

# *Safe Third Countries: European Developments*

---

ALBERTO ACHERMANN\* AND MARIO GATTIKER\*\*

## Abstract

This article touches on an important aspect of Western European asylum policy. Whenever possible, countries try to send back asylum seekers to so-called 'safe third countries'. The existence of a 'safe third country' results in the asylum seeker being refused entry, in expulsion during the asylum procedure or in refusal of the asylum application. However, the principle only works if the asylum seekers or refugees can actually be sent back to third countries. Both the Dublin Convention and the Schengen Agreement offer certain possibilities. At present, European countries are trying to conclude readmission agreements with as many third countries as possible. This article deals in particular with the multilateral Schengen-Poland Agreement and with the treaty between Switzerland and Germany, considered as an example of a modern bilateral readmission agreement. There are limits, however, to the expulsion of asylum seekers to third countries. In particular, the 1951 Convention and the ECHR demand that a certain minimum standard be met. Furthermore, in the area of 'soft law', the conclusions of the UNHCR Executive Committee must be observed. The authors examine the practical situation in certain European countries (Germany, France, Austria and Switzerland) and show to what extent the third country principle plays a role in national legislation and practice. They conclude with some remarks about the responsibilities of the host States, so-called safety in third or fourth States and the relationship between the readmission agreements and conventions governing State responsibility for examining asylum applications (Dublin and Schengen).

## 1. Basic concepts of the third country arrangement

The purpose of third country arrangements is to ensure that asylum seekers or refugees who have already received *protection* in one country, do not seek this protection in another country. This is linked to an objective concept of protection. The decisive factor is not where the asylum seeker would like to go and where he feels safe, but the place which is considered by the host second State as a host third State in accordance with particular criteria (for example, previous residence).

The third country concept takes various forms.<sup>1</sup> The possibility of being

\* Assistant at the University of Berne, attorney-at-law, LL.M. (EUI Florence).

\*\* Head of the Legal Department, Migration Unit, Caritas Switzerland, Lucerne.

<sup>1</sup> Kjaerum, M., 'The Concept of Country of First Asylum,' 4 *IJRL* 515-6 (1992).

accepted by a third country may be a reason for a *refusal of asylum* (for example, in Germany, Switzerland and Austria), and also the basis for *expulsion during the asylum procedure*, which is tantamount to *exclusion from the asylum procedure* (for example, in Germany or Switzerland). Previous residence in the third country also plays a role in *entry proceedings* at the border: persons arriving from a safe third country are in general refused entry (for example, in France, Austria, Germany and Switzerland). Intergovernmental co-operation at the European level points in the same direction: in the EU countries a treaty (the Dublin Convention) has been signed that lays down which contracting party is responsible for examining an asylum application. This country is also obliged to complete the asylum application. However, the States have the right to send asylum seekers back to third countries, thereby excluding them from the asylum procedure.

Possession of the necessary travel documents (this is rarely the case) or existing (bilateral or multilateral) treaties with third countries allowing expulsion are the prerequisites for the expulsion of asylum seekers and refugees to third countries. In addition to readmission treaties, the Dublin Convention and the Schengen Agreement call for mention. This article begins by outlining these expulsion regulations and goes on to deal with the international legal implications of the third country concept, the principle of *non-refoulement* of the 1951 Convention relating to the Status of Refugees (hereinafter the 1951 Convention), and the 1950 European Convention on Human Rights (ECHR). These conventions stipulate that such expulsion may only be made to *safe* third countries. It must first be clarified (as a preliminary question) which conditions in a third country have to be fulfilled in order for it to be considered safe. An overview of national developments in certain European States<sup>2</sup> with regard to third country status is followed by some closing remarks.

## 2. International law and expulsion to third countries

### 2.1 Dublin and Schengen

It may seem paradoxical to begin a discussion of expulsion to third countries under international law with two treaties designed to determine responsibility by laying down the criteria according to which a State is responsible for examining an application for asylum. The treaties in

<sup>2</sup> Cf. already Hailbronner, K., 'The Concept of "Safe Country" and Expeditious Asylum Procedures: A Western European Perspective,' 5 *IJRL* 36 (1993).

question are the Dublin Convention<sup>3</sup> and the Schengen Agreement.<sup>4</sup> They govern the obligations of the responsible country;<sup>5</sup> participating States undertake to examine the application of any alien applying for asylum and to take back asylum seekers who have in the meantime travelled to another participating State.<sup>6</sup>

The central concept of the Dublin and Schengen treaties is that a State is *responsible for examining* an application for asylum. The purpose is to prevent asylum seekers from becoming refugees in orbit (that is, being sent back and forth between different countries). However, *only one State* is to be responsible. In the future, therefore, asylum seekers will not have the opportunity of going through the asylum procedure in a second country.<sup>7</sup> What is new in terms of international law is the fact that the responsible country is *obliged* to examine the asylum application.<sup>8</sup> Until now, under international law, countries had no obligations with regard to carrying out asylum procedures.

The Dublin and Schengen treaties are relevant to the present topic, however, for the following reasons:

<sup>3</sup> Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, signed in Dublin on 15 June 1990. The Dublin Convention was signed by all 12 EU member States, but has only been ratified to this day by eight, namely, Denmark, Greece, Italy, Luxembourg, Portugal, the United Kingdom, France and Germany. Text of the Convention in 2 *IJRL* 469 (1990).

<sup>4</sup> Convention Applying the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders, signed in Schengen on 19 June 1990 (the so-called Schengen Implementing Agreement, hereinafter the Schengen Agreement). In Title II ('Abolition of Checks at Internal Borders and Movement of Persons'), the Schengen Agreement sets out provisions regarding the crossing of internal and external borders, visas and — in Chapter 7 — responsibility for the processing of applications for asylum (arts. 28–38). These provisions are similar to those of the Dublin Convention. Italy, Spain, Portugal and Greece have subscribed to Schengen through separate treaties. The ratification process has actually been completed, but the Agreement has not yet been put in force — allegedly on account of problems with the Schengen Information System (SIS). It is not expected to enter into effect before 1995. For text of relevant extracts, see 2 *IJRL* 660 (1990)—French, and 3 *IJRL* 773 (1991)—English.

<sup>5</sup> The criteria which define responsibility are primarily family members living in a member State who are recognized as having refugee status and secondarily, in this order, possession of a residence permit, a visa, an entry permit, illegal entry, and if this cannot be proved, an application for asylum as a last resort. Cf. Joly, D., 'The Porous Dam: European Harmonization On Asylum In The Nineties,' 6 *IJRL* 164–5 (1994).

<sup>6</sup> Cf. on Dublin, Achermann, A., 'Das Erstasylabkommen von Dublin,' 9 *ASYL (Schweizerische Zeitschrift für Asylrecht und -praxis)*, Number 4 (1990), 12–9; Bolten, J.J., 'From Schengen to Dublin: The new frontiers of refugee law,' in Meijers, H., ed., *Schengen: Internationalisation of Central Chapters of the Law on Aliens, Refugees, Security and Police*, 1991, 8–36.

<sup>7</sup> Cf. the preamble to the Dublin Convention: 'Aware of the need, in pursuit of this objective, to make measures to avoid any situations arising, with the result that applicants for asylum are left in doubt for too long as regards the likely outcome of their applications and 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'.

<sup>8</sup> Art. 29(1), Schengen Agreement; art. 3(1), Dublin Convention.

- A State which is not responsible may expel or send back asylum seekers to the responsible State (expulsion to a contracting State).
- Every State has the right to expel asylum seekers and refugees to a third country outside the area covered by the treaty (expulsion to third countries). According to the Dublin Convention (article 3, paragraph 5), each State retains the rights 'pursuant to its national laws, to send an applicant for asylum to a third State, in compliance with the provisions of the Geneva Convention, as amended by the New York Protocol'.<sup>9</sup>

This restriction undermines the basic concept that one country is always responsible. One of the aims of this treaty, that is, to prevent the phenomenon of refugees in orbit, is thus partially obstructed;<sup>10</sup> although asylum seekers may no longer be sent back and forth between the contracting parties to the two agreements, they may be sent back and forth between the contracting countries and non-contracting countries.

In the (correct) opinion of the EC Ministers for Immigration, the notion of a third State to which, under article 3, paragraph 5 of the Dublin Convention (and article 29, paragraph 2 of the Schengen Agreement), an applicant can be sent back or expelled needs to be harmonized in order to ensure uniform application. At their meeting on 30 November and on 1 December 1992 in London, therefore, the Ministers adopted a Resolution on a harmonized approach to questions concerning host third countries.<sup>11</sup> Paragraphs 1 and 3 of the Resolution declare that a member State must first verify the existence of a host third country to which the applicant can be expelled, regardless of whether this person is an asylum seeker or a refugee. The Dublin Convention applies only *if no such host third country exists*.<sup>12</sup> This means that the member State in which the alien makes an application for asylum will first examine whether this person can be expelled to a host third country. Only if this is not possible will a member State examine whether another State is responsible for examining the asylum application in accordance with the Dublin Convention. If so, the asylum seeker will be handed over to this State, which will re-examine

<sup>9</sup> Similarly, art. 29(2), Schengen Agreement.

<sup>10</sup> Cf. Gerlach, A., 'Dubliner Asylrechtskonvention und Schengener Abkommen: Lohnt sich die Ratifikation?' *ZRP (Zeitschrift für Rechtspolitik)* 1993, 164-6, at 166.

<sup>11</sup> For the text, see Meijers, H., ed., *A New Immigration Law for Europe? The 1992 London and 1993 Copenhagen Rules on Immigration*, Standing Committee of experts in international immigration, refugee and criminal law, 1993, 73-5. For the Resolution, cf. Fernhout, R. and Meijers, H., 'Asylum,' in Meijers, H., 'New Immigration Law for Europe', above, 16-9; Joly, D., 'The Porous Dam,' above note 5, 169-70. The resolution is not binding but will be adopted in national law as rapidly as possible: Hailbronner, K., 'The Concept of Safe Country', above note 2, 61. Cf. Gerlach, A., 'Dubliner Asylrechtskonvention und Schengener Abkommen: Lohnt sich die Ratifikation?', *ZRP (Zeitschrift für Rechtspolitik)* 1993, 164-6, at 166.

<sup>12</sup> Para. 1d. of the resolution.

whether it can expel the person in question to a host third country.<sup>13</sup> Only then does the responsible State examine the application. Depending on national legislation, asylum can be refused at the end because the asylum seeker resided in a third country before entry. The principle of the responsible State has thus been turned upside down: expulsion to a third State is no longer the exception but the rule. In the event that expulsion to a third State is not possible, this principle of responsibility is a necessary evil designed not to prevent a 'refugees in orbit' situation, but to avoid multiple applications. In other words, these provisions on responsibility do not serve the interests of asylum seekers, but derive from the principle that asylum seekers should have *one chance only*. The sole guarantee for asylum seekers and refugees is that, if no host third country outside the member States exists, one country must examine their applications.

Paragraph 2 of the Resolution lays down the requirements and criteria for establishing whether a country is a host third country. The criteria are as follows:<sup>14</sup> (1) In a host third country, the life and freedom of the asylum applicant must not be threatened within the meaning of article 33 of the 1951 Convention. (2) The asylum seeker may not be exposed to torture or inhuman or degrading treatment in the host third country. (3) Either the asylum seeker must have already received protection in the host third country or must have had an opportunity, at the border or in the territory of the host third country, to make contact with that country's authorities in order to seek their protection; or there must be clear evidence of the asylum seeker's admissibility to the host third country (for example, a visa<sup>15</sup>). (4) Lastly, the asylum seeker must be afforded *effective protection* in the host third country against *refoulement* within the meaning of the 1951 Convention. The Resolution further states that the contracting party to the Dublin Convention will take into account, on the basis of information available from the UNHCR, the practice adopted in the host third country with regard to the principle of *non-refoulement*. The first two criteria only affect international law that is binding on contracting parties. The third point is trickier. It does not answer the question of what happens if the asylum seeker has already received protection in a host third country but this country does not wish to take him or her back. The fourth criterion is thus the most important, in so far as the Resolution demands *effective protection against refoulement*.

## 2.2 Readmission agreements

Practice shows that, in the absence of treaties with third States, the safe third country principle cannot be applied, with the exception of the few

<sup>13</sup> Para. 3c. of the resolution.

<sup>14</sup> For text, see Hailbronner, K., 'The Concept of Safe Country', above note 2, 60.

<sup>15</sup> Fernhout, R. and Meijers, H., 'Asylum,' above note 11, at 17.

cases in which asylum seekers or refugees have the necessary papers for entry (travel documents or visa). The third criterion of the Resolution adopted by the EC Ministers for Immigration refers to this situation. Readmission agreements govern not only the *readmission of a country's own citizens* but also in general the *expulsion of citizens of third countries* and the *transit of third-country citizens* through the territory of the contracting State to a destination State.<sup>16</sup> For the moment, a close-meshed web of readmission agreements is being concluded, particularly with and between the countries of Central and Eastern Europe.<sup>17</sup> However, multilateral readmission agreements are the most promising, and the Schengen-Poland Agreement — the first of its kind — may be considered a model.

### 2.2.1 *The Schengen-Poland Agreement*

The Agreement concerning the readmission of persons with unauthorized residence was concluded between the Schengen contracting parties and Poland on 21 March 1991 and entered into force on 1 May 1991.<sup>18</sup> It governs the readmission of these countries' own citizens and the readmission, *without any formalities*, of persons who have crossed the (external) border of the other contracting party but do not have any entry or residence permit in the State seeking the application. In contrast to conventional expulsion agreements, which are based on illegal entry into the applicant State, the Schengen-Poland Agreement takes as the basis for readmission the fact of crossing the border and residence in the State to which the application for readmission has been made (if the alien subsequently continues to travel to another contracting State).<sup>19</sup>

### 2.2.2 *The new Swiss-German readmission agreement as an example*

The 1954 readmission treaty between Switzerland and Germany contained provisions regarding the readmission of third-country nationals.<sup>20</sup>

<sup>16</sup> Schneeberger, R., 'Schengen und Rückübernahmeabkommen,' *Asylon* (Zeitschrift des Bundesamtes für Flüchtlinge, Berne) No. 20, Mar. 1994, 2.

<sup>17</sup> An overview of readmission agreements in Central Europe, published by the UNHCR in September 1993, contains no fewer than 23 bilateral treaties concluded between countries of Central and Eastern Europe and Western European States or among each other. Various other treaties are being negotiated.

<sup>18</sup> According to a declaration in the protocol to the Agreement (declaration on arts. 2 and 5(3)), the readmission agreement is temporarily restricted to Polish citizens until the Schengen Agreement comes into force (in return Polish citizens no longer require visas for these countries). Art. 7 of the Agreement foresees the possibility to invite other countries to join. Membership is not restricted to the EU States. At the conference of the EC Ministers for Immigration, a recommendation was adopted according to which European States should, where possible, join the Schengen-Poland Agreement or conclude similar multilateral and bilateral treaties. The Schengen-Poland Agreement therefore serves as a model. Cf. Schneeberger, R., 'Schengen und Rückübernahmeabkommen', above note 16, 3.

<sup>19</sup> Schneeberger, R., 'Schengen und Rückübernahmeabkommen', above note 16, 3, rightly speaks of a change in system.

<sup>20</sup> Treaty of 25 Oct. 1954 between the Swiss Federal Council and the government of the Federal Republic of Germany on the return of persons at the border.

Expulsion had to be requested by a contracting party within six months of the illegal crossing of the border. In any case, the country wishing to expel third-country nationals had to *prove* that the alien had illegally entered the country from the other contracting country. In practice, such proof is difficult to produce and is in general possible only if the alien is caught while actually entering the country illegally.<sup>21</sup>

This Agreement has in the meantime been replaced by a new treaty on the readmission of persons with unauthorized residence.<sup>22</sup> With the Schengen-Poland Agreement for the readmission of third-country nationals as a model, the new treaty takes as its criterion of acceptance entry across the border (article 2 paragraph 1), that is, no longer the illegal crossing of a common border, but the previous (legal or illegal) residence in the other contracting country. The State to which the application has been made takes back the person without any formalities. According to the protocol and the joint declaration therein on articles 2, 3 and 4, it suffices that the entry across the border is proven or shown to be credible. In comparison with the earlier treaty, the barriers have been lowered. At the same time, the deadline for readmission has been extended to one year, though only the period of residence known to the other State counts (article 6).

### 3. The limitations of the third country concept in international law

In international law, States are free to decide which aliens may stay and which have to leave the country. International refugee law also authorizes States to expel even refugees.<sup>23</sup> This freedom is limited, however, in particular by the principle of *non-refoulement*.<sup>24</sup> Article 33 of the 1951 Convention forbids expelling refugees to countries where they may be persecuted. From article 3 of the ECHR and article 7 of the 1966 International Covenant on Civil and Political Rights, it emerges that

<sup>21</sup> Schneeberger, R., 'Schengen und Rückübernahmeabkommen', above note 16, 2.

<sup>22</sup> This was concluded on 20 Dec. 1993 and entered into force on 1 Feb. 1994. However, the necessary exchange of notes for the treaty to become law has not yet taken place. According to Schneeberger, R., 'Schengen und Rückübernahmeabkommen', above note 16, 3, the new treaty will be applied as soon as Switzerland has concrete prospects of joining the Schengen-Poland Agreement.

<sup>23</sup> This is clear from the 1951 Convention, since States have the right to turn back refugees provided they do not expel them to the persecuting country; cf. Frowein, J.A. and Zimmermann, A., *Der völkerrechtliche Rahmen für die Reform des deutschen Asylrechts*, 1993, 45.

<sup>24</sup> A *de facto* limitation on the expulsion in general of asylum seekers, refugees and aliens to third States is derived from the principle that — subject to special treaties (see above, section 2.2) — third countries are not obliged to allow aliens to enter their territory if these persons do not have the necessary papers (travel documents and visas). With regard to refugees who are in the country's territory, this means that they may not be turned back or expelled if no other State in which they are safe from persecution is obliged or willing to take them.

expulsion of persons to countries in which they can expect torture or other cruel, inhuman or degrading treatment is also forbidden.

### 3.1 Article 33 of the 1951 Convention

According to current theory and practice, the prohibition of *refoulement* forbids sending refugees back not only to the persecutor State but also to any country from which the refugee risks being expelled to such a State, as stipulated in article 45 paragraph 1 of the Swiss Asylum Act. The ban thus also extends to *indirect refoulement*, that is, expulsion or return to a country which, though it does not itself persecute the refugee, will send him or her back to a persecutor State.<sup>25</sup> In terms of the third country issues discussed here, this implies that expulsion on the basis of article 33 of the 1951 Convention (and article 45 of the Swiss Asylum Act) is impermissible if there are serious grounds for assuming in individual instances that the third country will not observe the *non-refoulement* principle.<sup>26</sup> This is the case for instance if

- the third country has repeatedly infringed the *non-refoulement* principle in the past and the applicant belongs to the category of refugees in question;
- the applicant would be recognized as a refugee in the country in which application is now made, but has virtually no chance of being accepted in the third country to which he or she is deported, because of its more restrictive practice. Expulsion to a third country should not take place, especially if the recognition rates differ widely.

### 3.2 Article 3 of the ECHR

The same considerations that apply to article 33 of the 1951 Convention are valid *mutatis mutandis* for the *refoulement* prohibition in article 3 of the ECHR. Here too, expulsion or deportation to a third country contravenes the *refoulement* prohibition if there is a risk that the alien in question will be expelled to the persecutor State. This risk exists if the person is not protected either *de jure* or *de facto* against expulsion in the third State.<sup>27</sup> In expulsions to third countries, the concrete situation must always be taken into account, that is, whether the person in question has sufficient legal and actual guarantees against expulsion to a persecutor State and can also assert these rights. Article 3 of the ECHR is also a barrier against

<sup>25</sup> Kälin, W., *Grundriss des Asylverfahrens*, 1990, 222; on the general question of the compatibility of the safe third country principle with the *refoulement* prohibition in the 1951 Convention, cf. Zimmermann, A., 'Das Konzept sicherer Herkunfts- und sicherer Drittstaaten im Lichte der Genfer Flüchtlingskonvention,' in Barwig, K. et al., eds., *Asyl nach der Änderung des Grundgesetzes*, 1994, 101–8.

<sup>26</sup> Kälin, W., *Grundriss*, above note 25, 263–4.

<sup>27</sup> Alleweldt, R., 'Protection against Expulsion Under Article 3 of the European Convention on Human Rights,' 4 *EJIL* 373 (1993). See Kälin, W., *Grundriss*, above note 25, 232–47, for a general discussion of ECHR art. 3.



expulsion to third countries because the alien in question must be guaranteed residence, provided he or she cannot lawfully be expelled to the country of origin. What can happen otherwise is that people are deported from one country to another and thus become refugees in orbit. This situation could, according to the ECHR, contravene article 3 of the ECHR.<sup>28</sup>

### 3.3 Executive Committee Conclusions

The Conclusions adopted by the Executive Committee of the UNHCR Programme should also be mentioned in this context. Remarkably enough, the resolution of the EC Ministers for Immigration on host third countries<sup>29</sup> also refers to Executive Committee Conclusion No. 58 on irregular movements of refugees and asylum seekers.<sup>30</sup> Moving in an irregular manner means people moving from a country in which they have *already found protection* to another country. Paragraph (f) of Executive Committee Conclusion No. 58 states that asylum seekers and refugees may only be returned to a country in which they have already found protection if they are protected there against *refoulement* and if 'they are permitted to remain there and be treated in accordance with *recognized basic human rights standards*<sup>31</sup> until a durable solution is found for them.'

Another Executive Committee Conclusion of great importance is No. 15 concerning refugees without an asylum country.<sup>32</sup> This conclusion calls for an effort to be made 'to resolve the problem of identifying the country responsible for examining an asylum request by the adoption of common criteria.' According to the Executive Committee, regard should be had to the principle that

asylum should not be refused solely on the ground that it could be sought from another State. Where, however, it appears that a person, before requesting asylum, already has a connection or close links with another State, he may, if it appears fair and reasonable, be called upon first to request asylum from that State.

This resolution is not overridden or contradicted by Conclusion No. 58 because the latter refers only to asylum seekers and refugees who have

<sup>28</sup> Einarsen, T., 'The European Convention on Human Rights and the Notion of an Implied Right to *de facto* Asylum,' 2 *IJRL* 374 (1990); Frowein, J.A. and Zimmermann, A., 'Der völkerrechtliche Rahmen,' above note 23, 46-7; Kälin, W., *Grundriss*, above note 25, 240.

<sup>29</sup> Cf. section 2.1 above.

<sup>30</sup> Conclusion No. 58 (XL), 1989: Problem of refugees and asylum seekers who move in an irregular manner from a country in which they had already found protection. For text, see 2 *IJRL* 148-50 (1990).

<sup>31</sup> This concept presumably refers to the minimum basic human standards explained in detail in Executive Committee Conclusion No. 22 (XXXII), 1981: Protection of Asylum-seekers in Situations of Large-Scale Influx. See Fernhout, R. and Meijers, H., 'Asylum,' above note 11, 17-8.

<sup>32</sup> Conclusion No. 15 (XXX), 1979.

already found protection in another country.<sup>33</sup> Asylum seekers who are only in transit should therefore — according to Conclusion No. 15 — only be returned if connections or close links with this third State exist.

#### 4. Selected third country arrangements

##### 4.1 Germany

The German concept of a safe third country was thoroughly redefined by the constitutional amendment (the so-called Asylum Compromise) which came into force on 1 July 1993. According to the new provision laid down in article 16a, paragraph 2 of the Basic Law,<sup>34</sup> asylum cannot be granted to an alien arriving from a member State of the European Community or from another third State, as defined by the law, in which the application of the 1951 Convention and the ECHR is guaranteed. Measures to end the alien's stay in Germany may be taken regardless of any appeals made.

Before this constitutional amendment, the existence of 'protection elsewhere' also led to rejection of the asylum application. However, the law assumed 'protection elsewhere' only if this really appeared to be the case. Asylum seekers were assumed to enjoy protection elsewhere (though this could be refuted) if they were in possession of a refugee passport or if, prior to entry, they had stayed more than three months in a country where they were not threatened with political persecution.<sup>35</sup> The new provision of the Basic Law no longer takes the concept of 'protection elsewhere' into account. The right of asylum can be denied merely because the asylum seeker has entered Germany from the territory of a third country considered to be safe.<sup>36</sup> According to article 16a paragraph 5 of the Basic Law and asylum law, by way of exception this principle does not apply if Germany is responsible for accepting and examining the asylum application. The provisions are based on the Dublin Convention and the Schengen Agreement.<sup>37</sup>

In addition to the countries of the European Community, Finland, Norway, Austria, Poland, Sweden, Switzerland and the Czech Republic

<sup>33</sup> Fernhout, R. and Meijers, H., 'Asylum,' above note 11, 17 with reference to the material.

<sup>34</sup> Law to amend the Basic Law (Grundgesetz; arts. 16 and 18), 28 Jun. 1993: *Bundesgesetzblatt* 1993, I 1002.

<sup>35</sup> § 27 Law on Asylum Procedure in the version of 26 June 1992.

<sup>36</sup> On the new third-country principle, see Classen, C.D., 'Sicheres Drittstaaten — ein Beitrag zur Bewältigung des Asylproblems?' *DVBl (Deutsches Verwaltungsblatt)* 1993, 700–5; Hailbronner, K., 'Die Asylrechtsreform im Grundgesetz,' *ZAR* 1993, 107–8; Renner, G., 'Asyl- und Ausländerrechtsreform 1993,' *ZAR* 1993, 118; Bethäuser, F., 'Die Regelungen über die sicheren Drittstaaten unter besonderer Berücksichtigung des Artikels 105 der Bayerischen Verfassung,' *ZAR* 1993, 169–74; Huber, B., 'Das Asylrecht nach der Grundgesetzänderung,' in Barwig, K. et al., eds., *Asyl nach der Änderung des Grundgesetzes*, 1994, 214–9.

<sup>37</sup> Hailbronner, K., 'Asylrechtsreform', above note 36, 113.

have been designated safe third countries for the purposes of this law. The Federal Government is authorized to issue an ordinance to strike a country from this list if conditions in that country change.<sup>38</sup> The alien who arrives from a safe third country of the European Community or from a third State figuring on the list will be refused entry.<sup>39</sup> An asylum request made within the country may be refused on the grounds that the alien does not enjoy any right of asylum because he or she has entered Germany from a safe third country. Furthermore, immediate expulsion of the alien is ordered.<sup>40</sup> Legal redress is extremely limited, and expulsion cannot as a rule be delayed through appeal.<sup>41</sup>

The amendment was strongly criticized before it was passed.<sup>42</sup> It was pointed out, for instance, that the decisive criterion for granting asylum was no longer the persecution suffered in the home country but the route chosen to flee. Regarding the structures of the new democracies in Eastern Europe, it was feared that they would be overwhelmed by the large numbers of people expelled. Under these conditions, asylum seekers could not expect to get a fair procedure, and at the end, this might result in an infringement of the principle of *non-refoulement*. Another criticism of the constitutional amendment was that it encouraged asylum seekers to enter the country illegally and to conceal their route of flight in order to circumvent the restrictions. However, the new provisions probably had the desired effect. The number of asylum requests in Germany in 1993 was 26% lower than in 1992. Furthermore, only one third of the 1993 asylum requests were made in the period after the asylum compromise came into effect in the second half of the year.<sup>43</sup>

#### 4.2 France

When a request for asylum is submitted at the border (at an airport or border crossing), entry may be refused if the asylum application is 'manifestly unfounded'.<sup>44</sup> A request is considered to be manifestly unfounded if, before arriving in France, the asylum seeker was residing in a third country where he or she could have applied for asylum. This examination takes place in a summary procedure. Asylum seekers at airports may be kept in so-called holding areas for up to 20 days. The refusal of entry, which can only be decreed formally by the Ministry of the Interior, may be appealed before a judge, though this appeal does

<sup>38</sup> § 26a of the Law on Asylum Procedure in the version of 30 June 1993 and annex 1 to § 26a.

<sup>39</sup> § 18 section 2 of the Law on Asylum Procedure in the version of 30 June 1993.

<sup>40</sup> Renner, G., 'Asyl- und Ausländerrechtsreform', above note 36, 120-1.

<sup>41</sup> Renner, G., 'Asyl- und Ausländerrechtsreform', above note 36, 124-5.

<sup>42</sup> Cf. for instance the statements by representatives of the UNHCR and Amnesty International at the hearings of the Interior Affairs Committee of the German Bundestag, March 1993.

<sup>43</sup> See the figures in Pollern, H.I., 'Die Entwicklung der Asylbewerberzahlen im Jahre 1993,' *ZAR* 1994, 29-30.

<sup>44</sup> Decree of 27 May 1982 on the admission of asylum seekers at the border.

not delay expulsion. If the request for asylum is not refused on the grounds of being manifestly unfounded, authorization to enter the country and a provisional residence permit are issued. The application is subsequently examined in a normal procedure by the responsible asylum authorities.

Asylum seekers who apply for asylum while already in the country must request a provisional residence permit. This may be refused if another country is responsible by international treaty for examining the application (when the Schengen Agreement or Dublin Convention comes into force). A further reason for refusing a residence permit is if the asylum seeker is accepted in a country other than the country of origin. This is the case when a third country is obliged to take back an asylum seeker. If the provisional residence permit is refused, the asylum seeker may insist on the application being examined by the authorities unless another State is obliged by international treaty to examine the request (this provision will become important once the above-mentioned agreements enter into force). This examination is a summary procedure.

The above-mentioned provisions governing the procedure within the country were introduced in the law of 24 August 1993<sup>45</sup> with a view to the forthcoming first asylum agreements. They are also seen as acceptance of the December 1992 Resolution of the European Ministers for Immigration on host third countries.<sup>46</sup>

### 4.3 Austria

In accordance with Austrian law, the possibility of being accepted in a safe third country plays an important role both when entering the territory of Austria and in the asylum application procedure. It is also grounds for refusing asylum.<sup>47</sup>

The conditions of entry (in most cases a valid passport and a visa) applying to all aliens are also valid for asylum seekers. Asylum seekers who do not fulfil these conditions will be granted entry without any formalities only if they come directly from a persecutor State. It is the task of the border authorities to determine whether entry has been direct. In practice, this requirement of direct entry from a persecutor State can

<sup>45</sup> Arts. 31 and 31bis, Ordinance No. 45-2658, 2 Nov. 1945 in the version of Law No. 93-1027, 24 Aug. 1993. Cf. *Documentation Réfugiés* No. 233, Jan. 1994, 19. On asylum procedure in France, see Julien-Laferrrière, F., 'Droit d'asile et politique d'asile en France,' 8 *ASYL* (1993), 75-80 and Oellers-Frahm, K., 'Grundlagen des Asylrechts in Frankreich,' in Hailbronner, K., ed., *Asyl- und Einwanderungsrecht im europäischen Vergleich*, 1992, 29-30; Grewe, C. and Weber, A., 'Die Reform des Ausländer- und Asylrechts in Frankreich,' 20 *EuGRZ* (1993), 496-9.

<sup>46</sup> Julien-Laferrrière, F., 'Droit d'asile', above note 45, 78. See section 2.1 above on the Resolution.

<sup>47</sup> On asylum law in Austria cf. Brandl, U., 'Asylrecht und Asylpolitik in Österreich,' 8 *ASYL* (1993), 3-10 and Pahr, W., 'Asyl- und Einwanderungsrecht in Österreich,' in Hailbronner, K., ed., 'Asyl- und Einwanderungsrecht', above note 45, 66-73, each with references to legislation and literature.

only be fulfilled if the asylum applicant arrives by air, since Austria's neighbours are considered to be safe third countries. Aliens who do not fulfil the above-mentioned criteria for entry do not receive a provisional residence permit under the asylum law and are subject to the normal law for foreigners. This situation applies to about 95% of asylum seekers.<sup>48</sup> They can be deported under the general provisions of the Aliens' Act, although the Aliens' Police *should* examine the *refoulement* prohibition in the light of the 1951 Convention and the ECHR. In many cases, aliens may be detained before being deported. The most common reason for turning down an asylum application is that the refugee was already safe from persecution in another State.<sup>49</sup> A second important reason for rejecting an asylum request is the negative outcome of asylum proceedings in another State.<sup>50</sup>

Austrian third State provisions are severely criticized in the literature and by refugee organizations and the UNHCR.<sup>51</sup> One criticism is that persecuted aliens are rarely granted an asylum application procedure. For instance, aliens arriving by air are refused entry on account of extremely short transit stays, even though the authorities have not determined whether they actually had an opportunity in the third country to request protection. The Aliens' Police, who are regionally organized and usually not familiar with the refugee issue, are unable to carry out thorough investigations to ensure that the *refoulement* ban is observed. The ground for refusing asylum is usually applied because of 'protection elsewhere' and is not linked with the question whether the alien actually enjoyed protection in the third State. Asylum seekers are often turned down solely because the possibility of submitting an asylum application theoretically existed in a third State which is a signatory to the 1951 Convention and the ECHR or which has an office of the UNHCR within its borders. In practice, for instance, asylum applications have been turned down solely because entry into Austria followed a brief transit stay in countries such as Russia, Turkey, Saudi Arabia, Algeria or Iran.<sup>52</sup>

#### 4.4 Switzerland

The Swiss Asylum Act contains various provisions dealing with admittance in a third State. Admittance in a third State can result in refusal of entry, rejection of the asylum application or expulsion during the proceedings.<sup>53</sup>

<sup>48</sup> Brandl, U., 'Asylrecht und Asylpolitik in Österreich', above note 47, 6.

<sup>49</sup> UNHCR, statement of 28 January 1994 to the German Constitutional Court, 6.

<sup>50</sup> § 2 para. 2 and 3 of the Asylum Law, *Österreichisches Bundesgesetzblatt* 1992, 8.

<sup>51</sup> UNHCR statement, above note 42 and supplementary UNHCR statement of 4 July 1994; Holz-Dahrenstaedt, A., 'Asyl in Österreich—ein sicheres Drittland?' *ZAR* 1993, 174–5

<sup>52</sup> Brandl, U., 'Asylrecht und Asylpolitik in Österreich', above note 47, p. 6.

<sup>53</sup> According to art. 16, para. 1 c of the Asylum Act, an asylum application will not be dealt with if the alien can travel to a State which is obliged by international treaty to examine the application and which will respect the principle of *non-refoulement*.

#### 4.4.1 Submission of the asylum application (Article 13a-e of the Asylum Act)

According to article 13a of the Asylum Act, the asylum application must be made either at an open border crossing or at a Swiss representation abroad.<sup>54</sup> The Federal Office for Refugees then decides whether to grant an entry permit.<sup>55</sup> An alien making an asylum application at the border is allowed to enter the country if one of the following three conditions<sup>56</sup> is met: (1) No other country is responsible by international treaty for examining the application and the asylum seeker possesses the necessary travel documents or is threatened as an asylum seeker or is at risk of inhuman treatment; (2) the asylum seeker can credibly demonstrate that he is threatened in the neighbouring State<sup>57</sup> with deportation which is unacceptable in international law; (3) Switzerland is responsible by international treaty for dealing with the asylum application.<sup>58</sup> If none of these conditions is met, the alien may be granted entry if he or she has close relations to persons living in Switzerland. In practice, spouses and underage children can benefit from this provision, though the alien is required to produce proof of the need for asylum protection. Entry can also be granted to asylum seekers who can plausibly demonstrate at the border that they have left their home country on account of political persecution and have arrived at the Swiss border without any delay.<sup>59</sup>

#### 4.4.2 Precautionary expulsion (Article 19 paragraph 2 of the Asylum Act)

Asylum seekers who are in Switzerland may stay until the end of the procedure. However, precautionary expulsion to a third State may be ordered even before the proceedings have been completed if the expulsion is *possible*,<sup>60</sup> *permissible*<sup>61</sup> and *reasonable*.<sup>62</sup> Precautionary expulsion is an

<sup>54</sup> This aspect is not treated here. Asylum seekers who make an application at a Swiss representation in a third State are usually refused entry on the grounds that they may request protection in that third State.

<sup>55</sup> In practice, however, most applications are not made at the border but in the country following entry (usually illegal). In the four years since 1990 only 1.2% to 2.8% of applications have been made at the border or an airport annually.

<sup>56</sup> Art. 13c, Asylum Act.

<sup>57</sup> Art. 13c, Asylum Act, together with art. 4, Asylum Ordinance 1, 22 May 1991; the country from which an alien arrived in Switzerland directly is understood to be a neighbouring State.

<sup>58</sup> If Switzerland were to join the Dublin Convention.

<sup>59</sup> Art. 4(2), Asylum Ordinance 1. As regards entry conditions, the procedure for asylum application at the airport is based on the principles outlined above. In this case, the neighbouring State is considered to be the State from which the alien left by air (art. 4(1), Asylum Ordinance 1), so that intermediate landing and brief transit stays do not interrupt the continuity of the journey.

<sup>60</sup> The alien may be expelled if it is technically possible. This is the case if the asylum seeker has the necessary travel documents or an international treaty exists with a third State (readmission agreement or responsibility agreement).

<sup>61</sup> There must be a guarantee that the asylum seeker will not be politically persecuted in the third State or treated inhumanely or forced to travel to a country where there is a real threat of the above-mentioned risks.

<sup>62</sup> The conditions must be fulfilled cumulatively; Achermann, A. and Hausammann, C., *Handbuch des Asylrechts*, 1991, 332.

interim order which merely determines the place of residence for the duration of the proceedings. This approach is, however, prejudicial to the outcome of the proceedings because expulsion as a rule creates the conditions for rejecting the application as per article 6 paragraph 2 of the Asylum Act (acceptance in a third State as ground for refusing asylum).<sup>63</sup>

Precautionary expulsion to a third State is considered to be *reasonable* if this State is responsible by international treaty for examining the asylum application, the asylum seeker stayed in the third State in question *for some time* before entering Switzerland or has close family or social connections in this third country. The term 'some time' was disputed in this context. In the 1988 asylum ordinance,<sup>64</sup> the term 'some time' was equated to 'without delay', in contrast to article 6 of the Asylum Act (refusal of asylum on account of acceptance in a third State), where the concept 'some time' usually means 20 days.<sup>65</sup> In principle, any earlier stay in a third State, however short, could result in precautionary expulsion, provided enforcement was not 'technically' impossible. The literature has always criticized this provision as being unlawful.<sup>66</sup> In its leading decision of 3 May 1994, the Asylum Appeals Commission has now put an end to this practice of many years' standing, ruling that the terms 'some time' in article 6 of the Asylum Act and in article 19 paragraph 2 of the Asylum Act are identical and in both cases mean '20 days as a rule' (article 2 of asylum ordinance 1). According to the above-mentioned ruling, the definition of 'reasonable' assumes a relationship of a certain quality to a third State. In the case in question, the Asylum Appeals Commission considered a residence permit (of limited duration but still valid at the time of the decision) in a third country (here Italy) as sufficient to make expulsion reasonable.<sup>67</sup>

The practice of the Swiss authorities with regard to article 19 paragraph 2 of the Asylum Act<sup>68</sup> is disputed for another reason. In general, the Federal Office for Refugees only takes into account that the third State has signed the 1951 Convention and the ECHR. The Asylum Appeals Commission appears to support this viewpoint.<sup>69</sup> Taking the abstract legal

<sup>63</sup> Achermann, A. and Hausammann, C., *Handbuch*, above note 62, 335.

<sup>64</sup> Art. 17, Asylum Ordinance 1.

<sup>65</sup> Art. 6, Asylum Act in conjunction with art. 2, Asylum Ordinance 1.

<sup>66</sup> Kälin, W., *Grundriss*, above note 25, 195; Achermann, A. and Hausammann, C., *Handbuch*, above note 62, 333; Stöckli, W., 'Vor einiger Zeit,' 3 *ASTL*, Number 1 (1988), 3-4; Gattiker, M., 'Aus den Augen - aus dem Sinn, Kritik der schweizerischen Erstasylantpraxis,' 3 *ASTL*, Number 1 (1988), 6-13.

<sup>67</sup> Leading decision of the Asylum Appeals Commission of 3 May 1994, not yet published.

<sup>68</sup> The same remarks apply to a rejection at the border.

<sup>69</sup> Decision of the Asylum Appeals Commission, 18 May 1993 re BA, Turkey, *EMARK* Nr. 29, E.2b. The Asylum Appeals Commission furthermore stated: 'Since Germany has signed the 1951 Convention and the ECHR and meets the international legal obligations in common with Switzerland, there is sufficient guarantee that the appellant will not be expelled by Germany to a country where a threat of this nature would exist for him.'

situation as a basis causes a number of problems. The expulsion is handled in many cases by the police alone, who are not very familiar with the refugee issue. It is difficult for the asylum seekers to assert their rights because of ignorance of the law and language difficulties. It should therefore come as no surprise that there have been isolated but repeated reports of cases in which asylum seekers have been sent back to the alleged persecutor State without any detailed examination of their application.<sup>70</sup>

#### 4.4.3 Third State as ground for rejecting asylum (Article 6 paragraph 1 and 2 of the Asylum Act)

According to article 6 paragraph 1a of the Asylum Act, the asylum application of an asylum seeker in Switzerland will generally be refused if he or she stayed for some time in a third State before entering Switzerland and can return there. The length of time spent in the third State in question must as a rule be at least 20 days.<sup>71</sup> In accordance with paragraph 1b of the same article, the application will be turned down if the asylum seeker can travel to a third State where he or she has close family or other social ties.<sup>72</sup> In both the applicable cases of article 6 paragraph 1, travel to the third State must be possible *de facto* and *de jure*. Furthermore, there must be a guarantee that the asylum seeker is permanently protected against deportation and enjoys acceptable living conditions. Cultural, linguistic and religious problems must also be taken into account in the decision.<sup>73</sup>

In principle, application of article 6 paragraph 1 assumes that refugee status will be examined. This examination can only be waived if travel to the third country is possible and any dangers can be ruled out.<sup>74</sup> In accordance with article 6 paragraph 2 of the Asylum Act, an asylum application abroad is also refused as a rule if the asylum seeker can be reasonably expected to apply for asylum in the third State. Such expectations are not reasonable if, for instance, the asylum seeker has close family relations in Switzerland.<sup>75</sup> Refusal of asylum on the basis of paragraph 2 is applied only if the asylum seeker enjoys effective and permanent protection in the third country. This assumes at least that the

<sup>70</sup> Examples in Gattiker, M. 'Aus den Augen', above note 66, 10. Such cases might occur time and again nowadays and are also reported in other countries; see the statement of the UNHCR to Austria, above note 49.

<sup>71</sup> The overall duration of the trip is not relevant if the alien has fled through several countries. The asylum seeker must have spent 20 days in at least one of these States, otherwise the required close relation is not given; cf. Kälin, W., *Grundriss*, above note 25, 168–9.

<sup>72</sup> Kälin, W., *Grundriss*, above note 25, 170.

<sup>73</sup> Cf. Kälin, W., *Grundriss*, above note 25, 170, note 89.

<sup>74</sup> Decision of the Asylum Appeals Commission, 31 Jul. 1992 re S.C., Romania, *EMARK* Nr. 2, E.3.

<sup>75</sup> Pursuant to Art. 79(2), Asylum Act, asylum may be granted to other close relatives of a refugee living in Switzerland if special circumstances warrant reuniting the family in Switzerland.



asylum seeker can claim an asylum application in the third country which corresponds to recognized international standards.<sup>76</sup>

## 5. Final remarks

### 5.1 The responsibility of the host States

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 brief contact with the territory of a third State without having sought or found protection there. This stance is open to political criticism and does not correspond to the UNHCR Executive Committee Conclusions. Expulsion to so-called 'safe third countries' must at least meet the minimum requirements of the 1951 Convention and the ECHR from the legal point of view. It is not enough for the host third country to be safe in just formal terms. Asylum seekers and refugees must be able to receive protection in the third State *de facto*; they must actually have access in the third State to an asylum procedure that meets certain minimum conditions which can be found in the relevant UNHCR Executive Committee Conclusions.<sup>77</sup> The Resolution of the EC Ministers for Immigration correctly demands *effective protection* in the host third country.<sup>78</sup>

Actual practice hardly meets these criteria. The formal approach, according to which the third country has signed the 1951 Convention and ECHR (Austria and Switzerland) or is on a list of 'safe' countries (Germany), allows individual safety to fall by the wayside. No attempt is made to ascertain whether these third States implement their international legal obligations, let alone whether they observe the *non-refoulement* principle in individual cases. Current trends in Western European host countries are a source of serious misgivings. With the development of a growing network of readmission agreements with the countries of Central and Eastern Europe, Western Europe is delegating its responsibility for examining asylum applications to countries which are probably not able structurally or in the individual case to cope with large numbers of asylum requests.<sup>79</sup> Expulsions to such countries, some of which are in the throes of political upheaval, are hardly likely to meet the requirements of the

<sup>76</sup> This emerges from the *refoulement* prohibition of the 1951 Convention and the ECHR. Recognized international standards include the right to an effective appeal, as per ECHR art. 13, against expulsion decisions which may lead to infringement of the *refoulement* principle.

<sup>77</sup> In a statement on 19 Jan. 1994, for instance, Amnesty International points out that asylum proceedings in Greece have serious shortcomings by international minimum standards.

<sup>78</sup> However, cf. Hailbronner, K., 'The Concept of Safe Country', above note 2, 60, who points out that the Resolution of the EC Ministers for Immigration does not require the examination of individual cases, but merely a general assessment of countries.

<sup>79</sup> Classen, C.D., 'Sichere Drittstaaten', above note 36, 702.

1951 Convention. Article 33 enjoins countries to ensure that they observe the *non-refoulement* principle. This obligation entails careful examination of the practice of host third countries with regard to particular groups of asylum seekers and particular countries of origin.

### 5.2 Safe third countries?

As already mentioned, countries in Central and Eastern Europe such as Poland and the Czech Republic are increasingly expected to serve as a safe third country. Serious doubts have been expressed with regard to these two States. For instance, the Administrative Tribunal in Frankfurt an der Oder<sup>80</sup> has stated with regard to *Poland*,<sup>81</sup>

According to the information available to this court, Poland is currently not a safe third country for the applicant. An essential attribute of a safe third country is that the application of the Convention relating to the Status of Refugees and the European Convention on Human Rights ... are guaranteed in this State. The court has serious legal misgivings whether Poland currently meets these conditions ... With the amendment of German asylum law and the steadily increasing number of asylum seekers actually sent back to Poland, however, there is a genuine danger that Poland will not be structurally able to carry out the refugee recognition procedures corresponding to the minimum standards of the 1951 Convention. The necessary infrastructure, administrative resources and legal basis are lacking, and the inevitable consequence is that infringement of the *non-refoulement* principle contained in article 33 of the 1951 Convention cannot be ruled out.

In a decision handed down on 15 September 1993, the Administrative Tribunal of Regensburg stated that the *Czech Republic* is not a safe third State because the relevant Czech legislation, in contravention of the 1951 Convention, does not allow for protection against expulsion outside the context of an asylum application and therefore asylum seekers risk being sent back directly or indirectly to their home country in which they claim they are threatened by persecution.<sup>82</sup>

### 5.3 Safe fourth and fifth States?

The network of readmission agreements which is developing between Western and Eastern European countries conceals additional dangers. It

<sup>80</sup> Decision of 16 Feb. 1994.

<sup>81</sup> Likewise the UNHCR points out that '... Poland will have to deal with a number of asylum-seekers returned from Germany. Given the absence of a refugee law and the lack of structures and personnel prepared to deal with refugee status determination, it is unclear how the Polish authorities will cope with the new situation': UNHCR, 'Legal Factsheets on Asylum Procedures in Central and Eastern Europe,' 1993, 36.

<sup>82</sup> *NVwZ*, Beilage 2/1993, 14. Cf. the decision of the Administrative Tribunal of Karlsruhe, of 27 Jan. 1994 regarding the Czech Republic. The Regensburg decision, however, was largely overridden by the judgment of the Bavarian Superior Administrative Tribunal of 28 Oct. 1993 (*EZAR* 632, Nr. 18).

is conceivable that a host third country will try to expel its asylum seekers to fourth countries. At the International Refugee Conference in Budapest held in February 1993, various Eastern European countries have stated that they, themselves, would expel refugees in their countries to safe third countries.<sup>83</sup> This makes it entirely impossible for the country which expels asylum seekers to third States to supervise observance of the *non-refoulement* principle, as required by article 33 of the 1951 Convention. It is also entirely conceivable that the asylum seeker, after passing through various stations, will end up in the persecutor State, especially if some country along the expulsion chain considers this State to be a 'safe country'.

#### **5.4 Readmission agreements and responsibility agreements**

The multilateral Schengen-Poland Agreement and the new generation of bilateral readmission agreements (for instance the agreement between Switzerland and Germany) have certain features in common with the Dublin Convention and the Schengen Agreement. According to all these agreements, a residence permit, an entry permit, a legal or even an illegal stay in a contracting State creates responsibility. The difference between a convention determining State responsibility and a readmission agreement is that the latter does not oblige the host State to carry out an asylum procedure. The incipient expulsion practice in Central and Eastern Europe is fraught with serious dangers which in our view can only be dealt with by having these countries sign the responsibility agreements as soon as possible. However, this would also entail at least harmonization of procedural standards and later of recognition criteria. Aliens should instead no longer be expelled to host third countries outside the enlarged contractual area.

The future will see the development of *two circles*, an inner circle consisting of the Dublin signatories who acknowledge their obligation to examine asylum applications but do not conduct asylum procedures because they send the asylum seekers to host third countries; and an outer circle of non-signatory States that accept asylum seekers but are themselves not obliged to carry out asylum procedures. They in turn will try to send back the aliens to another country. The policy of the Dublin and Schengen signatories seems to be shortsighted: 'refugee in orbit' situations will not be avoided; on the contrary they will increase in number. To the extent that asylum seekers still have a claim to an asylum procedure after expulsion to a third country, they will try — after refusal and perhaps even after recognition — to enter the West again and make a new asylum application.

<sup>83</sup> Classen, C.D., 'Sichere Drittstaaten', above note 36, 702.

## Résumé

Cet article touche à un aspect important de la politique d'asile des pays d'Europe Occidentale. Chaque fois que cela est possible, ceux-ci tentent de renvoyer les demandeurs d'asile vers des 'pays tiers sûrs'. L'existence d'un 'pays tiers sûr' entraîne pour le demandeur d'asile le refus d'entrée, l'expulsion durant la procédure d'asile ou la négation d'une demande d'asile. Cependant, le principe fonctionne seulement si les demandeurs d'asile ou les réfugiés peuvent effectivement être renvoyés vers un pays tiers. La Convention de Dublin et l'Accord de Schengen offrent tous deux certaines possibilités. Les pays européens essayent en ce moment de conclure des accords de réadmission avec autant de pays tiers que possible. Le présent article se penche en particulier sur l'accord entre le groupe de Schengen et la Pologne et sur celui entre la Suisse et l'Allemagne, ce dernier étant considéré comme un exemple d'accord bilatéral moderne de réadmission. Néanmoins, il y a des limites à l'expulsion des demandeurs d'asile vers des pays tiers. La Convention de 1951 et la CEDH exigent entre autres qu'un standard minimum soit respecté. De plus dans le domaine du 'soft law', les conclusions du Comité Exécutif du HCR doivent être observées. Les auteurs examinent la situation prévalant dans certains pays européens (Allemagne, France, Autriche et Suisse) et montrent jusqu'où le principe de pays sûr influence la législation et la pratique nationales. Ils concluent avec quelques remarques concernant la responsabilité des Etats hôtes, la soi-disant sécurité dans les 'troisièmes' ou 'quatrièmes' pays, et les relations entre les accords de réadmission et les conventions gouvernant la responsabilité des Etats dans l'examen des demandes d'asile (Dublin et Schengen).

## Resúmen

El presente artículo se refiere a un aspecto importante de la política de asilo en Europa occidental. Los países del área, siempre que les es posible, tratan de enviar a los demandantes de asilo hacia los llamados "seguros terceros países". La existencia de esta tercera opción, da como resultado el rechazo de entrada al demandante de asilo, en su expulsión durante el proceso de asilo o en la negativa de la solicitud de asilo. Sin embargo, este principio únicamente funciona si los solicitantes de asilo o refugiados pueden ser de hecho enviados hacia terceros países. Tanto la Convención de Dublin como el Acuerdo Schengen ofrecen ciertas posibilidades de ello. En la actualidad, los países europeos están tratando de concluir acuerdos de readmisión con cuantos terceros países sea posible. Este artículo enfoca particularmente el Acuerdo multilateral Schengen-Polonia y el tratado entre Suiza y Alemania, considerados como ejemplos modernos de acuerdos bilaterales de readmisión. Hay límites, sin embargo, para la expulsión de demandantes de asilo hacia terceros países. En particular, la Convención de 1951 y la Convención Europea de los Derechos Humanos requieren el cumplimiento de ciertas medidas básicas. Más aún, en el área de "ley dulce" se pide la observancia de las resoluciones del Comité Ejecutivo del ACNUR. Los autores examinan situaciones prácticas en ciertos países europeos (Alemania, Francia, Austria y Suiza) y muestran hasta qué punto el principio de los terceros países tiene un papel en la legislación nacional y en su práctica. Concluyen con algunas observaciones sobre la responsabilidades de los países anfitriones, es decir la seguridad en terceros o cuartos Estados y su relación entre los acuerdos de readmisión y convenciones respecto a la responsabilidad de los Estados para examinar las solicitudes de asilo. (Dublin y Schengen).