to negotiate them with some of the major countries of origin of asylum seekers and/or their neighbors, as set out in the six actions plans of the High Level Working Group.¹¹⁵

80. The Czech Republic has, according to the Danish Refugee Council report, signed readmission agreements with all its neighbors, i.e. Slovakia, Poland, Germany and Austria, as well as Romania, Hungary and Canada. These readmission agreements generally provide for the return of nationals of the contracting States or of third countries who have illegally entered the territory of the other contracting State. However, the DRC report stresses, "they do not take the situation of asylum seekers into consideration and, therefore, do not guarantee access to the asylum procedure." In fact, in 1996, UNHCR recommended that asylum seekers should not be returned to the Czech Republic on the basis of the 'safe third country' rule, because access to the asylum procedure was not guaranteed. According to UNHCR, countries which return an alien on the basis of the 'safe third country' rule should also inform the alien of his/her right to claim asylum in the Czech Republic and the fact that this must be done when entering the country.¹¹⁶ The situation in Slovakia is reported as being rather similar.¹¹⁷ So far, Slovakia has signed readmission agreements with all its neighbors, i.e. Austria, the Czech Republic, Poland, Ukraine and Hungary, and with Croatia, Slovenia, Romania and Cyprus. Slovenia has readmission agreements with 20 European countries and Canada.¹¹⁸

81. According to Landgren two key legal issues are raised by readmission agreements. Firstly there is the question of consistency with the obligation of *non-refoulement* - which prohibits return 'in any manner whatsoever' to a place where persecution is feared. Secondly there is the extent to which any and every State is obliged to examine an asylum request.¹¹⁹ Goodwin-Gill has noted the shifting of obligations which takes place with readmission agreements.¹²⁰ There is the potential for jeopardizing the clear-cut obligations in refugee law, since most readmission agreements do not entail an obligation or guarantee to carry out asylum procedure. The mere existence of a readmission agreement may be sufficient for EU States under the London Resolution which requires "clear evidence of his admissibility to a third country" if the protection seeker had not actually applied for or received protection elsewhere.

82. The costs for the transfer of applicants are borne by the (EU) State making the request for readmission. The States of central and eastern Europe, primarily, which sign re-

¹¹⁵ See, eg High Level Working Group on Asylum and Migration, *Action Plan for Morocco*, 11426/99 (Brussels, 30 September 1999); High Level Working Group on Asylum and Migration, *Action Plan for Sri Lanka*, 11428/99 (Brussels, 30 September 1999).

¹¹⁶ Danish Refugee Council, **Legal and Social Conditions for Asylum Seekers and Refugees in Central and Eastern European Countries**, April 1999
<http://rww.drc.dk/dk/publikationer/boegerogpjec/boeger/legal/index.html>

¹¹⁷ **Ibid.**

¹¹⁸ Applicant countries and the Community acquis: Slovenia update: 15.02.2001
<http://europa.eu.int/scadplus/leg/en/lvb/e22110.htm>

¹¹⁹ Landgren, **op.cit.**

¹²⁰ Goodwin-Gill, G. **The Refugee in International Law** (Oxford: Clarendon, 1996) p. 342.

admission agreements may also benefit financially when one-off payments accompany the signing of readmission agreements such as the DM 120 million which Germany paid to Poland and the DM 60 million which it paid to the Czech Republic for refugee related expenditure.

1.A.8 Summary of Points of Concern

83. The major points of concern in relations to the 'safe third country' concept are:

- That it can only assist in the management by the international community of protection/asylum if the individual has guaranteed access to procedures somewhere and without delay. Determining which State is responsible might have good reasons if one State is indeed responsible, and takes up that responsibility. However, the travel route might not be the best or only means for determining this responsibility;
- That *refoulement* may take place, and that while the actual return to harm may be the direct responsibility of the State enacting the return to the State of origin, all and any States in the chain which led to that return bear responsibility;
- That there is not always certainty that a State will examine the asylum claim, even if the person is 'admissible' in theory;
- That rather than ensuring **one** State examines an asylum application, the practice too often means that **no** State examines a claim, leaving an asylum seeker either in orbit, or potentially more likely, in illegality;
- That the removal of individual choice in where to lodge an asylum claim stands in the way of ultimate integration of the asylum seeker/refugee and again may cause the individual to turn to irregular movement and residence in order to be with family or other social networks, or be in a country in which he or she speaks the language etc.;
- That the use of the travel route as the means for apportioning responsibility for examining an asylum claim is neither fair to the States closest to troubled regions, nor to individual asylum seekers who had strong reasons for seeking to apply for asylum in States other than those they transited;
- That the use of the travel route as the means for apportioning responsibility for examining an asylum claim causes many asylum seekers to destroy documentation (be it valid or fraudulent) in order to avoid removal;
- That the 'safe third country' notion shifts the costs and responsibilities to the 'outer' States, whereas these States in fact are often those which need more solidarity shown towards them. In other words, the 'safe third country' concept enacts a kind of non-solidarity by shifting the burden to States of first asylum, rather than away from them. These States are often those which are least equipped and have a lower capacity for protecting large numbers of refugees.

84. There is a need for:

- research into actual cases of chain *refoulement*, so that an effective assessment can be made of the impact of this principle;

- measures and instruments of accountability within States and internationally to ensure that *refoulement* does not take place and that all asylum seekers gain access to fair and effective procedures;
- The opportunity to appeal the decision for removal to a 'safe third country', with suspensive affect.
- Measures which ensure that a state is responsible for assessing an asylum claim (avoiding both orbit and *refoulement*)
- Discussions as to the importance of a meaningful link between an asylum seeker and the state in which they seek asylum, which can be beneficial to both the individual and the host State and society, should the claim lead to protection and eventual integration.
- Deeper discussion on the subject of the idea put forward in the Conclusions to the Regional Conference of the Global Consultations on International Protection in Budapest, which suggested that the “appropriate allocation of State responsibility for determining refugee status” which is the objective of the ‘safe third country’ notion and readmission agreements could:

Best [be] achieved through the establishment of multilateral, co-ordinated approaches to the allocation of State responsibility ... preferably in the form of binding agreements. Such agreements, involving regional groupings of concerned countries, would both allocate responsibility for determining refugee status and have elements of burden-sharing, taking into account the capacities of the concerned States.

However, this discussion should aim to ensure that the safeguards suggested in the conclusions as necessary in the period prior to such an arrangement, be in place under any such agreement. Furthermore, the assistance in capacity building and resource provision from more prosperous to less prosperous States involved should be in place. Of particular importance would be consideration of a system in which, as suggested in the European Commission’s working document, and reiterated in the Budapest Conclusions, the individuals preferences, expressed in the location of the asylum application’s being made, be taken fully into account. In any case in which an individual would be transferred between States, both should be held fully accountable for ensuring that *refoulement* does not take place.

1.B ‘Safe Country of Origin’

85. The concept of the ‘safe country of origin’ leads to nationals of those countries designated as safe being either automatically precluded from obtaining asylum/refugee status or at least having it raised as a presumption against their claim, which they then need to rebut. From the point of view of States it might be said to be a way of 'weeding out' or indicating which people are illegal/irregular migrants with only the asylum channel as possible means of gaining residence rights. However, as many advocates of refugee rights have pointed out, even a country which is indeed safe for 99.999% of its residents might

fail a tiny minority, who then do have the right to seek protection in another State. In this section of the paper European practice will first be assessed, with regard to non-EU States. Then we will turn to another EU precedent, namely the defining within a collectivity of States of each member as inherently 'safe' meaning the citizens of 15 States are in principle excluded from exercising their right to seek and enjoy asylum in 14 countries which are integrating with their own.

86. The "safe country of origin notion is" say Crisp and van Hear:¹²¹

inherently dangerous, as there is an evident potential for persecution to occur in any State, however democratic its constitution. The notion of safe countries of origin is also susceptible to political manipulation. Once they have established a list of nations which fall into this category, the world's more affluent States may be tempted to include their closest allies and most important trading partners.

87. In a July 1991 Background Notes, UNHCR set out its position, prior to European developments:¹²²

In UNHCR's view the 'safe country of origin' principle is inconsistent with the spirit and possibly the letter of the 1951 Convention relating to the Status of Refugees - because it precludes *a priori* a whole group of asylum seekers from refugee status. It forms a reservation *de facto* to Article 1A(2) - and thus would be in violation of Article 42 which prohibits reservations to this article. Would introduce a new geographic limitation - incompatible with the protocol to the convention; Inconsistent with Article 3 of the 1951 Convention requiring States to apply its provisions without discrimination as to country of origin; inconsistent with the individual character of refugee status and subjective nature of the fear of persecution requiring evaluation of the applicant's statements rather than a judgement on the prevailing situation in countries of origin.

88. The key point in the development of this notion was the Conclusion agreed by the European Community in London in November 1992 on Countries Where There is Generally No Serious Risk of Persecution. (At the same meeting as the Resolution on 'safe third countries' - see above). Byrne and Shacknove write:¹²³

The EU Immigration Ministers defined a safe country of origin as a country 'which can clearly be shown, in an objective and verifiable way, normally

¹²¹ 'Refugee Protection and Immigration Control: addressing the asylum dilemma' RSQ Vol. 17 No. 3 1998 pp.1-27.

¹²² **Background note of the safe country concept and refugee status** EC/SCP/68 26 July 1991 - submitted by the High Commissioner to the EXCOM Sub-Committee of the Whole on International Protection.

¹²³ Byrne R. and A. Shacknove: 'The Safe Country Notion in European Asylum Law', **Harvard Human Rights Journal** vol.9 Spring 1996 pp. 193-194.

not to generate refugees or where it can be clearly shown, in an objective and verifiable way, that circumstances which might in the past have justified recourse to the 1951 Convention have ceased to exist.' ... The Conclusions of the EU Immigration Ministers provide that a safe country of origin determination by a Member State should not be an automatic bar to all asylum applications from that State, but may be used instead as justification for directing applicants into expedited procedures with sharply curtailed legal safeguards.

89. While there is no EU-wide agreement on which countries are designated as 'safe', a number of the various approaches can be mentioned.¹²⁴ In Denmark a special 'white list' was drawn up of countries from which citizens are unlikely to be granted refugee status. These countries are the Baltic States, Bulgaria, Romania, Russia, the Czech Republic, Slovakia, Poland as well as all Western European countries, USA, Canada, Australia, New Zealand, Japan and some African States. In the case of France, a clear link is made between the Cessation Clause (Article 1C(5)) of the Geneva Convention and their safety as a country of origin. Mention is made of the following countries: Romania, Bulgaria, Argentina, Benin, Cap Verde, Chile, Hungary, Poland, Czech Republic, Slovakia, and Uruguay. In Germany, a special accelerated procedure is used at airports, applied to asylum seekers coming from "safe countries of origin", or without valid passports. The list of "safe countries of origin", approved by Parliament, includes Bulgaria, Ghana, Poland, Romania, Senegal, Slovakia, the Czech Republic and Hungary.¹²⁵ In these cases, applicants awaiting a decision on entry into the country must remain at the airport, provided it has sufficient capacity to accommodate them. Usually, they stay in special premises within the airport's transit zone. UNHCR and other refugees assisting NGOs normally have access to asylum seekers in the transit zone.

90. The latest European Commission proposal on Minimum Standards on Procedures in Member States maintains the notion of 'safe country of origin' and seeks to harmonize it.¹²⁶

91. As was seen above in the case of 'safe third countries', Central and Eastern European States are also implementing this type of principle. Hungary, for example, defines a 'safe country of origin', in Section 2.d) of the Asylum Act, as a country of nationality, or habitual residence in the case of a stateless applicant, in respect of which there is a:

presumption that the country observes/implements the UN Covenant on Civil and Political Rights of 1966, the Geneva Convention of 1951, the UN Convention against Torture and Other Cruel Treatments or Punishment of 1984, the European Convention on Human Rights and Fundamental

¹²⁴ Information for this section, as for the 'safe third countries', is taken from the Danish Refugee Council's report on Western Europe, and its report on the countries of Central and Eastern Europe.

¹²⁵ Danish Refugee Council, *op.cit.*, p.101. This falls under Section 18a of the Asylum Procedure Act.

¹²⁶ European Commission, **Minumum standards**, *op.cit.*.

Freedom of 1950, and where, because of the characteristics of the legal order and the guarantee of legality, there may not exist a threat of persecution for reasons of nationality, membership of a particular social group, political opinion, race, religion, or torture, inhuman or degrading treatment, and which country allows independent national and international organisations to control and supervise the enforcement of human rights.

92. Where there are lists of 'safe countries of origin', and where the concept is applied, including as will be discussed below, in the intra-EU context, one thing is certain: the major countries of origin of asylum seekers for the last decade, including Afghanistan, Somalia, Iran and Iraq, do not appear on those lists. The impact the concept can have on the apparent aim of reducing the number of asylum applications is thus unclear.

93. Within the EU, the *Protocol on asylum for nationals of Member States of the EU, attached to the Treaty of Amsterdam*, is a measure which in principle excludes EU citizens (ie citizens of EU Member States) from the protection of asylum in other Member States, although States do have the flexibility to be able, unilaterally, to accept applications. The history of the Protocol can be traced to Spain's reaction to the protection which some EU Member States, notably Belgium and France, extended to members of ETA, the Basque nationalist organization. Spain proposed a measure to remove the right of EU nationals to seek asylum within the EU, suggesting that the national of any Member State be regarded, "for all legal and judicial purposes connected with the granting of refugee status and matters relating to asylum" as a national of the Member State in which he or she might be seeking asylum.¹²⁷ UNHCR, as Landgren explains, described the development as a "cause for concern" and advised that such a measure would be at variance with the international obligations of the Member States. If the problem for Spain was that the ETA members in question were terrorists, then what was required was more effective application of the 1951 Convention which excludes terrorists.

94. The key substantive article of the Protocol can be summarized as entailing that, in order for an asylum application to be considered, the country of nationality of the asylum seeker must formally have derogated from its human rights obligations, or must be determined, through a political process, to be a serious and persistent violator of human rights. If that is not the case, then a decision to receive an asylum request is a "unilateral" Member State decision which must be communicated to the Council of Ministers (which includes all Member States, including therefore the alleged violator of human rights). In essence, as part of the creation and formalization of an Area of Freedom, Security and Justice, it was essential from the Member States' perspective for the notion of European citizenship to be formalized by acknowledging that it would seem illogical for citizens to apply for asylum when they already have rights similar to nationals in other States. The only situation in which an EU citizen might need to seek asylum would be if his or her State of origin derogated (in the eyes of other Member States) from its human rights obligations. This denies both the fact that for some individuals there can be a protection need even from a State which appears generally not to violate human rights, which is

¹²⁷ See Landgren, *op.cit.*, Emphasis added to the citation of Spain's proposal by Landgren.

evidenced by the large number of claims made to the European Court of Human Rights on an annual basis by EU citizens. Few of these might actually deem their claim sufficient cause for them to seek to flee to achieve protection elsewhere, and the fact of their being an avenue for redress through the ECtHR may be one reason for that, however, the violations of rights cannot be denied. The motivation and justification of the Protocol also denies the fact that EU citizens do not enjoy *full* civil and political rights in other Member States than that of their nationality, nor even full access to social, cultural and economic provisions. It implies that simply having a legal status in a country is sufficient: that acknowledgment of refugeehood is not essential. Belgium was the only State to append a declaration to the protocol stating that it would carry out an individual examination of any asylum request made by a national of an EU Member State. However other States have made similar statements. Landgren cites the UK Government as stating: "The 1951 United Nations Convention requires that we consider applications for asylum individually, irrespective of where they come from and we will comply with that obligation."¹²⁸ Also, the Swedish Minister for International Development Cooperation, Pierre Schori, has stated that Sweden will consider asylum requests regardless of where [the individuals] come from,¹²⁹ and the Netherlands authorities indicated to UNHCR that they would continue to treat applications for asylum from nationals of EU Member States in the normal asylum procedure but on the presumption that the applicant originated from a safe country.¹³⁰

95. The UK's Immigration and Nationality Directorate in setting out 'How we apply the rules' explains:¹³¹

2. An EU national may apply for asylum. Being an EU national does not exclude their claim from being considered. However that claim normally should be processed against the presumption that it is manifestly unfounded.

3. The Protocol on Asylum for Nationals of Member States of the EU considers that the level of protection afforded to an individual's fundamental rights and freedoms by those Member States means that they are safe countries of origin. Therefore it sets out specific procedures that are to be applied to the handling of any claim made for asylum by a National of an EU Member State (including a dual national). Given the extent of free movement rights enjoyed by EU nationals it would be wholly exceptional, and possibly misguided, for an EU National to claim asylum in the UK.

¹²⁸ Landgren, *Ibid.* footnote 55. She adds: The UK has also said that the Protocol means that Member States must treat applications from EU nationals as either inadmissible or against a presumption that they are manifestly unfounded. Belgium's declaration "to the effect that it will apply the latter approach" was not, in the view of the UK, an exemption to the Protocol, and the United Kingdom "will continue to give individual consideration to asylum applications from European Union nationals". [House of Commons, Written Answers, 26 and 27 November 1997, on EU (Immigration and Asylum) and on Amsterdam Treaty (Asylum Seekers), respectively, Hansard, Vol. 301 Cols 547 and 608]

¹²⁹ *Ibid.*, [reference: Letter from Minister Schori to the Swedish Red Cross, 1 July 1997].

¹³⁰ *Ibid.*, [Internal communication from UNHCR's Regional Liaison Office, Brussels, 3 October 1997]

¹³¹ *op.cit.* Chapter 2.9

Nevertheless the procedures set out in the protocol, which is binding on the UK, must be followed.

96. UNHCR voiced concerns in this matter, as in the case of ‘safe third countries’ that the EU situation and developments could be copied in other regions of the world. EU States roundly rejected this notion.¹³² However, Landgren cites a JUSTICE report which notes developments based on the EU model being proposed by Russia for the CIS, and similar developments have also taken place in northern Africa.¹³³

97. Such a Protocol discriminates on the basis on nationality (which contravenes every human rights instrument, as they are all based on non-discrimination), and raises a barrier to the seeking of asylum for the nationals of 15 States (who if they genuinely needed protection would virtually be forced to seek that on another continent and not in a neighboring State). Landgren discusses how the Protocol might be said to serve as an amendment or modification of the 1951 Refugee Convention and its 1967 Protocol, explaining at length how the Legal Services of the European Commission dealt with the matter, and with its own concerns that the UN Charter stood in the way of such a modification which would be discriminatory on the grounds of nationality.¹³⁴ She concludes, however, that such a modification does not take place if the preamble can be read as meaning that Member States respect the 1951 Convention as not being incompatible with and prevailing over the Protocol. In that case, asylum applications from Member State nationals must be accepted.

98. If asylum applications from nationals of EU Member States must be accepted and assessed, the question of why there is a Protocol at all must be raised, and one must wonder whether it did anything other than perform a political function from Spain's perspective. This means, again, that relations between States prevailed above concern for individual rights, including the rights of citizens, should eventual changes in government bring about a regime which caused them to seek asylum elsewhere.

99. Landgren notes that in 1990 there was a peak in EU national claims at around 80. In 1996 there were fewer than 30, and only two have been recognized both in the

¹³² **Ibid.**

¹³³ On the CIS Landgren cites: JUSTICE Standing Committee of Experts on International Immigration, Refugee and Criminal Law, Briefing on *The Treaty of Amsterdam: Key Issues on Ratification* January 1998, p.5. On North Africa see Amnesty International, *Fear, Flight and Forcible Exile: Refugees in the Middle East*, (August 1997) <http://www.amnesty.it/ailib/aipub/1997/MDE/50100197.htm>.

A particularly far-reaching agreement, which has devastating implications for refugees, is the Union du Maghreb Arabe (UMA), signed in 1989 by Algeria, Libya, Mauritania, Morocco and Tunisia. Under the treaty, citizens of one UMA country may reside in any other UMA country. The authorities have interpreted this to mean that people fleeing persecution in a UMA country who arrive in another UMA country cannot be recognized as refugees, and therefore will not be offered protection.

¹³⁴ Landgren, **Ibid.** see in particular footnotes 62, 63 and 64.

Netherlands. The Protocol was clearly not drafted to deal with a refugee problem. Rather it was politically motivated, but will have clear protection implications over time, both in the mirroring in other regions and, many commentators are concerned, if non-ideal States gain accession to an enlarged EU. It is also worth bearing in mind that the Protocol was drafted and agreed to prior to the reaction the 14 other States had to the changes in Austrian governing coalition membership in 1999.

100. The key factor of concern with the 'safe country of origin' principle is the discrimination on the basis of nationality which it entails. If the notion of a person's coming from a 'safe country of origin' would not only be taken into account in the assessment of an asylum application, but even be a starting presumption on the part of those judging the claim, it would appear that barriers (perhaps not insurmountable in all cases, but high barriers nonetheless, would be put in the way of fair assessment of the facts. An acceptance of general presumptions of safety as being satisfactory as a starting point in substantive assessment of an asylum claim certainly takes State concerns into account, but may not balance those concerns fairly with the individual's right to an objective assessment of his or her asylum claim.

1.C Time limits

101. Many States have introduced time limits on the making of asylum claims. In general, the European Union States have not formally made such provisions, although, as will be seen below, there are implicit limitations made as to the timing of an application for asylum, or at least the moment at which the application is made has a bearing on the material well-being of the asylum seeker and implicitly on the decisions made about the case. Restrictions on the timing of an asylum application after entry to the territory have been made in Portugal, and in several eastern European countries as well as in the United States and Turkey. These time limits vary from twenty-four hours after entry to the territory to one year.

102. In the case of Portugal an eight-day time limit is prescribed. The eight-day rule is generally applied strictly by the authorities, in particular if the applicant has arrived by air. Reasons which might justify the submission of the application beyond the time limit include illness, detention or incorrect legal information. In practice, only strong and well-founded cases are accepted after the eight-day limit.¹³⁵

103. "Restrictive time limits for the submission of asylum application" are listed as one area of concern ECRE has about central and eastern Europe, and one reason for which the 'safe third country' principle cannot work.¹³⁶ Many of the time limits have been altered or abolished in the last few years. In 1997 Bulgaria had a limit of 72 hours; Czech Republic

¹³⁵ Danish Refugee Council, *op.cit.*, p.252.

¹³⁶ ECRE *Position on the Enlargement of the European Union in Relation to Asylum* (September 1998) 2(vi)

of 24 hours, Hungary 72 hours, Latvia 72 hours and Romania 10 days.¹³⁷ By 1999 the limits were as follows.¹³⁸ In Bulgaria: 48 hours for those who had entered the country illegally, and no limit on those who had entered the country legally. In Poland there is a limit of 14 days for those who could provide good reason for not having made a claim at the border and those for whom there was no reason to claim asylum at the time of entry but where there has been a change in circumstances in the country of origin warranting a claim for protection. In the case of illegal entry the claim must be made immediately. The Polish Supreme Administrative Court has ruled that all applications should be processed notwithstanding their date of submission. No legal consequences to transgression of the time limit are formulated in the Aliens Act of the Code of Administrative Procedure, which is the reason for which the Court has overturned decisions of both the Minister of Internal Affairs and the Refugee Board.¹³⁹

104. In Hungary, the 1997 Asylum Act, which entered into force in March 1998 abolished the 72 hour time limit. In Latvia, although the Asylum Law does not include any specific time limit within which an in-country application should be submitted, Section 21 States that applicants who have resided illegally in Latvia for more than 72 hours should be dealt with under the accelerated procedure. According to Section 6 paragraph 3 of the Romanian Asylum Law, in-country applications must be submitted within 10 days of entry to the country. Applicants who have entered Romania legally with a visa must apply before it expires. However, the Asylum Law does not specify the consequences of an application submitted beyond the deadline and, in practice, late applications are registered and processed like any other. Illegal entrants to Ukraine must make their application within 24 hours, and legal entrants within 72 hours. The penalties seem to be open to the discretion of regional authorities. The Czech Republic appears only to have time limits with regard to steps in the procedure, not access to the procedure after entry to the country. In Slovakia there was a 24 hour time limit, but this was abolished in September 2000.¹⁴⁰ One example is given in the USCR report of the difficult conjuncture between the time limit in Slovakia and its position as a 'safe third country': "In a Kafkaesque twist, some asylum seekers returned to Slovakia on the grounds that they traveled through its territory en route to other countries reportedly have also been refused the possibility of filing claims upon their return because they had used up their 24 hours while initially transiting the country."¹⁴¹

104 "Although [time limits] may have different legal impact, and may indeed be subject to different implementation they generally operate as procedural barriers from having the

¹³⁷ Jens Vedsted-Hansen, *Responding to the Arrival of Asylum-seekers: Control vs protection in asylum procedures* Technical Symposium on International Migration and Development, The Hague 29 June – 1 July 1998, p.14.

¹³⁸ Information from the Danish Refugee Council's report on Central and Eastern Europe, **op.cit**

¹³⁹ Chlebny, J. and W. Trojan, 'The Refugee Status Determination Procedure in Poland', **International Journal of Refugee Law**, Vol 12, No. 2, (2000) pp.220-221.

¹⁴⁰ European Commission Slovakia update: 09.01.2001, <http://europa.eu.int/scadplus/leg/en/lvb/e22109.htm>

¹⁴¹ USCR, **op.cit.**, p.16.

application examined in substance."¹⁴² At best the asylum seeker could get some other form of *non-refoulement* (eg toleration) - or might have to either go into irregularity - or irregularly move on to another State (potentially triggering the 'safe third country' principle). From the State perspective there may be a certain logic to this, but the backlash against the implementing State could be great in terms of, for example, the social/political costs of large numbers of irregular migrants.

105. Another example of time limits is that of Turkey. The Turkish authorities required that an asylum claim be lodged within five days of entry to the territory; in 1999, this limit was increased to ten days.

106. In *Jabari v. Turkey*,¹⁴³ the application for asylum made by Jabari was rejected by the Turkish police as it had been submitted beyond the five day time limit then in effect. EctHR considered "the automatic and mechanical application of such a short time-limit for submitting an asylum application must be considered at variance with the protection of the fundamental value embodied in Article 3 of the [European] Convention [on Human Rights]."¹⁴⁴ The UNHCR office in Ankara had accepted the claim to refugee status made by Jabari. The Turkish authorities nonetheless sought to deport her. The Court found that the decision to deport the applicant to Iran, if implemented, would be a violation of Article 3 of the European Convention on Human Rights relating to inhuman and degrading treatment.

107. The US has a one-year filing deadline. Introduced in the 1996 Illegal Immigration Reform and Immigrant Responsibility Act, it is part of a package of measures which were intended to ensure that frivolous, non-meritorious cases would not enter the asylum system.¹⁴⁵

(B) Time limit.

Subject to subparagraph (D), paragraph (1) [admissibility to procedures] shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of alien's arrival in the United States.

108. The deadline does not apply to people who can show that changed circumstances in their country of origin materially affect their eligibility for asylum, those who can demonstrate extraordinary circumstances which caused their delay, or those whose application is for the withholding of removal to a country where the applicant's life or freedom would be threatened. Advocates and practitioners have consistently raised concerns centering on two points: the need to apply early and the basis of proof of entry into the US territory. Many applicants for asylum arrive in a terrified and traumatized state, and need time to come forward. They are quite likely also not to know that they must

¹⁴² Vedsted-Hansen, *op.cit.* p.14.

¹⁴³ European Court of Human Rights, 11 July 2000.

¹⁴⁴ *Ibid.*, para 40.

¹⁴⁵ INA § 208(a)(2)(B)

apply as early as possible. Secondly, many arrive from countries which simply do not provide travel documentation, or where applying for documentation - indicating the will to leave the country - might in itself be an indication of intent to authorities which would cause persecution to take place or be intensified. Doris Meissner, head of the INS at the time of the enactment of the 1996 Act, acknowledged the right of asylum seekers to normalize their situation in day to day terms, before applying for the legal status of refugee.¹⁴⁶ In 2001, the Asylum Working Group, an informal coalition of over 25 refugee and human rights organizations is calling for the repeal of the one-year filing deadline.

109. UNHCR is against these limits, and has stated that while one can ask people to do this, a State cannot exclude asylum seekers from procedures if they do not comply. EXCOM Conclusion 15 (XXX) states that

While asylum seekers may be required to submit their asylum requests within a certain time limit, failure to do so, or the non-fulfilment of other formal requirements, should not lead to an asylum request being excluded from consideration.

110. There are, of course, situations in which the need for a refugee determination procedure comes long after entry into the host State. In these situations the application for refugee status may be a request to regularize what had for years been an irregular stay, in the light of new circumstances. Many former Yugoslavs who were already in the States of the European Union and other European States filed asylum applications between 1992 and 1999, although they had been in the host State in question for a long time before the Balkan conflicts broke out.¹⁴⁷

111. In some cases, such as the United Kingdom, these time limits are linked to the social assistance made available to the asylum seeker rather than to the access to procedures itself. However, with reception being increasingly linked to procedures and the program of dispersal in the UK, failure to make the asylum claim on entry to the State can result in limitations on access to refugee determination procedures. In the Adimi case, the Home Office claimed that "Immigration control ... is prejudiced in cases where an intending asylum seeker fails to present himself as such at the frontier." Lord Justice Simon Brown stated that "the premium placed by the benefit system upon refugees claiming asylum on entry rather than after entry already represents a significant sanction against late claims."¹⁴⁸

112. The timing of an asylum application also affects credibility:
Instructions to UK immigration officers (given on the Home Office website) include the following:

¹⁴⁶ USCR 'Five Years After Asylum Reform: INS regains control; Practitioners say reform still needed' see www.uscr.org.

¹⁴⁷ This is the type of situation in which the United States has been known to employ its version of a Temporarily Protected Status.

¹⁴⁸ R v Uxbridge Magistrate Court & Another ex parte Adimi, 29 July 1999.

Paragraph 341 of HC 395 (as amended) sets out some factors which may damage an applicant's credibility if no reasonable explanation is given.

These are as follows:

i) The applicant failed without reasonable explanation to apply forthwith upon arrival in the United Kingdom, unless the application is founded on events which have taken place since his arrival in the United Kingdom.

The term "forthwith" should not necessarily be taken to mean immediately on arrival. The case as a whole will need to be considered, particularly the circumstances surrounding the application and its timing. It is important that the applicant is given an opportunity to provide an explanation for any delay in submitting his asylum claim.

113. Furthermore, there are time limits set on the submission of documents and forms at various stages in the procedure. If forms are not submitted on time, an applicant is said not to have complied with the rules. In 1999, 5% of asylum applications were refused on non-compliance grounds, in 2000 the figure had risen to 27%.¹⁴⁹ One report indicates that those whose application is refused on non-compliance grounds are chiefly disqualified due to their failure to find legal advice (a requirement) and to complete the Statement of Evidence form. These requirements resulted from the 1999 Immigration and Asylum Bill.¹⁵⁰

114. In the Netherlands also, procedures and reception facilities are closely linked. The type and location of the reception facilities in which an asylum seeker is housed is linked directly to the stage they are at in their procedures. On occasion (chiefly in the Autumn each year since 1998) regular reception facilities for those arriving have become overloaded, meaning that the Government has established tented facilities and waiting lists. In part the over-crowding is due to people not complying with the request to move on to other facilities, or out of reception centers when their claim has been fully processed. So long as someone is not in the reception facilities, they are not entered in the stage of procedures which accompanies residence in that type of center.

115. The only form of time limit included in the European Commission's proposal on minimum standards for procedures is that the application should not be made late in a deportation procedure (ie where illegal entry has led to deportation, and rather than claiming asylum at an early stage, the applicant waits until the later stages of deportation proceedings.)

¹⁴⁹ Home Office, **op.cit.**, <http://www.homeoffice.gov.uk/rds/immigration1.html>. The rules state, for example, that a Statement of Evidence Form must be submitted within 14 days, and that only very exceptional circumstances can justify delay in this. Either late or non-submission of the SEF, or failure to attend an interview can result in an application being considered in principle as denied on the grounds of non-compliance. See: <http://www.ind.homeoffice.gov.uk/default.asp?PageId=942>.

¹⁵⁰ See **The Guardian**, "'Technical' rebuff for 30% of asylum seekers', 26 January 2001, and the website of the British Refugee Council: <http://www.refugeecouncil.org.uk/0201/info/stats/stats003.htm>.

116. There are three chief concerns on the issue of time limits. Firstly, such limits, if in fact used to exclude people from procedures, would primarily exclude those people who presumably had least access to information about regulations, and who were therefore disadvantaged anyway by, for example, a lack of representation, lack of social services and potentially trauma or other psychological or physical impediments linked to their flight and fear. Secondly, where the limits are not explicit, but implicitly taken into account in the handling of claims, there is a lack of transparency about application of regulations. Finally, where such limits are used not to exclude from procedures but to exclude from facilities and social rights access, discrimination is taking place between those who know the rules and those who do not, which could amount to discrimination on the basis of the means used to arrive in a host State and/or discrimination on the grounds of linguistic ability (nationality and ethnic background). One additional concern arises when time limits become linked to the 'safe third country' principle through the country to which the asylum seeker is returned refusing to process the claim as the deadline has been exceeded. This could result in an asylum seeker ultimately being refused access to procedures and protection in all countries. The 'safe third country' principle has the goal of allocating State responsibility for determining a refugee claim, yet in this linkage with time limits, as in other elements of its application discussed above, the principle can result, in practice, in no State assessing a protection need. The objective of determining which State has responsibility for assessing a claim is a reasonable one. The current practice of reaching that determination is, however, not reasonable, and other, more rational and protection oriented means of reaching the goal require investigation.

2. Relation of the three issues to the Convention, Protocol, Handbook and EXCOM Conclusions

117. In this part of the paper each of the three issues will be dealt with in the order they appear above. Crisp and van Hear point out that many of the restrictive practices employed are not specifically banned by the international refugee instruments – but are ‘clearly contrary to the spirit of the 1951 Refugee Convention’.¹⁵¹

2.A ‘Safe third countries’

118. There is no explicit legal prohibition against sending an asylum seeker to a State where no persecution is feared. However, there is also no obligation on an asylum seeker to seek asylum in the first country where that is possible.

119. European State practice may create an obligation on refugees to seek protection in the first country in which they could do so, and even on those States to accept responsibility for examination of their claims. However, the main effect of this would be to exacerbate the uneven distribution of refugees around the world. The Preamble to the 1951 Convention states:

Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation,
Expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees will do everything within their power to prevent this problem from becoming a cause of tension between States

120. UNHCR’s position as noted in its comments on the European Commission staff working paper is that:¹⁵²

any analysis of the issue must be based on the understanding that the responsibility for examining an asylum request lies primarily with the State to which it has been submitted. While that State may be relieved from such responsibility if it ensures that another State will consider the request, it is essential that any arrangements that may be concluded to this end, be consistent with the imperatives of refugee protection.

121. There are two key articles of the Convention to be referred to in the context of the ‘safe third country’ principle: Articles 31 and 33. Parts of the preamble are also relevant. ECRE has noted that:¹⁵³

¹⁵¹ ‘Refugee Protection and Immigration Control: addressing the asylum dilemma’ RSQ Vol. 17 No. 3 1998 p.14.

¹⁵² UNHCR, **Revisiting the Dublin Convention: Some reflections by UNHCR in response to the Commission staff working paper** (April 2000) p.2.

There is no common acceptance in international law of the concept beyond the possibility of acknowledging that another country might be more appropriate to provide protection. However, the concept has now been codified in the EU Dublin Convention.

122. These positions from UNHCR and ECRE, reflecting a wider perception of State responsibility for assessing a claim, indicate that the State where a claim is made takes on responsibilities with respect to the claimant, including the processing of the claim and ensuring that *refoulement* does not occur. The suggestion is however made that passing responsibility to another State, which agrees to its role in the given case, and which will, under strict safeguards, assess the claim fairly and efficiently, does not have to be problematic, even if it is the exception rather than the rule, and still entails responsibilities on the part of the State where the claim is lodged.

2.A.1 Arriving Directly¹⁵⁴

Article 31 Refugees unlawfully in the country of refuge

(1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was

threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

(2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

123. In a case before the British High Court, the following assessment of this article was made: "A literal construction of 'directly' would contravene the clear purpose of the Article ... this condition can be satisfied even if the refugee passes through intermediate countries on his way to the United Kingdom".¹⁵⁵

124. Lord Justice Simon Brown rejected the argument that this understanding is only relevant if the applicant "could not reasonably have been expected to seek protection in any such intermediary country and this will not be the case unless he actually needed, rather than merely desired, to come to the United Kingdom." In other words this is an argument suggesting that the applicant must claim asylum where he first may and that only considerations of continuing safety would justify impunity for further travel.

¹⁵³ ECRE Guidelines Sept. 1999 - para 40

¹⁵⁴ Article 31 will also be referred to below in the context of time limits.

¹⁵⁵ R v Uxbridge Magistrate Court & Another ex parte Adimi, 29 July 1999.

125. Lord Justice Simon Brown however, agreed rather with an argument saying:¹⁵⁶

that some element of choice is indeed open to refugees as to where they may properly claim asylum ... any merely short term stopover en route to such intended sanctuary cannot forfeit the protection of the Article [31a], and that the main touchstones by which exclusion from protection should be judged are the length of stay in the intermediate country, the reasons for delaying there (even a substantial delay in an unsafe third country would be reasonable were the time spent trying to acquire the means of travelling on) and whether or not the refugee sought or found there protection de jure or de facto from the persecution they were fleeing.

126. These two arguments set out the difficulty of relating the 'safe third country' concept to Article 31 of the Convention. Support for the argument offered by Lord Justice Brown can be found in UNHCR Guidelines on detention.¹⁵⁷

The expression "coming directly" in Article 31(1), covers the situation of a person who enters the country in which asylum is sought directly from the country of origin, or from another country where his protection, safety and security could not be assured. It is understood that this term also covers a person who transits an intermediate country for a short period of time without having applied for, or received, asylum there. No strict time limit can be applied to the concept "coming directly" and each case must be judged on its merits.

127. In questioning the interpretation and application of the term "coming directly" we arrive at concerns about the documentation presented by asylum seekers, and the fact that they may precisely be encouraged to destroy their documents in order to obfuscate information about their travel route when the word 'directly' is taken to mean without touching land anywhere between the country of origin and the country where the asylum application is filed. On this it is useful also to turn to the Handbook.¹⁵⁸

205. The process of ascertaining and evaluating the facts can therefore be summarized as follows:

(a) The applicant should:

(i) Tell the truth and assist the examiner to the full in establishing the facts of his case.

¹⁵⁶ **Ibid.**

¹⁵⁷ UNHCR Guidelines on applicable Criteria and Standards relating to the Detention of Asylum-Seekers (10 February 1999) para 4.

¹⁵⁸ OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, (1979) HCR/IP/4/Eng/REV.1, Reedited Geneva, January 1992.

(ii) Make an effort to support his statements by any available evidence and give a satisfactory explanation for any lack of evidence. If necessary he must make an effort to procure additional evidence.

(iii) Supply all pertinent information concerning himself and his past experience in as much detail as is necessary to enable the examiner to establish the relevant facts. He should be asked to give a coherent explanation of all the reasons invoked in support of his application for refugee status and he should answer any questions put to him.

(b) The examiner should:

(i) Ensure that the applicant presents his case as fully as possible and with all available evidence.

(ii) Assess the applicant's credibility and evaluate the evidence (if necessary giving the applicant the benefit of the doubt), in order to establish the objective and the subjective elements of the case.

(iii) Relate these elements to the relevant criteria of the 1951 Convention, in order to arrive at a correct conclusion as to the applicant's refugee status.

128. In limiting the access of asylum seekers to procedures in the countries in which they choose to seek asylum on the grounds that they traveled through other countries, States would appear to limit their own access to the truth from applicants during proceedings, and give a certain definition to the term 'directly' as used in the Convention, which may semantically appear not to be wrong, but which goes against the spirit not only of Article 31, but also of the preamble as cited above, as it effectively means neighboring States must take a disproportionate responsibility for the protection of refugees. EXCOM Conclusion No.58 refers also to the destruction of evidence:¹⁵⁹

The wilful destruction or disposal of travel or other documents by refugees and asylum-seekers upon arrival in their country of destination, in order to mislead the national authorities as to their previous stay in another country where they have protection, is unacceptable. Appropriate arrangements should be made by States, either individually or in co-operation with other States, to deal with this growing phenomenon.

2.A.2 *Non-refoulement*

129. The concerns about *refoulement* have been dealt with at length above, but will briefly be returned to here. ECRE has noted that without safeguards the 'safe third country' notion poses "a serious risk to the institution of asylum and to the fundamental principle of *non-refoulement*".¹⁶⁰

¹⁵⁹ Executive Committee Conclusions No. 58 (XL) - 1989 - Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection, (j)

¹⁶⁰ ECRE, (1999), *op.cit.*.

Article 33 Prohibition of expulsion or return ("refoulement")

(1) No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever 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.

(2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

130. That States are responsible for any *refoulement* of a refugee also from another State to which an asylum seeker has been removed has been set out by UNHCR as follows:¹⁶¹

The responsibility of a State under the 1951 Convention and 1967 Protocol is engaged whenever that State is presented with a request for asylum involving a claim to 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 find protection in one country does not remove the obligation of other States to respect the principle of non-refoulement in dealing with the refugee, even though it may be agreed that the primary responsibility for providing international protection, including asylum, lies with another State.

2.A.3. What makes a country 'safe'?

131. EXCOM Conclusion No.58¹⁶² acknowledges that some refugees move on, irregularly, from a place where they are protected, sometimes because the protection they are receiving cannot be considered by the refugee to be 'durable' as a solution, as opportunities for education, employment etc. may be limited.¹⁶³ In such cases, the EXCOM sees reason for returning the refugees under certain circumstances.¹⁶⁴

Where refugees and asylum-seekers nevertheless move in an irregular manner from a country where they have already found protection, they may be returned to that country if

¹⁶¹ UNHCR, **Readmission Agreements, "Protection Elsewhere" and Asylum Policy**, 1 August 1994 (UNHCR's Response to the Council of Europe's Recommendations concerning Readmission Agreements)

¹⁶² Executive Committee Conclusions No. 58 (XL) - 1989 - Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection

¹⁶³ **Ibid.**, (b).

¹⁶⁴ **Ibid.**, (f)

i) they are protected there against refoulement and

ii) they are permitted to remain there and to be treated in accordance with recognized basic human standards until a durable solution is found for them. Where such return is envisaged, UNHCR may be requested to assist in arrangements for the re-admission and reception of the persons concerned;

132. This Conclusion gives cause to consider that States may be justified in returning people who had indeed already achieved protection, ie who have come from a ‘first country of asylum’ as long as there is no new protection need or reason to believe protection would not be continued on return. However, it gives no justification for the return of people who merely transited a State. In other words, it supports the notion of return to a ‘first country of asylum’ (so long as there is no claim of persecution in that country), but rejects the notion of their being ‘safe third countries’.

133. Article 1 E of the 1951 Convention gives rise to further questions in relation to the impact a person’s status in another ‘host’ State may have on their application for protection:

This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

134. The Handbook offers illumination on this point:

144. This provision relates to persons who might otherwise qualify for refugee status and who have been received in a country where they have been granted most of the rights normally enjoyed by nationals, but not formal citizenship. (They are frequently referred to as “national refugees”.) The country that has received them is frequently one where the population is of the same ethnic origin as themselves.

135. Those people who have in fact been accepted as refugees in a third country, unless they are seeking protection from a fear of persecution *in* the third country, would therefore be more likely to be excludable from acceptance as refugees, although a procedure would be needed to establish that no well-founded fear existed vis-à-vis the third country.

136. EXCOM Conclusion 15¹⁶⁵ states that: “the intentions of the asylum seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account.” And “Asylum should not be refused solely on the grounds that it could be sought from another state.” State practice, as described above, can therefore be said not to

¹⁶⁵ Executive Committee Conclusions No. 15 (XXX), 1979 **Refugees Without an Asylum Country** (h) iii and iv.

coincide with this Conclusion reached by the body of States overseeing the High Commissioner's work.

137. This Conclusion indicates that refugees do, and legitimately should, have a voice in determining the State in which they seek asylum: that a meaningful link between individual and State is relevant to long-term protection and the integration capacity of both State and individuals. One implication of this could be that determining that a State is responsible for both the assessment of an asylum claim and any resulting protection on the basis of travel route, for example, could stand in the way both of upholding individual rights with regarding to the seeking of asylum and to State goals of integrating those people protected into their society.

2.B ‘Safe Countries of Origin’

138. In UNHCR's view the 'safe country of origin' principle, when used to deny access to asylum procedures, is inconsistent with the spirit and possibly the letter of the 1951 Convention relating to the Status of Refugees. This is because it precludes *a priori* a whole group of asylum seekers from refugee status. It forms, furthermore, a reservation *de facto* to Article 1A(2) which would be in violation of Article 42 prohibiting reservations to this article.

Article 42 Reservations

(1) At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to Articles 1, 3, 4, 16(1), 33, 36-46 inclusive.

139. The ‘safe country of origin’ principle also introduces a new type of geographic limitation, which is incompatible with the protocol to the convention. In addition, it is inconsistent with Article 3 of the 1951 Convention requiring States to apply its provisions without discrimination as to country of origin;

Article 3 Non-discrimination

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin

Also, as is the case of the ‘safe third country’ principle, this is inconsistent with the individual character of refugee status and subjective nature of the fear of persecution requiring evaluation of the applicant's statements rather than a judgement on the prevailing situation in countries of origin.

140. Where the European Union’s protocol, and other similar regional measures are concerned, it is possible that States would suggest that EU citizenship means people fall under the exclusion of Article 1(E):

This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as

having the rights and obligations which are attached to the possession of the nationality of that country.

141. The Handbook tells us, as cited above, that:

144. This provision relates to persons who might otherwise qualify for refugee status and who have been received in a country where they have been granted most of the rights normally enjoyed by nationals, but not formal citizenship. (They are frequently referred to as “national refugees”.) The country that has received them is frequently one where the population is of the same ethnic origin as themselves.

145. There is no precise definition of “rights and obligations” that would constitute a reason for exclusion under this clause. It may, however, be said that the exclusion operates if a person's status is largely assimilated to that of a national of the country. In particular he must, like a national, be fully protected against deportation or expulsion.

146. The clause refers to a person who has “taken residence” in the country concerned. This implies continued residence and not a mere visit. A person who resides outside the country and does not enjoy the diplomatic protection of that country is not affected by the exclusion clause.

142. However, EU citizenship as described in Part Two of the (consolidated) Treaty Establishing the European Communities does not grant the nationals of EU Member States rights ‘largely assimilated’ to those of nationals of the State where they are residing, nor does the Protocol refer to any distinction between those who have already taken residence, and those who move due to a fear of persecution – all would be in principle excluded from (in depth) asylum procedures.

143. Citizenship of the EU means that:¹⁶⁶

1. ... Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.

144. Citizens of the Union have the right to freedom of movement between Member States and to vote and stand for election in local and European Parliamentary elections. However, the fact of European citizenship which is **dependent on** national citizenship of a Member State, does not grant all the rights of citizens such as social welfare rights, for example. Nor does it confer the protection of the government of another Member State or a supra-

¹⁶⁶ Treaty Establishing the European Communities, consolidated version, 1997, Article 17 (ex Article 8).

national body, other than consular protection or assistance in a country where one's own Member State has no diplomatic representation.¹⁶⁷

2.C Time Limits

145. UNHCR's **Guidelines on applicable Criteria and Standards relating to the Detention of Asylum-Seekers** state that:¹⁶⁸

given the special situation of asylum-seekers, in particular the effects of trauma, language problems, lack of information, previous experiences which often result in a suspicion of those in authority, feelings of general insecurity, and the fact that these and other circumstances may vary enormously from one asylum-seeker to another, there is no time limit which can be mechanically applied or associated with the expression, "without delay". The expression, "good cause", requires a consideration of the circumstances under which the asylum-seeker fled.

¹⁶⁷ **Ibid.**, Article 20 (ex Article 8c).

¹⁶⁸ UNHCR, 'Detention' **op.cit.** para 4.

3. Ways of managing use of these concepts: Conclusions and points for discussion

3.A. 'Safe third countries'

146. In discussing ways to manage the 'safe third country' concept, one needs to recall the goals which policy-makers set out when creating this approach. These included :

- the avoidance of the 'refugee in orbit' phenomenon;
- the avoidance of 'asylum shopping';
- the assignation of responsibility for assessing an asylum claim;
- improving inter-State cooperation in the management of refugee protection;
- support for international relations, through this cooperation and the inter-State trust it inspires;
- the sharing of the 'burden' of asylum and protection across those States capable of playing a role;
- the creation of capacity to share the burden.

With regard to the last point in particular, attention has to be given to avoiding real (and perceived) burden-shifting, in the interest of good international relations.

147. The description and analysis of the principle and practice of 'safe third country' concepts set out above demonstrate that while the concept is problematic, in its definition and application, it is a concept which can be appropriate to ensuring both that an asylum seeker has his or her claim examined somewhere, and in managing the protection of asylum seekers between States. However, it is a concept in need of development as the problems outlined indicate. In general, commentators have been of the view that if the 'safe third country' concept meant someone already had asylum somewhere, and was applying anew in another State for protection from persecution in the State of origin (rather than the State where asylum had been granted) then it was reasonable to apply the principle – in other words if there is a matter of a 'first country of asylum' rather than of a 'safe third country'. However, when it means a claim is not even considered because someone transited another State, so did not even enter a claim or procedures elsewhere, it raises new questions as it often effectively denies access to protection and opens the risk that *refoulement* will occur.

148. Countries have been considered 'safe' for applicants at various stages in their search for protection:

1. During transit (a matter of hours)
2. When they have spent some time in a country *en route*
3. When they have applied for protection in that State, though the claim was not examined
4. When they have applied for protection and the claim was examined but neither refugee nor a *de facto* status was granted
5. When the individual has received and enjoyed protection

149. Questions for discussion

- Can a country be considered ‘safe’, and determined responsible for the assessment of the asylum application, in **all** of these time and quality related instances?
- If the reason for which those already protected in a given State seek new protection elsewhere is related to the quality of life under a protected status in the host State, and that quality is related to material means and their impact on policy, what sort of assistance (in the widest developmental context) to the given State would be appropriate? Can assistance be presumed to be sufficient to avoid the desire to migrate to seek further opportunities, either for citizens or for refugees in the less developed States?
- Will States in which protection has been sought (whether granted or not) be prepared to disregard a subsequent application for protection elsewhere in their treatment of the asylum seeker or refugee if he or she is returned?

150. Suggestions:

- A country might in general be considered ‘safe’ for an applicant to be returned to if he or she actually enjoyed protection in that country, after examination of an asylum application, and if there are guarantees that the protected status will be continued on return, without prejudice due to the seeking of protection elsewhere (in other words if there is a ‘first country of asylum’)
- If a ‘first country of asylum’ exists, then measures for sharing the responsibility for protection could and should be considered if the number of claimants in that country appears significant in relation to its economic, social and political capacity to grant protection.
- If a person has already applied for (but not received) protection elsewhere, then any return of that person to that State must be accompanied by a guarantee of *non-refoulement* and no prejudicial treatment of the existing claim due absence from the country and/or the making of a second claim elsewhere.

151. At all stages in the search for protection the following issues must be borne in mind:

- The social and humanitarian reasons for which an applicant chooses to apply for protection in a given State
- The need for an applicant to be able to appeal a decision including a decision based on the fact that he or she was protected elsewhere, or had already applied for protection elsewhere

152. On the basis of experience with the Dublin Convention and extrapolating to wider ‘safe third country’ approaches:

- Attention needs to be paid in considering the presence of another country which could assess an asylum claim to the question of whether the State in which the claim is made and the State to which the applicant might be removed interpret and apply the 1951 Convention in the same way, or at least with the same outcome, on the particular issues of the individual case (simply having signed, ratified and applying the Convention are not sufficient factors). This is the only way to guard fully against the *refoulement* of a person who one of the States

potentially responsible for examining a claim deems to be indeed in need of protection.

- For this reason it seems that the application of the ‘safe third country’ principle, removing an applicant prior to examination of his or her claim during a regular procedure is inappropriate, so long as States maintain differences in interpretation and application of the Convention.
- The European Commission’s suggestion that the State in which a claim is lodged is the State responsible for examining the claim therefore seems the most logical approach in general as well as within the EU area. This suggestion is borne out by the empirical implications of the Commission’s evaluation.

153. Following this European Commission suggestion, and mindful of UNHCR’s suggestion that the presence of a meaningful link between the asylum seeker and the country in which protection is sought is relevant and important, responsibility for assessing a claim could most logically be determined to fall with the State in which protection is sought, unless (continuing and satisfactory) protection has already been granted elsewhere.

154. In considering whether removal to a ‘safe third country’ is appropriate, States need to have due regard to the issue of solidarity between States in granting protection to those in need. Consistent removals to a small number of ‘safe countries’ close to a country of origin of significant number of people in need of protection could cause various forms of perceived insecurity in that State. Particular regard should be had to this issue when mass exoduses are involved, but those are not the only cases in which solidarity between States is important.

155. In this light, a study of regional mechanisms for determining responsibility for assessing claims on an individual basis, incorporating both elements of solidarity (financial and resource oriented as well as in terms of sheer numbers of asylum applicants) and an understanding of the individual’s role in deciding which is the State in which protection can be most appropriately be sought on the basis of existing meaningful links, would be useful. Any such mechanism would have to involve safeguards including those mentioned below

156. If removals are to take place to ‘safe third countries’ then there need to be:

- explicit provisions made for return to take place only if the asylum-seekers will be readmitted, protected against *refoulement* and given access to full and fair procedures for determining status, as well as to effective protection, as necessary. If an asylum application had been made previously in the State to which the asylum seeker is removed, then the case should be re-opened, any decision taken *in absentia* ruled as void, and no negative account should be taken of the attempt to seek protection elsewhere.
- In order to avoid ‘orbit’ situations readmission agreements need to be structured to include consent to return, by both the State and the individual, and guarantees against *refoulement*, as well as access to procedures *which meet*

international standards. Also, individual circumstances need to be taken into account where there is humanitarian reason to do so.

157. How can States be held accountable?

If guarantees about access to procedures and *non-refoulement* are being made then there needs to be accountability in every State involved in the ‘chain’.

- In the State seeking to remove a person to a third State, the decision needs to be made by a central authority;
- That authority needs to be held accountable for its decision to remove, both in the short term through access to appeals processes for individuals, and in the longer term. One area for discussion would be the type of national or international oversight which might be appropriate, including a supervisory body (there could be a supervisory role here for the United Nations in the sense of Article 35 of the 1951 Convention)
- In the State to which a person has been removed, central authorities need to be held accountable for guarantees made about access to procedures and *non-refoulement*. There could be discussion about who should hold them accountable: the authorities in the State which removes the individual to that State as ‘safe’ and/or international authorities involving again a potential N supervisory role.

3.B. ‘Safe Country of Origin’

158. The ‘safe country of origin’ notion does not seem to be an appropriate measure for use by any State seeking to genuinely fulfill its international obligations under the 1951 Convention and 1967 Protocol. Denying access to procedures of even very limited numbers of asylum seekers each year does not go very far in unburdening an administrative system for assessing asylum applications, but goes a long way towards denying the right of individuals to seek asylum.

159. As a measure of foreign policy, a political tool between States, the notion would also seem to be of doubtful usefulness, as exemplified in the situation where it is used most powerfully, ie between EU States. If cases arise where asylum must, in spite of initial presumptions of general safety, be granted, then the statement made about the country of origin becomes inevitably politicized.

160. Points for discussion:

- Does the presumption of generalized safety in the country of origin entail discrimination on the grounds of nationality whether it is used as a means to withhold access to procedures, or as a means of raising the barrier during substantive assessment of the claim?
- How often should assessments of generalized safety, if they are employed, be renewed, and to what extent can governments expend resources in countries of origin looking into individual claims?

3.C. Time limits

161. The setting of time limits is something which States are increasingly doing for themselves: limits on their own administrative handling of an asylum case. However, those limits usually run to months or years rather than days or weeks, and only rarely does failure to meet the deadline result in a positive outcome for the application without further investigation. In other words, the inverse of the limitations some States are imposing on asylum seekers does not happen: States would see it as not being in their interests for it to happen, as they have control over entry to and residence in their territory. It is likewise not in the asylum applicant's interest to be held to strict deadlines, and as is so often the case, such a rule penalizes those with a strong protection need, who are suffering varying degrees of stress and trauma, perhaps the most. Such time limits are likewise unlikely to be in the State's interest if they result in people without a status remaining in the territory but excluded from asylum procedures. Clearly there is an administrative need to have efficient, and therefore relatively rapid and at least smooth running, procedures. Indeed, not leaving asylum procedures to wait and face backlog situation is very desirable, also from the perspective of the asylum seeker. However, deadlines, which are often not something an asylum seeker can easily be informed about, and the barring of a claim or presumption of irregularity, if the deadline is not met, do not seem to be a useful or appropriate tool. Appropriate measures for discussion, taking the 'problem' to be a matter of administrative momentum, would be:

- Can the smooth running 'pace' of procedures be facilitated by guaranteeing that all asylum seekers be represented and assisted in making their case in all States by lawyers who, with no costs to the asylum seeker, would be keenly aware of the appropriate timing for each stage in the procedures?
- If deadlines for the submission of paperwork or the claim itself are set, they should be constructed as guidelines of appropriate timing to facilitate efficient handling of a claim, not hard and fast rules with severe penalties.