At Fortress Europe’s Moat:
The “Safe Third Country” Concept

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Asylum in Europe is in the balance. As this issue paper goes to print, the member states of the European Union (EU) are preparing to implement the Dublin Convention, which is set to enter into force in September 1997 in 12 of the EU’s 15 member states. Austria, Finland, and Sweden, members of the EU as of January 1995, are expected to become parties to the Dublin Convention in the near future.

The Dublin Convention contains provisions that designate responsibility for adjudicating asylum claims among the EU’s member states, ostensibly to prevent the “refugee in orbit” phenomenon and to promote greater burden sharing. Similar to the “safe third country” concept, designation of responsibility for deciding asylum claims under Dublin’s provisions is largely based on the notion that, as a matter of course, the first EU country that an asylum seeker sets foot in ought to be responsible for deciding his or her claim to refugee status. Although this proposition seems straightforward enough, it has tremendous implications for refugee protection and asylum, potentially setting in motion “chain deportations” that could result in forced repatriation of refugees (refoulement) without ever affording them the opportunity to have their claims heard on the merits.

Even before the Dublin Convention enters into force, there are strong indications that this convention’s approach to managing access to asylum procedures carries with it serious risks for bona fide refugees. These indications are manifest with the earlier implementation of the Schengen Convention, which contains almost identical provisions for determining state responsibility for deciding asylum claims to those in Dublin. Schengen has been in force since March 1995 in a subset of EU states (the Benelux countries, France, Germany, Portugal, and Spain). The increasingly widespread use of safe third country laws in recent years, closely connected to both Schengen and Dublin, also provides mounting evidence of the ill effects for refugees of the Dublin approach to asylum.

This issue paper addresses the risks for asylum seekers of the emerging Dublin and safe third country system and assesses whether they provide adequate opportunities for refugees to receive effective protection and to find durable solutions to their predicaments. It is based on USCR site visits to Austria, the Czech Republic, Germany, Poland, and Slovakia during the spring of 1996. While USCR was conducting these site visits, the German Federal Constitutional Court gave its stamp of approval for the German safe third country law in a landmark decision, citing Germany’s participation in the Schengen and Dublin conventions as an important factor in its deliberations. But unlike the German Court’s largely optimistic assessment concerning the impact of the safe third country and Dublin system on refugee protection, USCR found these bilateral and multilateral arrangements to be cause for great concern about refugee protection in Europe.

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At Fortress Europe’s Moat:

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- An Iraqi woman flees her homeland via Kurdish-controlled northern Iraq to Turkey and continues by train on to Greece. In Athens, she boards a plane to Frankfurt airport, where she requests asylum, claiming to be a victim of persecution at the hands of Saddam Hussein’s regime. But the German border police automatically refuse to review the woman’s request and bar her entry to Germany on the grounds that she should have sought protection in Greece, a member of the (then) European Community, and therefore a “safe third country.” Although a German administrative court overturns the negative decision and orders the Federal Office for the Recognition of Foreign Refugees (Bundesamt) to review the woman’s case, the Bundesamt rejects it as manifestly unfounded after a cursory interview, citing the same reason for the denial as that of the border police: her brief sojourn in Greece, where she ostensibly could have sought protection, renders her ineligible for asylum in Germany.

- An Iranian man without proper documentation travels overland to Germany via Hungary and Austria. He asks for asylum, but his application is summarily rejected by the Bundesamt on the grounds that he should have sought protection in Austria, also listed by Germany as a safe third country. He is immediately deported. From Austria, he files an appeal with a German administrative court against the negative decision. He also requests readmission to Germany to await a final ruling in his case, but the court rules both motions as inadmissible. The man then applies for asylum in Austria, but his request there is likewise denied. The Austrian Federal Asylum Office asserts that his claim to refugee status is not credible. However, two other procedural grounds cited as reasons for the denial call into question the extent to which the man’s case was actually reviewed on its merits: because he entered Austria illegally from Hungary, considered in Austrian administrative practice to be a safe third country, the Federal Asylum Office concludes that he should have sought protection there; second, his rejection in Germany, although he never received a substantive refugee status determination procedure there, also renders him ineligible for asylum in Austria.

On May 14, 1996, the German Constitutional Court upheld Germany’s safe third country law as constitutional, rejecting the cases of the above two claimants as unfounded. Both had filed appeals with the Court less than four months after a series of landmark amendments aimed at comprehensive asylum reform were enacted on July 1, 1993. Since the so-called “asylum compromise” entered into force, thousands of asylum seekers attempting to find protection in Germany have been subject to the safe third country law. And like the Iraqi woman and Iranian man described above, they have faced the following predicament: the denial of access to a comprehensive asylum determination procedure because they ostensibly could, and thus should, have sought protection in countries traveled through en route to their final destinations.

Of the 1993 asylum reform measures passed in Germany, the safe third country law is the most sweeping and controversial. Germany lists by law states that have signed and are deemed to implement the 1951 UN Refugee and European Human Rights Conventions as safe third countries. All member states of the European Union (EU)—plus the Czech Republic, Norway, Poland, and Switzerland—are on the list. With all nine states sharing its border listed as safe, Germany considers virtually all asylum seekers arriving overland to be ineligible for asylum. And unlike the asylum regulations in most Western European countries, German law denies the right of appeal to asylum seekers arriving via safe third countries.
Critics have argued that the German law fundamentally compromises refugee protection because it withholds due process and lacks other basic safeguards to ensure that refugees will in fact have access to a comprehensive and fair asylum procedure somewhere. Contrary to the stated goals of the German asylum reform, the safe third country law fails to distinguish bona fide refugees from those with spurious claims. 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. Moreover, many of the countries Germany considers safe either implement safe third country laws of their own, or routinely deport asylum seekers to fourth countries without a merits review of their cases. The danger for refugees then is that no so-called safe country will take responsibility for reviewing 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.

Doubts concerning the safe third country law's constitutionality gathered momentum as a steady stream of asylum seekers rejected under the law sought remedy in German courts. By the end of 1994, these doubts, coupled with widespread confusion on how the law should be applied, led the Constitutional Court to decide that a comprehensive ruling was needed. And in late November and early December 1995, the Court held four days of hearings on the safe third country law and other main provisions of the 1993 asylum reform.

Yet few people observing the review expected the Constitutional Court to overturn the safe third country law. Doing so would have removed a cornerstone of the 1993 asylum legislation and risked reopening the national debate on asylum, a painful two-year-long process sparked by the arrival of record numbers of asylum seekers and punctuated by rampant xenophobic violence. Some informed observers felt that political pressure and a strong desire to avoid risking a repeat of this experience weighed heavily in the deliberation process. Refugee and human rights advocates were still hopeful, however, that the Court would at least remedy some of the more serious refugee protection problems resulting from the safe third country law's implementation.

The May 14, 1996 decision thwarted such hope. By upholding the law as it stands, the Court placed its faith in the German government's position that countries designated as safe are willing and generally able to provide due process and protection to asylum seekers and refugees. This ensures adequate protection against refoulement, according to the Court, thereby eliminating the need for an individual appeal right for asylum seekers Germany turns back. The Court furthermore asserted that the 1993 asylum reform, in conjunction with international agreements that designate responsibility for deciding asylum claims (the Schengen and Dublin Conventions), provides the basis for a common European approach to refugee protection and the framework for burden sharing between states.

The Constitutional Court's stamp of approval is likely to bolster the substantial impact that the German safe third country law has had since it entered into force in July 1993. Indeed, the adoption of the safe third country concept, which the Court alluded to in its ruling, has had consequences that extend well beyond Germany's own national policies and practices toward asylum seekers and refugees. Although by no means the first in Europe to enact a safe third country law, Germany's opting for this policy (as has been the case with so many European policies toward common problems) has had a disproportionate influence on Western European approaches toward asylum. The German Court's May 14, 1996 decision put to rest any doubts concerning what the tenor of these approaches will be. Moreover, as of this writing, even the United States and Canada are following Europe's example, adopting the safe third country concept into their own administrative regulations and asylum laws, and considering adopting an agreement assigning responsibility to examine asylum claims.

The safe third country concept is in all likelihood here to stay. But what kind of an approach to managing refugee problems does it actually represent? More specifically, how has implementation of this principle affected the prospects that genuine refugees in search of safe haven might actually find it?

**USCR's Inquiry**

It was with these questions in mind that the U.S. Committee for Refugees (USCR) conducted site visits in the spring of 1996 to Austria, the Czech Republic, Germany, Poland, and Slovakia to investigate the effects of safe third country laws in the region. USCR's findings unfortunately do not square with the German Constitutional Court's optimistic assessment on the state of refugee protection in
Since the original five states adopted the Schengen Agreement as a convention in June 1990, all EU countries with the exception of Ireland and the United Kingdom have joined, or stated their intention to join, the Schengen Convention. Italy signed the Schengen Convention in November 1990. Spain and Portugal signed the Convention in June 1991, Greece in November 1992, Austria in April 1995, and Denmark, Finland, and Sweden in December 1996. Iceland and Norway, not EU members, also signed agreements for associate membership in December 1996.

The (then) 12 member states of the European Community drafted the Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities, better known as the "Dublin Convention," in June 1990. By June 1991, all 12 (then) EC member states had signed the Dublin Convention. And with Ireland's ratification of the Dublin Convention in May 1997 (the last of the 12 member states to ratify), the convention is scheduled to enter into force in September this year.

Austria, Finland and Sweden have joined the EU since the (then) 12 EU member states signed the Dublin Convention and began the ratification process. These three countries are expected to sign and ratify the Dublin Convention during the summer of 1997.
Europe. Beneath the veneer of proclamations on “safety elsewhere” lies a far more difficult and uncertain reality for refugees, one in which protection remains problematic and long-term solutions far from assured. Rather than accepting responsibility for assisting persons fleeing persecution and promoting real cooperation between states to ensure

**The very logic that underpins the European safe third country regime is one that systematically evades accountability and indeed penalizes states that seek to provide it.**

that protection will be granted to those in need, the very logic that underpins the European safe third country regime is one that systematically evades accountability for these concerns and indeed penalizes states that seek to provide it.

Even as the German Court was examining the safe third country law, USCR was aware of cases in which German-designated safe third countries had failed to review asylum seekers’ cases on the merits and had deported them to decidedly unsafe fourth countries where their security was in jeopardy. Several cases involved the possible refoulement of refugees.

The rejection of asylum seekers on safe third country grounds also raises issues that go beyond the fundamental concern of whether asylum seekers will be permitted to apply for asylum in the countries to which they are deported. Their transfer to third countries begs a host of questions concerning the fairness of the procedures that await them there and the sort of opportunities the genuine refugees among them might have to find lasting solutions to their predicament. While investigating these issues, USCR identified other serious deficits in refugee protection in German-designated safe third countries. The problems spanned the entire asylum process—from access to asylum procedures, to the procedures themselves, to integration possibilities for recognized refugees.

These issues cannot be separated from an honest assessment of what “safety” really means. USCR is concerned that a real danger inherent in the German Court decision, because of its minimalist interpretation of state responsibility for refugees under the 1951 Refugee Convention, is this: it will encourage policymakers across Europe and elsewhere to wash their hands of responsibility for correcting these serious deficits. USCR nevertheless believes that Europe’s continued commitment to protecting refugees will require all concerned to do more than pay simple lip service to what is minimally required of them; they will need to make genuine solutions possible.

### THE BACKGROUND

The number of countries that have adopted safe third country laws leaves no shortage of experience from which to gauge the laws’ practical effects. But the states of Central Europe are particularly relevant to such a study, largely because they are positioned at the epicenter of the tremendous changes that followed the disintegration of the Soviet Bloc in 1989 and 1990. The democratic revolutions of Central and Eastern Europe inevitably have led to new lines of division in Europe as a whole. And, as in the days of the Cold War, the states of Central Europe continue to straddle many of the newly emerging fault lines.

One significant new division concerns refugees and migrants. Eastern Europeans, trapped by draconian travel restrictions during the Cold War, were suddenly free to travel abroad when the communist order finally collapsed. The establishment of democratic rule in Eastern Europe also opened new and more accessible travel routes for persons from farther afield—Middle Easterners, Africans, and Asians—attempting to reach Western Europe. The collapse of the impermeable structures of the Eastern Bloc that had insulated Western Europe prior to 1989 meant that Western Europe met head on the pressures of a host of new refugee and migratory movements.

This new reality has profoundly affected Western European attitudes and responses toward refugees and migrants. Fears of a deluge of unwanted foreigners entering their territories have led to a siege mentality in many Western European countries since the fall of the Berlin Wall. Compounding these fears has been an outbreak of nationality-based conflicts in the former Yugoslavia and the Caucasus, producing the largest refugee movements in Europe since World War II.13

In this dramatically changed environment, Western European governments increasingly have viewed the growing pressures of transit migration
(generated by both political and economic circumstances) across Eastern and Central Europe to their territories as a threat both to their own domestic orders and to plans for European unity. Their emerging priorities have focused on restricting access to Western Europe, both through policies of their own and through helping governments farther to the east to curb unauthorized transit movements across their territories.\textsuperscript{14}

The newly democratic states of Central Europe, stable and well off relative to their neighbors farther east and enticed by the possibility of EU membership, have eagerly latched onto, and begun to borrow from, Western Europe’s restrictionist agenda.\textsuperscript{16} Governments have found safe third country laws to be particularly useful tools in the pursuit of deterrence because they permit governments to summarily deny access to their territories and asylum procedures, thus shifting the burden of asylum seekers elsewhere, at least theoretically with relatively little effort.

Faced with record numbers of claimants entering Germany during 1992, the framers of the German asylum reform searched for such expedient ways to ease their country’s burden. They looked to other countries, particularly to Poland and the Czech Republic, to be part of the solution to the German asylum crisis. Poland and the Czech Republic had become preferred countries of transit for many asylum seekers traveling to Germany. Therefore, Germany designated both as safe third countries. The safe third country law, the rationale went, would enable Germany to refuse entry and return the large numbers of asylum seekers who had transited these two, or other, states before entering Germany.

The idea was by no means new at the time. Several other European countries had enacted safe third country laws of their own well before Germany. Among them, Austria instituted a safe third country law with its 1991 Asylum Act, which, in some respects, has been farther reaching in its implementation than its German equivalent. Nevertheless, passage of the German law stands as a watershed because it tipped the balance definitively in favor of restrictionist approaches to managing asylum issues in Western Europe.

During the debates on the asylum reform measures, refugee and human rights advocates sharply criticized the restrictionist tenor of the safe third country approach. They warned of the consequences for refugee protection of returning large numbers of asylum seekers to Poland and the Czech Republic: Their nascent asylum procedures overwhelmed, mass chain-deportations would ensue, ultimately resulting in \textit{refoulement}.\textsuperscript{17}

To allay such fears, the German government agreed to limit the number of deportations to Poland to 10,000 for 1993, the first year the German asylum reform was in force. In the event of a mass influx of asylum seekers into Poland, Germany also agreed to admit “certain groups of such persons.” It also extended an aid package of DM 120 million to Poland to help set up structures to receive and accommodate asylum seekers and refugees, secure Poland’s borders, and return rejected asylum seekers.\textsuperscript{18} The Czech Republic later received DM 60 million from Germany for similar purposes.\textsuperscript{19}

Despite the bleak predictions, large-scale chain deportations resulting in \textit{refoulement} have not taken place. The number of applications filed in both Poland and the Czech Republic has also remained relatively low since the German reform entered into force, although 1996 figures suggest that this trend may be reversing itself. While only 842 asylum seekers requested asylum in Poland in 1995 (a figure representative of preceding years), some 3,205 persons filed asylum applications during 1996. Similarly, in the Czech Republic, asylum seekers filed 1,186 and 1,406 asylum applications for 1994 and 1995, respectively. That figure rose to 2,156 applications for asylum in 1996. The Slovak Republic received only several hundred applications during each of the three years.\textsuperscript{20}

Several factors explain why this prediction was not realized, not least of which is that the German safe third country law has been extremely difficult to implement. Its success has hinged on the willingness and ability of countries like Poland and the Czech Republic to readmit those who have transited their territory before entering Germany. In practice, Germany has been able to return only those caught in the immediate border region or persons for whom it has the definitive proof of their travel route (passport stamps, tickets or receipts found with the applicant, etc.) necessary to convince transit coun-
tries to readmit them. Since the German safe third country law entered into force, applicants, often coached by smugglers assisting them, increasingly have destroyed their documents and claimed they cannot remember which countries they traveled through to reach Germany. The German Bundesamt has reported that more than half of asylum applicants attempt to conceal their travel route to avoid rejection on safe third country grounds. If their removal to a third country was impossible to carry out, claimants were admitted to the procedure, where their claims were reviewed on their merits.2

As a result, some 127,210 asylum seekers managed to enter Germany and file asylum applications in 1994, although the overwhelming majority were ineligible for consideration by the strict letter of the law. An almost identical number were able to file claims in 1995, and slightly fewer, some 116,367 persons, applied in 1996.22

While these figures remain large, they represent more than a 70 percent decrease from the

438,191 asylum seekers who applied in Germany in 1992, the year before the asylum changes entered into force.23 This points to the substantial deterrent effect the safe third country law has had. In particular, it has discouraged many Romanians and Bulgarians from traveling to Germany. Both nationalities, which in recent years have received almost universal denials in the German asylum procedure, were among the largest groups of applicants prior to the asylum reform.24 Increasing numbers of asylum seekers also chose to apply in other Western European countries with comparatively liberal asylum procedures. Applications in the Netherlands rose by 48 percent from 1993 to 1994. In the latter year, some 52,576 persons filed claims there.25

But few asylum seekers have considered entering the asylum procedures in Poland, the Czech Republic, or Slovakia as a viable permanent solution. Even in the spring of 1996, when USCR made site visits to the region, most asylum seekers still viewed these countries as transit points on the journey farther west.26

Many, particularly government representatives, have cited the allure of economic opportunities in Western Europe as the decisive factor in motivating asylum seekers to continue on westward rather than stop in Central and Eastern Europe.27 While there is certainly truth to this, the argument has not stopped there. It has often been used to draw the sweeping and erroneous conclusion that all asylum seekers entering Western Europe must be economic migrants rather than refugees fleeing persecution.

By their own asylum procedures, EU member states recognized some 48,000 asylum seekers as refugees in need of protection in 1995.28 Nevertheless, in the current environment in Western Europe, charged as it is over the anti-immigrant animus, an asylum seeker’s preference for seeking protection there has effectively translated into the presumption that he or she is an economic migrant with no legitimate claim to refugee status. Concerns over abuse of the asylum procedure have a certain legitimacy. But acceptance of this simplistic explanation has failed to shed light on the more complex reality

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**Restrictive asylum measures are closely linked to anti-immigrant sentiments, here being debated through posters on a Geneva sidewalk.**

Photo: USCR/B. Frelick

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**Fears of a deluge of unwanted foreigners entering their territories have led to a siege mentality in many Western European countries.**
and ultimately has poisoned constructive discourse on the asylum issue and on the place of foreigners in general. The skewed logic to these conclusions has nevertheless served as a convenient justification for instituting blanket polices to close the door to refugees and migrants alike.

The lack of effective solutions elsewhere that might provide alternatives for refugees to asylum in Western Europe also often has been left unaddressed. Despite the genuine efforts of many refugee practitioners in Poland, the Czech Republic, and Slovakia, the prospects for economic and social integration in these countries remain poor at present, even for the most adaptable refugees.29

There are other reasons for Western Europe’s comparative attractiveness as a destination for asylum seekers. Among them is the fact that their asylum procedures by and large remain more sophisticated, offering higher levels of due process, and hence protection, than their Central European counterparts.30 The prospect of joining relatives in Western Europe also has been a motivating factor. While countries like Germany, France, and the United Kingdom already are host to sizable minorities from a range of refugee-producing countries in Africa, Asia, and the Middle East, few foreigners from outside the immediate region currently live in Poland, the Czech Republic, and Slovakia.

No doubt, lack of interest in remaining in Central Europe has discouraged many refugee practitioners and has made it harder for them to provide effective solutions for refugees. As Elzbieta Przychodzen, director of the Polish refugee reception center in the town of Debak, told USCR: for many asylum seekers, neither a positive decision nor a negative decision in the Polish asylum procedure is a solution because most do not want to stay in the country.31

In searching for explanations for this state of affairs, it should be remembered that Poland, the Czech Republic, and Slovakia only stopped producing large numbers of refugees themselves some seven years ago. Since these countries began the transition to democratic rule, they have faced many other pressing priorities. The tremendous social and economic problems they have confronted while assisting their own populations have rendered finding an appropriate response to refugees an exceedingly difficult task. As Andrzej Wasiuk, director of the Polish Border Police, told USCR, Poland is still in the process of developing the policies and structures to manage the new issues presented by refugees and immigrants.32 This observation holds equally true for the other newly democratic states of Central Europe. Few countries farther to the east even have begun to address these issues.

The net result is that despite the hard work of many dedicated individuals, significant barriers remain for refugees interested in seeking asylum in Central Europe. While the pull of Western Europe certainly remains powerful in its own right, the poor prospects for both legal protection and integration in countries like Poland, the Czech Republic, and Slovakia have likewise acted as strong added incentives for many asylum seekers to continue westward.

This state of affairs begs several questions: Is it legitimate for Western European governments to exclude potential refugees because they could find protection in countries where effective solutions remain the exception rather than the rule? Is there even a precedent in international law for such exclusionary practices?

SAFE THIRD COUNTRY LAWS: ASYLUM SEEKERS’ RIGHTS AND STATE RESPONSIBILITIES

Where does the responsibility lie for reviewing an asylum seeker’s claim to refugee status and granting that person protection if he or she qualifies for it? In the example of the Iraqi woman whose case the German Federal Constitutional Court reviewed, is Germany responsible because the woman chose to seek asylum there? Or is it Greece, where the women spent some hours before flying to Frankfurt? The German constitution declares Greece a safe third country by virtue of its EU membership.33 Is Turkey, her previous country of transit, responsible, despite its geographic reservation to the 1951 Convention, which declares that it has no obligations to non-European refugees? Or should the woman have stayed in the “safe zone” of Iraqi Kurdistan, (which became decidedly unsafe when Saddam Hussein’s troops crossed into Erbil in September 1996)? Of all these options, where does the woman feel safest? Should her preferences be taken into account? Or is the state’s prerogative to control who enters and remains on its territory paramount even when it concerns possible refugees?

Similar questions could be asked for any person who, unwittingly or out of necessity, passes
through a variety of other countries before seeking asylum in Germany or most other Western European states. No consensus exists on the answers. The issues raised in the example reveal a daunting task: reconciling the problems of refugee flight, which are essentially international in character, with solutions to those problems that, to date, have generally required individual states to assume responsibility. This task is all the more difficult in a compact and heterogeneous Europe where issues confronting one country easily spill over into the next.

The failure to meet the challenges posed by the arrival of larger numbers of asylum seekers in Europe has unleashed an unseemly competition in which individual European states have each sought to trump the other with increasingly restrictive policies.

While Western European states generally have agreed not to send refugees against their will (directly) to the states that persecuted them, they have increasingly disagreed on what their obligations are in providing actual solutions for refugees. Questions concerning which state along an asylum seeker’s travel route is “responsible” for reviewing his or her claim and what constitutes “safety” remain the source of considerable disagreement. Current safe third country laws, under which individual states write off large numbers of asylum seekers for whom they unilaterally declare themselves to be not responsible, embody the lack of consensus. Indeed, the failure to meet the challenges posed by the arrival of larger numbers of asylum seekers in Europe has unleashed an unseemly competition in which individual European states have each sought to trump the other with increasingly restrictive policies for fear of being saddled with the “problem” of receiving asylum seekers whom other states have rejected.

The German answer to the Iraqi woman’s predicament, according to legislators who framed the 1993 asylum compromise, is that she should have sought protection in the first country where that was possible. Where would that have been in her case? All the countries on her travel route have different answers. Germany regards Greece as the first safe country of asylum. Greece, however, does not accept asylum applications from persons who have not traveled directly from the country of persecution. The woman’s travel through Turkey would disqualify her for asylum in Greece. And Turkey signed the Refugee Convention with a geographical reservation exempting itself from responsibility for non-European refugees. Given the individual policies of each of these countries, which effectively wash their hands of any obligation to the woman, she appears to be left with no options.

Notwithstanding the German Court’s decision that upheld the stated rationale behind the safe third country concept (the proposition that an asylum seeker must seek asylum in the first country where it is possible), nowhere in international refugee law can such a precedent be found. As Antonio Fortin, UNHCR’s Senior Legal Officer in London, pointed out: “Although the persistent repetition of this assumption has led many to accept it uncritically, the reality is that no such international principle exists.”

On the contrary, internationally established norms for the treatment of refugees suggest that refugees should be free to choose where they wish to seek asylum. Conclusion 15 adopted by UNHCR’s Executive Committee (ExCom), a body comprised of 50 governments that oversees UNHCR’s work, clearly 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.” Not only does it assert the asylum seeker’s right to choose, ExCom Conclusion 15 also forbids policies that provide the very basis for the safe third country concept as it is currently implemented: “Asylum should not be refused solely on the ground that it could be sought from another state.”

The rationale for the safe third country concept, UNHCR’s Antonio Fortin continues, appears to be a misreading of the concept of “first country of asylum.” According to this principle, “a country need not consider substantively an application for recognition of refugee status and/or for asylum submitted within its jurisdiction, if the applicant has already found protection in another country.” ExCom Conclusion 58, which addresses the issue of irregular movements of refugees and asylum seekers between countries, supports this position. But nowhere in Conclusion 58 is it suggested that refugees and asylum seekers may be removed to countries where they have not already explicitly been granted protection.
Governments nevertheless have twisted the first asylum notion to make the jump from an explicit grant of protection by the first host country to the hypothetical possibility that a person could have sought protection as the basis for an asylum seeker's removal from their territory. Consequently, "a large number of signatories to the 1951 Convention are shirking their responsibility for examining asylum applications simply because the asylum seekers in question have had a brief contact with the territory of a third state without having sought or found protection there," according to Achermann and Gattiker.43 The net result is the collective abdication of any obligation for solving a common problem. For the individual refugee, the consequences are potentially devastating.

SAFE THIRD COUNTRY LAWS AND THE RISK OF CHAIN DEPORTATION

Highest on the list of negative repercussions of safe third country laws is that they risk initiating a series of chain deportations whereby an asylum seeker is passed on from one country to the next, each refusing to take responsibility for reviewing his or her claim to refugee status. Eventually the journey ends, either in a country that fails to offer effective protection to the person—or worse—in his or her country of origin.44 If refoulement does occur, the countries that participated in the act have abrogated the most basic provision of the 1951 Refugee Convention, which is to ensure that those who have suffered persecution are not victimized once again.

The problem is that the current safe third country regime enables most states in the chain to sidestep responsibility for such egregious violations. Once an asylum seeker is refused entry or deported, he or she is out of sight and out of mind to the deporting state. How can the deporting state expect the safe third country to admit the asylum seeker to its asylum determination procedure when the deporting state failed to do so itself? Unfortunately, lip service to the nonrefoulement principle and "general conditions of safety" given by officials in the deporting state will do little to help those who are being mistreated in a country farther down the chain because few mechanisms or safeguards now exist to provide accountability for those violations.

Both the Iraqi and Iranian claimants contesting the constitutionality of the German safe third country law argued to the German Federal Constitutional Court that their removal from Germany risked triggering such a series of deportations and possibly their forced return to the countries they fled. To prevent this from happening, the Iraqi woman reasoned that she should only be returned to Greece if she were guaranteed the chance to file an asylum application there and to receive protection should she qualify for it.45 Under Greek law, which stipulates that only persons arriving directly from the country of alleged persecution may file asylum claims, she would likely be denied access to the Greek procedure. If returned from Greece to Turkey, she then would run the serious risk of being returned to Iraq because Turkey does not oblige itself to protect non-European refugees.46 Similarly, her Iranian co-claimant argued that Austria planned to deport him to Hungary on safe third country grounds. The Iranian man's protection would not be assured because Hungary, like Turkey, signed the Refugee Convention with a geographical reservation, exempting itself from protecting non-European refugees.47 His forced return to other countries or direct return to Iran might then result. Austria considers Hungary to be a safe third country, despite UNHCR's recommendation in 1995 that third countries not return non-European asylum seekers to Hungary, as there was no guarantee that they would receive effective protection there.48

An unswayed German Court notwithstanding, the fears expressed in the arguments of the two claimants unfortunately have been borne out by the experience of other asylum seekers. With respect to Greece, UNHCR reported to the German Court in March 1994 that there were no guarantees that asylum seekers returned to Greece would receive effective protection there. UNHCR reported that it was aware of a series of cases in which Greece had deported asylum seekers to previous transit countries, some resulting in refoulement.49 These allegations were preceded by a 1993 Amnesty International report which claimed that Greece had forcibly returned Iraqi asylum seekers to Turkey and refused
Refugee protection can only be assured if asylum seekers at a minimum are guaranteed access to a fair and comprehensive asylum determination procedure in the safe third country.

Photo: UNHCR/A. Hollmann

entry to others. Austria’s safe third country policies and practices, which are relevant to the Iranian man’s case, as well as those of other Central European countries that USCR visited, will be discussed in more detail below.

But it would be misleading to single out the countries thus far discussed without acknowledging that safe third country laws affect asylum seekers across the whole of Europe. Various concerned refugee and human rights advocates have devoted considerable time and energy to monitoring the “human fallout” resulting from the rapid proliferation in safe third country laws since the late 1980s. In its February 1995 report entitled “Safe Third Countries: Myths and Realities,” the European Council on Refugees and Exiles (ECRE) documented sixteen case histories of persons denied protection by the safe third country policies of several Western European countries.

One such case involved an Iraqi national who applied for asylum in Copenhagen, Denmark in March 1994. He was rejected on safe third country grounds and deported several days later to Italy, his last country of transit. Although the Danish police escorted him to Rome, they did not inform the Italian authorities that the man wished to apply for asylum. Nor was an interpreter provided in Rome for him to make such a request. Instead, the Italian authorities arranged to deport the man to Tunis and handed his travel papers to their Tunisian counterparts.

Upon arrival in Tunisia, the man was detained, interrogated, allegedly burnt with cigarettes, and threatened with the possibility that he would be turned over to the Iraqi embassy in Tunis. A family friend of the man living in Copenhagen traveled to Tunis and, with UNHCR’s assistance, was able to secure the man’s release. He then reapplied for asylum at the Danish embassy in Tunis, and several months later his application was granted. But in the interim, he was required to report to the Tunisian police every other day. They allegedly told the man not to speak of his prison experience in Tunisia and continued to threaten him,
saying that he would be taken to the Iraqi embassy if he did not leave the country.51

Another ECRE-documented case concerned a family of five Iraqi Kurds who traveled through Lebanon, Jordan, and Italy before reaching Slovenia, where they requested asylum. After less than 48 hours in Slovenia, the authorities rejected the family’s request on the grounds that they should have asked for protection in Italy, despite the lack of a legal basis in Slovenian law for the decision. The Italian authorities immediately deported the family to Jordan. Although UNHCR’s Rome office communicated this to the UNHCR office in Amman, due to closing times of the Amman office, UNHCR staff in Amman were not able to meet the plane on which the Iraqi family was traveling. The UNHCR representative in Amman learned the next day at the airport that the family “had decided to return to Iraq.”52

As the German section of Amnesty International reported shortly after the German Constitutional Court’s decision on the safe third country law in May 1996, the Court failed to consider these and other cases of individuals who have fallen victim to the safe third country regime.53 The examples, nevertheless, demonstrate the lack of sufficient guarantees in current practice that persons in need of protection will indeed find it somewhere. UNHCR, Amnesty International, and other concerned organizations have long argued that refugee protection can only be assured if asylum seekers at a minimum are guaranteed access to a fair and comprehensive asylum determination procedure in the safe third country.54

Rather than seizing the opportunity to make such guarantees mandatory, the Court condoned the removal of asylum seekers from safe third countries to fourth states without a review on the substance of their claim of a well-founded fear of persecution. Only if a safe third country chooses to return an asylum seeker to his or her country of origin, or to other countries where refoulement might seriously be risked, is the safe third country obliged under international law to entertain a hearing on the merits of an individual’s case, according to the German Court.55

But if a determination on the safety of a person’s removal is poorly made, or not made at all, what recourse does that person actually have in practical terms? In reality, by the time asylum seekers are in third and fourth countries, they are already far enough down the chain to make it next to impossible for anyone in the original deporting state to redress the individual’s protection problems.56

**Austria and Hungary: Safe Third Countries?**

Consider the UNHCR-documented case of 17 Kurds from Turkey who traveled through Austria to Germany in January 1995. Only hours after having entered Germany, they were arrested because they lacked the requisite entry visas.

At least one man in the group was able to secure a lawyer’s services while in detention in Germany. At his request, the lawyer filed an asylum application on the man’s behalf and a motion for a preliminary injunction with the Administrative Court of Stuttgart to prevent his removal to Austria. The German Bundesamt rejected the man’s asylum application the next day on safe third country grounds. Two days later, at four o’clock in the morning, the German authorities handed over the man and the 16 others in his group to the Austrian authorities, failing to make any mention of the man’s asylum request. About half an hour later, the group’s deportation to Turkey was arranged.

Article 37 of the Austrian Aliens Law requires the border police to conduct an individual review of safety conditions in the country to which a person is to be returned prior to carrying out his or her deportation. But in the case of the 17 Kurds, authorities kept no written records of interviews that such a review would have generated.

The Austrian authorities claimed that no one in the group requested asylum. It was evident to UNHCR, however, that the Austrian authorities failed to secure the services of an interpreter. Without one, the man, who formally requested asylum in Germany, and who spoke neither German nor English, would have had great difficulties requesting asylum in Austria. It would also have been impossible to properly carry out the requisite review under Austrian and international law concerning the safety of carrying out the deportation. After only seven hours in Austria, the group was deported from Vienna airport to Istanbul.57

What recourse did this man and his traveling companions have to prevent their refoulement? German proclamations that Austria is “safe” certainly provided them little assistance. During a USCR site visit to Austria in April 1996, UNHCR, Amnesty International, and others told USCR that there have been several clear cases, and more questionable ones, in which the Austrian authorities have failed to gauge adequately the safety of deport-
ing would-be asylum applicants, thus violating both national and international law.

In testimony to the German Constitutional Court in November 1995, UNHCR’s representative in Germany, Judith Kumin, also cited a case of chain deportation resulting in *refoulement*, in this instance involving Austria and Hungary. Relevant to the case of the Iranian man contesting the constitutionality of the German safe third country law, Austria had deported an Iranian family to Hungary in December 1994. Once in Hungary, the family had applied for refugee status with UNHCR. In Hungary, UNHCR conducts status determination procedures for non-Europeans because of Hungary’s geographical reservation to the 1951 Refugee Convention, which limits its recognition of refugees to Europeans. UNHCR was in the process of securing a temporary residence permit for the family when the Hungarian authorities repatriated them to Tehran without warning. From the incident, Kumin concluded that there is “no adequate guarantee of protection for refugees in Hungary.”

Another, more recent case involved 12 Iranians whom the German authorities had also returned to Austria on safe third country grounds in February 1996. Although the German authorities informed their Austrian counterparts that people in the group had asked for asylum in Germany, the Austrian authorities reportedly did not follow up on these requests. Instead, they arranged the group’s deportation to Odessa, Ukraine (despite Ukraine’s not having signed the 1951 Refugee Convention). This was only averted when one in the group intentionally cut himself with a knife badly enough to require a doctor, leading the Austrian Airlines pilot to refuse to transport the deportees against their will. The wounded person was hospitalized, and all were then permitted to file asylum applications in Austria.

But must an asylum seeker resort to such a desperate act to get his or her case heard? By the German Court’s own litmus test, these examples of mistreatment of asylum seekers constitute violations of German standards for the conduct of a safe third country.

Neither should these breaches in refugee protection be occurring under Austrian law, according to the views of Dr. Manfred Matzka, director of the Austrian Interior Ministry’s Section III (with competence over issues involving passports, citi-

*Refugees from former Yugoslavia arriving in Hungary. Photo: UNHCR/A. Hollmann*
zension, refugees, and aliens affairs). Dr. Matzka told USCR in April 1996 that he would consider unacceptable Austria's complicity in initiating either *refoulement* or chain deportations whereby asylum seekers are returned from country to country without a review on the merits. Despite Dr. Matzka's expressed views, and a seemingly liberal policy compared to Germany's on safe third country removals, the Austrian practice of denying access to a determination procedure and deporting asylum seekers without sufficiently investigating what awaits them in the countries to which they are sent has been problematic. The need for inter-state safeguards to guarantee access to proper asylum determination aside, there are several reasons for the lapse in Austrian protection standards related to both national law and administrative practice.

The first problem concerns the substantial discretionary power of the Aliens Police to refuse entry and to deport asylum seekers. Austrian border guards have the authority to refuse entry to asylum seekers arriving via safe third countries without consulting the Federal Asylum Office. Although applicants may appeal the decision to refuse entry, they have no corresponding right to remain in Austria while the appeal is being decided. Only applicants arriving directly from the country of persecution (about 10 percent of the total) are permitted to enter Austria legally and are granted temporary residence permits, provided they file asylum applications within seven days of arrival.

What is considered "direct" travel also has definite ramifications for a person's admissibility. Although Dr. Matzka told USCR that cases of "mere transit" (including those coming overland in an uninterrupted fashion) should be considered as direct travel to Austria, in practice asylum seekers reportedly have been denied access to the territory and asylum procedure because they spent some hours in the transit area of another country's airport. Asylum seekers arriving by land are also said to be denied entry to Austria routinely even when their travel from the state of persecution to Austria has been uninterrupted.

As a result of these strict admissibility requirements, some 90 percent of all asylum applicants in Austria have entered the country illegally. They therefore have been subject to the provisions of the Aliens Act and hence the authority of the Aliens Police. For this vast majority, the lack of clear administrative criteria or instructions to clarify how provisions of the Aliens Act applied to them has meant that efforts to implement the Aliens Act often have been taken independently of a person's oral request to seek asylum or without regard to the status of an application already filed. The lack of clarification on which law takes precedence—the Aliens Act or Asylum Act—has led to arbitrary results. For some (including persons removed to Austria because it was the safe third country, as seen in the above examples), it has resulted in denial of access to an asylum determination procedure and subsequent deportation, sometimes to decidedly unsafe countries. For others who managed to file applications with the Federal Asylum Office, the fact that they were awaiting decisions on their cases has not entitled them to legal status to remain in Austria. While the Aliens Police generally have permitted applicants to remain to await first-instance decisions of the Federal Asylum Office, no uniform practice exists concerning the right to remain for second-instance decisions and court appeals.

Organization of the Aliens Police at the state level has contributed to arbitrary and, in some cases, poor decision-making. Asylum applicants reportedly had fairly good chances of gaining access to the asylum procedure and receiving a comprehensive hearing on the merits at the refugee reception center in Traiskirchen, in Niederösterreich. But if an asylum seeker applies in the state of Burgenland, bordering on Hungary, his or her chances of receiving a satisfactory hearing are significantly diminished, according to some refugee advocates in Austria. Whereas fewer than 10 percent of the asylum seekers in Traiskirchen are detained while their applications are processed, almost all applicants in Eisenstadt, where the reception center for Burgenland is located, reportedly spend the determination procedure in detention pending their deportation.

Austrian practices to determine whether a country is safe have also been problematic. Safety from persecution in a third state may be used as grounds to deny access to the asylum determination procedure by the Aliens Police or as a basis to deny asylum once a person has filed an application with the Federal Asylum Office. Austrian law requires an individual review of safety conditions in the third country in both cases. But the perfunctory manner in which many such reviews are conducted has reportedly rendered this right an unobserved safeguard.

The examples in this report strongly suggest that the Aliens Police reviews of safety condi-
tions for asylum applicants in third countries have been poor. Possibilities for serious breaches of refugee protection have been further enhanced because the Austrian Aliens Police do not have the legal constraint of their German counterparts only to deport asylum seekers to countries listed as safe. (As seen in the examples above, the Austrian Aliens Police returned Turkish citizens directly to their own country and attempted to remove the group of Iranians to Ukraine.)

The reviews of the Austrian Federal Asylum Office on safety conditions in third countries have also reportedly been of questionable quality. Often they are confined to theory, having little bearing on the actual conditions asylum seekers face in third countries to which they are removed.73

The wording of the law, which focuses on past conditions of safety, has contributed to the poor decisions, according to Dr. Gertrude Hennefeld, legal advisor to refugees for the state of Niederösterreich.74 Reviews concerning safety in third countries are conducted in accordance with Article 2 of the Asylum Act, which states that a refugee shall not be granted asylum in Austria if he or she was already safe from persecution in another country. The phrasing means that the Austrian authorities only review whether asylum seekers were safe at the time they transited third countries.

By focusing exclusively on past conditions, the authorities fail to address more relevant questions about whether asylum seekers will actually be admitted to the asylum procedure in the third country and afforded protection when returned there.75 If the law were to be amended to apply to present conditions of safety, UNHCR representatives in Vienna say that the authorities would be required to look far more specifically at the asylum seeker’s actual prospects for filing an asylum application and securing effective protection in the third country.76

Lack of accommodation and support has also acted as a barrier to asylum seekers pursuing their claims in Austria. Since the 1991 Asylum Act entered into force, the number of asylum applicants denied government assistance during the asylum procedure has increased markedly. Whereas 56.9 percent of all asylum seekers received government accommodation and support in 1992 (the 1991 Asylum Act entered into force in June 1992), only 23.6 percent of the caseload received such support in 1993, UNHCR reported.77 According to a legal advisor to asylum seekers and refugees in Austria, the lack of support, together with the poor prospects for many to obtain legal status, has led many asylum seekers to leave Austria for other countries.78 In December 1995, the Catholic and Protestant churches reported that the decrease in government assistance has also led to a growing population of homeless asylum seekers.79

Austrian safe third country rules, as seen in the examples already given, have led to some unfortunate results. This was highlighted in a UNHCR report published in October 1994, which said:

Analysis of administrative practice reveals that the mere transit through or a simple short-term sojourn in such countries as Bulgaria, Romania, Hungary, Slovakia, the Czech Republic, Slovenia, Russia, Turkey, Algeria, Saudi Arabia or Iran will as a general rule lead to the rejection of an asylum application, the reason invoked for the denial of asylum being safety from persecution in another country.80

Many of these countries are not only unsafe but produce significant numbers of refugees themselves. Due to Austrian practices, UNHCR recommended that other European countries not consider Austria a safe third country because Austrian officials could not guarantee that persons removed to their territory on safe third country grounds would be given access to an asylum determination procedure.81

ACCESS TO THE ASYLUM PROCEDURE IN POLAND AND THE CZECH AND SLOVAK REPUBLICS

Almost overnight, then-Czechoslovakia and Poland made the transition from producing refugees to receiving them. Both began hosting asylum seekers and refugees as early as 1990 (in Poland’s case, Sweden returned between 600 and 800 asylum seekers on safe third country grounds), one year before either had signed the 1951 Refugee Convention.82 But it was not until Germany’s asylum reform in 1993 that the prospect of returning thousands of persons to these countries on safe third country grounds raised serious concerns about their ability to cope with receiving large numbers of asylum seekers. Neither Poland nor Czecho-
slovakia’s successor states have had to contend with the large numbers of returnees that were predicted to come due to the German asylum changes. Despite the smaller numbers, legitimate questions remain concerning the prospects that persons who do wish to apply for asylum will in fact be able to gain access to the asylum procedures and find effective protection should they qualify for it in these countries. These concerns begin with access to their respective asylum procedures.

The Czech and Slovak Republics

Although there appear to be few problems concerning access to the asylum procedure in most areas of the Czech Republic, insufficiently documented asylum seekers reportedly have encountered difficulties entering the territory and gaining access to the asylum procedure on the Czech Republic’s eastern border with Slovakia. According to some humanitarian observers, asylum seekers without the requisite travel papers periodically have been “bounced back” from the Czech Republic to Slovakia without a review on the merits of their claims to refugee status. There is no basis in Czech asylum law for such summary denials.

In an April 1996 meeting with USCR, representatives of the Czech Directorate of Aliens and Border Police denied allegations that access to the Czech asylum procedure was being blocked at any of the Czech Republic’s borders. All persons, documented or not, have been given the chance to file asylum applications if they so request, representatives of the directorate told USCR. But reports that contradict these assurances are cause for concern.

An asylum seeker’s chances of gaining access to the asylum procedure are equally problematic in the Slovak Republic. Insufficiently documented asylum seekers returned to Slovakia from other countries allegedly are routinely denied access to the Slovak asylum procedure. At times, they are issued “prohibition of stay” stamps in their passports, ordering their departure and barring their re-entry to Slovakia for at least several years. Some would-be asylum seekers are also detained for being in the country illegally. And when possible, asylum seekers are reportedly returned to the countries from which they come. If their travel documents indicate that they originally entered Slovakia by way of Ukraine or Hungary, they are summarily returned there, reportedly without consideration for the protection problems that might arise in those countries or the risks of refoulement.

The passage of a new refugee law, no. 283/95, which entered into force on January 1, 1996, reportedly has compounded the difficulties of insufficiently documented asylum seekers, both entering and returned to Slovakia. Article 4, paragraph 2 of the new law states that a person wishing to apply for refugee status in the Slovak Republic must do so at a border crossing when entering the country. Those who do not (in practice, illegal entrants), must seek asylum with the police within 24 hours of their entry. Exceptions to the 24-hour rule have been made only when the applicant had been able to demonstrate that “serious obstacles” rendered it impossible for him or her to file a request within the 24-hour period.

Despite assurances given by representatives of the Slovak Migration Office to USCR that Slovakia has not used the 24-hour provision as grounds to deny asylum seekers a hearing on the merits, reports on the new law’s implementation point to the contrary. The number of persons denied access to the asylum procedure, as well as the number of detentions resulting from the provision, appear to have increased as a result of a strict interpretation of the 24-hour limit by the Slovak Aliens Police. 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.

One case that came to USCR’s attention involved four Syrian asylum seekers who flew from Damascus to Bratislava via Prague in January 1996. Because they had hoped to seek asylum in Germany, the group enlisted the help of smugglers in Slovakia to plan their onward travel. But instead of taking them to Germany, the smugglers abandoned the Syrians in the cold on the Czech side of the Czech-Slovak border. Czech border guards caught the group and returned them to Slovakia, where they reportedly asked for asylum. But instead of entertaining this request, the Slovak authorities put the Syrians in jail, where they remained for several days, apparently without access to medical attention despite all having suffered from exposure in the cold weather. They were then returned by plane to Prague. Although the Czech Aliens Police tended to
their medical needs, the Syrians were returned again to Bratislava. The Slovak authorities immediately expelled them once more to Prague, where the Czech police finally consented to receiving their asylum applications.

Another previous ECRE-documented case with a less fortunate outcome involved a Somali national with five dependent children returned from Belgium to the Czech Republic on safe third country grounds in July 1994. Several days after arriving at the Prague airport they were removed to Bratislava because they had an expired Slovakian transit visa in their passport. Although UNHCR had interviewed the applicants and found them to be of concern, the Slovak authorities refused to allow them to file applications for asylum, arguing that they were “tourists.” The reasoning of the Slovak authorities continued that the applicants had to be deported to the “country of first asylum/transit,” because “their stay in Slovakia would be too costly and impossible.” The applicants were deported again, this time to Ukraine, a nonsignatory to the Refugee Convention, over the protests of UNHCR. They were lost track of once in Ukraine.1

A more recent case brought to USCR’s attention involved a Bosnian Muslim family of three who, only through UNHCR’s persistent intervention, narrowly averted refoulement. The family had fled their home in Banja Luka in February 1993 and traveled to Slovakia, where they were granted temporary protection. In February 1995, for lack of integration prospects in Slovakia, they requested and were granted Slovak exit visas for travel to Austria. They went to Vienna (later in April 1995, Austria introduced visa requirements for Bosnians) and then, a day later, to Rostock, in northern Germany, by car. From there they boarded a ferry to Sweden (where they had distant relatives) and requested asylum upon arrival.

The Swedish authorities refused to grant the family entry, however, citing Germany as the “safe country of first asylum.” Once they were back in Germany, the police instructed them to return to Slovakia by train through the Czech Republic. But because they lacked visas, the Czech border police also refused them entry. They returned to Germany, made their way to a town near Dortmund where a cousin lived, and requested temporary protection. Nine days later, however, the German authorities ordered them to return to Slovakia. That day, they were deported from Duesseldorf’s airport to Prague, where they were placed on a connecting flight to Bratislava. They returned to the humanitarian center that had been their home for the previous two years. Shortly afterward, the Slovak Aliens Police began proceedings to return the family to Bosnia, citing a “violation of domestic order” as the reason.

The family told UNHCR that they could not return home because their town was occupied by the Bosnian Serbs. Under a barrage of protest by UNHCR and others, the Slovak Aliens Police eventually relented and reversed its decision, permitting the family to remain in Slovakia.

The above cases raise serious concerns about both Czech and Slovak treatment of asylum seekers. As one observer told USCR with respect to Slovakia: “The Aliens Police are the gate keepers to the Slovak asylum procedure, and at the moment they are keeping the gate shut.” The actions of the German authorities are also at issue in the case of the Bosnian family. Although the family was deported via Prague, Germany’s clear intent (as seen on the ticket reservation for the flight) was to return them to Slovakia, not a country on Germany’s safe third country list. Even if the German authorities returned the family because they already had found temporary protection in Slovakia, it became evident upon their return that they had ceased to enjoy this protection and were in danger of refoulement. ExCom Conclusion 58 requires states to “give favorable consideration” to cases in which the basis for their protection no longer exists.8 The German authorities apparently failed to consider this possibility in the Bosnian family’s case.

Despite some troubling reports, there is little evidence of a pattern of such problems of this sort in the Czech Republic proper or on the Czech Republic’s western borders for persons readmitted from Germany.8 The asylum procedure in the
Czech Republic, still governed by the Law on Refugees enacted by the former Czech and Slovak Federal Republic (CSFR), requires asylum seekers to inform passport control officials in writing of their intention to apply for asylum at the time they enter the country. Similar to the Slovak law (although without the 24-hour time limit), the Czech law stipulates that persons who do not comply with this requirement may also apply with the Aliens Police once in the country provided they give “objective reasons” for their delay.\(^9\)

In practice, the overwhelming majority of applicants, some 80 to 85 percent according to the Czech Directorate of Aliens and Border Police, apply for asylum once in the country. Very few request asylum on the Czech Republic’s border with Germany.\(^9\) According to UNHCR and representatives of the Czech Helsinki Committee, most persons who ask for asylum once inland are admitted to the procedure. Unlike their Slovak counterparts, the Czech authorities generally do not scrutinize the reasons why inland applicants failed to apply with the border police, but simply refer them to refugee reception centers where they can formally lodge their claims.\(^9\)

However, admission to the asylum procedure remains problematic for foreigners in detention pending deportation for having committed criminal offenses, according to a UNHCR report on refugee conditions in the Czech Republic issued in April 1996. Of particular concern is the inclusion of individuals who have been detained for several months for using forged documents. If no one intervenes on their behalf, they are denied the right to file asylum applications and their deportations are arranged, the UNHCR report said.\(^9\)

Problems related to access to the asylum procedure on the Czech-German border have centered around a lack of information concerning the possibilities and procedure for applying for asylum in the Czech Republic. No such information is readily available unless an applicant explicitly asks for it, according to UNHCR. Furthermore, there is no UNHCR or nongovernmental presence in the border area to address such concerns.\(^9\) A representative of the Czech Helsinki Committee who had visited a northern area on the Czech-German border expressed the concern to USCR that asylum seekers returned from Germany on safe third country grounds might be unaware of the possibilities of applying for asylum in the Czech Republic.\(^9\) UNHCR also reported that some applicants, after already having requested asylum with the German authorities, do not understand the need to reiterate their wish to seek asylum once in the Czech Republic. Interpreting for certain nationalities reportedly also has been problematic. Czech border guards normally speak only Czech and German. A few speak a little English and French.\(^9\)

Of the 7,302 persons readmitted from Germany to the Czech Republic in 1995, only about 20 persons actually applied for asylum with the Czech authorities at the border, Ivo Schwarz, head of the Czech Border Police for the Czech border region adjacent to the German state of Bavaria, told USCR.\(^9\)

**Poland**

In contrast to the Czech and Slovak Republics, there are fewer reported cases in which Poland has refused asylum seekers entry or summarily deported them without a review of their claims on the merits.\(^8\) While there are intermittent complaints that Polish border guards have ignored some asylum requests, the relatively low incidence of such reports suggests that access to the asylum procedure at Poland’s borders has been less problematic than elsewhere.

A person wishing to apply for refugee status in Poland may do so either at the border or with the Ministry of Interior’s Department for Migration and Refugee Affairs (DMRA), the responsible body for deciding claims to refugee status. Border applicants are required to fill out an initial application, which the Polish Border Police then forward to the DMRA. According to Andrzej Wasiuk, director of the Polish Border Police, his agency plays no role in the asylum process other than to pass on the application and refer the applicant to the DMRA.

Since the German asylum reform entered into force in 1993, few persons returned from Germany have actually applied for asylum in Poland upon their return. In 1995, only 6.4 percent (260 persons) of the 4,064 persons readmitted from Germany applied for asylum in Poland.\(^9\) This figure nevertheless accounts for 31 percent of all the applications filed in Poland in 1995. From January through April 1996, the DMRA reported that applications submitted by persons readmitted from Germany had risen substantially, however, to account for about two thirds of all applications filed.\(^10\)

Documented persons returned from Germany and those who do not ask for asylum after being caught while trying to cross the border ill-
gally generally have their passports stamped with an order to leave the country within two to three days, according to the Polish Border Police in the western border town of Zgorzelec. Undocumented persons in the same circumstances are referred to their respective embassies in Warsaw to get the necessary travel documents to depart the country. Repeat offenders attempting to make their way illegally to Germany are generally taken into custody and deported under Border Police escort. The Polish Border Police claim that anytime a person requests asylum, he or she is referred to the DMRA instead of being deported.

Nevertheless, in a November 1995 report on Poland, UNHCR expressed its concern that Polish law lacks adequate safeguards to ensure that insufficiently documented asylum seekers arriving in or returned to Poland will in fact have access to the asylum determination procedure.

The low incidence of negative reports for asylum seekers on Poland’s borders has not meant that access to the Polish asylum procedure has been trouble free. Most seriously, humanitarian observers reported to USC a pattern in which the DMRA has discouraged certain asylum applicants from applying in Poland without entering into a comprehensive review of their cases. According to representatives of UNHCR’s liaison office in Warsaw, the DMRA has informed certain would-be asylum applicants, particularly those from Eastern European countries, that it would not be worth their while to apply for asylum in Poland. The DMRA has reportedly deterred others from filing asylum applications by telling them to return in several weeks.

While not constituting outright denials of access to the asylum procedure, these obstacles have effectively blocked some would-be applicants from applying for asylum, UNHCR representatives said. Most asylum seekers in Poland are destitute, unable to wait for several weeks to file an asylum application without the provision of food and shelter. Because access to social assistance at Polish refugee reception centers is linked to filing an asylum application, those who are unable to file are also effectively barred from receiving any social assistance. Without food and shelter, their chances to remain in Warsaw to file an asylum application at some later date are poor.

UNHCR’s September 1995 report, An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR, stated that the term “protection,” at a minimum, involves “protection against return to situations of persecution, serious insecurity or other situations justifying the granting of asylum as well as treatment in accordance with basic human rights standards. The latter means that refugees must also be able to satisfy basic subsistence needs in the country of asylum.”

Even when a person does manage to lodge an asylum application with the DMRA, his or her referral to a refugee reception center is not automatic. Tomasz Kozlowski, director of the DMRA, told USC that asylum seekers are not referred to a refugee reception center if they can provide for themselves or if they present no valid claim to refugee status. Rather than stemming abuse of the asylum procedure (the stated reason for the policy), however, UNHCR and others reported that the DMRA referral policy has led to denial of social support, and thus the means to remain in Poland, for certain applicants, some with strong claims to refugee status.

In practice, the DMRA’s decision to refer an applicant appears to be based on the assumption of that person’s approval or denial in the refugee determination procedure, according to UNHCR. DMRA makes the decision concerning a referral to the reception center, UNHCR continued, based only on information taken from a cursory interview and a person’s initial application form, not on a comprehensive review in a formal asylum determination procedure.

Similar to the situation in the Czech Republic, UNHCR and other humanitarian organizations have reported a dearth of information concerning the refugee determination procedure in Poland, particularly for persons readmitted from other countries.

Irena Rzeplinska, a lawyer with the Helsinki Foundation for Human Rights, told USC that some returnees from Germany did not know that it was possible to apply for refugee status in Poland. To fill the information void, the Helsinki Founda-
The divergence between the stated rationale of the Schengen and Dublin Conventions and their actual provisions points to an agenda motivated far more by a desire to keep asylum seekers and refugees at arm’s length than a genuine concern for their well-being. Photo: UNHCR/N. Leto

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examples cited in this report, however, strongly suggest that the gaps in refugee protection under the current safe third country regime amount to more than “problems arising out of uncoordinated practice,” as Professor Hailbronner submitted in his testimony to the Court.113

While well-documented incidents of chain deportations resulting in refoulement remain few, cases in which asylum seekers have been denied a hearing on the merits in third countries are far more common. Some have been removed to fourth countries where they stand little chance of receiving effective protection. Reports of asylum seekers not explicitly, but effectively, denied access to the asylum procedures in safe third countries also speak poorly of refugee protection standards where such problems have occurred.

Rather than cause for reassurance that the safe third country law poses few risks for genuine refugees, the dearth of well-documented chain deportation cases ultimately resulting in refoulement may be more indicative of how difficult it has been to follow the movements of persons who have become the victims of chain deportations. Keeping track of their fates and successfully intervening on their behalf have required the timely attention of, and communication between, often-overburdened refugee advocates in several countries. Not surprisingly, successful interventions to date have often been left to chance.

The experience of refugee practitioners in the field also suggests there is more cause for concern than satisfaction with the current safe third country system. One UNHCR protection officer working in Central Europe told USCR that he has regularly confronted serious protection problems concerning access to the asylum procedure in which both potential and actual violations of national and international law have been involved. The asylum seekers on whose behalf he intervened, he added, were just the ones who were lucky enough to contact UNHCR. He felt that there were probably considerably more persons who were less fortunate. What he had personally witnessed, he concluded, likely amounted to only “the tip of the iceberg.” Others with whom USCR spoke voiced similar concerns.

What emerge from such accounts are pieces of a puzzle forming a picture that does not auger well for individual refugees seeking protection in Western and Central Europe. They point to the “fictitious concept of safety” on which the current safe third country regime is based.114

In its May 14, 1996 decision, the German Constitutional Court found that Article 33 of the 1951 Refugee Convention protects both against direct refoulement and against the removal of persons to states where their return to their country of origin is seriously risked.115 Examples cited in this and other reports meet this litmus test of what the Court considers impermissible.

Numerous other cases, while not constituting outright breaches of international protection standards, highlight the priorities of the safe third country regime—priorities that have far more to do with avoiding the costs associated with hosting asylum seekers and refugees than providing actual solutions for them. But the German Court chose to disregard these concerns. In doing so, it failed to recognize the pressing need, at the very least, for basic procedural safeguards to ensure that the rights of asylum seekers and refugees will in fact be respected on the ground.

Certainly many of the protection problems arise from national practice for which the individual states concerned bear primary responsibility. But overall deficiencies in the current safe third country system are also responsible for the breakdown in protection standards. Underpinning the system is a lack of accountability. And without accountability, it is individual refugees who have paid the price.

### READMISSION AGREEMENTS

In practice, the implementation of safe third country rules would not be possible without agreements that provide for the readmission of persons who transit one state before entering the territory of another. The enactment of the German safe third country law has touched off a flurry of negotiations between governments, resulting in a web of such bilateral readmission agreements that now stretches from Western through Eastern Europe and beyond. The “Working Paper on Readmission Agreements” produced by the Secretariat of the Intergovernmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America, and Australia documented that no fewer than 44 bilateral readmission agreements between the various states of Europe were in effect in 1994.116 More have been negotiated since.

The accountability deficit begins with these agreements. Most, including the 1994 model read-
mission agreement drawn up by the EU ministers responsible for immigration, solely address the issue of readmission of third country nationals and citizens of the states party to the agreement who find themselves in an illegal situation in the removing state.\textsuperscript{117} Contrary to internationally established norms on refugee protection, these bilateral readmission agreements fail to address the special situation of asylum seekers.\textsuperscript{118} More specifically, they lack any provisions to ensure that asylum seekers returned on the basis of safe third country rules will have access to a fair and full asylum determination procedure. No bilateral readmission agreement to date obliges a state readmitting a person to entertain his or her asylum request. Neither is the deporting state required to inform the receiving state of would-be asylum applicants or the fact that they were deported solely on safe third country grounds.\textsuperscript{119}

Requiring states to implement such procedural safeguards (long recommended by both ECRE and UNHCR) might solve many of the problems concerning access to an asylum determination procedure. Where there are presently no mechanisms to provide accountability, the institution of these safeguards would require states to assume active responsibility for the proper treatment of asylum seekers and refugees both deported and returned to them on the basis of safe third country rules.

The German Constitutional Court appeared to see little merit in UNHCR's and ECRE's suggestions. Instead of calling for the German government to institute binding requirements, the Court simply issued a weak suggestion that the German authorities might inform their counterparts in the receiving state to which they plan to remove an asylum seeker.\textsuperscript{120}

Without procedural safeguards, the denial of access to the asylum procedures in third states, as well as chain deportations, will likely continue. The risk of refoulement accompanies these serious threats to refugee protection.

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\textbf{No bilateral readmission agreement to date obliges a state readmitting a person to entertain his or her asylum request.}

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\textbf{THE SCHENGEN AND DUBLIN CONVENTIONS: RESPONSIBILITY-SHARING AGREEMENTS?}

Two Western European multilateral accords, the Convention applying the Schengen Agreement\textsuperscript{121} and Dublin Convention,\textsuperscript{122} include modest safeguards that offer somewhat better possibilities for maintaining refugee protection not contained in bilateral readmission agreements. Both the Schengen and Dublin accords proposed to reduce the incidence of "refugees in orbit" by establishing mechanisms that sort out responsibility for deciding asylum claims among their member states.\textsuperscript{123}

Steps to bolster accountability should be welcomed. But serious flaws in both agreements run counter to this goal and point to priorities that have little in common with establishing effective refugee protection standards. Rather than a genuine concern for refugee welfare, the driving force behind Schengen and Dublin has been to pave the way for freedom of movement for both goods and persons within Western Europe. The lowering of internal barriers to travel between Western European states has translated into the deterrence of unwanted foreigners at external frontiers, as expressed in both Schengen and Dublin. The implicit incentives set in motion with the agreements have rewarded states that restrict access to foreigners—refugees and migrants alike—and penalized those that have sought to acknowledge human rights concerns.

Belgium, France, Germany, Luxembourg, the Netherlands, Portugal, and Spain began implementing the Schengen Convention on March 26, 1995.\textsuperscript{124} Austria, Denmark, Finland, Greece, Italy, and Sweden, also signatories to Schengen, are expected to implement the agreement in the near future. Norway and Iceland became associate members to the Schengen Convention in December 1996 and are also preparing to implement the agreement.\textsuperscript{125}

The Dublin Convention contains essentially the same provisions on asylum as Schengen, but will be effective for the entire EU. With Ireland's ratification of the Dublin Convention in May 1997, the agreement is scheduled to enter into force in September in 12 of the EU's 15 member states. Austria, Finland, and Sweden, members of the EU as of January 1995, are expected to become parties to the Dublin Convention in the near future. The
Dublin Convention will supersede those provisions of the Schengen Convention that address issues related to asylum.

Similar to the safe third country concept, both the Schengen and Dublin Conventions are based largely on the idea that the country of first arrival ought to be responsible for examining an asylum seeker’s application. Member states party to the agreements undertake to readmit and examine the asylum applications of claimants to whom they have issued a residence permit or visa, or persons who entered their territory first before traveling on to another member state. But unlike the removal of asylum seekers under current bilateral readmission agreements, the transfer of an asylum seeker between the agreements’ member states can take place only when the receiving state has formally agreed to readmit and review that person’s asylum claim.

While this appears to be a significant improvement over the current safe third country system, tied as it is to the use of bilateral readmission agreements, both Schengen and Dublin are not without their hitches. Under the agreements, the contracting states reserve the right to return asylum seekers to safe third countries outside the treaty areas. These provisions contradict the idea that one state is responsible. They are therefore at odds with the goal of eliminating the problem of refugees in orbit. While the refugee-in-orbit phenomenon might be reduced between the countries party to the agreements, it will continue between individual member states and third countries outside of the treaty area.

The divergence between the stated rationale of these agreements and their actual provisions points to an agenda motivated far more by a desire to keep asylum seekers and refugees at arm’s length than a genuine concern for their well-being. Subsequent negotiations between the (then) EC ministers responsible for immigration to establish criteria for fusing the use of safe third country rules with implementation of the Dublin Convention highlighted the overriding restrictionist concerns of (then) EC governments.

The nonbinding “resolution on a harmonized approach to questions concerning host third countries,” agreed upon in London on November 30 and December 1, 1992, states that formal identification of a host third country is to precede the substantive examination of an asylum claim. Only if a host third country cannot be identified, the resolution continues, will the provisions of the Dublin Convention be invoked. Following these guidelines, the clear priority, instead of ensuring asylum seekers’ access to a status determination procedure, has become their removal outside of the treaty space whenever possible.

Since the Schengen Convention entered into force, asylum seekers for whom Germany has accepted responsibility have been admitted to the German asylum procedure even if their onward deportation under the safe third country law would have been possible. While this is a positive development, the German Federal Constitutional Court in its review of the German asylum reform appeared to take this as assurance that other governments party to the agreement would do the same. However, there is no legal mechanism to prevent other governments, or indeed the German government, from denying asylum seekers a hearing on the merits and deporting them to third countries outside the treaty area. Most Schengen member states, like Germany, implement safe third country laws of their own that have resulted in the removal of applicants from Schengen territory.

These loopholes drain much of the force out of provisions in both the Schengen and Dublin Conventions that seek to provide accountability for reviewing asylum requests. But even if these loopholes were closed, the problem would not be entirely solved. It would only aid those who actually manage to enter Schengen or Dublin territory. Focused as it is on external closure, the Schengen and Dublin system offers strong incentives for its member states to adopt additional policies to keep undesired foreigners out. Indeed by imposing a duty on one state to review an asylum request, the Schengen and Dublin system penalizes those countries that fail “to adequately fend off the inflow of refugees, genuine or not.”

Italy, Spain, Portugal, and Greece were required to adopt tougher visa policies when joining the Schengen Convention in order to secure such benefits as free movement of their own nationals throughout Schengen territory. Largely at Germany’s insistence, in September 1995, Italy followed other states and introduced visa requirements for citizens of the former Yugoslavia to prevent the influx of asylum seekers and others to Schengen territory.

As hinted at in the example of the former Yugoslavia, the Schengen Convention foresees a common visa policy that will effectively target refugee- and migrant-producing states with more stringent visa requirements. A country that fails
to comply with the restrictionist agenda will experience the consequences of its liberal approach, either through diplomatic pressure exerted by other member states, or by being designated as responsible for reviewing the asylum requests of persons to whom it issues visas.

In addition, all Schengen states have been required to tighten external border controls as a prerequisite to being included in the agreement’s implementation. In an October 15, 1996 report, the European Parliament said that it “was right to fear that refugees would be turned away at the external borders [of Schengen territory].” The number of persons refused entry to Schengen territory at its external borders has increased substantially since the Schengen Convention entered into force on March 26, 1995, the European Parliament report charged.138

USCR also took note of this trend during its site visit to Central Europe in the spring of 1996. Polish border police in the western border town of Zgorzelec told USCR that it has become significantly more difficult to make an unauthorized crossing from Poland into Germany since the Schengen Convention became effective.139 A reported increase in the number of arrests of unauthorized entrants in the German border areas adjacent to Poland, Austria, and the Czech Republic since the Schengen Convention entered into force appears to confirm this observation.140 Other states such as Austria and Italy are presently working to strengthen control over their external frontiers in order to implement the Schengen Convention

**EFFECTIVE BURDEN SHARING?**

Somewhat ironically, the German Federal Constitutional Court justified its approval of the safe third country concept by heralding it as a mechanism that provides the basis for a regional approach to refugee protection and burden sharing between states.141 The Court is referring to the fact that the 1993 asylum reform has enabled Germany to take part in implementing the Schengen and Dublin Conventions and bilateral readmission agreements by removing constitutional obstacles that had previously blocked the transfer of asylum seekers to third states. Yet where these agreements have failed to address issues of refugee protection adequately, so
too do they have little in common with providing a European mechanism for equitable burden sharing.

In “Safe Third Countries: Myths and Realities, ECRE reported that “the safe third country notion and practice, based entirely, as it is, on countries’ geographical location in relation to refugee movements and travel routes, does not imply any element of equity or fair distribution of refugees.” Like the safe third country concept, the Schengen and Dublin Conventions are based primarily on assigning responsibility to the country of first arrival in their respective treaty areas. Because most asylum seekers have traveled overland to Western Europe, the Schengen and Dublin system imposes a disproportionate burden on states, such as Germany, with long land borders forming the external frontiers of the treaty areas.

The inherent inequity of the Schengen system is borne out by initial statistics on the implementation of the agreement’s asylum provisions. While France, the Netherlands, Spain, Portugal, and Belgium requested that Germany assume responsibility for reviewing some 1,733 asylum applications in the period from March 26 through August 1995, Germany asked Schengen members to review only 382 cases.

Nor has the Schengen approach to “burden sharing” proved to be efficient, according to a European Parliament report issued on October 15, 1996. The report, based on the experience of one-and-a-half years with the Schengen Agreement in force, said that “problems persist in determining which contracting party is responsible for processing an asylum application.”

Similar to bilateral readmission agreements (in obtaining the necessary consent to readmit a person), the Schengen Convention’s ability to function depends on one state having concrete proof that another member state is in fact responsible for readmitting an asylum seeker and examining his or her request. Such proof is often lacking; the Bundesamt agreed to accept only 26 percent of the asylum seekers for whom other Schengen member states requested Germany to take responsibility between March 26 and August 31, 1995. For that same period, other Schengen member states agreed to accept only 15 percent of the applications that Germany requested they take.

The inability of Western European states to establish collectively a more equitable approach to burden sharing also bears considerable responsibility for the downward spiral in Western European refugee protection standards. One by one, Western European states have adopted increasingly restrictive asylum policies, in part out of the fear that if they did not, their comparatively open asylum procedures would act as a magnet to large numbers of asylum seekers. It was precisely this domino effect rather than pursuit of regional cooperation in any positive sense that led Germany to enact its safe third country law and other restrictive reforms in July 1993.

Dr. Thomas Herzog, office director of the governing Christian Democratic Union/Christian Social Union’s working group on domestic affairs, told USCR in January 1996 that the German government had suggested to its European neighbors giving the then-EC far greater competence over asylum prior to enacting its own reforms. But most member states did not seriously consider Germany’s proposals because a greater EC role on asylum would have required the EC states to share the burden of Germany’s asylum-seeker caseload, which by 1992 accounted for 78.7 percent of the Community’s total.

While a variety of forces contributed to Germany’s disproportionate popularity as a destination for asylum seekers (such as its strong economy relative to its European neighbors, generous social benefits, the presence of asylum seekers’ family members there, and its more accessible geographical position on the dividing line between east and west) one particularly important factor was the openness of the German asylum procedure relative to those of other Western European countries. Prior to being amended, article 16 of the German constitution declared that the “politically persecuted enjoy the right to asylum.” The constitution thus guaranteed asylum seekers access to a status determination procedure and the right to remain in Germany pending a final outcome in their cases. This meant that the German authorities had little control over the number of people considered under their asylum procedure at a time when other Western European countries had already begun closing their doors to asylum seekers and refugees.

Prior to Germany’s restrictive reforms, Switzerland, Denmark, Sweden, Italy, Austria, and Greece already had adopted either laws or policies to deny entry to the territory and access to their asylum procedures for asylum seekers arriving via safe third countries. As these countries and others geographically less accessible than Germany were able to avoid or deflect increasing numbers of asylum seekers, Germany, in Dr. Herzog’s words, became the “asylum reserve coun-

25  Fortress Europe’s Moat
try of Europe."  

By late 1992, its asylum procedure was overwhelmed and incidents of xenophobic violence had risen sharply. Both factors catapulted the asylum issue to the top of the political agenda. And with efforts to establish a European burden-sharing mechanism a non-starter, Germany felt forced to find its own national solutions, resulting in the sweeping asylum reforms enacted in July 1993.

The downward spiral has not ended with the German asylum changes, however. Concurrent to the enactment of Germany’s asylum reforms, Finland and the United Kingdom also adopted versions of the safe third country concept into their asylum laws. Soon afterwards, in 1994, the Netherlands, whose asylum procedure remained comparatively open following the German reform, experienced a dramatic increase in asylum applications, leading it to adopt new restrictive measures aimed at deterrence and shifting its burden elsewhere.

France, in September 1994, also enacted legislation empowering its authorities to return asylum seekers arriving via other EU member states. Although applications in Central Europe remain low to date, it is no accident that Romania’s and Slovakia’s new refugee laws and proposed legislation in Poland and Hungary contain safe third country provisions in anticipation of the day when they might attract substantial numbers of asylum seekers.

**REFUGEES’ FREEDOM TO CHOOSE**

The safe third country system and the Schengen and Dublin Conventions are based on the presumption (without legal precedent) that it is a government’s prerogative to decide where an asylum seeker should apply for asylum. Put into practice, this skewed notion has had a range of adverse effects for asylum seekers and refugees beyond those associated with blocked access to a refugee status determination and chain deportations.

Depriving refugees of the freedom to choose where they request asylum might be more understandable were economics the sole factor determining their choice. Refugees, by very definition, however, are people who have been deprived of choices, forced to flee their homes and countries in order to escape persecution, sometimes to save their lives.

The motives behind a refugee’s choosing a specific destination to seek asylum therefore are often far more complex than a simple desire to secure a more prosperous life. From the standpoint of refugee welfare, it follows that refugees themselves, rather than governments, are usually best equipped to make such crucial decisions as the one on where to seek protection. By arbitrarily designating the country of first arrival as responsible for hosting an asylum seeker—often a country with which the asylum seeker has had minimal contact and no other connection—governments ignore the multiplicity of concerns that are at the heart of making this crucial choice. Consequently, governments risk denying both effective protection and durable solutions for bona fide refugees.

Receiving a fair refugee status determination would certainly be at the top of the list of a refugee’s concerns in deciding where to apply for asylum. Despite efforts at so-called harmonization of asylum procedures within the EU (under which
governments generally have adopted the most restrictive of each other's policies), tremendous variations in the treatment of asylum seekers and refugees still exist among the individual EU member states, let alone between EU member states and European countries farther to the east.

Refugee recognition rates for individual EU member states are one indicator of these divergences as statistics for 1995 demonstrate. While Finland (0.8 percent), Sweden (1.2 percent), Portugal (2 percent), and the United Kingdom (5.6 percent) had the lowest refugee recognition rates during that year, Belgium (32 percent) and Denmark (21.5 percent) reported the highest rates. Germany, the Netherlands, and France, countries that hosted the largest percentages of the total EU asylum-seeker caseload during 1995, registered approval rates in between these two extremes (16.6 percent, 17.7 percent, and 15.6 percent, respectively). These statistics are not entirely representative, as some countries such as Finland and Sweden, that had very low refugee recognition rates during 1995, granted some form of temporary protection to 44.5 percent and 38 percent of their caseloads, respectively. The figures also belie Denmark's generosity. Apart from granting refugee status to 21.5 percent of its caseload, Denmark extended temporary protection to an additional 63 percent of the applicants who received a status determination there. Similarly, the Netherlands granted temporary protection to 20.8 percent of its caseload during 1995, in addition to those to whom it accorded refugee status.

While these statistics shed no light on specifics, they nevertheless illustrate the point that considerable differences in the treatment of asylum seekers and refugees still exist from country to country within the EU. The differences are even more stark for certain nationalities of asylum seekers. For example, during 1995 the recognition rate for Iraqi asylum applicants in Germany stood at 90.2 percent (status determinations made under both Article 16a of the constitution and Article 51 of the aliens act) while in Greece, Belgium, and Austria it ranged between 11 and 13 percent. Similarly, while France granted refugee status to 30 percent of all Sri Lankan asylum seekers who received a status determination there during 1995, the United Kingdom recognized as refugees only 1.6 percent of its Sri Lankan applicants.

From the asylum seeker's perspective, these figures, showing the wide range of treatment he or she might receive depending on which country makes the refugee status determination, underscore the importance of preserving a refugee's freedom to choose where to request asylum. The removal, for instance, of an Iraqi refugee from Germany to Austria on safe third country grounds (and soon within the context of the Schengen Convention) might translate into his or her refoulement rather than protection, given the differing standards for the recognition of Iraqi nationals as refugees that may be inferred from the two countries' strongly diverging approval rates.

Beyond these serious protection concerns, the safe third country system and the Schengen and Dublin Conventions also have other troubling consequences for refugees and asylum seekers. Notably, the Schengen and Dublin Conventions only permit the reunification of immediate family members if the anchor relative already in a Schengen or Dublin member state has been granted refugee status. Neither agreement provides for the reunification of immediate family members (let alone more distant relatives with a close relationship) who are asylum seekers.

In an October 1996 report, the Dutch Refugee Council noted that implementation of the Schengen Convention had resulted in the separation of some families (in one case a husband from his wife and children) because family members used different travel routes to reach the Netherlands. By denying asylum seekers the chance to join family members, governments risk withholding important social support to asylum seekers that may impede their prospects for successful integration if granted refugee status. Asylum seekers themselves, not governments, are in the best position to know who (immediate family members or others) will be able to offer them such support.

The Dutch Refugee Council also reported other adverse humanitarian consequences of enforcing Schengen's provisions on determining the member state responsible for adjudicating asylum applications. During 1996, some asylum seekers in poor health did not receive proper medical treatment because the Dutch authorities had deemed them inadmissible to the asylum procedure on the grounds that another Schengen member state bore responsibility for deciding their cases. Rather than acknowledging the vulnerable situation of these asylum seekers, the authorities instead slated them for return to other Schengen member states, a process that can take up to three months to complete.
Dublin, and national safe third country laws do not end there. Current Western European admissibility requirements also have the potential for harming asylum seekers who manage to gain admission to an asylum determination procedure in an EU country.

In Germany, for instance, the Bundesamt devotes a portion of its interviews with asylum applicants to documenting their travel routes in order to see who may be denied a full status determination and be deported on safe third country grounds. For this reason, many asylum seekers, often well coached by human smugglers who helped them reach Germany, attempt to conceal their travel route from the Bundesamt in order to avoid a rejection on safe third country grounds. By misrepresenting or concealing the truth on these points, however, an asylum seeker risks losing credibility when relating the substance of his or her claim to refugee status. This, perhaps wrongly, may lead to his or her rejection in a refugee status determination. The Bundesamt may also construe an applicant’s concealing his or her travel route as noncompliance with Article 15 of the law on the asylum procedure, which requires the applicant to provide all information necessary to reach a decision on his or her case. Noncompliance with Article 15 constitutes grounds for denying the applicant’s case as manifestly unfounded.¹⁶⁵

Moreover, fear of deportation due to the strict admissibility requirements of many EU countries has likely discouraged substantial numbers of would-be asylum seekers from filing applications in the first place. In its February 1995 report, “Safe Third Countries:” Myths and Realities, ECRE reported that “the number of persons entering, fearing to be returned to other countries, and therefore choosing not to lodge applications at all, has increased dramatically as has the activities of illegal traffickers of persons to those countries.” Through such stringent admissibility requirements and other barriers to legal entry for refugees, “Western European countries are indirectly adding to the number of persons without legal status in their countries and providing fertile soil for the illegal trafficking of persons,” the ECRE report charged.¹⁶⁶

**ASYLUM PROCEDURES IN CENTRAL AND EASTERN EUROPE**

The summary return of refugees to the newly democratic states of Central and Eastern Europe on the basis of safe third country rules raises even greater humanitarian concerns. At present, despite the considerable efforts of some refugee practitioners, the prospects for receiving a fair and full refugee status determination in Poland, the Czech Republic, and Slovakia remain slimmer than for those admitted to normal asylum procedures in most EU member states. Integration possibilities for recognized refugees in these three countries are more elusive.

Barriers to refugee protection and integration also remain in Hungary, which continues to maintain a geographical reservation to the Refugee Convention, thereby excluding non-European

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*Western European governments are able to pay lip service to the UN Refugee Convention as they pawn off asylum seekers on their neighbors, professing that those countries will honor the protection needs of the vulnerable.*

*Photo: UNHCR/ A.Hollmann*
ans from consideration under its asylum procedure. Possibilities for receiving a fair and full refugee status determination and integration for recognized refugees grow even dimmer in countries farther to the east.\textsuperscript{167}

**Poland**

Despite considerable progress since the early 1990s, significant problems with the Polish refugee status determination procedure remained at the beginning of 1997. During USCR's site visit to Poland in May 1996, several humanitarian organizations told USCR that the quality of the case preparation and decision making had steadily improved since 1992. Representatives of UNHCR and NGOs nevertheless reported that it took too long for the DMRA to make status determinations. During 1996, the DMRA took on average six to nine months to issue first-instance decisions, which the DMRA's director conceded to USCR was too long a time given Poland's relatively small caseload.\textsuperscript{168}

During USCR's site visit, humanitarian organizations also criticized the DMRA for its policy of discontinuing accommodation and support for applicants after a denial in the first instance. Even more problematic, humanitarian practitioners in Warsaw charged, was the lack of an effective right to appeal. During 1996, the DMRA, responsible for making first-instance decisions, also continued the job of reviewing appeals. Although negative decisions in the second instance may be appealed to the High Administrative Court, only several asylum seekers had actually managed to do so as of May 1996.\textsuperscript{169}

Significant barriers to integration for recognized refugees in Poland also remain. Recognized refugees receive permanent residence status, permission to work, and, under some circumstances, have access to limited social assistance. But despite several attempts since 1993, the Polish government has been unable to create an effective integration program to help refugees become self-sufficient.\textsuperscript{170}

Elzbieta Przychodzen, director of a refugee reception center in Debak (near Warsaw), pointed out to USCR during its site visit that the reception of foreigners in Poland is still very much a new phenomenon, one that Poland is not yet adequately prepared for. The Polish social system, at present, is ill-equipped to cope with the problems of Polish citizens, let alone foreigners, Przychodzen said. She noted that a small number of Polish NGOs do offer some support to asylum seekers and refugees, but such support remains limited. Przychodzen concluded that little has changed with respect to integration possibilities in Poland between 1991 and 1996. The only change, she pointed out, is that the German border has become significantly more difficult to cross since 1995, leaving increasing numbers of asylum seekers stranded in Poland with little prospect for the refugees among them finding durable solutions to their predicaments.\textsuperscript{171}

Estimates on the number of recognized refugees who have left Poland appear to confirm Przychodzen's observations. Representatives of the UNHCR liaison office in Warsaw estimated that out of about 700 individuals that Poland had recognized as refugees by May 1996, only 200 to 400 remained in the country. The rest had left, most presumably to Western Europe, for lack of integration possibilities.\textsuperscript{172}

**The Czech Republic**

During USCR's site visit to the Czech Republic in April 1996, representatives of several humanitarian organizations in the Czech Republic reported that, despite some genuine efforts at improvement, the quality of the Czech refugee status determination procedure remained inconsistent.

The Directorate of Aliens and Border Police Services (hereafter directorate), responsible for adjudicating asylum claims in the first instance, reportedly lacks sufficient knowledge of conditions in many refugee-producing countries to make informed status determinations. The dearth of directorate staff with knowledge and training on the human rights conditions is particularly problematic with respect to Africa. Without adequately trained and informed staff to assess their claims to refugee status, some asylum seekers (especially applicants from countries such as Liberia, Angola, Nigeria, and Somalia) have received negative decisions based on erroneous assumptions regarding safety conditions in their countries of origin. One refugee advisor questioned whether supporting documentation that asylum seekers submit to substantiate their claims is in fact taken into account in the adjudication process.

Further problems with the directorate's asylum adjudications reportedly include placing unreasonable demands on applicants to produce documentation that will prove their claim to a well-founded fear of persecution and giving too much weight to the use of fraudulent documents. One authoritative observer of the status determination
procedure reported that the authorities do not necessarily approve applicants who offer plausible, detailed, and internally consistent claims to refugee status without some form of documentation to corroborate their story. The authorities reportedly also do not give applicants an adequate chance to explain any contradictions that might arise in their testimony.

These deficiencies in the asylum determination procedure have resulted in the denial of applicants who clearly fall under the mandate of the UN Refugee Convention, several refugee practitioners told USCR. Staff of the Interior Ministry’s Department for Refugees, responsible for making decisions in the second instance, issue decisions that are of marginally better quality than the directorate’s, according to one authoritative source. Nevertheless, one source told USCR that the Czech High Court has returned about half of all the asylum cases it has reviewed—either to the directorate or the Department for Refugees—for reexamination due to methodological flaws in the decision making.

Access to legal advice is also sometimes problematic. One source told USCR that some asylum applicants only have access to legal counseling after receiving a first-instance denial from the directorate. In the appeals process, it is much more difficult to rectify any mistakes or oversights that may have contributed to the original negative decision, the source reported.

As is the case in Poland, the asylum procedure in the Czech Republic also takes too long given the relatively small caseload. Although the directorate generally issues first-instance decisions within 90 days as mandated by law, the Department for Refugees takes 290 days, on average, to decide appeals. During a visit to Cerveny Ujezd, a refugee reception center north of Prague toward the Czech-Saxony border, USCR spoke with a number of asylum seekers who had waited more than one year, some as long as two, to receive a decision on their appeals from the Department for Refugees. Denials in the second instance may be appealed to the Czech High Court. However, following a denial in the second instance, an applicant falls under the Law on Foreigners and must apply for a permit to remain in the Czech Republic pending a decision by the High Court. Furthermore, an applicant no longer receives accommodation and support following a second-instance denial.

From the standpoint of assistance provided, the prospects for recognized refugees to integrate in the Czech Republic are somewhat better than in Poland or Slovakia. Persons granted refugee status automatically receive permanent resident status (law no. 150/1996), permission to work, integration assistance, and housing for up to one year in one of ten integration centers. After five years, according to a 1996 amendment to the refugee act (law no. 150/1996), recognized refugees are eligible for Czech citizenship.

**Slovakia**

Reports of poor decision making in the Slovak Republic’s asylum determination procedure also raise serious concerns. During USCR’s April 1996 site visit to Slovakia, humanitarian organizations reported that no systematic approach to the grant of asylum exists in Slovakia, resulting in arbitrary approvals and denials. Although the Migration Office’s interviews with asylum applicants were reported to be of good quality, some observers of the process noted that the justifications for denying refugee status did not always correspond, and sometimes contradicted, the interviews conducted in those cases. Observers of the asylum procedure also charged that the Slovak authorities gave too much weight to false or missing travel documents in denying applicants. The overwhelming majority of applicants granted refugee status over the past several years were those who had proper travel documents, one authoritative source said.

Although the Slovak refugee law authorizes the Ministry of the Interior (of which the Migration Office is a part) to decide appeals, it was unclear in 1996 which office in the ministry is responsible for the job. Applicants denied under the normal procedure have 15 days from the issuance of a negative decision to file an appeal with the Interior Ministry, which in turn has 60 days to issue a decision. Negative decisions in the second-instance may be appealed to the Slovak Supreme Court. A UNHCR representative may be present at any stage of the determination procedure if either UNHCR or the applicant desires.

Persons granted refugee status receive work authorization, integration assistance, and are eligible for government housing for up to six months. In addition to providing for the acceptance of refugees according to the UN Refugee Convention definition, the new refugee law stipulates that asylum seekers may be granted refugee status for humanitarian reasons. Provisions for temporary protection are also codified in the new law.
CONCLUSION

A fundamental principle set forth in the UN Universal Declaration of Human Rights is that "everyone has the right to seek and enjoy asylum." This right is as needed today as it was in 1948 when this declaration was written, or during the ensuing years of the Cold War. Many governments, and increasingly de facto authorities, continue today to persecute innocent civilians with impunity in the countries and territories they control. Other governments turn a blind eye to persecution perpetrated by various militant groups in their midst, or are incapable of protecting the victims.

While the need to provide solutions for refugees remains unchanged, never since World War II has the right to asylum been more in jeopardy in Europe than now. In 1997, a short eight years after the fall of the Berlin Wall, Western European countries are well on their way to erecting new barriers in its place—not walls of concrete and barbed wire to prevent people from leaving as in the days of the Cold War, but legal barriers designed to keep refugees and migrants out.

The safe third country concept—forming the basis for national safe third country laws and providing the logical underpinnings for the Schengen and Dublin Conventions—is one of the most subtle and destructive of these barriers. Schengen and Dublin, touted as burden-sharing agreements, in reality, shift the burden of asylum seekers and refugees.

These multilateral accords and national safe third country laws pose a serious threat to asylum, not just because of their practical effects for individual refugees, but also because they create the illusion of addressing the problems of these vulnerable individuals. Western European governments are able to pay lip service to the UN Refugee Convention as they pawn off asylum seekers on their neighbors, professing that those countries will honor the protection needs of the vulnerable. But with the only consensus between states based on deterrence rather than providing accountability, the net results are clear. Asylum seekers may be bounced back elsewhere or become victims of *refoulement*, while the illusion of protection remains intact. Where does such a system ultimately lead? How far can the buck be passed, and at what cost?

Some of the answers to these questions are already apparent and have been addressed in this report. As Western Europe sets the standard through shoring up its barriers to unwanted foreigners, the countries of Central and Eastern Europe are following its example. It appears likely that, in time, countries such as Poland, the Czech Republic, and Hungary (and perhaps others) will be granted EU membership and thereby join the Schengen and Dublin "clubs."

Irrespective of the prospects for EU enlargement, many Central and Eastern European countries today have already adopted, or are in the process of adopting, safe third country laws and other deterrent measures of their own. As these countries grow more capable of policing their borders (with Western European assistance), the buffer preventing refugees from reaching the West is pushed farther eastward and southward, thereby exerting yet more pressure on countries closer to, and bordering on, refugee-producing states. These countries are often without established asylum procedures and with little wherewithal to protect the vulnerable.

One might also reasonably ask whether, under such a system, certain persecuted individuals will in fact be able to seek asylum at all. In recent years, there have already been several examples of vulnerable groups, in effect, prevented from becoming refugees on the grounds that their predicament could best be dealt with by keeping them in their own homes and communities.

Such a policy might have some merit if the interests of the vulnerable were truly taken as paramount and if sufficient international will existed to ensure protection in place. But one need not look far to find instances where these prerequisites were in dangerously short supply. Bosnia, in the heart of Europe, offers one unfortunate example of where the international community opted for pursuing "protection" in place, a policy that ended with tragic results. Unable to agree on how to share the burden of Bosnian refugees, Western European governments backed the establishment of UN-declared "safe areas," in lieu of permitting larger numbers of vulnerable Bosnians to seek asylum in their own countries. As international will to provide protection flagged in Bosnia, the experiment ended with the fall of the so-called "safe areas" of Srebrenica and Zepa in July 1995 and the harrowing Bosnian Serb atrocities that accompanied their fall.173

While such examples reveal that the right to asylum remains as important as ever in the 1990s, the increased use of the safe third country concept along with other deterrent measures demonstrates how far current European discourse on the refugee
issue has shifted away from a human rights context. For European government officials, from west to east, the task is admittedly daunting. Many face pressing priorities of managing the problems of their own citizens and must answer to their own constituents.

It seems likely that German Constitutional Court Judge Sommer—who only in September 1994 publicly labeled the safe third country concept as “a roof for which no house yet exists” that may lead to a system of “organized irresponsibility”174—felt the pressure of politics in deciding to uphold the law he once strongly criticized. But refugees, vulnerable individuals without a constituency, cannot afford to become the pawns of politics. It is therefore an obligation of governments to enter into a serious discussion that accounts for human rights concerns and move away from policies that make no effort to differentiate between vulnerable individuals in need of protection and other migrants. At stake is not only the welfare of the individuals caught up in the system, but European human rights standards.

RECOMMENDATIONS

1) The use of national safe third country laws and practices should be discontinued immediately.

The designation of a safe third country to which an asylum seeker is to be returned is an arbitrary and unilateral designation on the part of the deporting state. There are no assurances that the asylum seeker will be admitted to the asylum procedure in the receiving state or that the procedure there will be fair and of high quality, or even on a par with the system of the deporting state. The safe third country concept also serves to undermine the principles of international burden sharing that its proponents purport to uphold. In effect, the safe third country concept shifts the burden to states with less capacity to adjudicate asylum claims and integrate refugees, ultimately placing greater, not less, burden on countries of first asylum.

2) In accordance with internationally established norms on refugee protection, governments should accept responsibility for deciding asylum claims.

Normally, the state in which an asylum seeker chooses to file an application for asylum should grant that person a full and fair refugee status determination. This does not mean that asylum seekers should have unencumbered rights to apply in multiple countries. In order to prevent “asylum shopping,” an information-sharing arrangement (some aspects of which are in the Schengen Convention) could be established in the EU to identify claimants who have already been denied by one EU-member country after a full hearing on the merits, thereby allowing other EU states receiving the same applicants to require them to overcome the presumption that their claims are manifestly unfounded.

3) The use of the criteria set forth in the Schengen and Dublin Conventions for determining the state responsible for adjudicating an asylum claim should likewise be abandoned. The country where the asylum seeker first chooses to seek asylum, rather than the country of first arrival, should normally assume responsibility for adjudicating the asylum claim.

Like the designation of a safe third country, the designation of the member state of first arrival as responsible is an arbitrary designation that risks compromising refugee protection as well as lasting solutions to the predicament of the individual in question. Although under Schengen and Dublin a member state must formally accept responsibility for reviewing an asylum seeker’s case before he or she may be transferred there, all member states reserve the right to remove the asylum seeker to a third state outside the treaty area. This contradicts the purported impetus for the asylum provisions of the agreements, which was to provide accountability.

Even in cases where a member state agrees to adjudicate the claim, protection may be compromised due to the considerable differences—across the board and for certain groups and nationalities of asylum seekers—in the asylum procedures among Schengen and Dublin member states. At present, an applicant cannot be assured of receiving full and fair due process when transferred from one state to another within Western Europe.

As is the case with safe third countries, returning an asylum applicant to another Schengen or Dublin member state may neglect factors such as family or community links that play a crucial part in providing satisfactory solutions for the individual in question.

Nor does the use of the Schengen and Dublin criteria for determining the member state responsible for adjudicating an asylum claim appear to be
in the best interests of the states party to these agreements. Implementing the Schengen Convention’s asylum provisions has resulted in added costly bureaucracy to deal with the transfer of asylum seekers under the agreement. To date the member states appear to be seeing little return for their investment of time, money, and energy in this so-called burden sharing measure.

Because the proof of an asylum seeker’s travel route necessary to obtain the consent of the “responsible” state to readmit him or her is often lacking, Schengen’s member states have agreed to accept responsibility for only a small percentage of the overall number of cases where transfer of responsibility was requested.

The maximum period of three months that an asylum seeker must wait in order to receive a decision on which state will be responsible is time not only that the asylum seeker must spend in limbo, but also time for which the state hosting him or her must often pay for his or her accommodation and support. It would be less costly and more humane simply to grant the asylum seeker a full and fair status determination in the first state of his or her choice.

4) Instead of erecting barriers to refugees and migrants alike, states should concentrate on creating efficient asylum procedures that do not compromise fairness or quality.

Were refugee status determination procedures more efficient, it would reduce the incentive for filing “abusive” claims while bona fide refugees would still receive due process and protection. Efficient national procedures would therefore lessen the need for burden sharing between European states. European states which continue to attract disproportionate numbers of asylum seekers should be monetarily compensated (perhaps through the EU) for their extra burden.

5) In addition to ending safe third country practices, Western European states should likewise discontinue the use of other policies—such as unfair visa requirements targeted to refugee producing countries, carrier sanctions, and perfunctory fast-track procedures—that are designed to prevent or deter refugees from filing applications for asylum in their territories.

6) Although USCR believes that “safe” third country practices are fundamentally harmful and ought to be abolished, if Western European policymakers are unable or unwilling to adopt these fundamental changes, USCR recommends that they at the very least adopt the four following interrelated safeguards as minimum requirements to make the procedure less egregiously abusive:

a) Agree to transfer an asylum seeker on the basis of safe third country rules only to states that have signed and fully implement the provisions of the 1951 UN Convention and 1967 Protocol relating to the Status of Refugees, have fair and full asylum determination procedures, are able to provide for the asylum seeker’s basic subsistence needs, and are able to offer durable solutions for refugees.

b) Agree to the removal of an asylum applicant on safe third country grounds only after receiving in advance of each transfer the explicit consent of the receiving state to readmit the asylum seeker, grant him or her access to a full and fair refugee status determination procedure, and provide assurances that he or she will not be subject to chain deportations or refoulement.

c) Agree to give the asylum seeker the chance to rebut the presumption of safety in the third country in an individual and fair procedure.

The body that is normally responsible for adjudicating refugee claims should be the only authority permitted to conduct such a procedure. Border guards and police should be clearly instructed to refer applicants to this office at all times.

Such a procedure should give due consideration to the best interests of the asylum seeker, both from a protection and humanitarian standpoint. For instance, applicants should not be sent to a safe third country where worse treatment for similarly situated individuals is evident—as is the case if refugee recognition rates are considerably lower.

Humanitarian considerations such as family connections should also be considered. Under no circumstances should immediate family members be forced to file asylum claims in separate countries due to safe third country rules.
d) Agree to offer every assistance to countries such as Poland, the Czech Republic, Slovakia, and Hungary to improve their asylum procedures and provide integration opportunities for recognized refugees.

While Germany generously offered DM 80 million to Poland and DM 60 million to the Czech Republic following its 1993 asylum changes, some informed observers charge that a disproportionate amount of this funding has been used to pay for modernizing the police and border controls of these countries. While securing borders is a legitimate pursuit, more assistance needs to be specifically earmarked to ensure respect for legal protection and humane temporary accommodation for asylum seekers and durable solutions for refugees in Central Europe.

As the newly democratic states of Central and Eastern Europe are considered for EU membership, they should be assisted to meet, and be held to, the highest human rights standards for asylum seekers, refugees, and other foreigners in their territories and at their borders.

ENDNOTES

1 Bundesverfassungsgericht, 2 BvR 1938/93, 2 BvR 2315/93 (14 Mai 1996) pp. 18-26. “German Federal Constitutional Court: Decision on the law concerning asylum seekers arriving from safe third countries” (May 14, 1996). Henceforth, this court decision will be referred to in English as “German FCC Decision.” Both the Iraqi woman and Iranian man cited in the examples were the claimants against the safe third country law in the Court’s review. In the second example, the assertion that the extent of Austria’s review of the Iranian man’s case on its merits is questionable is based on USCR discussions with UNHCR-Austria, Amnesty International-Austria, and other refugee advocates based in Austria in April 1996. All said that the Austrian Federal Asylum office regularly mixed conceptually their reasons for denying asylum applicants—denying cases on the merits vs. denials on safe third country grounds. These organizations asserted that once it had been established that the safe third country law was applicable, the quality of the review of the case on its substance was at times suspect.

2 Ibid, p. 50.

3 Ibid, pp. 26-28 and pp. 47-50. The Iraqi woman in the example filed and was granted a preliminary injunction by the German Federal Constitutional Court (the Court) on September 13, 1993, thereby suspending her deportation and permitting her entry to Germany. The Court denied the second claimant, the Iranian man, a preliminary injunction to permit his re-entry to Germany from Austria on October 26, 1993. Nevertheless, the Court declared the man’s case as admissible for the purposes of reviewing the constitutionality of the safe third country provision.


7 German FCC Decision, p. 5. The goal of the asylum reform as stated in the bill containing the legal changes was “to continue to grant protection to persons who were actually politically persecuted but to deny the right to asylum and access to a protracted asylum procedure to those who are not in need of protection because they clearly were never politically persecuted or are not persecuted anymore.” (Previous quote translated from German by author.) The safe third country law clearly contradicts this goal.

8 Hailbronner, p. 170. From July 1 through December 31, 1993, Germany’s Federal Constitutional Court granted preliminary injunctions to 13 of 59 applicants appealing negative decisions based on the safe third country law.

Poland should not be considered a safe third country. On September 15, 1993 the Administrative Court of Regensburg had likewise ruled that the Czech Republic could not be considered a safe third country because laws outside of its asylum procedure did not ensure against refoulement.

Also see: "Constitutional Court Judge Criticizes New Asylum Law," Migration News Sheet (October 1994) p. 4. In addition, throughout 1994 and 1995, various administrative and state courts issued contradictory rulings on how the safe third country law should be applied, most notably to persons whose travel routes to Germany could not be firmly established. The German Federal Administrative Court addressed this last issue in its November 7, 1995 ruling, which held that all persons arriving by land were ineligible for asylum on the basis of the safe third country rule regardless of whether their travel routes were known or not. For more information see: Country Report on Germany, World Refugee Survey 1996, p. 147.

These observations are based on USCR's interviews with a variety of observers of asylum law and policy in Germany in government, and nongovernmental and international organizations in late 1995 and early 1996.

German FCC Decision, pp. 66-67.


Kumin, p. 31.

The German asylum reform has had a domino effect in inducing many Central and Eastern European countries to adopt restrictive laws and practices on asylum and migration. A web of bilateral agreements to manage the readmission of citizens of the concerned states and third country nationals who cross one state's territory before entering the territory of another have been negotiated and adopted in Central and Eastern Europe, many following the German asylum reform. Slovakia and Romania adopted safe third country laws in 1996. Draft laws in Poland and Hungary also contain safe third country provisions.

A.J. Langdon, Justice and Home Affairs Cooperation with Associated Countries (Phare Programme, Services Contract 95-0683.01, October 1995) p. 3. The ten Central and Eastern European countries with association agreements with the European Union (EU) also have been particularly eager for assistance from EU member states to combat unauthorized migration.

Kumin, p. 30.

The higher number of asylum applicants registered during 1996 in the Czech Republic and Poland does not contradict this assertion. In Poland, for instance, although the number of asylum seekers applying for asylum increased dramatically in 1996, many asylum seekers abandoned their applications after filing. Government representatives contend that most asylum seekers only filed applications in Poland as a stop-gap measure to buy time in their attempts to reach points farther west. While UNHCR concedes that there is some truth to this, it also has pointed out that delays in the determination procedure, coupled with limited prospects for integration for recognized refugees, have also been factors causing many asylum seekers to abandon their claims and leave Poland.

This was a common theme raised particularly by government representatives in all the countries USCR visited to gather information for this study.

UNHCR Regional Bureau for Europe and Food and Statistical Unit, Statistics on individual asylum applications and individual refugee status determination procedures for 1995, (UNHCR, 9-16-96).

Through interviews with UNHCR, nongovernmental organizations, and, in some cases, government representatives, it was evident that successful integration of refugees remained the exception rather than the rule in Poland, the Czech Republic, and Slovakia in the spring of 1996.

For a variety of reasons which are discussed far more extensively later in this report, it was clear to USCR during its site visits that neither Poland, the Czech Republic, nor Slovakia was able to conduct refugee status determinations—complete with administrative and judicial appeal rights—that were of comparable quality to those conducted in the German procedure.
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Asylum Country," 4 of the International Obligations of Countries Vis-a-Vis Refugees, and Asylum Seekers in Turkey. With the passage of Decision no. 11-30-94, the Turkish authorities took over the screening non-European asylum seekers from November 1994.

Nevertheless, Turkey still maintains its geographical reservation to all asylum seekers who request protection in their territory, and asylum to all those who meet the definition of a refugee. Prior to the German asylum reform, the law required the German government to do exactly that. The German asylum changes bring Germany closer to the more restrictive provisions of the European Communities is determined through the legislative process and requires the additional approval of the Bundesrat, the upper house of parliament.

Most Western European states interpret their legal responsibilities under the 1951 Refugee Convention as limited to honoring the principle of nonrefoulement in a direct sense. Most contest the notion that they, as signatories to the Convention, are legally obliged under international law to grant a hearing to all asylum seekers who request protection in their territory, and asylum to all those who meet the definition of a refugee. Prior to the German asylum reform, the law required the German government to do exactly that. The German asylum changes bring Germany closer to the more restrictive interpretations of the 1951 Refugee Convention held by other Western European states.

The nonbinding "Resolution on a harmonized approach to questions concerning host third countries" agreed upon by the immigration ministers of EC member states in London on November 30 and December 1, 1992 attempted to establish objective criteria for applying the safe third country concept. As Kumin says, p. 29, considerable disagreement remains on these points in practice.

The legislation presented on March 2, 1993 by the caucuses of the CDU/CSU, SPD, and FDP justified revoking Germany's previously unqualified right to apply for asylum by asserting that politically persecuted refugees should seek protection in the first country possible. "Die (Drittstaat) Regelung beruht darauf, dass ein vor politischer Verfolgung Flüchtender in dem ersten Staat um Schutz nachsuchen muss, in dem dies moeglich ist." In FCC Decision, p. 8.


Barriers to Protection: Turkey's Asylum Regulations," International Journal of Refugee Law (Vol. 9, No. 1, Oxford University Press, 1997). Prior to December 1994, UNHCR had the job of screening non-European asylum seekers in Turkey. With the passage of Decision no. 94/6169 on 11-30-94, the Turkish authorities took over the job of screening non-European asylum seekers from UNHCR. Nevertheless, Turkey still maintains its geographical reservation to the 1951 Refugee Convention.


Fortin, p. 10.


Achermann and Gatikler, p. 35.

Note on International Protection, submitted by the High Commissioner to the Executive Committee of the High Commissioner's Program, 44th session, A/AC.96/815 (31 August 1993) p. 8. Sadako Ogata, the UN High Commissioner for Refugees, recounted that: "UNHCR field offices report a number of instances where asylum seekers have been refused admission and returned to a country through which they had previously passed, only to be sent summarily onwards from there, without an examination of their claim, either to a country of origin or to another, clearly unsafe country."

German FCC Decision, p. 48. Italics added for emphasis.

Ibid, pp. 21-22.


UNHCR, Background information on the situation of non-Europeans in Hungary in the context of the "safe third country" concept (Geneva, November 1995).

"Greece may not be a Safe Third Country According to UNHCR," Migration News Sheet (April 1994) p. 5.


European Council on Refugees and Exiles (ECRE), "Safe Third Countries:" Myths and Realities, case history no. 1, appendix B (February 1995). Hereafter cited as ECRE.

ECRE, case no. 8.


Fortin, p. 22. Ogata, p. 9. Ogata remarked, "There is ... a need for measures of return to 'first' countries of asylum to be implemented in actual practice with due regard to the principle of nonrefoulement. Without the prior consent and cooperation of the country of return, there is a grave risk that an asylum seeker's claim may not receive a fair hearing there and that a refugee may be left 'in orbit' and eventually returned to danger."

Amnesty International, Europe: Harmonization of Asylum Policy, Amnesty International EC Project (November 1992) p. 16. Amnesty International took a similar position: "The 'host third country' must be in the position to give effective and reliable guarantees...best ensured if asylum seekers would be given a recognized status in that country and
a right to pursue their claims through a fair and satisfactory asylum procedure."

52 German FCC Decision, p. 61. "Auch ein solcher Staat, der seinerseits eine Drittstaatenregelung vorsieht, kann gemaess Art. 16a Abs. 2 Satz 2 GG zum sicheren Drittstaat bestimmt werden. Allerdings darf der Staat nach seiner Rechtsordnung nicht befeuert sein, Auslander in einen solchen Staat abzuschieben, in dem ihnen die Weiterschiebung in den angeblichen Verfolgerstaat droht, ohne dass dort (d.h. im "Viertstaat") in einemfoermlichen Verfahren geprüft worden ist, ob die Voraussetzung der Art. 33 GFK, Art. 3 ERMK vorliegen, oder ein dementsprechender Schutz tatsächlich gewährleistet ist."

53 This case was mentioned to USCR in an interview with Andrea Soelkner of UNHCR-Vienna (April 9, 1996). UNHCR-Vienna had documented the case in its report: "Problembereiche des Asyl/GFremdenG/BundesbetreuungsG aus der Sicht des UNHCR," p. 2 of Fallbeispiele, UNHCR Regional Office in Vienna (September 1995).


55 Soelkner interview. The case was also mentioned to USCR in an interview with Gertrude Hennefeld, refugee advisor for Niederosterreich, (April 11, 1996).

56 German FCC Decision, p. 61. "Refoulement, as illustrated in the case of the Turkish Kurd, constitutes a violation of international law as well as Austrian and German law. In the second example, the Austrian authorities' intention to deport the Iranian asylum seekers to Ukraine also should raise questions concerning Austria's status as a German-designated safe third country. The German Constitutional Court ruled that Germany may designate as safe third countries states that also have safe third country laws of their own. Such a third country can no longer be considered as "safe," however, if that country deports asylum seekers to fourth states where they risk onward deportation to the country of alleged persecution without a hearing on the merits. Ukraine has neither signed the Refugee Convention nor established any laws or procedures to assess refugee claims. "Refoulement" from Ukraine would be a serious risk."

57 USCIR interview with Dr. Manfred Matzka, director of Section III of the Austrian Interior Ministry (April 11, 1996).

58 Austrian law provides for an individual review of safety conditions in the country to which a person is to be removed. In contrast, removal of asylum seekers to safe third countries is automatic under German law. No right to an individual review exists.

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to Poland on the basis of the safe third country rule.

procedure. One concerned the return of three Armenian men

* Czech Helsinki Committee interviews.

Republic, raises some concerns. Once returned to the Czech Republic, the woman and her children allegedly were threatened with deportation to Iran if they did not depart the country within five days. They returned to Germany and were about to be removed once more when Germany’s Federal Administrative Court agreed to suspend their deportation pending a Constitutional Court decision on the safe third country law. This was documented in: “Government’s Representative Acknowledges ‘Failings and Transitory Problems’ of the New Asylum Law,” Migration News Sheet (no. 154/96-01, January 1996) p. 7. USCR is not aware of other cases in which returnees from Germany to the Czech Republic have had difficulty filing asylum claims in the Czech Republic.

One case raised by German Constitutional Court Judge Boekkenfoerde in the oral hearings on the German safe third country law, involving an Iranian woman and her two children returned from Germany to the Czech Republic, raises some concerns. Once returned to the Czech Republic, the woman and her children allegedly were threatened with deportation to Iran if they did not depart the country within five days. They returned to Germany and were about to be removed once more when Germany’s Federal Administrative Court agreed to suspend their deportation pending a Constitutional Court decision on the safe third country law. This was documented in: “Government’s Representative Acknowledges ‘Failings and Transitory Problems’ of the New Asylum Law,” Migration News Sheet (no. 154/96-01, January 1996) p. 7. USCR is not aware of other cases in which returnees from Germany to the Czech Republic have had difficulty filing asylum claims in the Czech Republic.


Czech Directorate of Aliens and Border Police Services interviews.

UNHCR position on the situation of refugees in the Czech Republic, p. 3. USCR interviews with representatives of the Czech Helsinki Committee (April 4, 1996).

UNHCR position on the situation of refugees in the Czech Republic, p. 3.

Ibid, p. 5.

Czech Helsinki Committee interviews.

UNHCR position on the situation of refugees in the Czech Republic, p. 5.

Czech Directorate of Aliens and Border Police Services interviews.

USCR is aware of several reports in which Polish Border Guards allegedly denied asylum seekers access to the asylum procedure. One concerned the return of three Armenian men to Poland on the basis of the safe third country rule. A week after their deportation, the men phoned members of the Protestant Lutheran Community in Wuedeshausen, Germany who had been following their case to tell them that they had been refused the opportunity to apply for asylum in Poland and deported onward to Belarus. Belarus has not signed the 1951 UN Refugee Convention or the 1967 Protocol relating to the Status of Refugees. When asked by UNHCR about the case, the Polish authorities said that the men had never asked for asylum in Poland. This case was documented in the Poland Country Report, World Refugee Survey 1996, p 159.

ECRE also documented a case in which the Polish Border Police allegedly denied an Armenian family of five access to the asylum procedure after they had been returned from Germany on safe third country grounds in April 1994. The family claimed that once back in Poland, the Border Police refused to accept their asylum request because they had not been granted asylum in Germany. Their passports were stamped ordering them to leave Poland on their own accord within three days. After remaining in Poland for 20 days without any assistance (sleeping in a train station and a park), the family returned to Germany. Although the Bundesamt intended to remove them once more to Poland, the Administrative Court of Berlin ruled that there were serious doubts concerning the legality of the Bundesamt’s decision. The Court continued, saying that in all probability Poland could not be considered a safe third country. This case was documented in ECRE, case history no. 4.

Wasiuk interview.


USCR interview with representatives of the Polish Border Police (Zgorzelec, May 24, 1996).

UNHCR, Background information on the situation in Poland in the context of the “safe third country” concept (Geneva, November 1995). Hereafter referred to as “Background information on Poland.”

Cabrini and Shelow interview.

Ibid.


Kozlowski interview.

Cabrini and Shelow interview.

USCR interview with Irena Rzeplinska, lawyer with the Helsinki Foundation for Human Rights (Warsaw, May 22, 1996).

Background information on Poland.

Cabrini and Shelow interview.
Background information on Poland.

German FCC Decision, p. 45. "Bei nicht zu leugnen Schwierigkeiten in einzelnen Fällen werde in der europäischen Praxis das Refoulement-Verbot insgesamt eingehalten."


Representatives of the two claimants who brought suit against the safe third country law argued that the law is based on a fictitious concept of safety. Third countries also have an interest in sending asylum seekers elsewhere, which has lead to the danger of chain deportations and possible refoulement. See German FCC Decision, p 45.

"Das Refoulement-Verbot verbietet daher neben der unmittelbaren Verbringung in der Verfolgerstaat auch die Abschiebung oder Zurückweisung in solche Staaten, in denen eine Weiterschiebung in den Verfolgerstaat droht." German FCC Decision, p. 62.

ECRE.


UNHCR ExCom Conclusion No. 15. ExCom Conclusion 15 states that: "Agreements providing for the return by states of persons who have entered their territory from another contracting state in an unlawful manner should be applied in respect of asylum seekers with due regard to their special situation."

Kumin, p. 32.

German FCC Decision, p. 73.


Under Article 29, Sentence 1 of the Convention on the Application of the Schengen Agreement, the “Contracting Parties undertake to ensure that any application for asylum lodged by an alien on the territory of one of them will be processed.” International Journal of Refugee Law (Vol. 3, No. 4, 1992) pp. 781-782. Similarly, the preamble to the Dublin Convention states: "...concerned to provide all applicants for asylum with a guarantee that their applications will be examined by one of the Member States and to ensure that applicants for asylum are not referred successively from one Member State to another without any of these States acknowledging itself to be competent to examine the application for asylum.” International Journal of Refugee Law (Vol. 2, No. 3, 1990) p. 470.


This is a simplification of the criteria used to establish responsibility under both the Schengen Agreement and Dublin Convention. For more details, see the text of both agreements, referred to in footnotes 121 and 122.

Lumpp interview.

Article 29, paragraph 2 of the Convention on the Application of the Schengen Agreement and Article 3, paragraph 5 of the Dublin Convention provide for the removal of asylum seekers to third countries outside their respective treaty areas.

ECRE found that these agreements are actually likely to increase the incidence of refugees in orbit, p. 8.

Resolution on a harmonized approach to questions concerning host third countries, (London, 30 November and 1 December 1992) Ministers of the Member States of the European Communities responsible for Immigration.

Lumpp interview.

German FCC Decision, p. 53.

Lumpp interview.

Hathaway, p. 726.


Fortschreibung des Berichts über die bisherigen Erfahrungen mit der Anwendung des Schengener Durchführungsübereinkommens, German Interior Ministry (September 18, 1995) p. 11. Hereafter referred to as “German Report on Schengen’s Implementation.”

Ibid, p. 11.


USCR interview with members of the Polish Border Police in Zgorzelec (May 24, 1996).

German Report on Schengen’s Implementation, p. 9.
Fortress Europe's Moat appeal. 

from Finland will not be suspended to await a decision on their declared inadmissible have a right to appeal, their deportation inadmissible to the asylum procedure. Although applicants seeking arrival directly from the country of alleged persecution

law (adopted in June 1990) permits the rejection of asylum seekers who transit its territory en route to Western Europe. See individual country reports in World Refugee Survey 1997.

Refugee Convention at the time. 

seekers to Poland, despite Poland's not having signed the

In

Sweden began the practice of returning asylum seekers who had arrived via safe third countries.

Denmark adopted a policy of turning back asylum seekers who had arrived via safe third countries.

In 1989, Sweden began the practice of returning asylum seekers to Poland, despite Poland's not having signed the UN Refugee Convention at the time.

The Martelli Law of 1990 permits the rejection of asylum seekers at the border if they arrive via a safe third country.

The safe third country concept was first introduced in Austria with an asylum law adopted in April 1990. The 1991 asylum law (adopted in June 1992) further stipulates that only asylum seekers arriving directly from the country of alleged persecution will have a right to a refugee status determination.


Herzog interview.

Finland Country Report, World Refugee Survey 1994, pp. 129-130. Under a Finnish law, which entered into force on July 15, 1993, asylum seekers arriving via safe third countries are inadmissible to the asylum procedure. Although applicants declared inadmissible have a right to appeal, their deportation from Finland will not be suspended to await a decision on their appeal.


UNHCR Regional Bureau for Europe and Food and Statistical Unit, 1995 statistics on individual asylum applications and individual refugee status determination procedures (UNHCR September 16, 1996).

Ibid.

Ibid.


Ibid.


ECRE, p. 10.

Latvia, Ukraine, and Belarus have yet to accede to the 1951 Refugee Convention. And while Belarus and Ukraine have adopted elements of national refugee legislation, Latvia has balked at doing so, for fear of having to assume responsibility for asylum seekers who transit its territory en route to Western Europe. See individual country reports in World Refugee Survey 1997.

Kozlowski interview.

USCR interviews with UNHCR, the DMRA, and NGO representatives in Warsaw (Warsaw, May 1996).

Cabrini and Shelow interview.

Przychodzen interview.

Cabrini and Shelow interview.


Migration News Sheet, "Constitutional Court Judge Criticizes New Asylum Law" (October 1994) p. 4.