A COMPARATIVE PERSPECTIVE ON SAFE THIRD AND FIRST COUNTRY OF ASYLUM POLICIES IN THE UNITED KINGDOM AND NORTH AMERICA: LEGAL NORMS, PRINCIPLES AND LESSONS LEARNED

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INTRODUCTION

The Refugee Convention and Protocol define who is a refugee and the rights to which refugees are entitled.[1] These include protection against expulsion if lawfully present in a state's territory, and against return (refoulement) to the frontiers of a country where their lives or freedom would be threatened on account of their "race, religion, nationality, membership of a particular social group or political opinion" (the five Convention grounds).[2] These instruments do not, however, positively require states to grant lawful status to all refugees who arrive at their borders or who are present in their territory without such status. The Universal Declaration, meanwhile, recognizes a universal right to seek and enjoy asylum in other countries, but not a right to choose one's country of asylum, or any obligation to grant refugee or asylum status.[3]

To what extent, then, do asylum-seekers have a right to expect that the particular country in which they find themselves consider their applications for refugee status and, if recognized, grant them the benefits of that status? UNHCR takes the position that:

> asylum-seekers and refugees should ordinarily be processed in the territory of the State where they arrive, or which otherwise has jurisdiction over them. This is also in line with general State practice. The primary responsibility to provide protection rests with the State where asylum is sought.[4]

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[1] Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention]; Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, *ratified* Oct. 4, 1968, 114 CONG. REC. 29,607 (1968) [hereinafter Refugee Protocol].

[2] Refugee Convention, *id.* art. 1, 32, 33.

[3] G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 14 (Dec. 10, 1948).

[4] U.N. High Comm'r for Refugees [UNCHR], *Guidance Note on Bilateral And/or Multilateral Transfer Arrangements of Asylum-Seekers*, ¶ 1 (May 2013), https://www.refworld.org/docid/51af82794.html.

There is, however, "no unfettered right to choose one's country of asylum," although "[t]he intentions of an asylum-seeker . . . ought to be taken into account to the extent possible."[5] UNHCR accepts that transfer agreements to either safe first or third countries of asylum are legally permissible,[6] but its position is that they should ideally be between states parties to the Convention and Protocol or "otherwise party to relevant refugee and human rights instruments," "contribute to the enhancement of the overall protection space in the transferring State, the receiving State and/or the region as a whole" and be "governed by a legally binding instrument, challengeable and enforceable in a court of law by the affected asylum-seekers."[7]

In addition, the transfer arrangement needs to guarantee that each asylum-seeker:

- will be individually assessed as to the appropriateness of the transfer, subject to procedural safeguards, prior to transfer. Pre-transfer assessments are particularly important for vulnerable groups, including unaccompanied and separated children. The best interest of the child must be a primary consideration;
- will be admitted to the proposed receiving State;
- will be protected against *refoulement*;
- will have access to fair and efficient procedures for the determination of refugee status and/or other forms of international protection;
- will be treated in accordance with accepted international standards (for example, appropriate reception arrangements; access to health, education and basic services; safeguards against arbitrary detention; persons with specific needs are identified and assisted); and
- if recognized as being in need of international protection, will be able to enjoy asylum and/or access a durable solution.[8]

There should also be evidence of a meaningful connection to the other State that would make it "reasonable and sustainable" for a person to apply for asylum there. The connections that UNHCR has recognized are principally family ties; long-term residence or long-term stays in the prior country; or linguistic or cultural connections.[9]

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[5] *Id.* ¶ 3(i) (citation omitted).

[6] *See id.* ¶¶ 2-3.

[7] *Id.* ¶¶ 3(iii)-(v) (citation omitted).

[8] *Id.* ¶ 3(vi) (citation omitted).

[9] UNCHR, *Legal Considerations Regarding Access to Protection and a Connection Between the Refugee and the Third Country in the Context of Return or Transfer to Safe Third Countries* ¶ 6 & n.15 (Apr. 2018), https://www.refworld.org/docid/5acb33ad4.html. Another ongoing concern that has been expressed repeatedly by UN bodies and in Global Consultations

Wealthy refugee-receiving countries across the global north have recently been experimenting with systems that they believe will allow them lawfully to remove or turn back asylum-seekers reaching their borders, without considering their claims for international protection. These include the Trump administration's Asylum Cooperation Agreements (ACAs), the United Kingdom's Nationality and Borders Act,[10] and the recent amendments to Denmark's Aliens Act that will allow asylum-seekers to be transferred to third countries for processing.[11] Although these systems have many important differences, they rest on a shared premise that neither the Refugee Convention nor international, regional or domestic human rights laws prohibit such transfers, as long as they are to a "safe first country of asylum," in which the transferees have previously had access to protection, or a "safe third country," where they will in theory have access to protection in the future.[12]

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has been that these kinds of transfers should not be for the purpose of burden-shifting or reduce access to asylum overall. For UNHCR's position on these principles, see generally UNCHR, *Global Consultations on International Protection 2nd Meeting: Asylum Processes (Fair and Efficient Asylum Procedures)*, EC/GC/01/12, (May 31, 2001), https://www.refworld.org/docid/3b36f2fca.html; UNHCR, *The Dublin II Regulation: A UNHCR Discussion Paper* (Apr. 2006), https://www.refworld.org/docid/4445fe344.html; UNHCR, *UNHCR Position on the Return of Asylum-Seekers to Greece under the "Dublin Regulation"* (Apr. 15, 2008), https://www.refworld.org/docid/4805bde42.html; UNHCR, *Conclusions Adopted by the Executive Committee on the International Protection of Refugees: 1975-2009*, at 18, 77, 168, 196, 199 (Dec. 2009), https://www.unhcr.org/en-us/578371524.pdf. See also UNHCR, *Summary Conclusions on the Concept of 'Effective Protection' in the Context of Secondary Movements of Refugees and Asylum Seekers* (Feb. 2003), https://www.refworld.org/docid/3fe9981e4.html.

[10] Nationality and Borders Bill 2021-22, HC Bill [141] (UK). As of February 2022, the Bill had passed the House of Common and was at the report stage in the House of Lords. *See* Nationality and Borders Bill 2021-22, HL Bill [82] (UK); *Nationality and Borders Bill*, U.K. PARLIAMENT, https://bills.parliament.uk/bills/3023 (Feb. 18, 2022, 6:57 PM)

[11] Megan Specia, *Denmark Would Push Asylum Seekers Outside Europe for Processing*, N.Y. TIMES (June 3, 2021), https://www.nytimes.com/2021/06/03/world/europe/denmark-asylum-process.html (last updated Sept. 2, 2021). For UNHCR's strongly worded critique of the law when it was first proposed, see UNHCR, *Observations on the Proposal for amendments to the Danish Alien Act*, ¶¶ 5-8 (Mar. 8, 2021), https://www.refworld.org/docid/6045dde94.html.

[12] There are two broad types of safe third country (STC) rules/mechanisms. The first designates what may be called safe countries of protection, to which a refugee claimant may be transferred in order to seek or enjoy international protection. The second establishes a list (often called a "White List") of safe countries of origin, whose residents are presumed not to need international protection at all. There are significant overlaps between the two. Both seek to justify expedited removal of refugee claimants, and both rely on often-contested findings about the destination country's compliance with international human rights and refugee law, and some courts have explicitly found that similar principles apply when deciding if a country is "safe" for either purpose. This article is concerned, however, only with the first: "safe"

This article will first look at the history of "safe country" rules and procedures in North America before exploring litigation over such rules in the United Kingdom, in order to identify emerging legal norms limiting or prohibiting "safe country" transfers. We will argue that although there is a clear legal consensus that transfer cannot take place without an individualized assessment of whether it would put an asylum-seeker at risk of refoulement or inhuman and degrading treatment, there is so far little indication of consensus on the need to ensure access to the positive benefits of refugee status, such as housing, education, employment and eventual integration, or on the relevance to the legality of the transfer of social and cultural ties or private and family life.

I. U.S. FIRST ASYLUM AND SAFE THIRD COUNTRY LAW AND POLICIES

A. Containment and Asylum Prevention Policies

The current U.S. safe third country agreements operate in tandem with a series of other internal policies aimed at preventing access to asylum in the United States. Before detailing each of these policies, it is useful to set out a historical overview of the sources of U.S. immigration law on which the government has grounded its authority to restrict persons seeking asylum who could ostensibly have sought asylum prior to arrival in the United States. The Immigration and Nationality Act (INA), which incorporates the United States' codification of the Refugee Protocol through the Refugee Act of 1980, includes certain exceptions to eligibility for asylum. Among these are aliens who may be removed to a safe third country; aliens who did not apply for asylum within one year of arrival; and aliens who previously applied for and were denied asylum.[13] The INA also gives discretion to the Attorney General to deny asylum to aliens who have "firmly resettled in another country prior to arriving in the United States."[14]

It is important to note that these bars, which operate once an individual has arrived on U.S. soil, are not the only ones preventing access to asylum under U.S. law. The United States has implemented a wide range of laws and policies to externalize its borders for decades, with the intention of preventing access to asylum.[15] Among them are the agreements the United States has

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countries of protection.

[13] Immigration and Nationality Act (INA), 8 U.S.C. § 1158(a)(1) (amended 1980). For discussion on use of the term "alien" in the INA, see Legal Info. Inst., *Alien*, CORNELL L. SCH., https://www.law.cornell.edu/wex/alien (last visited Sept. 15, 2021). The United States ratified the Refugee Protocol in 1968, see *supra* note 1.

[14] § 1158(b)(2)(A)(vi). Section B.2 relies on the discussion of the history of firm resettlement in *Matter of A-G-G-*, 25 I. & N. Dec. 486, 489-96 (B.I.A. 2011) and provides more detailed analyses in the relevant regulations and cases.

[15] A thorough review of the U.S. migration policies vis-à-vis its southern neighbors

entered into with Mexico, principally, the 2009-2017 Mérida Initiative and its *Programa Frontera Sur* through which Mexico has carried out U.S. migration enforcement by tightening its border with Guatemala and cracking down on migrants found in Mexico.[16] The United States imposed similar policies on Haiti, particularly the U.S.-Haiti agreement of 1981 that authorized the U.S. Coast Guard to interdict Haitian vessels on the high seas and return Haitian asylum-seekers before they could enter U.S. territorial waters.[17] The earlier U.S.-Mexico policies have never been challenged in U.S. courts, but the U.S. Supreme Court upheld the U.S.-Haitian interdiction policy in *Sale v. Haitian Centers Council, Inc.*, a case which has ramifications for safe third and first country of asylum policies in general, and will be discussed later in this article.[18]

B. U.S. Law on Firm Resettlement as a "First Country of Asylum" Policy

The initial "first country of asylum" provision in U.S. law was the firm resettlement bar, which can be traced back to a provision in the Displaced Persons Act of 1948.[19] The United States did not ratify the 1951 Refugee Convention, but following the Refugee Convention's coming into force, passed the Refugee Relief Act in 1953.[20] The Refugee Relief Act included in its refugee definition an individual "who has not been firmly resettled."[21] The

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appears in Bill Frelick et al., *The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*, 4 J. MIGRATION & HUM. SEC. 190, 199-203 (2016).

[16] *See generally* Mérida Initiative, U.S. DEP'T OF STATE, https://2009-2017.state.gov/j/inl/merida//index.htm. The State Department points to Mexico's apprehension of more than 150,000 migrants in FY2015 and FY2016 as an indication of success of the Mérida Initiative. CLARE R. SEELKE & KRISTIN FINKLEA, CONG. RSCH. SERV., R41349, U.S.-MEXICO SECURITY COOPERATION: THE MÉRIDA INITIATIVE AND BEYOND 24-25 (2017). Mexico has received more than $100 million in U.S. equipment and training specifically for security along its southern borders with Guatemala and Belize. *See* Alejandra Castillo, *Programa Frontera Sur: The Mexican Government's Faulty Immigration Policy*, COUNCIL ON HEMISPHERIC AFF. (Oct. 26, 2016), http://www.coha.org/programa-frontera-sur-the-mexican-governments-faulty-immigration-policy/.

[17] Agreement on Migrants-Interdiction, Haiti-U.S., Sept. 23, 1981, 33 U.S.T. 3559, T.I.A.S. No. 10,241.

[18] *See generally* Sale v. Haitian Ctr. Council, Inc., 509 U.S. 155 (1993).

[19] Displaced Persons Act of 1948, Pub. L. No. 80-774, §§ 2(c), 4, 62 Stat. 1009, 1009, 1011 (1948) (permitting visas to be issued to eligible displaced persons who, *inter alia,* had not been "firmly resettled" by January 1, 1948).

[20] *See* UNHCR, STATES PARTIES TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL 1 (Apr. 2015), https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf.

[21] Refugee Relief Act of 1953, ch. 336, Pub. L. No 83-203, § 2(a), 67 Stat. 400, 400 (1953) (amended 1954 and 1957) (authorizing issuance of 240,000 special immigrant visas). The relevant language in the 1951 Refugee Convention appears in art. 1, sections C(3) and E,

bar remained in the law until 1957,[22] but even after it was omitted, firm resettlement remained as a discretionary bar to refugee admissions.[23]

The Supreme Court decided the first case on firm resettlement in 1971. In *Rosenberg v. Yee Chien Woo*, involving a Chinese national who had lived in Hong Kong for six years before arriving in the United States, the Supreme Court addressed whether courts had to examine an individual's firm resettlement in a prior country in determining eligibility for asylum in the absence of a statutory basis for the bar.[24] The Court found that the omission of a firm resettlement provision in the Refugee Relief Act was unintentional and did not require a departure from the longstanding principle of firm resettlement in U.S. asylum considerations.[25] The Court did not establish precise factors for deciding whether an individual was firmly resettled, but stated that firm resettlement was "one of the factors which the [immigration adjudicators] must take into account to determine whether a refugee seeks asylum in this country as a consequence of his flight to avoid persecution."[26] The Supreme Court's decision in *Woo* established the firm resettlement bar as a critical discretionary factor in asylum decisions, though criteria for that determination were inconsistently applied by adjudicators and courts.[27]

In 1980, the immigration agency (the Immigration and Naturalization Service, INS at the time) issued Interim Regulations that required immigration adjudicators to apply firm resettlement as a mandatory bar to asylum.[28] The Regulations required adjudicators to consider various factors

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which exclude from the refugee definition an individual who "has acquired a new nationality, and enjoys the protection of the country of his new nationality," and one who "is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country." Refugee Convention, *supra* note 1, art. 1 §§ C, E.

[22] Refugee Relief Act § 20 (terminating after December 31, 1956), *amended by* An Act to Amend the Immigration and Nationality Act, and for Other Purposes, Pub. L. No. 85-316, § 15(a), 71 Stat. 639, 643 (1957).

[23] Immigration and Nationality Act, Pub. L. No. 82-414, § 208(b), 66 Stat. 163, 167 (1952). From 1957-1990, the former U.S. Immigration and Naturalization Service (INS) continued to apply firm resettlement as a bar to asylum. *See, e.g.*, Matter of Sun, 12 I. & N. Dec. 36 (B.I.A. 1966).

[24] 402 U.S. 49, 50-52 (1971).

[25] *See id.* at 55-56.

[26] *Id.* at 56.

[27] *Compare* Chinese Am. Civic Council v. Att'y Gen. of U.S., 566 F.2d 321, 328 n.18 (D.C. Cir. 1977) (applying factors such as passage of time, family ties, intent, and business and property connections as part of totality of circumstances test) *with* Abdille v. Ashcroft, 242 F.3d 477, 486 (3rd Cir. 2001) (rejecting the totality of circumstances approach and focusing on receipt of permanent resident status, citizenship, or other specific indicia of status).

[28] 8 C.F.R. § 208.8(f)(1)(ii) (1981), Asylum Procedure, Nat'l Archives & Records

in comparison to other residents of the prior country: housing availability and conditions; employment availability and suitability; ability to own or obtain property; and the ability to enjoy the other "rights and privileges" of other residents.[29] Examples of these other benefits listed in the Regulations were travel documents, education, public relief and naturalization.[30]

In 1989, the Board of Immigration Appeals (BIA) decided in *Matter of Soleimani* that, despite the language of the 1980 regulations, firm resettlement was a discretionary consideration, and should not be applied as a mandatory bar by immigration judges or the Board in asylum decisions.[31] It also placed the burden of proof on the immigration service to prove up the foreign laws establishing that the refugee was firmly resettled in the prior country of asylum.[32] The firm resettlement provision was amended in 1990 to require that all immigration adjudicators apply the provision as a mandatory bar to asylum.[33] The bar was codified in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996[34] and included in the amended Immigration Regulations in 2000, with essentially the same language as in the 1990 regulations.[35] The firm resettlement bar, per the Regulations, requires that the government prove that the third country has

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Admin., https://tile.loc.gov/storage-services/service/ll/cfr/cf/r1/98/10/25/-T/8C/IP/20/8/cfr1981025-T8CIP208/cfr1981025-T8CIP208.pdf. The Regulations set out broad factors for triggering the bar: 1) whether the individual had been offered "resident status, citizenship, or some other type of permanent resettlement" by another country to which he had traveled and where he had entered "as a consequence of his flight from persecution;" unless 2) he faced substantial and conscious restrictions to residence in that country that s/he could not be considered to be resettled. § 208.14.

[29] § 208.14.

[30] *Id.* It is interesting to note the parallel between these factors and the factors considered by UNHCR of what states should take into account in determining what constitutes "effective protection" for purposes of whether a refugee could be transferred to a "first country of asylum." UNHCR, *A Guide to International Refugee Protection and Building State Asylum Systems*, at 163 (2017), https://www.unhcr.org/3d4aba564.pdf. Notable omissions in the U.S. regulations compared to the international factors as indicated by UNHCR are family and cultural ties.

[31] 20 I. & N. Dec. 99, 104 (B.I.A. 1989).

[32] *Id.* at 106.

[33] 8 C.F.R. § 208.14(c)(2) (1991), Procedures For Asylum And Withholding of Deportation, Nat'l Archives & Records Admin., https://tile.loc.gov/storage-services/service/ll/cfr/cf/r1/99/10/26/-T/8C/IP/20/8/cfr1991026-T8CIP208/cfr1991026-T8CIP208.pdf (mandatory denial).

[34] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, § 604, 110 Stat. 3009-546, 3009-691 (codified as amended at 8 U.S.C. § 1158(b)(2)(A)(vi)) (amending Immigration and Nationality Act § 208(b)(2)(A)(vi)) [hereinafter IIRIRA].

[35] 8 C.F.R. § 1208.13(c)(1), (2)(i)(B) (2001).

formally offered the alien indefinite residence status.[36]

However, the federal courts proceeded to take a range of perspectives in deciding what factors established an offer of indefinite residence status, and what kind of status qualified as 'indefinite.' In the precedent decision of *Matter of A-G-G-*, the BIA categorized the federal caselaw as incorporating two main approaches: the "direct offer" approach, and the "totality of the circumstances" approach.[37] The BIA defined the "direct offer" approach as requiring that the government provide direct evidence of an offer of some form of permanent residence, "such as a grant of asylum, a residence permit, or . . . a passport" or other travel document.[38] In the alternative "totality of the circumstances" approach, courts would consider indirect evidence such as: residence or citizenship laws; the refugee's intentions to remain; his/her length of stay; and social and economic ties.[39] Under the latter approach, evidence of a "direct offer" was a single factor among other indirect evidence of firm resettlement.[40] In *Matter of A-G-G-*, the BIA analyzed the federal court decisions incorporating these two approaches and established a four-step framework based on the commonalities between them and the language of the Regulations.[41] It clarified that as a first step, the Department of Homeland Security (DHS) has the *prima facie* burden of presenting evidence of the refugee's firm resettlement—evidence that might include "a passport, a travel document, or other [proof] of permanent residence" or refugee status.[42] In the absence of direct evidence, the government would be required to produce indirect evidence sufficient to establish permanent resettlement in the prior country.[43] The indirect evidence factors are particularly interesting for the normative principles discussion, as they expand on the 1980 regulations to include, according to the BIA:

> the immigration laws or refugee process of the country of proposed resettlement; the length of the alien's stay in a third country; the alien's intent to settle in the country; family ties and business or property connections; the extent of social and economic ties developed by the alien in the country; the receipt of government benefits or assistance,

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[36] *See* § 1208.13(c)(2)(ii); § 1208.15.

[37] 25 I. & N. Dec. 486, 495 (B.I.A. 2011).

[38] The Third, Seventh and Ninth Circuit Courts of Appeals adopted the "direct offer" approach. *See* Abdille v. Ashcroft, 242 F.3d 477 (3rd Cir. 2001); Diallo v. Ashcroft, 381 F.3d 687 (7th Cir. 2004); Maharaj v. Gonzales, 450 F.3d 961 (9th Cir. 2006).

[39] See discussion of these factors in *A-G-G-*, 25 I. & N. Dec. at 496, 498.

[40] *Id.* at 495-96. The Second and Fourth Circuits adopted the totality of circumstances approach. *Id.* (citing Sall v. Gonzales, 437 F.3d 229, 233 (2d Cir. 2006); Mussie v. I.N.S., 172 F.3d 329, 331 (4th Cir. 1999)).

[41] *Id.* at 500-01.

[42] *Id.* at 501-02.

[43] *Id.* at 502.

> such as assistance for rent, food and transportation; and whether the alien had legal rights normally given to people who have some official status, such as the right to work and enter and exit the country.[44]

The second step of the analysis shifts the burden to the refugee to rebut DHS' *prima facie* showing.[45] The refugee must establish, by a preponderance of evidence, that the first country did not make the offer or s/he could not qualify for it, or rebut the factors in the DHS' evidence to establish that s/he could not legally and permanently remain.[46] The third step requires the adjudicator to assess the totality of the evidence and determine whether firm resettlement has been established or rebutted by a preponderance of evidence.[47] Finally, if the judge finds the individual has been firmly resettled, the refugee has the burden to show whether an exception applies that entitles him or her to asylum.[48] *Matter of A-G-G-* was the state of firm resettlement law until the 2019 interim rule discussed below, which purported to address "third country" considerations, but addressed both first country of asylum and third country transit or stay as bars to asylum.[49]

C. U.S. Law on Safe Third Country of Asylum Considerations

The safe third country bar was implemented by regulations passed in 1995, which allowed adjudicators to deny asylum on a discretionary basis where asylum (or an equivalent form of protection) was available in a third country.[50] Like the firm resettlement bar, the safe third country bar was codified in IIRIRA in 1996, during the Clinton Administration.[51] IIRIRA provides that an alien may not apply for asylum if s/he "may be removed, pursuant to a bilateral or multilateral agreement, to a country . . . where [his/her] life or freedom would not be threatened on [protected grounds], and where the alien would have access to a full and fair asylum procedure . . . or

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[44] *Id.* at 502 (citation omitted); *cf.* 8 C.F.R. § 208.14 (1981).

[45] *A-G-G-*, 25 I. & N. Dec. at 503.

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] The USCIS' training manual continues to cite *Matter of A-G-G-* as good law. *See* U.S. CITIZENSHIP & IMMIGR. SERVS., RAIO DIRECTORATE – OFFICER TRAINING 8, 29-30 (2019), https://www.uscis.gov/sites/default/files/document/foia/Firm_Resettlement_LP_RAIO.pdf. For recent cases citing *Matter of A-G-G-*, see, for example, *Matter of K-S-E-*, 27 I. & N. Dec. 818, 819-22 (B.I.A. 2020), https://www.justice.gov/eoir/page/file/1267846/download.

[50] 8 U.S.C. 1158(a)(2)(A); *see also* BEN HARRINGTON, CONG. RSCH. SERV., LSB10402, SAFE THIRD COUNTRY AGREEMENTS WITH NORTHERN TRIANGLE COUNTRIES: BACKGROUND AND LEGAL ISSUES 3-4 (2020).

[51] IIRIRA, *supra* note 34, § 604(a) (codified as amended at 8 U.S.C. § 1158(a)(2)(A)).

[other] temporary protection."[52] The law, then, has two prerequisites: 1) the existence of an agreement between the United States and the country to which the individual could be removed where s/he would not face persecution; and 2) access to full and fair procedures in the removal country for asylum or an equivalent form of protection.

In July 2019, the Department of Homeland Security (DHS) issued an Interim Final Rule on 'third country' considerations concerning aliens applying for asylum in the United States, stating:

> Notwithstanding [the firm resettlement regulation], any alien who enters, attempts to enter, or arrives in the United States across the southern land border on or after July 16, 2019, after transiting through at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence en route to the United States, shall be found ineligible for asylum . . . .[53]

The Rule includes several exceptions which the alien bears the burden of proving: that s/he applied for protection or asylum in at least one country outside the country of origin and received a final decision denying protection; or that s/he only travelled through countries that are not parties to the Refugee Convention or Protocol or the Convention against Torture; or that s/he has been a victim of 'severe' human trafficking. The Rule also states that aliens who fall under the firm resettlement provision are automatically presumed not to have a 'credible fear of persecution' from their countries of origin.[54]

So far, there have been four safe third country (STC) agreements executed between the United States and other states: with Canada,[55] Guatemala,[56] Honduras,[57] and El Salvador.[58] These will be explained and assessed below;

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[52] *Id.*

[53] Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829, 33,843 (July 16, 2019) (codified at 8 C.F.R. pt. 208, 1003, 1208).

[54] The Rule's conflation of fear from country of origin with fear from country of transit is one of the most problematic aspects of it. The Rule contemplates that an offer of "permanent resident status" or "citizenship," if granted by a third country, automatically presume lack of persecution in the native country. *But see* Maharaj v. Gonzales, 450 F.3d 961, 1029 (9th Cir. 2006) (the Regulation's focus on "offer" rather than the receipt of "some other type of permanent resettlement" underscores that the resettlement question turns on whether the alien remains in fear of being returned to persecution in his native country).

[55] Agreement for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, Can.-U.S., Dec. 5, 2002, T.I.A.S. No. 04-1229 (entered into force Dec. 29, 2004).

[56] Agreement on Cooperation Regarding the Examination of Protection Claims, Guat.-U.S., July 26, 2019, T.I.A.S. No. 19-1115 (entered into force Nov. 15, 2019).

[57] Agreement for Cooperation in the Examination of Protection Claims, Hond.-U.S., Sept. 25, 2019, T.I.A.S. No. 20-325 (entered into force March 25, 2020).

[58] Agreement for Cooperation in the Examination of Protection Claims, El Sal.-U.S.,

however, they must be understood in the context of a slew of additional policies put in place primarily but not entirely by the Trump Administration, particularly 'Metering;' the Migrant Protection Protocols with Mexico; the Transit-Country Asylum Ban; Prompt Asylum Case Review; and the Humanitarian Asylum Review Program. Recognizing the complex interplay of these various policies is essential to appreciate the full effect they have on the right to asylum, but also to understand the choices facing the Biden Administration in restoring access to asylum and related human rights guarantees to refugees and migrants.[59]

1. Metering

In 2016, the Obama Administration instituted the 'metering' policy aimed at placing numerical *per diem* limits on individuals seeking asylum at the border.[60] At the time, it was to deter an upsurge of Haitians who were arriving at the San Ysidro border from Cuba.[61] The Trump Administration expanded the program and applied it to all nationalities.[62] As of the time of this writing, it remains intact.[63]

Sept. 20, 2019, T.I.A.S. No. 20-1210 (entered into force Dec. 10, 2020).

[59] A chart from the Migration Policy Institute (MPI) illustrating these policies can be found in the Appendix.

[60] Although the MPI chart states that metering began in 2018, litigation has since revealed that it actually began under the Obama Administration in 2016. *See* David J. Bier, *Obama Tripled Migrant Processing at Legal Ports - Trump Halved It*, CATO INST.: CATO AT LIBERTY (Feb. 8, 2019), https://www.cato.org/blog/obama-tripled-migrant-processing-legal-ports-trump-halved-it (citing Al Otro Lado, Inc. v. Nielsen, 327 F. Supp. 3d 1284, 1315, 1321 (S.D. Cal. 2018)) ("[T]urning back asylum seekers at ports of entry actually started in 2016 under the Obama administration. Customs and Border Protection (CBP) officers at ports of entry had already developed a policy in May 2016 of forcing asylum seekers to wait in Mexico. The Watch Commander at the San Ysidro port in San Diego told officers on May 29, 2016 'to ensure that groups that may be seeking asylum are directed to remain in the waiting area on the Mexican side.'").

[61] *See Metering and Asylum Turnbacks*, AM. IMMIGR. COUNCIL (Mar. 8, 2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/metering_and_asylum_turnbacks_0.pdf.

[62] *Id.* (under metering, CBP officers assert a lack of capacity to inspect and process asylum seekers, requiring them to wait for weeks or months in Mexico just for the opportunity to start the asylum process. This practice began as early as 2016 at certain ports of entry along the U.S.-Mexico border but its use expanded significantly, border-wide, during the Trump administration); *see also* Muzaffar Chishti & Jessica Bolter, *Interlocking Set of Trump Administration Policies at the U.S.-Mexico Border Bars Virtually All from Asylum*, MIGRATION POL'Y INST. (Feb. 27, 2020), https://www.migrationpolicy.org/article/interlocking-set-policies-us-mexico-border-bars-virtually-all-asylum (metering).

[63] *See* David Bier, Commentary, *Biden's Closed Door Immigration Policies are not 'Open Borders*,' CATO INSTITUTE (Feb. 18, 2021), https://www.cato.org/commentary/bidens-closed-door-immigration-policies-are-not-open-borders; *Three Trump-Era Policies Still*

2. Migrant Protection Protocols

On June 9, 2019, the United States and Mexico entered into an agreement by which Mexico committed to accepting migrants back from the United States and to expanding its immigration enforcement.[64] Initially, Mexican President Lopez Obrador had pushed back against U.S. pressure to accept non-Mexican migrants deported from the United States, but following the Trump Administration's threat to place tariffs on Mexican goods, he conceded to the 'Remain in Mexico' agreement.[65] The MPP agreement required Mexico to accept all migrants from Spanish-speaking countries whom the United States sent back under the policy.[66] The United States subsequently expanded the program to include Brazilians.[67] As a result of the MPP, more than 70,000 non-Mexican asylum-seekers were returned to Mexico from the United States to await their court hearings.[68] On January 21, 2021, the Biden Administration suspended the program and since then, no new people have been enrolled.[69] On June 1, 2021, DHS terminated the program entirely, but the consequences of the MPP expulsions have not been fully addressed.[70]

Preventing Refugees from Seeking Safety in the US, ASYLUM ACCESS: BLOG (Apr. 13, 2021), https://asylumaccess.org/three-trump-era-policies-still-preventing-refugees-from-seeking-safety-in-the-us/.

[64] Joint Declaration and Supplementary Agreement Regarding Irregular Migration, at 3-4, Mex.-U.S., June 7, 2019, T.I.A.S. No. 19-607 [hereinafter MPP Agreement].

[65] *See* Chishti & Bolter, *supra* note 62; Nick Miroff & Kevin Sieff, *How Mexico Talked Trump out of Tariff Threat with Immigration Crackdown Pact*, WASH. POST (June 10, 2019), https://www.washingtonpost.com/immigration/trump-mexico-immigration-deal-has-additional-measures-not-yet-made-public/2019/06/10/967e4e56-8b8e-11e9-b08e-cfd89bd36d4e_story.html.

[66] *See* MPP Agreement, *supra* note 64, at 3-4; U.S. CUSTOMS & BORDER CONTROL, GUIDING PRINCIPLES FOR MIGRANT PROTECTION PROTOCOLS 1 (2019).

[67] Chishti & Bolter, *supra* note 62; *see also* Press Release, Dep't of Homeland Sec., DHS Expands MPP To Brazilian Nationals (Jan. 29, 2020), https://www.dhs.gov/news/2020/01/29/dhs-expands-mpp-brazilian-nationals.

[68] *Explainer: The Migrant Protection Protocols*, NAT'L IMMIG. F. (Aug. 25, 2021), https://immigrationforum.org/article/explainer-the-migrant-protection-protocols/. In one report about the consequences of the continued implementation of the MPP, Doctors without Borders reported that 80% of migrants returned under the policy to Nuevo Laredo were abducted by criminal gangs and 45% suffered violence and various harms. *A Timeline of the Trump Administration's Efforts to End Asylum*, NAT'L IMMIGR. JUST. CTR., https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2020-08/08-19-2020-asylumtimeline.pdf (last updated Aug. 2020).

[69] Press Release, U.S. Dep't of Homeland Sec., DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program (Jan. 20, 2021), https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program.

[70] *See* Memorandum from Alejandro N. Mayorka, Sec'y of U.S. Dep't of Homeland Sec.,

3. Transit Country Asylum Ban

The Transit Country Asylum Ban implemented the July 2019 Rule discussed earlier. Under the ban, any non-Mexican migrant entering at the southwest border or arriving without valid documents who cannot show that s/he applied for and was denied in any country s/he transited is ineligible to apply for asylum in the United States.[71] Since under the Rule they are also automatically considered not to meet the 'credible fear' standard, the Rule is effectively a blanket bar to asylum.[72]

In contrast to the MPP, the Transit Country Asylum Ban could be applied at any time during an individual's proceedings. Thus, an immigration judge could conclude asylum proceedings and then apply the Transit Ban. Alternatively, a Customs and Border Patrol (CBP) officer could initially apply the Transit Ban and pretermit an asylum application. An individual could still proceed on a claim for withholding of removal, or Convention Against Torture (CAT) protection, but the more permanent protection of asylum would no longer be available. In his Executive Order of February 2, President Biden ordered a review of this policy, and on February 16, 2021,

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Termination of the Migrant Protection Protocols Program (June 1, 2021). Subsequently, courts have vacated DHS' June policy change, *see* Texas v. Biden. No. 2:21-cv-067, 2021 WL 3603341, at *27 (N.D. Tex. Aug. 13, 2021), *aff'd*, 20 F.4th 928 (5th Cir. 2021), *petition for cert. filed*, Docket No. 21-954 (Dec. 29, 2021), and DHS has begun to reimplement the MPP program, *see* Memorandum from Robert Silvers, Under Sec'y of U.S. Dep't of Homeland Sec., Guidance Regarding the Court-Ordered Reimplementation of the Migrant Protection Protocols (Dec. 2, 2021). In addition, individuals who had been processed and returned to Mexico by the United States are permitted to register, but DHS has not indicated how they will proceed with these cases. *See* Press Release, U.S. Dep't of Homeland Sec., DHS Announces Expanded Criteria for MPP-Enrolled Individuals Who Are Eligible for Processing into the United States (June 23, 2021), https://www.dhs.gov/news/2021/06/23/dhs-announces-expanded-criteria-mpp-enrolled-individuals-who-are-eligible-processing. Also. the June policy changes do not protect people who were ordered removed after a final hearing in the tented MPP "courts." *See Featured Issue: Migrant Protection Protocols (MPP)*, AM. IMMIGR. Laws. ASS'N, https://www.aila.org/advo-media/issues/all/port-courts (last updated Dec. 22, 2021). Another related program, known as Title 42 expulsions, also implemented by the Trump Administration to authorize quick turn-backs at the U.S.-Mexico border, will not be addressed here as they do not fall precisely under 'safe-third,' or 'first asylum' country policies. Title 42 was put in place ostensibly in response to the Corona virus pandemic, to prevent migrant entrants who might pose a health risk. More than 940,000 migrants were summarily expelled under Title 42. *See* Priscilla Alvarez, Biden to Extend Trump-Era Expulsion Policy as 'Record Numbers' of Migrants Cross Border, CNN POL. (Aug. 2, 2021), https://edition.cnn.com/2021/08/02/politics/aclu-title-42/index.html.

[71] *See* Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829, 33,843 (July 16, 2019) (codified at 8 C.F.R. § 208.13(c)(4)).

[72] *See* EXEC. OFF. IMMIGR. REV., U.S. DEP'T OF JUST., PM 19-12, GUIDELINES REGARDING NEW REGULATIONS GOVERNING ASYLUM AND PROTECTION CLAIMS 2 (2019) (rescinded 2021); *see also* Chishti & Bolter, *supra* note 62.

the United States District Court for Northern California enjoined application of the Rule in litigation discussed below.[73]

4. Prompt Asylum Case Review and Humanitarian Asylum Review Programs

The Prompt Asylum Case Review (PACR) and Humanitarian Asylum Review Program (HARP) are designed to expedite processing of asylum and other forms of humanitarian relief within ten days, and remove those whose claims are denied.[74] They operate to reinforce the bars to asylum for persons falling under the safe third country provisions, and were intended to end the prior policy of 'catch and release,' which had allowed most asylum-seekers to be released into the community until their cases were decided.[75] HARP applies to Mexican nationals, while PACR applies to non-Mexicans, but the policies are otherwise essentially the same. Individuals applying for protection are held in CBP custody while their claims are being processed within the ten-day period.[76] Though Mexicans are not subject to the Transit Country Asylum Ban, under HARP the standard for a 'credible fear' determination was heightened to require that they prove a 'significant possibility' that they would qualify for asylum.[77]

5. Asylum Cooperation Agreements (Safe-Third Country Agreements)

The first bilateral safe third country agreement, or STCA, that the United States entered into pursuant to the IIRIRA provision was in 2002 with Canada.[78] Canada designated the United States a 'safe third country' for refugees in 2004 and applied the agreement to all persons seeking refugee status at any official port of entry at the U.S.-Canada border. Refugee applicants were refused entry and sent back to the United States without further processing.[79] A number of organizations representing refugees in

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[73] *See* Exec. Order No. 14,012, 86 Fed. Reg. 8,277 (Feb. 2, 2021) (directing Secretary of State, Attorney General, and Secretary of Homeland Security to review all existing regulations inconsistent with a welcoming strategy to promote integration and inclusion).

[74] *See* BEN HARRINGTON, CONG. RSCH. SERV., R46755, THE LAW OF ASYLUM PROCEDURE AT THE BORDER: STATUTES AND AGENCY IMPLEMENTATION 24 (Apr. 9, 2021).

[75] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-144, SOUTHWEST BORDER: DHS AND DOJ HAVE IMPLEMENTED EXPEDITED CREDIBLE FEAR SCREENING PILOT PROGRAMS, BUT SHOULD ENSURE TIMELY DATA ENTRY 5-9 (2021).

[76] *Id.*

[77] *See* Chishti & Bolter, *supra* note 62 ("By February 28, CBP stated that a total of more than 1,200 migrants had been placed in HARP and nearly 2,500 in PACR, and a lawsuit against the programs has revealed that more than 700 have been removed through PACR.").

[78] *See supra* note 55.

[79] *See Refugees Entering from US and Safe Third Country: FAQ*, CAN. COUNCIL FOR REFUGEES (Feb. 2017), https://ccrweb.ca/en/refugees-entering-us-and-safe-third-country-faq

Canada challenged the STCA twice. In the latest decision in 2021, the Agreement that had been struck down by the Canadian Federal Court on the grounds that it violated the Canadian Charter of Rights and Freedoms was overturned by the Federal Court of Appeal.[80] This litigation is discussed below.

The latest versions of these agreements, called 'Asylum Cooperation Agreements' (ACAs) were instituted by the Trump Administration and entered into with Guatemala, Honduras and El Salvador. The agreement with Guatemala was implemented in November 2019, pursuant to which both individuals and families arriving in the United States who had transited through Guatemala and did not seek asylum or could prove that they would be persecuted there, were deported to Guatemala.[81] Hundreds of migrants from El Salvador and Honduras were deported to Guatemala under the ACA before the agreement was suspended.[82] Before the Biden Administration ended the Guatemalan ACA, a congressional inquiry determined that, as of October 2020, no one who had been removed to Guatemala under it succeeded in obtaining asylum.[83]

(last visited Sept. 16, 2021, 7:53 AM).

[80] *See* Can. Council for Refugees v. Canada (Immigration, Refugees and Citizenship), 2020 FC 770, para.10 (Can. Ont.), *vacated*, 2021 FCA 72, para.10 (Can.), *perm. app. granted*, 2021 CarswellNat 5884 (Can.) (WL).

[81] *See* BEN HARRINGTON, CONG. RSCH. SERV., LSB10402, SAFE THIRD COUNTRY AGREEMENTS WITH NORTHERN TRIANGLE COUNTRIES: BACKGROUND AND LEGAL ISSUES 2 (Jan. 3, 2020) (stating the Guatemala ACA was implemented following an exchange of notes between the two governments and that the U.S. Attorney General and DHS determined that Guatemala provided access to "full and fair" asylum procedures).

[82] Chishti & Bolter, *supra* note 62; *see also* Press Release, U.S. Dep't of State, Suspending and Terminating the Asylum Cooperative Agreements with the Governments El Salvador, Guatemala, and Honduras (Feb. 6, 2021), https://www.state.gov/suspending-and-terminating-the-asylum-cooperative-agreements-with-the-governments-el-salvador-guatemala-and-honduras/. The agreement was suspended in March 2020 due to the pandemic.

[83] *See* DEMOCRATIC STAFF OF S. FOREIGN RELS. COMM., CRUELTY, COERCION, AND LEGAL CONTORTIONS: THE TRUMP ADMINISTRATION'S UNSAFE ASYLUM COOPERATIVE AGREEMENTS WITH GUATEMALA, HONDURAS, AND EL SALVADOR 4 & n.5 (2021) (citation omitted). An exhaustive study by the BU International Human Rights Clinic examined the dire conditions and grave risks from which migrants are fleeing the Northern Triangle, and the laws and policies that force migrants and refugees to flee and fail to protect them in Central American countries and Mexico. *See generally* B.U. INT'L HUM. RTS. CLINIC, DISAPPEARED MIGRANTS FROM CENTRAL AMERICA: TRANSNATIONAL RESPONSIBILITY, THE SEARCH FOR ANSWERS AND LEGAL LACUNAE (Jan. 19, 2021), https://www.bu.edu/law/record/articles/2019/seeking-answers-for-families-of-disappeared-migrants/.

D. Legal Challenges

1. Migrant Protection Protocols

In December 2018, DHS announced the Migrant Protection Protocols, which were implemented in January 2019. DHS claimed that the MPP were issued pursuant to Section 235(b)(2)(C) of the INA. According to DHS:

> Section 235 of the Immigration and Nationality Act (INA) addresses the inspection of aliens seeking to be admitted into the U.S. and provides specific procedures regarding the treatment of those not clearly entitled to admission, including those who apply for asylum. Section 235(b)(2)(C) provides that "in the case of an alien . . . who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the U.S.," the Secretary of Homeland Security "may return the alien to that territory pending a [removal] proceeding under § 240" of the INA.[84]

The MPP was challenged in court almost immediately. In the first action, *Innovation Law Lab v. Nielsen*, the plaintiffs' main challenge to the MPP was that they exceeded the authority afforded DHS under Sec. 235(b)(2)(C) — in essence, that they were *ultra vires*.[85] However, more important for this discussion, they also argued that they violated the government's *non-refoulement* obligations under the Refugee Protocol.[86] The District Court for the Northern District of California issued a nationwide preliminary injunction against application of the MPP, finding that the plaintiffs were likely to prevail in the claim that the MPP violated the Administrative Procedures Act.[87] The District Court found that the MPP were not a legitimate extension of the contiguous territory return provision under prior law.[88] Moreover, it found that the MPP were adopted "without sufficient regard to *refoulement*" considerations.[89] On this issue, the Court stated that the individual plaintiffs provided sufficient evidence that their reasons for flight from El Salvador, Guatemala and Honduras were based on "extreme violence, including rape and death threats."[90] The decision went on to state:

> One plaintiff alleges she was forced to flee Honduras after her life was

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[84] Press Release, U.S. Dep't of Homeland Sec., Migrant Protection Protocols (Jan. 24, 2019), https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols.

[85] *See* Innovation L. Lab v. Nielsen, 366 F. Supp. 3d 1110, 1113 (N.D. Cal. 2019), *vacated as moot sub nom.*, 5 F.4th 1099 (9th Cir. 2021).

[86] *Id.* at 1126-27.

[87] *Id.* at 1228.

[88] *Id.* at 1223-26.

[89] *Id.* at 1127-28.

[90] *Id.* at 1129.

> threatened for being a lesbian. Another contends he suffered beatings and death threats by a "death squad" in Guatemala that targeted him for his indigenous identity. Plaintiffs contend they have continued to experience physical and verbal assaults, and live in fear of future violence in Mexico.[91]

The District Court's injunctive order was initially stayed pending government appeal to the Ninth Circuit Court of Appeals, leaving the MPP in place.[92] A second Ninth Circuit panel reinstated the injunction against the MPP on both the statutory and the *non-refoulement* grounds that had been articulated by the District Court.[93] Before the Supreme Court could hear oral arguments on the government's writ of certiorari from the Ninth Circuit decision, the Biden Administration withdrew the case from the Supreme Court calendar and terminated the MPP.[94]

The Ninth Circuit's decision in *Innovation Law Lab v. Wolf* is particularly relevant for the normative principles the court assessed in determining whether the United States was violating its Refugee Protocol obligations.[95] The Court did not examine only direct *non-refoulement*, but also the range of indirect ways in which the MPP undermined the full application of *non-refoulement*.[96] For example, the MPP gave broad discretion to CBP agents to determine whether to send an individual back to Mexico, and placed the burden on the individual to affirmatively claim credible fear or seek asylum. If an individual did make a credible fear showing and asked for asylum, s/he remained in CBP custody, often handcuffed and denied access to an attorney, until the claim was heard by an asylum officer.[97] The MPP also raised the burden of proof from the prior standard of 'reasonable fear' in the expedited removal process to a 'more likely than not' showing of persecution.[98]

In *E.O.H.C v. Secretary of the United States Department of Homeland Security*, Guatemalan asylum-seeker plaintiffs challenged the MPP on constitutional and statutory right-to-counsel grounds as well as Refugee

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[91] *Id*.

[92] Innovation L. Lab v. McAleenan, 924 F.3d 503, 510 (9th Cir. 2019).

[93] *Cf.* Innovation L. Lab v. Wolf, 951 F.3d 1073, 1095 (9th Cir. 2019), *modified*, 951 F.3d 986, 991 (9th Cir. 2020) (reinstating the part of the injunction operating within the Ninth Circuit).

[94] *See* Mayorkas v. Innovation L. Lab, 141 S. Ct. 2842 (2021) (mem.); Innovation L. Lab v. Mayorkas, 5 F.4th 1099 (9th Cir. 2021) (mem.).

[95] 951 F.3d 1073, 1088-89 (9th Cir. 2019).

[96] *See id.* at 1088-93.

[97] *Asylum Seekers Subject to Trump's Remain in Mexico Policy Must Be Given Access to Counsel*, ACLU: SAN DIEGO & IMPERIAL COUNTIES (Nov. 5, 2019), https://www.aclusandiego.org/en/news/aclu-asylum-seekers-subject-trumps-remain-mexico-policy-must-be-given-access-counsel.

[98] *See* 951 F.3d 1073, at 1088.

Convention and CAT grounds.[99] On appeal from the District Court's dismissal of the case on jurisdictional grounds, the Third Circuit reversed, making two important findings.[100] First, the Circuit Court asserted that there must be jurisdiction over the claim, as judicial review would be meaningless if the plaintiffs were returned to Mexico to await the outcome of their case—in other words, jurisdiction was either "now or never" as far as the consequences of removal were concerned.[101] Second, the Court found that although there is no statutory right to counsel in removal proceedings, there is a Fifth Amendment right to counsel (at no expense to the government) as part of due process in all immigration proceedings.[102]

Another class action challenged the MPP interview process for denying access to counsel. In *Doe v. McAleenan*, the District Court for the Southern District of California granted a preliminary injunction on behalf of the class, requiring the government to give aliens access to counsel both to prepare for and during the interviews on their claims of fear of return.[103]

2. PACR and HARP

In December, 2019, the ACLU challenged the Prompt Asylum Claim Review (PACR) and Humanitarian Asylum Review Process (HARP) policies as they applied to Mexican and non-Mexican nationals.[104] The plaintiffs claimed that under the new policies, asylum-seekers subject to credible fear proceedings are detained in CBP facilities rather than ICE detention centers, a practice that has serious negative consequences for their rights to access counsel and third parties, and drastically impedes their ability to apply for asylum.[105] The complaint asserts that the policies "all but guarantee[] that many asylum seekers will be erroneously sent back to countries where they

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[99] 950 F.3d 177, 181-82 (3d Cir. 2020), *aff'g in part, rev'g in part sub nom.* Culajay v. McAleenan, 396 F. Supp. 3d 477 (E.D. Penn. 2019) (citing Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art 3, Dec. 10, 1984, 1465 U.N.T.S. 85).

[100] *Id.* at 188.

[101] *Id.* at 185-86 ("The now-or-never principle governs here too. Although appellants must await a final order of removal to challenge their removal to Guatemala, [8 U.S.C.] § 1252 (b)(9) does not bar their challenges to their temporary return to Mexico. . . . [M]ost of their claims may proceed.").

[102] *See id.* at 187-88. As the complaint in this case indicated, 98% of MPP asylum-seekers who proceeded in their claims without counsel were deported. *See Policies Affecting Asylum Seekers at the Border*, AM. IMMGR. COUNCIL (Jan. 29, 2020), https://www.americanimmigrationcouncil.org/research/policies-affecting-asylum-seekers-border (stating that less than 5% of asylum seekers in MPP proceedings have a lawyer).

[103] *See* Doe v. McAleenan, 432 F. Supp. 3d 1200, 1207-12, 1215-16 (S.D. Cal. 2020), *vacated as moot sub nom.*, 85 F. App'x 115 (9th Cir. 2021).

[104] Las Ams. Immigrant Advoc. Ctr. v. Wolf, 507 F. Supp. 3d 1, 9, 16 (D.D.C. 2019).

[105] *See id.* at 9.

face danger and that, as a result, some of them will be killed or endure horrific violence."[106]

3. The Transit-Country Asylum Ban

Shortly after the issuance of the July 2019 Rule establishing the third-country asylum ban, a number of organizations brought injunctive action to stop its enforcement.[107] The District Court for the Northern District of California granted a preliminary injunction against the Rule in four states on the U.S.-Mexico border.[108] The Ninth Circuit affirmed the injunction on two of the argued grounds: 1) that the Rule was inconsistent with and exceeded the statutory grounds under which it was issued (8 U.S.C. § 1158(b)(2)(C)); and 2) that the Rule is arbitrary and capricious because it is inconsistent with the justifications for its issuance, and does not reflect Agency consideration of its serious impact on vulnerable victims.[109]

As the Ninth Circuit stated, the Rule requires:

> Guatemalan aliens reaching our southern border to apply for, and then be finally denied, asylum by Mexico before they are eligible to apply for asylum in the United States. The same requirement applies to aliens who arrived in Mexico from other countries by plane or ship before traveling to our southern border. Aliens traveling overland from El Salvador, Honduras, or other countries south of Guatemala, must apply for and be finally denied asylum by Mexico, Guatemala, or another country through which they travelled.[110]

The Court rejected the government's arguments that the Rule simply implemented the INA's safe-third-country and firm-resettlement bars.[111] The Court found that both of those bars are grounded on the requirement that an alien has a genuinely safe option for protection in the country to which s/he

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[106] Memorandum in Support of Motion for Preliminary Injunction at 3, Las Ams. Immigrant Advoc. Ctr. v. Wolf, 507 F. Supp. 3d 1 (D.D.C. 2019) (No. 1:19-cv-3640 (RDM)).

[107] *See generally* Press Release, Am. Immigr. Council, Federal Court Blocks Trump Asylum Ban from Being Applied to Thousands of Asylum Seekers (Nov. 19, 2019), https://www.americanimmigrationcouncil.org/news/federal-court-blocks-trump-asylum-ban-being-applied-thousands-asylum-seekers.

[108] E. Bay Sanctuary Covenant v. Barr, 385 F. Supp. 3d 922, 960 (N.D. Cal. 2019), *order reinstated*, 391 F. Supp. 3d 974 (N.D. Cal. 2019).

[109] *See* E. Bay Sanctuary Covenant v. Barr, 946 F.3d 832, 857-58, (9th Cir. 2020), *amended and superseded on denial of rehearing en banc sub nom.*, 994 F.3d 962 (9th Cir. 2020). Following government challenge and appeal to the U.S. Supreme Court for an emergency stay of the decision, the injunction was lifted against all states but California pending the Ninth Circuit appeal. *See* Barr v. E. Bay Sanctuary Covenant, 140 S. Ct. 3 (2019).

[110] *E. Bay Sanctuary Covenant*, 946 F.3d at 843.

[111] *See id.* at 846.

is being returned.[112] In contrast, "the Rule does virtually nothing to ensure that a third country is a 'safe option,'" nor did it "even superficially resemble the firm-resettlement bar."[113] There was no requirement for a formal agreement between the United States and the third country, nor any investigation into whether there is a "full and fair" procedure to apply for asylum in the third country.[114] The Court found that:

> The Rule is arbitrary and capricious for three reasons. First, evidence in the record contradicts the agencies' conclusion that aliens barred by the Rule have safe options in Mexico. Second, the agencies have not justified the Rule's assumption that an alien who has failed to apply for asylum in a third country is, for that reason, not likely to have a meritorious asylum claim. Finally, the agencies failed to adequately consider the effect of the Rule on unaccompanied minors.[115]

As soon as the July 16 Asylum Eligibility Rule took effect, two other actions were filed in the District Court for the District of Columbia, which were consolidated in *Capital Area Immigrants' Rights Coalition v. Trump*.[116] The cases challenged the Rule on a number of grounds: that it violated the INA and the Trafficking Victims Protection Reauthorization Act (TVPRA); that it was arbitrary and capricious; that it violated due process; and that it was issued without allowing notice and comment, as required.[117] The District Court granted summary judgment for the plaintiffs, finding that the manner in which the Rule was promulgated violated the notice-and-comment requirement, and vacated it in its entirety.[118] In doing so, the Court did not address the remaining claims, nor did it address the merits of the safe first/safe third country bars to asylum.[119]

4. The U.S.-Canada STCA

Refugee claimants and organizations representing them filed the first challenge to the STCA in Canada in 2007.[120] In this case, the Canadian

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[112] *Id.* at 846-48.

[113] *Id.*

[114] *Id.*

[115] *Id.* at 849-50. The Court's point about whether these policies protect particularly vulnerable populations is an important one. The Court held that the Rule, by failing to exempt unaccompanied minors, was inconsistent with the 2008 Trafficking Victims Protection Act (TVPA) amendment that was specifically intended to extend immigration protections to unaccompanied minors. *Id.* at 853-54.

[116] 471 F. Supp. 3d 25, 31 (D.D.C. 2020).

[117] *Id.* at 35-36.

[118] *Id.* at 58-60.

[119] *See id.* at 32.

[120] Canadian Council for Refugees v. Canada, 2007 FC 1262 (Can.).

Federal Court found in favor of the claimants,[121] but the decision was overturned by the Federal Court of Appeals.[122] Then in 2017, the Canadian Council for Refugees (CCR) and the Canadian Council for Churches, along with their refugee clients, filed another action on similar grounds in the Federal Court.[123] They submitted evidence that U.S. practices (including the one-year bar, the "zero tolerance policy" and widespread and lengthy detention of asylum-seekers) increased the risk of *refoulement*, and imposed cruel and inhuman treatment on refugees such that the United States was not a safe third country.[124] Canada's implementation of the STCA by returning refugees to the United States thus made it complicit with practices that violated the Refugee Convention as well as violating sections 7 and 15 of the Canadian Charter of Human Rights and Freedoms.[125]

In its decision of July 22, 2020, the Federal Court of Canada ruled that sending refugee claimants back to the United States violated their rights to liberty and security of the person under the Canadian Human Rights Charter because many are placed in arbitrary detention and held in deplorable conditions in the United States.[126] The Court also found that they face a high risk of *refoulement* from the United States due to procedural bars to completing asylum claims (such as expedited removal and the one-year bar), and the United States' restrictive interpretation of particular social group claims, which placed the majority of women making such claims at grave risk of *refoulement* and gender-based persecution.[127] Additional claims were raised and considered in the Court's decision for the Homsi applicants, Syrian refugees who claimed that the combination of national origin and religion-based bars—the 'Muslim ban'—violated the non-discrimination guarantee of the Canadian Charter of Rights and Freedoms.[128]

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[121] *Id.* para. 338.

[122] Canada v. Canadian Council for Refugees, 2008 FCA 229, para. 131 (Can.).

[123] *See* Canadian Council for Refugees v. Canada (Immigr, Refugees and Citizenship), 2020 FC 770, at para. 1 (Can.), *vacated*, 2021 FCA 72 (Can.); *see also* Press Release, Canadian Council for Refugees, The US Is Less Safe Than Ever for Refugees, Evidence Filed in Court Challenge Show (July 4, 2018), https://ccrweb.ca/en/media/safe-third-court-challenge-july-2018.

[124] Canadian Council for Refugees, 220 FC 770, paras. 60-63.

[125] *Id.* para. 10.

[126] *See id.* paras. 93-116, 138-40.

[127] *See id.* paras. 105-06, 151-54.

[128] Among the named applicants in the case were Syrian citizens Reda Yasin Al Nahass, her son Mohammad Majd Maher Homsi and her two daughters, Karam Maher and Hala Maher Homsi. The decision describes Ms. Al Nahass' kidnapping, attack and threats of sexual violence in 2015 in Syria. When her family was able to obtain her release, Ms. Al Nahass came to the United States with her children and sought asylum in 2016. However, following President Trump's inauguration, passage of the 'Muslim Ban' and a rise in anti-Muslim, anti-Arab racism in the United States, Ms. Al Nahass and her children tried to enter Canada and

The Government of Canada appealed the decision to the Federal Court of Appeal, and in an April 15, 2021 decision, the Federal Court of Appeal reversed the Federal Court decision and dismissed the challenges to the Safe Third Country Agreement.[129] In what appears to be a highly technical decision, the Court of Appeal's main ruling was that because the claimants had challenged only part of the legislative scheme underlying the STCA provisions and procedures, and not the entire scheme, the individual provision challenges could not be decided.[130] Further, only attacking some but not all of the statutory scheme led the Appellate Court to conclude that the evidentiary record was insufficient to make findings of Charter infringement.[131] The appellate decision hardly addressed the merits of the claims, but focused on a wide range of ways in which the claimants failed to frame their case properly, and why their main challenges should have been against Canadian administrative review of the United States' compliance with the STCA and its monitoring efforts, as opposed to the United States' human rights violations that meant it was not a safe place for refugees.[132]

5. The Asylum Co-Operation Agreements

On January 15, 2020, the National Immigrant Justice Center and other organizations filed suit against implementation of the 'safe third country' agreements with Guatemala, Honduras and El Salvador.[133] The lawsuit challenged the ACAs as violating the INA, the Refugee Act and the APA on behalf of individuals who sought asylum in the United States but were removed to Guatemala under the U.S.-Guatemala ACA.[134] In February 2020, the plaintiffs sought permanent injunctions against the ACA,[135] and on March 15, 2021, the Court granted joint motions to hold the case in abeyance and stayed the case in light of statements that the Biden Administration was reviewing the ACA policy.[136] The Court's latest order was for the parties to

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were turned back by Canadian border officials. Upon securing Canadian counsel, the family was able to enter Canada and obtain a stay of removal. *See id.* paras. 21-27.

[129] Canada (Minister of Citizenship and Immigration) v. Canadian Council of Refugees, 2021 FCA 72 (Can.), *perm. app. granted*, 2021 CarswellNat 5884 (Can.) (WL).

[130] *See id.* paras. 2, 5, 53, 62-63, 84-90.

[131] *See id.* paras. 74-83, 135-42, 150.

[132] *See id.* paras. 47-54, 61-73, 84-89.

[133] Compl. for Declaratory and Injunctive Relief at 44-48, U.T. v. Barr, No. 1:20-cv-00116-EGS (D.D.C. filed Jan. 15, 2020) (Court Listener), ECF No.3.

[134] *Id.* at 6, 44-48.

[135] *See generally* Plaintiffs' Mem. of Law in Support of Their Mot. for Sum. J. and Permanent Inj., U.T. v. Barr, No. 1:20-cv-00116-EGS (D.D.C. filed Feb. 28, 2020) (Court Listener), ECF No.38-1.

[136] *See generally* Min. Order, U.T. v. Barr, No. 1:20-cv-00116-EGS (D.D.C. ordered Mar. 15, 2021) (Court Listener).

submit status reports on the ACAs.[137]

6. Biden Administration Suspension of Certain Policies

On February 2, 2021, the Biden Administration issued several Executive Orders that ended the HARP and PACR programs, and committed to review the MPP and asylum transit ban as well as the Asylum Cooperative Agreements.[138] On February 6, 2021, the Administration suspended and began the process of terminating the Asylum Cooperative Agreements with the Northern Triangle states.[139] In its press statement announcing the policy reversal, the Department of State indicated that El Salvador, Guatemala and Honduras had been notified of the suspension of the agreements, making permanent the temporary halt due to COVID-19 of transfers that had begun under the Guatemala ACA.[140] Nevertheless, the challenges to the ACAs and the related policies shed light on the main legal issues the litigants and courts have focused on, and which are likely to be determinative of their validity under the international refugee regime.[141]

II. SAFE COUNTRY PRINCIPLES IN THE UK

From the late 1990s onwards, the Member States of the European Union have worked towards the creation of a Common European Asylum System (CEAS), in which the United Kingdom largely chose to participate until its

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[137] *See* Min. Order, U.T. v. Barr, No. 1:20-cv-00116-EGS (D.D.C. ordered Nov. 23, 2021) (Court Listener).

[138] Exec. Order No. 14,010, 86 Fed. Reg. 8,267, 8,267 (Feb. 2, 2021) ("[I]mplement a multi-pronged approach toward managing migration through North and Central America that reflects the Nation's highest values.").

[139] Press Release, U.S. Dep't of State, Suspending and Terminating the Asylum Cooperative Agreements with the Governments El Salvador, Guatemala, and Honduras (Feb. 6, 2021), https://www.state.gov/suspending-and-terminating-the-asylum-cooperative-agreements-with-the-governments-el-salvador-guatemala-and-honduras/.

[140] *Id*. As the press release noted, the ACAs with El Salvador and Honduras were not implemented by the time the Trump Administration left office. *Id.* Meanwhile, 85 nongovernmental organizations requested that the Biden Administration allow approximately 945 Honduran and Salvadoran asylum seekers summarily deported to Guatemala between November 2019 and March 2020 be permitted to return and pursue their asylum claims. Press Release, Nat'l Immigrant Just. Ctr., 85 Organizations Call On Biden Administration To Provide Immediate Access To Asylum To Those Deported To Guatemala Under Trump-Era Asylum Cooperative Agreement (July 9, 2021), https://immigrantjustice.org/press-releases/85-organizations-call-biden-administration-provide-immediate-access-asylum-those (letter on the website).

[141] For an overview of Biden immigration policies to date, see generally Sarah Libowsy & Krista Oehlke, *President Biden's Immigration Executive Actions: A Recap*, LAWFARE BLOG (Mar. 3, 2021), https://www.lawfareblog.com/president-bidens-immigration-executive-actions-recap.

departure from the European Union.[142] One of its linchpins is the "Dublin system," which seeks to allocate responsibility for international protection between Member States. The Dublin system was first agreed in 1990 and entered into force in 1997.[143] It is currently expressed in Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).[144] This is known as "Dublin III" because it is the third set of Dublin rules. It applies not just to Member States of the EU, but also to Iceland, Norway, Switzerland, and Liechtenstein, pursuant to separate agreements between those countries and the EU.[145]

With regard to transfers outside Europe, all EU Member States other than Denmark participate in the Procedures Directive, which allows states to enact domestic "safe first country" and "safe third country" laws, as long as they meet certain minimum conditions (these are discussed below). When the transition period following the United Kingdom's departure from the European Union ended at 11:00 PM on December 31, 2020, new inadmissibility rules[146] came into effect. They were followed on March 24, 2021 by a policy statement called the New Plan for Immigration[147] and on July 06, 2021 by the introduction of the Nationality and Borders Bill.[148] The Borders Bill relies heavily on the assertion that refugees should "claim asylum in the first safe country they reach." The explicit goal of the Bill is to penalize and therefore deter spontaneous asylum claims as far as possible,[149]

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[142] EUROPEAN UNION COMMITTEE, BREXIT: REFUGEE PROTECTION AND ASYLUM POLICY, 2017-19, HL 428, ¶ 1 (UK).

[143] Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, Aug. 19, 1997, 1997 O.J. (C 254) 1.

[144] Commission Regulation 604/2013, 2013 O.J. (L 180) 31 (EU) [hereinafter Dublin III Regulation].

[145] *See generally EU Dublin III Regulation (Regulation (EU) No 604/2013)*, OFF. OF THE REFUGEE APPLICATIONS COMM'R, http://www.orac.ie/website/orac/oracwebsite.nsf/page/eudublinIIIregulation-main-en (last visited Oct. 8, 2021).

[146] HOME OFFICE, STATEMENT OF CHANGES TO THE IMMIGRATION RULES: HC 1043, at 4-5 (Dec. 10, 2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/943127/CCS207_CCS1220673408-001_Statement_of_changes_in_Immigration_Rules_HC_1043__Web_accessible_.pdf.

[147] HOME OFFICE, NEW PLAN FOR IMMIGRATION: POLICY STATEMENT, 2021, CP 412 (UK).

[148] *See* Nationality and Borders Bill 2021-22, HC Bill [141] (UK).

[149] Nationality and Borders Bill 2021, Explanatory Notes ¶¶ 21, 23, 145 (UK) ("The purpose of this [denying rights to "Group 2" refugees] is to discourage asylum seekers from travelling to the UK other than via safe and legal routes. It aims to influence the choices that

and to substitute states' obligations towards refugees arriving in their territory or at their borders with admissions through resettlement programs.[150]

This section will outline the development of key "safe country" principles in UK law over the past several decades. These concepts primarily emerged in the Dublin litigation in UK courts and tribunals, which drew on the decisions of the Court of Justice of the European Union (CJEU) and European Court of Human Rights (ECtHR). It will then look briefly at the UK's much more limited law and practice with regard to removals of refugees to "safe countries" outside Europe. Although there have not yet been any published decisions in the litigation over the "inadmissibility" Rules, and at the time of writing the Borders Act had yet to be implemented, this section will end by highlighting relevant legal arguments around the New Plan for Immigration and the Borders Bill.

A. How the Dublin System Works

Dublin III sets out the following basic hierarchy of responsibility for deciding which country is responsible for determining a refugee claim made by a person present in one of the Member States:

i) if the applicant is an unaccompanied minor, the country where a family member or a sibling is legally present; in the absence of a family member in a Member State, the country where the minor has lodged their asylum claim; in each case this must also be in the best interests of the minor;[151]
ii) the country where an applicant has a family member who has been granted international protection;[152]
iii) the country where an applicant has a family member who has a pending application for international protection;[153]
iv) the country that issued the applicant a valid residence document or visa;[154] and
v) the country where the applicant first irregularly crossed the border

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migrants may make when leaving their countries of origin - encouraging individuals to seek asylum in the first safe country they reach after fleeing persecution, avoiding dangerous journeys across Europe.").

[150] The Home Office tweeted a video of resettled refugees in support of the New Plan for Immigration with the headline "This is the safe and legal way refugees are resettled for a new life in the [UK]." @ukhomeoffice, TWITTER (June 15, 2021, 11:30 AM), https://twitter.com/ukhomeoffice/status/1404823513773445122?lang=en.

[151] Dublin III Regulation, *supra* note 144, art. 8(1).

[152] *Id.* art. 9.

[153] *Id.* art. 10.

[154] *Id.* art. 12.

into a Member State.[155]

Detailed subclauses address complex cases, such as, for example, applicants who simultaneously hold valid visitor visas issued by several different countries,[156] or those who entered irregularly across the border of one country but have since spent significant periods of time in another.[157] Finally, discretionary clauses allow states to request that another State take charge of a claim in order to "bring together" family members on humanitarian grounds.[158]

If a person claims asylum in one Member State but that State believes the claim is in fact the responsibility of another, the first State can nonetheless exercise its discretion to consider the claim.[159] Alternatively, it can make either a "take charge" or a "take back" request to the other State. There are strict deadlines for making and responding to take charge and take back requests.[160] Individuals cannot make take charge or take back requests, although some legal systems provide mechanisms for an individual to compel a State to make them.

Unlike in other refugee transfer regimes, refugees should in theory enjoy substantially the same minimum reception conditions,[161] procedural protections,[162] and human rights protections[163] in almost all States in the CEAS, and their claims should be determined according to the same substantive criteria.[164] Nonetheless, there are a range of reasons a refugee

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[155] *Id.* art. 13(1).

[156] *Id.* art. 12(3).

[157] *Id.* art 13(2).

[158] *Id.* art. 17(2).

[159] *Id.* art. 17(1).

[160] *Id.* art. Chapter VI.

[161] See generally Council Directive 2003/9, 2003 O.J. (L 31) 18, 18-25 (EC) [hereinafter Reception Directive] laying down minimum standards for the reception of asylum-seekers, and then Council Directive 2013/33, 2013 O.J. (L 180) 96, 96-110 (EU) (recast) laying down standards for the reception of applicants for international protection. Ireland, Denmark and the United Kingdom could choose whether to opt into this directive. The United Kingdom took part in the first directive but not the recast directive; Ireland and Denmark initially took part in neither, but Ireland opted into the recast directive in 2018.

[162] Based on Council Directive 2005/85 2005 O.J. (L 326) 13 (EC) and Council Directive 2013/32, sec. III, 2013 O.J. (L 180) 60 (EU) (recast) on common procedures for granting and withdrawing international protection. The UK and Ireland took part in the first directive but not the recast directive. Denmark took part in neither.

[163] As protected by the European Convention on Human Rights and Fundamental Freedoms, E.T.S. No. 005 (as amended, C.E.T.S. No. 213) and Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) 391.

[164] Based on Council Directive 2004/83, 2004 O.J. (L 304) 12, 12-23 (EC) on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the

might wish to challenge removal from one Member State to another. These include family ties, the location of diaspora communities, language, and perceptions that some countries are less racist or offer fairer or faster refugee determination procedures, or better living conditions, financial support, or job opportunities. There has therefore been a consistent stream of litigation resisting Dublin transfers. Some of the litigation addresses issues peculiar to the operation of the Dublin system,[165] but much of it raises issues that arise in any "safe country" system: what makes a third country safe; who has the burden of proving this; and what considerations other than "safety" determine whether a transfer or return is lawful or appropriate?

There are two parallel but distinct legal regimes governing Dublin transfers. The first is European Union law. Article 78 TFEU and Article 18 of the Charter of Fundamental Rights of the European Union both provide that the right to asylum is to be guaranteed with due respect for the 1951 Convention and the 1967 Protocol, although the content of that right is not settled. In addition, *refoulement* is prohibited by Article 19 of the Charter, which prohibits removal, expulsion or extradition of a person "to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment." [166]

The second legal regime is based on the European Convention on Human Rights, to which all 47 members of the Council of Europe are signatories, including Turkey.[167] The right to claim asylum is not contained in the ECHR, and challenges to Dublin transfers cannot be brought before the ECtHR on the grounds that they violate the Refugee Convention.[168] However, the ECtHR implicitly accepts that removing someone to a country where s/he would be at real risk of persecution would violate the prohibition on inhuman and degrading treatment under Article 3 ECHR.[169] Conversely, the CJEU has

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protection granted [hereinafter Qualification Directive] and Council Directive 2011/95, 2011 O.J. (L 337) 9, 9-27 (EU) (recast) on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted. The UK and Ireland took part in the first directive but not the recast directive. Denmark took part in neither.

[165] Such as whether a Member State has interpreted the hierarchy of responsibility correctly, or whether a deadline has been missed.

[166] Charter of Fundamental Rights of the European Union, *supra* note 163, arts. 18, 19.

[167] *Chart of Signatures and Ratifications of Treaty 005*, COUNCIL OF EUR. https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=005 (last updated Jan. 15, 2022).

[168] *See, e.g.*, M.S.S. v. Belgium and Greece, 2011-I Eur. Ct. H.R. 255, ¶ 286 (2011), https://hudoc.echr.coe.int/fre?i=001-103050; Sheekh v. Netherlands, App. No. 1948/04, ¶ 135 (May 23, 2007), https://hudoc.echr.coe.int/eng?i=001-78986.

[169] *See, e.g.*, Ilias and Ahmed v. Hungary, ¶¶ 125-126 (2019), https://hudoc.echr.coe.int/eng?i=001-198760.

found that because the Dublin system implements European law, EU Member States cannot transfer an asylum-seeker to another Member State if to do so would put them at real risk of inhuman and degrading treatment, as prohibited by the Charter's Article 4.[170] In practice, therefore, there is a significant overlap between the Dublin jurisprudence of the ECtHR and the CJEU. The inhuman and degrading treatment feared may be during the asylum procedure or even after a grant of international protection.[171]

Two overall themes emerge: the primacy in principle of individual rights, even when they threaten to undermine the purpose of the transfer system; and the limited grounds on which challenges to transfer normally succeed, reflecting both the low threshold for considering a third country "safe" and the limited weight given to refugees' rights other than *non-refoulement* and protection against inhuman and degrading treatment.

B. The Primacy in Principle of Individual Rights

The Dublin litigation has reiterated that systems designed to deflect a receiving State's responsibility for individual refugee status determination must nonetheless be open to legal challenge on an individual basis, even when this may run directly counter to the systems' purpose. This was first articulated in a series of cases establishing that the presumption that a third country was "safe" must be rebuttable.

Between 2009 and 2011, a number of asylum-seekers brought cases before the ECtHR alleging that they were subjected to inhuman and degrading treatment in Greece and at risk of *refoulement* from the country.[172] These culminated in the leading case of *M.S.S. v. Belgium and Greece*, in which the Grand Chamber found first, that the claimant had been subjected to inhuman and degrading treatment and was at risk of refoulement in Greece,[173] and second, that Belgium had violated his rights under Article 3 ECHR by removing him to Greece in accordance with the Dublin Convention.[174] It is the judgment against Belgium that is relevant here. This was based on the following principles:

i) "[I]n the absence of proof to the contrary," it must be presumed that a receiving State will comply with its obligations under regional or

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[170] Joined Cases C-411/10 & C-493/10, N. S. v. SSHD, ECLI:EU:C:2011:865, ¶ 86 (Dec. 21, 2011).

[171] *See* Case C-163/17, Jawo v. Bundesrepublik Deutschland, ECLI:EU:C:2019:218, ¶ 88 (Mar. 19, 2019).

[172] *E.g.* K.R.S. v. United Kingdom, App. No. 32733/08 (Dec. 2, 2008), https://hudoc.echr.coe.int/eng?i=001-90500.

[173] M.S.S. v. Belgium and Greece, 2011-I Eur. Ct. H.R. 255, ¶¶ 264, 321 (2011).

[174] *Id.* ¶¶ 344-68.

international human rights and refugee law;[175]

ii) However, "the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where . . . reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention."[176]

The court rejected Belgium's reliance on the fact that the claimant had "failed to voice" his fears about transfer to Greece, noting that there had been no clear mechanism for him to do so. It also found that because Belgium knew or had reason to know of the problems in Greece, the burden of proof was not entirely on the claimant.[177]

In December of the same year, the CJEU took a similar position in the leading case of *N. S. v Secretary of State for the Home Department*. It rejected the UK Home Secretary's argument that "the scheme of [the Dublin Regulation] entitles her to rely on the conclusive presumption that Greece (or any other Member State) would comply with its obligations under European Union law." Such a presumption, it held, would undermine "the safeguards which are intended to ensure compliance with fundamental rights by the European Union and its Member States."[178]

The same principle has been applied to presumptions that a State is safe based on general principles of mutual trust and confidence between European Member States and on a country's status as a signatory to the Refugee Convention or the ECHR. [179] Although one State is entitled to "ordinarily" or "reasonably" expect that another will comply with its treaty obligations, "without having any obligation to inquire in detail to test whether that was indeed the case,"[180] individuals must have an opportunity to adduce evidence to the contrary.[181]

In another vindication of the primacy of the human rights of individuals, the UK Supreme Court affirmed that what was at issue was not the safety of the proposed country of return in general, but its actual safety for the

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[175] *Id.* ¶ 343.

[176] *Id.* ¶ 353 (citing Saadi v. Italy, 2008-II Eur. Ct. H.R. 207, ¶ 147).

[177] *Id.* ¶¶ 346-52.

[178] *See* Joined Cases C-411/10 & C-493/10, N. S. v. SSHD, ECLI:EU:C:2011:865, ¶¶ 47, 99-101 (Dec. 21, 2011).

[179] Case C-163/17, Jawo v. Bundesrepublik Deutschland, ECLI:EU:C:2019:218, ¶¶ 81-84 (Mar. 19, 2019); *N. S.*, ECLI:EU:C:2011:865, ¶¶ 78-80.

[180] R (Elayathamby) v. SSHD [2011] EWHC (Admin) 2182, ¶ 37.

[181] *Jawo*, ECLI:EU:C:2019:218, ¶ 90.

particular claimant.[182] The CJEU's emphasis in *N. S.* on the systemic failures of protection in Greece had raised the possibility that "systemic failure" was a threshold for a successful challenge.[183] This was expressly rejected by the UK Supreme Court, which found that "an exclusionary rule based only on systemic failures would be arbitrary both in conception and in practice."[184] The CJEU ultimately endorsed this view in *C.K. v. Republika Slovenija*.[185]

The strength of the primacy of individual rights is borne out by its persistent acknowledgment, even when it is perceived to threaten the effectiveness of the entire Dublin system. In the words of the UK Supreme Court:

> A system whereby a State which is asked to confer refugee status on someone who has already applied for that elsewhere should be obliged, in every instance, to conduct an intense examination of avowed failings of the first State would lead to disarray.[186]

Neither the CJEU nor the British courts, however, have sought to articulate a coherent legal justification for preventing such an examination in any individual case. Precedent-setting decisions have the potential to limit individual challenges, but they require an enormous investment of time and resources. In the recent case of *R (SM and Others) v. Secretary of State for the Home Department*, for example, the UK's Upper Tribunal (Immigration and Asylum Chamber) considered three linked challenges to Dublin returns to Italy.[187] The determination ran to 356 paragraphs, and by the time it was issued, the claimants' asylum applications had been pending in the United Kingdom for at least 3.5 years.[188]

Within the EU, the right of individual challenge is now so firmly

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[182] R (EM (Eritrea)) v. SSHD [2014] UKSC 12, [2014] AC 1321, ¶¶ 56-58, 62-66, 69-70.

[183] *Id.* ¶ 49

[184] *Id.* ¶ 48.

[185] In Case C-578/16 PPU, *C.K. v. Republika Slovenija*, the CJEU found that reception conditions for vulnerable asylum seekers in Croatia were generally good, but that this did not excuse Slovenia from considering whether return there would violate the Article 3 rights of a woman suffering from post-natal depression. *See* ECLI:EU:C:2017:127, ¶¶ 71-76, 91-93 (Feb. 16, 2017). In a published "leading judgment," similarly, the Swiss Federal Administrative Court found that although there were no systemic flaws in the Bulgarian asylum system, a woman who suffered from PTSD and faced various other specific obstacles could not be returned there. *See* Tribunal administratif federal [TAF] [Federal Administrative Court] Feb. 11, 2020, Arrêt F-7195/2018 (Switz.), https://www.refworld.org/cases,CHE_TFS,5e53a7934.html

[186] *R (EM (Eritrea))*, [2014] UKSC 12, ¶ 40.

[187] R (SM & Others) v. SSHD (Dublin Regulation – Italy) [2018] UKUT (IAC) 429, ¶¶ 7-9, https://www.bailii.org/uk/cases/UKUT/IAC/2018/429.html.

[188] *See id*. ¶¶ 341, 348, 354.

established that the EU Commission and Parliament chose to expand it in the latest versions of the Dublin Regulation and the Procedures Directive. Both now allow an individual to challenge a transfer not only on Article 3/Article 4 grounds, but also on the grounds that a person does not have the required connection with the proposed receiving State.[189]

C. The Narrow Grounds for Successful Challenge

Although the majority of successful challenges to Dublin transfers have been on Article 3 grounds, UK courts have recognized that, in theory, challenges to transfer can be brought on the grounds of any violation of the ECHR, because any act by a public authority that violates the ECHR is unlawful under UK domestic law. It is important to recognize at the outset, however, that the ECHR primarily prohibits human rights violations by a State against those present within its territory or under its jurisdiction. Its reach is more limited where the challenge is to removal to another State, and it is only there that the feared violation of protected rights will occur. As the House of Lords remarked in *EM (Lebanon) (FC) v. Secretary of State for the Home Department*, "it cannot be required that an expelling Contracting State only return an alien to a country which is in full and effective enforcement of all the rights and freedoms set out in the Convention."[190]

In such "foreign cases" – whether involving transfer within the CEAS or outside it – the feared violation of rights must normally be shown to be "flagrant," except, broadly speaking, where the threatened violation is of Article 2 or 3. This is particularly the case with regard to the "qualified rights", with which a State can lawfully interfere so long as the interference is proportionate and in pursuit of a legitimate public interest: family and private life (Article 8), freedom of thought, conscience and religion (Article 9), freedom of expression (Article 10), and freedom of assembly and association (Article 11). Although the prohibition in Article 3 is absolute, a similar concern about placing "excessive" obligations on contracting States limits challenges to removal where the feared inhuman and degrading treatment would result not from the direct action of the destination State but from international "disparities in social and economic rights," such as poverty or lack of access to health care.[191]

The most straightforward challenges to Dublin transfers therefore rely on

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[189] *See, e.g.*, CJEU C-63/15, Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie, ECLI:EU:C:2016:409 (June 7, 2016); Council Directive 2013/32, *supra* note 162, art. 38(2)(c).

[190] EM (Lebanon) (FC) v SSHD [2008] UKHL 64, [2009] AC 1198, ¶ 11 (quoting Soering v. The United Kingdom, App. No. 14038/88 (July 7, 1989), https://hudoc.echr.coe.int/eng?i=001-57619).

[191] *Id.* ¶ 10.

risks of direct inhuman and degrading treatment at the hands of state actors in the receiving "safe country,"[192] in clear violation of Article 3 ECHR (or Article 4 of the Charter). More common are cases where a returned refugee or asylum-seeker fears being forced to live in inhuman and degrading conditions arising out of destitution, homelessness or denial of access to essential services. In keeping with the general principle that whether treatment is inhuman or degrading depends in part on the affected person's individual characteristics, courts consistently state that they are taking into account a general presumption that asylum-seekers are inherently vulnerable.[193] In *M.S.S.*, the Grand Chamber acknowledged that Article 3 does not require states to provide everyone within their jurisdiction with a home, nor does it require them to provide asylum-seekers with a certain minimum level of financial support. On the other hand, it identified asylum-seekers as a "particularly underprivileged and vulnerable population group in need of special protection" and noted "the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the [European Union] Reception Directive."[194] Thus, the court found in 2011 that Greece had violated Article 3 because the claimant had spent several "months living in a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live. Added to that was the ever-present fear of being attacked and robbed and the total lack of any likelihood of his situation improving."[195]

Arguably, however, the initial emphasis on the inherent vulnerability of all asylum-seekers has eroded over time, to be replaced with an emphasis on the "particularly vulnerable," such as children, single mothers, and victims of trafficking, torture, or gender-based violence.[196] In 2019, the CJEU held that

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[192] *See generally* Factsheets, Eur. Ct. H.R., "Dublin" Case (2021), https://www.echr.coe.int/Documents/FS_Dublin_ENG.pdf. In *M.S.S. v. Belgium and Greece*, the Grand Chamber noted evidence of the routine detention of asylum seekers in inhuman and degrading conditions, including "overcrowding, dirt, lack of space, lack of ventilation, little or no possibility of taking a walk, no place to relax, insufficient mattresses, dirty mattresses, no free access to toilets, inadequate sanitary facilities, no privacy, limited access to care . . . . insults, particularly racist insults, proffered by staff and the use of physical violence by guards." M.S.S. v. Belgium and Greece, 2011-I Eur. Ct. H.R. 255, ¶ 162 (2011).

[193] *See, e.g.*, *id.* ¶ 233.

[194] *Id.* ¶ 251.

[195] *Id.* ¶ 254.

[196] See, for example, The Queen on the application of: 1) HK (Iraq) 2) HH (Iran) 3) SK (Afghanistan) 4) FK (Afghanistan) - and - The Secretary of State for the Home Department [2017] EWCA Civ 1871, ¶ 43-48 (recognizing the line of cases suggesting that because asylum seekers are in an especially vulnerable category of persons, a higher standard of appropriate medical or other care may be required under Article 3, but then in fact

"situations characterised even by a high degree of insecurity or a significant degradation of . . . living conditions" would not come within the scope of Article 4 of the Charter (or Article 3 ECHR).[197] Instead, the deficiencies in the receiving State:

> must attain a particularly high level of severity . . . . where the indifference of the authorities . . . would result in a person wholly dependent on State support finding himself, irrespective of his wishes and personal choices, in a situation of extreme material poverty that does not allow him to meet his most basic needs, such as, inter alia, food, personal hygiene and a place to live, and that undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity . . . .[198]

For adult asylum-seekers without particular additional vulnerabilities, all of the following have been found acceptable: a "risk of becoming homeless and reduced to destitution in a life on the margins of society;" dependence on a social welfare system reliant on family support (which was unavailable to asylum-seekers); a lack of integration programs or "essential" language courses;[199] prolonged housing in emergency accommodation designed for short-term stay; difficulty in accessing health care; effective exclusion from the labor market; long delays in processing claims;[200] and being "left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions."[201]

There is thus little protection against effective denial of the benefits of recognition as a refugee set out at Articles 3-30 and 34 of the Convention, such as access to housing, education, integration, and ultimately, naturalization. This is reflected in the fact that the only obligation of the Refugee Convention that is normally considered is the negative one of *non-refoulement.* In *M.S.S.*, the ECtHR set out as its first "General Principle:"

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considering the additional specific vulnerabilities of the claimants); Tarakhel v. Switzerland, 2014-VI Eur. Ct. H.R. 195, ¶ 119 (2014), https://hudoc.echr.coe.int/eng?i=001-148070 (finding that the " requirement of "special protection" of asylum seekers identified in *M.S.S. v. Belgium and Greece* "is particularly important when the persons concerned are children, in view of their specific needs and their extreme vulnerability"); R (SM & Others) v. SSHD (Dublin Regulation – Italy) [2018] UKUT (IAC) 429, ¶¶ 308, 317 (distinguishing "an 'ordinary case' of an asylum seeker who is not particularly vulnerable" from "demonstrably vulnerable" asylum-seekers and beneficiaries of international protection).

[197] Case C-163/17, Jawo v. Bundesrepublik Deutschland, ECLI:EU:C:2019:218, ¶ 93 (Mar. 19, 2019).

[198] *Id.* ¶¶ 91-92 (citing *M.S.S.*, 2011-I Eur. Ct. H.R. 255, ¶¶ 252-263).

[199] *Id*. ¶¶ 47, 94.

[200] *R (SM & Others)*, [2018] UKUT (IAC) 429, ¶¶ 294, 301-303, 315, 325.

[201] *Tarakhel*, 2014-VI Eur. Ct. H.R. 195, ¶ 115.

> In cases concerning the expulsion of asylum-seekers the Court has explained that it does not itself examine the actual asylum applications or verify how the States honour their obligations under the Geneva Convention. Its main concern is whether effective guarantees exist that protect the applicant against arbitrary refoulement, be it direct or indirect, to the country from which he or she has fled.[202]

Even where courts have recognized that a country's asylum system has ceased to function, this has not been a barrier to transfer, as long as enforced returns were not in fact taking place.[203]

This reflects in part that the ECHR itself contains no right to asylum. In theory, because the Charter and other fundamental sources of European Union law do refer to the Refugee Convention, legal challenges based on these sources should prove more fruitful. So far, however, there has been little clarity in this regard. In *Halaf v. Darzhavna agentsia za bezhantsite pri Ministerskia savet*, the CJEU was asked by the Administrative Court of Sofia in Bulgaria for a preliminary ruling on three questions, the second and third of which were:

2. The "content" of the right to asylum enshrined in Article 18 of the Charter; and
3. Whether the obligation under EU treaties "to comply with instruments under international law on asylum" required Member States to request UNHCR to "present its views" before carrying out a Dublin transfer, where UNHCR documents indicated that the state responsible under Dublin criteria "is in breach of provisions of European Union law on asylum."[204]

UNHCR then made detailed submissions to the CJEU, setting out the legal basis for its view that "[w]hile the principle of *non-refoulement* is a fundamental right and the cornerstone of international refugee protection, the right to asylum in international law goes beyond the prevention of *refoulement.* The process starts with admission to safe territory and concludes with the attainment of a durable solution."[205] The CJEU found, however, that it did not need to reach this question, and that there was no obligation to

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[202] *M.S.S.*, 2011-I Eur. Ct. H.R. 255, ¶ 286.

[203] SSHD (Respondent) v. Nasseri (FC) (Appellant) [2009] UKHL 23, ¶ 43 (noting that "the practice for dealing with asylum applications may leave something to be desired and very few applicants are accorded refugee status" but finding that the lack of evidence that "any Dublin returnee is in practice removed to another country" was "of critical importance").

[204] ECLI:EU:C:2013:342, ¶ 25 (May 30, 2013).

[205] Brief for UNHCR as Amicus Curiae Supporting Applicant at 6, Case C-528/11, Halaf v. Darzhavna agentsia za bezhantsite pri Ministerskia savet, ECLI:EU:C:2013:342 (May 30, 2013), https://www.refworld.org/pdfid/5017fc202.pdf.

consult the UNHCR under such circumstances.[206]

UK Tribunals have also raised but then avoided deciding this issue. In *R (Hagos) v. Secretary of State for the Home Department (Dublin returns - Malta)*, the Upper Tribunal accepted "for present purposes" that the applicant had "a right to have his asylum claim assessed in accordance with fair and efficient procedures" but declined to decide the issue "conclusively."[207] It then went on to find, moreover, that the particular asylum-seeker in that case would have access to a fair procedure, partly because of the assistance he had received from his English lawyers and the high profile of his case.[208] In *R (Hassan and Another) v. Secretary of State for the Home Department (Dublin – Malta; EU Charter Art 18)*, another panel of the Upper Tribunal expressed serious concern about the proposition that breaches of the right to asylum stopping short of *refoulement* could not found an appeal against Dublin transfer.[209] In the decision in that case, Tribunal President Mr. Justice McCloskey set out the asylum-seekers' claim that if returned to Malta they would be denied their rights under Article 18 to have their asylum claims decided "within a reasonable time and according to a fair procedure," and that as a result they would be in "indefinite limbo."[210]

The judgment then reviewed the caselaw, relied on by the Home Office, that suggested that challenges could only be brought on the grounds that there was a risk of inhuman and degrading treatment (Article 4 of the Charter) or *refoulement* (broadly, Article 19).[211] Justice McCloskey described the right *to asylum* (and not simply *against refoulement*) as a "vital, internationally recognised human right" and suggested that a Dublin transfer could be successfully resisted where there was a real risk of a breach of Article 18.[212] As in *R (Hagos)*, however, the Tribunal found that there was insufficient evidence of ongoing breaches of Article 18 in Malta for the matter to succeed on that ground.[213]

In *R (Abdulkadir) v. Secretary of State for the Home Department*, however, the High Court took the opposite view.[214] It found that although challenges could be brought on the grounds of violations of any of the rights guaranteed by the ECHR, challenges based on EU law could only be brought on Article

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[206] *Halaf*, ECLI:EU:C:2013:342, ¶¶ 40-47.

[207] IJR [2015] UKUT (IAC) 271, ¶ 51, https://www.bailii.org/uk/cases/UKUT/IAC/2015/271.html. These were said to include "the provision of appropriate information and legal advice and an effective remedy." *Id.*

[208] *See Id.* ¶ 53.

[209] [2016] UKUT (IAC) 452.

[210] *Id.* ¶ 39.

[211] *See id.* ¶¶ 49-72

[212] *Id.* ¶ 92.

[213] *Id.* ¶¶ 74-75.

[214] [2016] EWHC (Admin) 1504 (Eng.)

4 grounds.[215] This precluded challenges on the grounds of systemic deficiencies in the asylum procedure, unless those deficiencies led to a violation of Article 4.[216]

Other than Article 3, the ECHR right most commonly relied on is the Article 8 right to respect for private and family life, where the asylum-seeker has family ties either in the State that seeks to transfer them or in the State they wish to be transferred to.[217] Article 8, unlike Article 3, is a qualified right, with which a State can lawfully interfere if to do so is "necessary in a democratic society" and in the public interest.[218] The perceived public interest in the proper operation of the Dublin system can therefore be expressly taken into account as weighing against individual rights in such cases.[219] As noted above, moreover, when the challenge rests on a future violation of a qualified right in the receiving State, it is necessary to show a risk of a "flagrant" violation. The result is that such cases are difficult to win.[220] This harsh result is mitigated in part, however, by the fact that the Dublin system itself makes ties to immediate family members[221] a key criterion for allocating responsibility, and its preamble confirms that "respect for family life should be a primary consideration" in its application.[222]

D. A Safe Third Country Somewhere

The EU's 2005 Procedures Directive, in which the UK participated, contained safe first country and safe third country rules.[223] They relieved

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[215] *Id.* ¶ 146.

[216] *Id.* ¶ 147. In this case, the applicants relied on evidence that the lack of available accommodation prevented access to the asylum procedure: "no claim for accommodation can officially arise until an asylum seeker has formally registered a claim, but no claim will be registered without the provision of an address." *Id.* ¶ 79.

[217] *See, e.g.*, R (CK (Afghanistan) & Others) v. SSHD [2016] EWCA (Civ) 166, ¶ 6; *see generally* R (ZAT & Others) v. SSHD (Article 8 ECHR – Dublin Regulation) [2016] UKUT (IAC) 61.

[218] STEVEN GREER, THE EXCEPTIONS TO ARTICLES 8 TO 11 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 14, 18 (Council of Eur. 1997), https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15(1997).pdf.

[219] *See, e.g.*, RSM (A Child) v. SSHD [2018] EWCA (Civ) 18, ¶ 166 (Eng.).

[220] See, for example, R (B & Anor) v. SSHD [2013] EWHC (Admin) 2281, ¶ 21 (Eng.), an unsuccessful challenge to Dublin transfer to France on Article 8 and 9 grounds, in light of French anti-hijab laws.

[221] Defined as a pre-flight spouse, an "unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals," minor children, and parents of unmarried, minor applicants for or beneficiaries of international protection. Dublin III Regulation, *supra* note 144, art. 2(g).

[222] *Id.* recital 14.

[223] Council Directive 2005/85, *supra* note 162, arts. 25-27.

states of the obligation to consider an asylum claim if it was "inadmissible" because a non-Member State was considered to be either a safe first country or safe third country of asylum for that particular applicant.[224] Article 26 defined a safe first country as one in which a person "has been recognised . . . as a refugee" or "otherwise enjoys sufficient protection" and where they will be readmitted.[225]

Article 27(1) defined a safe third country as one where:

(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
(b) the principle of *non-refoulement* in accordance with the Geneva Convention is respected;
(c) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and
(d) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.[226]

According to Article 27(2), safe third country provisions could be applied, however, only pursuant to national laws that included:

(a) rules requiring a connection between the person seeking asylum and the third country concerned on the basis of which it would be reasonable for that person to go to that country;
(b) rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant. Such methodology shall include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe;
(c) rules in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that he/she would be subjected to torture, cruel, inhuman or degrading treatment or punishment.[227]

Thus, the right of individual challenge was recognized, but although the definition of a safe country included the absence of threats to "life and

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[224] *Id.* art. 25.
[225] *Id.* art. 26.
[226] *Id.* art. 27.
[227] *Id.*

liberty" on account of Convention grounds and the possibility of applying for and being granted "protection in accordance with the Geneva Convention,"[228] an individual was only entitled to challenge the transfer on Article 3 (or 4) grounds.[229] These rules were duly incorporated into UK law but rarely, if ever, arose in practice to justify refusing to consider an asylum claim.[230]

In addition, UK courts have interpreted the Refugee Convention as permitting the removal of a recognized refugee to a "safe third country" as long as they do not already have leave to remain under UK domestic law. The only protection against removal the Convention confers on such a refugee, in this view, is the prohibition on *refoulement* contained in Article 33.[231] Thus, in *R (ST (Eritrea)) v. Secretary of State for the Home Department*, the UK Supreme Court upheld the SSHD's decision to refuse to grant refugee status to a citizen of Eritrea whom a UK Tribunal had found to be a Convention refugee because she was at risk of persecution in Eritrea, and to remove her to Ethiopia where she had lived all her life.[232] The Supreme Court upheld the decision on the narrow ground that a person on "temporary admission" pending the determination of their refugee claim was

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[228] *Id.*

[229] When these rules were incorporated in a "recast" Procedures Directive in 2013, they were renumbered Article 35 and Article 38. *See* Council Directive 2013/32, *supra* note 162, arts. 33(2), 35, 38. Article 38 expanded the grounds of challenge to include that "the third country is not safe in [the applicant's] particular circumstances" and added that "the applicant shall also be allowed to challenge the existence of a connection between him or her and the third country in accordance with point (a)." Nonetheless, the definition of "safe" continues to be a narrow one. In Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17, *Ibrahim v. Bundersrepublik Deutschland, Budersrepublik Deutschland v. Magamadov*, ECLI:EU:C:2019:219 (Mar. 19, 2019), for example, the CJEU held that Germany was entitled to treat asylum claims by persons granted subsidiary protection in Poland and Bulgaria as inadmissible on safe third country grounds. This was in spite of the fact that both Poland and Bulgaria were said to be systematically violating the Procedures Directive and Article 18 of the Charter by granting asylum seekers subsidiary protection without first examining whether they were in fact entitled to refugee status, and refusing to consider fresh claims for refugee status based on changes in country conditions. ¶¶ 95-101.

[230] In an appearance before the House of Commons Home Affairs Select Committee on September 03, 2020, representatives of the Home Office said, in answer to direct questions from MPs, that they were "not aware" that the UK had "returned people to other third countries to have their asylum claims heard." HOME AFFAIRS COMMITTEE, ORAL EVIDENCE: CHANNEL CROSSINGS, MIGRATION AND ASYLUM-SEEKING ROUTES THROUGH THE EU, 2020-1, HC 705, para. Q110 (UK), https://committees.parliament.uk/oralevidence/793/default/.

[231] *See* R (ST (Eritrea)) v. SSHD [2012] UKSC 12, [2012] 2 AC 135, ¶¶ 58-60.

[232] For procedural reasons, the Court only considered this broad point of principle; a further appeal against the decision to return her to Ethiopia was still pending. SSHD v ST (Eritrea) [2010] EWCA Civ 643, ¶ 12.

not "lawfully" in the UK for the purposes of Article 32.[233] On the broader issue of whether a person found to be a refugee (but not yet granted lawful status) could be returned to a country where they did not enjoy the "full panoply of rights" guaranteed by the Refugee Convention, Lord Hope, joined by five other judges, noted that this principle appeared to be "undergoing a process of development among the Member States of the European Union," which he hoped the Home Office would take account of in making any future decision whether to return the appellant to Ethiopia.[234] As we have seen, however, that process of development has not yet embraced the "full panoply of rights" set out in the Refugee Convention.

The "safe third country" principle was thus endorsed in sweeping terms: only *refoulement* was prohibited, at least in the case of refugees not yet granted lawful status.[235] Access to an effective asylum procedure in the other country was not said to be required, let alone the positive rights of access to employment, benefits, integration, etc., set out in the Convention. In *Secretary of State for the Home Department v. RR (refugee-safe third country) Syria*, the Upper Tribunal relied on *R (ST (Eritrea))* and found that a Syrian refugee could in theory have been lawfully returned to Algeria, if she had not been at risk of *refoulement* from there to Syria.[236] The risk of *refoulement*, moreover, was said to arise not due to any deficiencies in Algerian refugee procedures (which were not considered), but due to a specific security cooperation agreement between Algeria and Syria.[237] Nor was there any discussion – at the level of general principle – of the refugee's future rights in Algeria. The court noted, however, that "as a matter of international state practice" such cases only arose where a person had "some connection" to a "safe" third country, "based on nationality, prior residence, marriage, entitlement to residence, historical ties etc. [;] it does not arise simply because there is a safe third country somewhere."[238] This appellant had an Algerian husband and three Algerian children, and she had lived in Algeria for nine months before coming to the UK.[239] Although she claimed to have been persecuted in Algeria before she left, this aspect of her account

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[233] *Id.* ¶ 40.

[234] *Id.* ¶¶ 45-47.

[235] The appellant had been granted only "temporary admission" (TA) pending consideration of her asylum claim. The issue of the rights of a person in another lawful status – as a student, a worker or spouse – were not addressed. By the time the case reached the Supreme Court, the Appellant had been on TA, without the right to work without seeking express permission, and required to report to the Home Office every two months, for over 13 years.

[236] [2010] UKUT (IAC) 422, ¶ 23.

[237] *See id.* ¶¶ 30-31.

[238] *Id.* ¶ 11.

[239] *Id.* ¶ 26.

was disbelieved.[240]

RR (Syria) has been considered in a handful of unpublished cases before the Upper Tribunal. One involved essentially the same facts, and the court came to the same conclusion: a Syrian man could not be removed to Algeria, where he had lived with his Algerian wife, because of the risk that he would be refouled from there to Syria.[241] By contrast, the Tribunal upheld the SSHD's decision that a recognized Syrian refugee could be refused refugee status because he was married to a Russian citizen, and Russian law provided for their citizens to apply for their spouses to be admitted and then obtain permanent residence after a year.[242] No such application had been made, and although the couple had visited Russia "briefly" ten years before the appeal, they had married in Dubai and lived together in Oman.[243] In another, the Upper Tribunal found that the First-tier Tribunal Judge had erred in allowing the refugee appeal of a stateless Rohingya from Myanmar because he was returnable to Bangladesh, where he had lived for 14 years, including one year outside a refugee camp, when he had been in Dhaka and had been able to work.[244] Thus, although these appellants had a genuine, personal connection with the safe country, their status there would be legally precarious at best, and there was not perceived to be any requirement that they be entitled to all of the rights set out in the Refugee Convention. As a matter of state practice, however, it important to note that in the 11 years since *RR (Syria)*, there appear to have only been three such cases before the Upper Tribunal.[245]

Since the end of 2020, the UK Government has been introducing fundamental reforms of the asylum system that have at their heart the assertion that asylum-seekers "should claim asylum in the first safe country they" reach.[246] The reforms have proceeded in three stages.

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[240] *Id.* ¶ 15.

[241] SSHD v. Albadawi [2016] UKUT (IAC) AA/09311/2014, ¶¶ 3-4, 8, https://tribunalsdecisions.service.gov.uk/utiac/aa-09311-2014.

[242] IH v. SSHD [2018] UKUT (IAC) PA/06205/2017, ¶ 23, https://tribunalsdecisions.service.gov.uk/utiac/pa-06205-2017.

[243] *Id.* ¶ 2.

[244] SSHD v. AH [2016] UKUT (IAC) AA/07125/2015, ¶ 24, https://tribunalsdecisions.service.gov.uk/utiac/aa-07125-2015.

[245] Two further cases citing *RR (Syria)* did not address the issues being discussed here. *See* HA v. SSHD [2015] UKUT (IAC) AA/11037/2014, [12], https://tribunalsdecisions.service.gov.uk/utiac/aa-11037-2014 (finding that the appellant's nationality was not what she claimed) and KR v. SSHD [2018] UKUT (IAC) PA/07283/2016, [6], https://tribunalsdecisions.service.gov.uk/utiac/pa-07283-2016 (where the First-tier Tribunal judge was criticized for "going on a frolic" when he had found that the appellant, a Kurdish refugee from Iran, could be safely returned to Iraq, and the UK authorities confirmed that they were not suggesting this).

[246] This phrase recurs throughout government announcements and Home Office publications. *See, e.g.*, HC Deb (24 Mar. 2021) (691) col. 930; HOME OFFICE,

First, on December 10, 2020, the Home Office announced new "inadmissibility" Rules to come into effect immediately upon the UK's departure from the Dublin system three weeks later.[247] These provide that an asylum claim may be treated as inadmissible and not considered in the UK if:

> (i) the applicant has been recognised as a refugee in a safe third country and they can still avail themselves of that protection; or
> (ii) the applicant otherwise enjoys sufficient protection in a safe third country, including benefiting from the principle of non-refoulement; or
> (iii) the applicant could enjoy sufficient protection in a safe third country, including benefiting from the principle of non-refoulement because:
> (a) they have already made an application for protection to that country; or
> (b) they could have made an application for protection to that country but did not do so and there were no exceptional circumstances preventing such an application being made, or
> (c) they have a connection to that country, such that it would be reasonable for them to go there to obtain protection.[248]

Significantly, there is no definition either in the rules or in the Home Office's published guidance defining what sort of "connection" would make it reasonable for a person to go to another country to claim asylum. Mere presence is clearly sufficient, but not necessary, meaning that a person's claim could be deemed inadmissible on the grounds that they ought to have chosen to go elsewhere to seek asylum, even to a country where they have never been.[249] This significant expansion of the definition of safe first country is coupled with the removal of any explicit requirement that transfer to a safe third country be reasonable. Connections to a safe third country are relevant to the finding of inadmissibility, but not to a subsequent transfer.

INADMISSIBILITY: SAFE THIRD COUNTRY CASES 3, 5 (2020) (UK), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/947897/inadmissibility-guidance-v5.0ext.pdf (providing guidance for the asylum inadmissibility rules "handling of asylum claims under third country inadmissibility principles" effective in December 31, 2020).

[247] HOME OFFICE, STATEMENT OF CHANGES TO THE IMMIGRATION RULES: HC 1043, at 4-5 (Dec. 10, 2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/943127/CCS207_CCS1220673408-001_Statement_of_changes_in_Immigration_Rules_HC_1043__Web_accessible_.pdf.

[248] Immigration Rules, pt. 11: Asylum, ¶ 345A (2016), https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-11-asylum.

[249] The Home Office Guidance repeatedly refers to a relevant safe country as one the applicant was present in or had a connection to. *See* HOME OFFICE, *supra* note 246, *passim*.

Transfer can be to any "safe" country anywhere in the world.[250]

This was followed by the release of a New Plan for Immigration "policy statement" in Parliament in March,[251] and then, on July 06, 2021, by the Nationality and Borders Bill.[252] At the time of writing, the Bill had made it through the initial stages of the UK legislative process with unanimous support in the House of Commons from the Conservative and Democratic Unionist parties, and unanimous opposition from all others.[253]

The Bill would expand the concept of safe countries of asylum in several significant ways. First, it would significantly lower the standard for finding a country "safe." In the context of an inadmissibility decision, a "safe" country would be one where:

i) "The claimant's life and liberty are not threatened . . . by reason of their race, religion, nationality, membership of a particular social group or political opinion;"

ii) "A person" will not be sent from that state to a further State in contravention of the Refugee Convention or in violation of Article 3 of the ECHR; and

iii) "A person may apply to be recognised as a refugee and . . . receive protection in accordance with the Refugee Convention."[254]

A country could therefore be considered "safe" even where there is a real risk to the claimant of human rights violations, including threats to life and liberty other than on Refugee Convention grounds or even inhuman and degrading treatment other than in the context of removal to a further country. It is not even clear that it would need to be shown that this particular claimant would be protected against *refoulement* or removal in violation of Article 3. There is no consideration of the accessibility or fairness of the asylum procedures in the safe State; in fact, it is not even a requirement that the claimant be able to apply for refugee status, just that in general, in that State "a person" "may" do so. Nor is protection "in accordance with the Refugee Convention" defined.

Secondly, it would enact the Inadmissibility Rules set out above into

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[250] This is a significant divergence from the Procedures Directive, which allows for inadmissibility in the terms set out above, but makes it conditional on admissibility to the specified safe third country to which it would be reasonable for the applicant to go. If that country will not admit them, the case must be determined within the State where the person finds themselves, and in accordance with all of the procedural safeguards set out in the Directive. *See* Council Directive 2013/32, *supra* note 162, arts. 35-39.

[251] HOME OFFICE, *supra* note 147.

[252] Nationality and Borders Bill 2021-22, HC Bill [141] (UK).

[253] *Nationality and Borders Bill: Second Reading*, U.K. PARLIAMENT: VOTES IN PARLIAMENT (July 20, 2021), https://votes.parliament.uk/Votes/Commons/Division/1083.

[254] HC Bill [141], cl. 14, renumbered cl. 15 after amendments in the House of Commons.

legislation, but further lower the required degree of the connection to another State. While under the current rules, inadmissibility is triggered by a previous opportunity to apply for "sufficient protection," including protection from *refoulement*, the Bill would require only an opportunity to apply for protection from removal in violation of the Refugee Convention or Article 3 ECHR. In other words, although a safe State is one in which "a person" may apply for "protection in accordance with the Refugee Convention," there is no requirement that this particular applicant received, applied for, or even had an opportunity to apply for such protection. Finally, the Bill would authorize the transfer of asylum-seekers to third countries without any requirement that it be possible to apply for and be granted protection in accordance with the Refugee Convention there.[255]

The Bill thus reinforces the trend identified above of defining a safe third State merely by the absence of *refoulement* or inhuman and degrading treatment. Where it proposes a radical departure from the Convention is in reducing a State's obligations to refugees within its own territory to the same bare minimum. Those who "stopped" in a "safe" country on their journey to the UK but are eventually recognized as refugees will be designated "Group 2" refugees.[256] The Home Secretary will have the power to enact immigration rules that deny them access to public welfare benefits except in cases of destitution (in violation of Article 23 of the Convention), and treat them "differently" from Group 1 refugees in other ways.[257] The bill provides three examples of where the rules might in future differentiate: with regard to the length of leave, the conditions for settlement, and rights to family reunion.[258] The formal Explanatory Notes published together with the Bill confirm that the intention is to give Group 2 refugees limited periods of leave to remain without an automatic right to settlement (in violation of Article 34), expect them "to leave the UK as soon as they are able to or as soon as they can be returned or removed, once no longer in need of protection" (in potential violation of Article 32), and "restrict" their rights to family reunion.[259]

Opportunities for individual challenge remain, in that a finding of inadmissibility depends on whether it was or would be reasonable for an individual to claim asylum in a particular safe country. Although there is no

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[255] *Id.* Sch. 3, cl. 1.

[256] Any refugee who did not come directly to the UK, did not claim asylum as soon as reasonably practicable, or has entered or is in the UK unlawfully without good cause, would be in Group 2. *Id.* cl. 10(1)-(3), renumbered cl. 11 after amendments in the House of Commons.

[257] *See id.* cl. 10(5)-(9); *see also Public Funds*, U.K. GOV'T (Feb. 17, 2014), https://www.gov.uk/government/publications/public-funds—2/public-funds (counting a range of benefits included in public funds).

[258] HC Bill [141], cl. 10(5), now cl. 11(5).

[259] Nationality and Borders Bill 2021, Explanatory Notes ¶ 19 (UK).

formal inadmissibility procedure or right of appeal against a finding of inadmissibility,[260] these did not exist against a Dublin transfer either, and presumably challenge by way of judicial review would still be available. In a significant restriction on the right of individual challenge, however, when it comes to the definition of a safe country, if the Home Secretary designates a country as safe, only the presumption that a person will not be removed from there in violation of their "Convention rights" under the ECHR is rebuttable. A presumption that rights under the Refugee Convention will be respected is not.[261]

There were several trends in the public consultation around the New Plan for Immigration and the parliamentary debate on the Borders Bill that are relevant here. The first is that opponents of the New Plan for Immigration strongly criticized it as in breach of a number of different Convention rights, implicitly rejecting the narrow focus on *non-refoulement* and inhuman and degrading treatment in the recent jurisprudence described above. UNHCR criticized the potential breaches of Articles 23, 31, 32 and 34 of the Refugee Convention,[262] and several leading barristers' chambers made similar arguments.[263] The second is that it is one thing to introduce safe country principles in domestic law, and quite another to implement them in practice. In the first year after the inadmissibility rules were implemented, "9,622 asylum claimants were identified for consideration on inadmissibility grounds," but only 11 were removed.[264] During the same period, no country was identified as a potential "safe country somewhere" for the UK's unwanted asylum-seekers.[265]

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[260] *See generally* HC Bill [141], cl. 13-14, now cl. 14 and 15.

[261] *Id.* sch. 3, ¶ 5.

[262] *See* UNHCR, *UNHCR Observations on the New Plan for Immigration policy statement of the Government of the United Kingdom*, ¶ 45-49 (May 4, 2021), https://www.unhcr.org/uk/publications/legal/60950ed64/unhcr-observations-on-the-new-plan-for-immigration-uk.html.

[263] These included Garden Court Chambers, which argued that it would breach Articles 23 and 24, and Matrix Chambers, which argued that it would breach Article 34. The Law Society, which described the two-tier system generally as in breach of the Convention. *New Plan for Immigration Consultation - Law Society Response*, LAW SOC'Y (June 2, 2021), https://www.lawsociety.org.uk/campaigns/consultation-responses/new-plan-for-immigration.

[264] *How Many People Do We Grant Asylum or Protection To?*, U.K. HOME OFFICE (Mar. 3, 2022), https://www.gov.uk/government/statistics/immigration-statistics-year-ending-december-2021/how-many-people-do-we-grant-asylum-or-protection-to.

[265] *See, e.g.*, Lizzie Dearden, *Priti Patel Appoints Man Behind Australia's 'Inhumane' Asylum Offshoring to Review Border Force*, THE INDEP. (Feb. 17, 2022), https://www.independent.co.uk/news/uk/home-news/channel-crossings-priti-patel-australia-migrants-b2017190.html.

CONCLUSION: LIMITATIONS AND POSSIBILITIES IN APPLYING NORMATIVE PRINCIPLES TO FIRST AND SAFE THIRD COUNTRY POLICIES

Transfers or returns of refugees under first or third country of asylum agreements without individualized assessments would not be consistent with the Refugee Convention or with international human rights law, nor would agreements that rest on unrebuttable presumptions that receiving States will comply with their treaty obligations. To this extent, U.S. policies that seek to transfer or push back refugees *en masse*, based purely on their nationality and without an opportunity to challenge the decision, are arguably inconsistent with international norms.

But the grounds on which transfer can be resisted because the receiving country is not "safe" continue to be contested. Although there is consensus that there must be protection against *refoulement* and inhuman and degrading treatment, efforts to make transfer conditional on access to a fair and effective asylum procedure or to a durable solution have had less success. This is reflected in the UK Government's assertions that its Borders Bill is consistent with the country's obligations under the Convention.[266] The narrow emphasis in previous litigation and advocacy on *non-refoulement* and inhuman and degrading treatment seems to have had adverse consequences; however, UNHCR explicitly condemned the New Plan for Immigration and the Borders Bill for their failure to respect all of the rights enshrined in the Convention, not simply for the risks it creates of *refoulement*. On this particular issue, the U.S.' "firm resettlement" principles – prior to the Trump policies – set a higher standard, at least for a safe "first" country.

In comparing the U.S. and Canada safe third and first country of asylum considerations, both with each other and with UK norms, several key differences must be taken into account. First, despite its ratification of the critical treaties relevant to application of the U.S. firm resettlement, Third Country Asylum Rule and ACA bars, U.S. courts do not automatically apply international law, whether treaty or custom, in their decision-making process, despite the Constitution's Article VI proscription to do so.[267] A treaty must either be found to be self-executing, or conforming legislation must be passed

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[266] The UK Government asserts that in spite of the creation of Group 2 status under Nationality and Borders Bill, "[a]ll individuals recognised as refugees by the United Kingdom will continue to be afforded the rights and protections required under international law, specifically those afforded by the 1951 Refugee Convention." Nationality and Borders Bill 2021, Explanatory Notes ¶ 146 (UK).

[267] U.S. CONST. art. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Law of any state to the Contrary notwithstanding.").

in U.S. domestic law for courts to enforce its provisions.[268] The requirement that treaties must be determined to be self-executing or explicitly codified in domestic law means that U.S. courts will not independently apply a provision in a treaty the United States has ratified, such as the Civil and Political Rights Convention (ICCPR), absent a specific finding that it is self-executing.[269] Thus, U.S. courts will not, for example, take into consideration family ties in the United States in determining whether an individual can be prevented from obtaining asylum if s/he passed through another country *en route*.[270] In addition to the obligation to determine whether a treaty is self-executing, U.S. courts have developed a series of jurisprudential doctrines that create barriers to application of international law in many cases in which the challenge might be against state action or state actors. These include whether the issue under consideration is a political question and whether sovereign immunity or acts of state shield the inquiry.[271]

Second, Supreme Court doctrine in immigration cases has created additional critical barriers to robust application of international standards: the doctrine of plenary power, and the primacy of domestic law in interpreting international law.[272] Thus, despite the fact that both the Refugee Protocol and

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[268] *See* RESTATEMENT (FOURTH) OF FOREIGN REL. L. OF THE U.S. § 310(1) (AM. L. INST. 2018); *see also* Foster v. Nielsen, 27 U.S. 253 (1829); Medellin v. Texas, 552 U.S. 491 (2008).

[269] International Covenant on Civil and Political Rights pmbl., arts. 17, 23-24, Oct. 5, 1977, T.I.A.S. 92-908 (enter into force Sept. 8, 1992) [hereinafter ICCPR].

[270] *See* RESTATEMENT (FOURTH) OF FOREIGN REL. L. OF THE U.S. § 310; *see also* S. Res. of Ratification of International Covenant on Civil and Political Rights, 102d Cong., 138 Cong. Rec. S4781-01, S4784 (1992) ("[T]he United States declares that the provisions of Articles 1 through 27 of the [ICCPR] are not self-executing."); S. EXEC. REP. NO. 102-23, at 20 (1992) (stating Congressional intent that ICCPR will not create private cause of action in U.S. courts); *e.g.*, Dutton v. Warden, FCI Estill, 37 Fed. Appx. 51, 53 (4th Cir. 2002) ("ICCPR is not privately enforceable"); Walker v. Tillerson, 1:17–CV–732, 2018 WL 1187599, at *9 (M.D.N.C. Mar. 7, 2018) (denying ICCPR Article 12 claim on citizenship right for lack of private right of action).

[271] *See* Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 EUR. J. INT'L L. 159, 169-73 (1993), http://www.ejil.org/pdfs/4/1/1197.pdf (on different doctrines barring application of international law in U.S. courts).

[272] The effect of the plenary power doctrine on the application of international law in U.S. domestic legal decisions is significant. The plenary power doctrine dictates that U.S. courts exercise extreme deference to administrative decision-making under an interpretation that Congress and its administrative delegates have almost exclusive power under the Constitution to determine policies on immigration and naturalization. The end result is a process in which judicial deference is at its peak and petitioners may only challenge administrative decisions on procedural grounds. *See, e.g.*, Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 843-44 (1984) (providing deference to agency-promulgated policies "unless [it is] arbitrary, capricious, or manifestly contrary to the [authorizing] statute"); *see also* D. B. Janzen Jr., First Impressions and Last Resorts: The Plenary Power Doctrine, the

the CAT have been codified in domestic law,[273] Supreme Court jurisprudence interprets treaties through the lens of domestic statutory interpretation and not through international customary or international authoritative interpretation.[274] Related to this doctrine is the effect of the United States' failure to ratify the Vienna Convention on the Law of Treaties (VCLT).[275] Although U.S. courts do refer to the VCLT, they do so as 'instructive' guidance, and not as binding rules of treaty interpretation.[276] Hence, core interpretive rules that would ensure the primacy of international law in testing the legality of U.S. immigration policies are inconsistently applied.[277] In this regard, the fact that the United States does not recognize an authoritative role for UNHCR in interpreting the Refugee Protocol and Convention is particularly important.

Several cases illustrate the interplay of these doctrines that put the United States at significant variance from international consensus on the scope of *non-refoulement*, the limitations on a State's ability to prevent access to asylum, and the interpretation of elements of the refugee definition. In *Sale v. Haitian Centers Council, Inc.*, the Supreme Court found that *non-refoulement* does not apply to the United States' actions in interdicting vessels on the high seas to prevent Haitian asylum-seekers from reaching U.S. territory in order to apply for asylum.[278] Most important, the basis of the Court's decision was not an examination of international legal interpretation

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Convention Against Torture, and Credibility Determinations in Removal Proceedings, 67 EMORY L. J. 1235, 1238 (2018), https://scholarlycommons.law.emory.edu/cgi/viewcontent.cgi?article=1067&context=eljv.

[273] The CAT has been codified in the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA). *See* § 2242, 112 Stat. 2681-822.

[274] *See* Ganash Sitaraman, *The Use and Abuse of Foreign Law in Constitutional Interpretation*, 32 HARV. J. L. & PUB. POL'Y 653, 689 (2009) ("In cases where the fundamental rights that a court seeks to protect are described in a treaty or convention or are a matter of customary international law, the question is merely whether those rights are incorporated by domestic law.").

[275] Vienna Convention on the Law of Treaties, opened for signature, May 23, 1969, 1155 U.N.T.S. 331.

[276] *But see* Mora v. New York, 524 F.3d 183, 196 n.19 (2d Cir. 2008) ("Although the United States has not ratified the Vienna Convention on the Law of Treaties, our Court relies on it as an authoritative guide to the customary international law of treaties, insofar as it reflects actual state practices.").

[277] In contrast to the VCLT art. 27, which requires that a state cannot "invoke the provisions of its internal law as justification for its failure to perform a treaty," U.S. courts apply 'last in time' and 'compatibility' rules which are entirely at odds with the VCLT. *See* RESTATEMENT (THIRD) FOREIGN REL. L. § 115(1)(a) (AM. L. INST. 2015) ("An act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supersede the earlier rule or provision is clear or if the act and the earlier rule or provision cannot be fairly reconciled.").

[278] Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 177-79 (1993).

of the provision at issue – Article 33 of the Refugee Protocol – but domestic law interpretation of the U.S. statutory version of the provision.[279] The precedent-setting Supreme Court asylum decisions of *I.N.S. v. Stevic* and *I.N.S. v. Cardoza-Fonseca* reinforce the international-law-via-domestic-law interpretation in finding that the refugee definition and the *non-refoulement* provision in the Refugee Convention refer to two different standards, and that not all putative refugees are entitled to be considered for asylum.[280]

Third, the paucity of United States' ratifications of human rights treaties—and the reservations the United States has made to the few it has ratified—mean that human rights treaty arguments that could form grounds for challenging extraterritorial extension of U.S. asylum policies, or constrain the application of first country and safe third country considerations, are few and far between.[281] Particularly problematic is that the United States is the sole remaining country in the world that is not a State Party to the Convention on the Rights of the Child,[282] a treaty with particular relevance to maintaining family unity, preventing a child's separation from parents, prohibiting any form of physical or mental violence, abuse or neglect, and ensuring at all times the 'best interest of the child' as the guiding principle for state action.[283]

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[279] *Id.* at 179-87 (referring to the Refugee Protocol as non-self-executing).

[280] *See* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 436-37 (1987); I.N.S. v. Stevic, 467 U.S. 407, 430 (1984).

[281] The most common U.S. reservation to human rights treaties is that the U.S. Constitution has supremacy over any treaty obligation. *See* DEBORAH WEISSMAN ET AL., UNC SCHOOL OF LAW HUMAN RIGHTS POLICY LAB, UNDERSTANDING ACCOUNTABILITY: THE DOMESTIC ENFORCEMENT OF INTERNATIONAL HUMAN RIGHTS TREATIES 33 (2016-17), https://law.unc.edu/wp-content/uploads/2019/10/understanding-accountability-for-torture.pdf ("The text of the Supremacy Clause states unequivocally that treaties shall be the law of the land. However, the United States consistently appends RUDs [reservations, understandings and declarations] that not only serve as an attempt to limit treaty obligations but also act to deny automatic treaty enforceability with further domestic legislation."). Note that this approach is inconsistent with VCLT art. 27.

[282] Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th, Sess., Supp. No. 49, U.N. Doc. A/44/736 (1989), 28 I.L.M. 1148 (1989); *see also* U.N. Treaty Collection, 11. Convention on the Rights of the Child, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en.

[283] The consequences of the STCA and ACA policies are a wide range of violations of these guarantees, including family separation, metering, detention of children, and summary returns. *See* YAEL SCHACHER ET AL., DEPORTATION WITH A LAYOVER: FAILURE OF PROTECTION UNDER THE U.S.-GUATEMALA ASYLUM COOPERATIVE AGREEMENT 5, 36 (2020), https://static1.squarespace.com/static/506c8ea1e4b01d9450dd53f5/t/5ec3f0b370656c62ed7daa24/1589899466780/Guatemala+ACA+Report+-+May+2020+-+FINAL.pdf ("The ACA transferees also gave accounts showing that their registration and processing at the Guatemalan airport was inadequate, lacking in both humanitarian reception care and access to information. Transferees, including small children, waited hours on the tarmac with no food,

In the UK, similarly, international treaties have no direct effect on domestic law. Although there is a presumption that domestic law can and should be read consistently with international law,[284] international law does not enter domestic law except through acts of Parliament or through the common law.[285] Although Section 2 of the Asylum and Immigration Act 1993 prohibits the Secretary of State from enacting immigration rules that are contrary to the Refugee Convention, now that the UK has left the European Union, there is no legal barrier to Parliament passing primary legislation contrary to it.[286]

Canada, in contrast, has incorporated its main human rights treaty commitments into the Canadian Charter of Rights and Freedoms, and theoretically should apply these obligations directly in its interpretations of Canadian law. Thus, in both Federal Court decisions in the two *Canadian Council v. Canada* cases, the Court considered whether the U.S.-Canada STCA violated Canada's obligations under the Refugee Convention and the CAT directly, as well as the Canadian Charter. The likelihood that the United States would violate the applicants' right to protection from *refoulement* and the arbitrary and inhumane immigration detention policies of the United States, were assessed at the Canadian Federal Court level under Convention standards, not only the Canadian Charter.[287] However, at the Court of Appeals level, the calculation seemed to change dramatically so that the substance of the claims of international law violations were no longer the central issue. Commentators have given various explanations for the diametrically different Court of Appeals approaches, from political considerations to a lesser "rule of law" application to non-citizens of Canada than citizens.[288] However, among the important factors that differ in the Canadian as opposed to the U.S. approach is that the former automatically considered family ties, children and vulnerable claimants as exceptions to

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water, or adequate medical attention . . . . [C]hildren in the shelter are showing signs of anxiety, aggression, and arrested development."); *Guatemala Asylum Agreement*, 603 DIVERSITY (Feb. 21, 2022), https://603diversity.com/2022/02/21/guatemala-asylum-agreement/ ("Many [ACA transferees] arrive with children, some with very young children, which creates another barrier to access work, as child care options are quite limited.").

[284] Lord Jonathan Mance, former Deputy President, Sup. Ct. of the U.K., Lecture at King's College: International Law in the U.K. Supreme Court, ¶ 8 (Feb. 21, 2017), https://www.supremecourt.uk/docs/speech-170213.pdf.

[285] *See, e.g.*, R (SG and others) v. SOS for Work and Pensions [2015] UKSC 16, [235]; R (Miller and others) v. SOS for Exiting the European Union [2017] UKSC 5, [55].

[286] Asylum and Immigration Appeals Act, (1993) § 2 (UK), https://www.legislation.gov.uk/ukpga/1993/23.

[287] *See* Her Majesty the Queen v. Canadian Council for Refugees, 2008 FCA 40, paras. 3, 11 (Can.) (citing Canadian Council for Refugees v. Canada, 2007 FC 1262 (Can.)).

[288] *See, e.g.*, Audrey Macklin, *Citizenship, Non-Citizenship and the Rule of Law*, 69 U. NEW BRUNSWICK L. J. 19, *passim* (2018).

safe third country returns—though at the appellate level, these considerations, along with the other substantive claims, were not considered central to the Court of Appeal review. Although these exceptions were not mandated by the Charter, they are mandated under Canada's application of its human rights treaties, including the ICCPR, and were given careful consideration in both Federal Court decisions in 2007 and 2020.[289]

In the United States, in limited fashion, federal courts do interpret international treaty and customary law when required to apply it in particular contexts in the absence of finding a treaty to be self-executing, primarily through the doctrine of consistency.[290] That is, courts will not interpret a statute in a manner inconsistent with an international treaty or customary principle if at all possible.[291] This doctrine is fairly routinely applied by federal courts, in tandem with the practice of using international consensus and comparative application of the principle in question to support or confirm a domestic statutory construction.[292] How have the core normative principles identified by UNHCR as essential to the conformity with the international refugee and human rights regime fared, then, in U.S. jurisprudence on first safe and third country of asylum policies?

Despite the territorial limitations on the reach of the *non-refoulement* prohibition, as the cases above have shown, both federal courts and immigration courts have found it to be a rule of customary international law, binding on immigration adjudicators, as an international and statutory legal obligation. Moreover, courts appear to have (mostly) held the line in interpreting the firm resettlement provision(s) as requiring an individual examination of whether the factors have been proved to establish firm resettlement, including the relative permanency of the status offered, and that the first country would not violate *non-refoulement* (or allow chain *refoulement*). The decisions have been fairly consistent since *Matter of A-G-G-* that firm resettlement requires proof of admission by the proposed receiving state, and a form of international protection must be offered. However, the courts have not consistently emphasized the need to show fair and efficient procedures for determination of refugee status or particular protection of vulnerable groups such as unaccompanied and separated children in these determinations – tolerating separation of children from their

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[289] *See* Canadian Council for Refugees v. Canada, 2007 FC 1262 (Can.); Canadian Council for Refugees v. Canada (Immigr, Refugees and Citizenship), 2020 FC 770.

[290] *See* Gary Born, *Customary International Law in United States Courts*, 92 WASH. L. REV. 1641, 1703 (2017) (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 728-31, 734-35 (2004); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, (1964)).

[291] RESTATEMENT (FOURTH) OF FOREIGN REL. L. OF THE U.S. §§ 309, 406; *see also* Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

[292] *See* Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1124-27 (1990).

families in some of the decisions on the recent Transit Country, ACA and MPP (first and third country) policies. Similar to the state of European law, U.S. decisions have not yet established as prerequisites to first or third country transfers that the receiving state be shown to adhere to international human rights standards in reception conditions; access to health, education and basic services; or safeguards against arbitrary detention.

With minimal application of international legal principles in the U.S. cases challenging the first safe and third country of asylum policies, the analyses are almost exclusively based on U.S. statutory and—less frequently—Constitutional law. As described in the cases above, federal courts have primarily examined the legality of the provisions in terms of whether they comply with the APA, whether there is sufficient evidence to support the government's claim of the safety afforded, or availability of asylum in the transit or third country, and whether certain due process guarantees were met while the individual was in U.S. custody, such as access to counsel.[293] The task for U.S. lawyers is to support their claims of statutory and constitutional violations with evidence from the European caselaw and internationally-normative refugee law principles to convince U.S. courts that they must interpret the domestic provisions consistently with those international norms, and that longstanding U.S. precedent on firm resettlement parallels these core principles. While the Trump era policies of first and safe third country of asylum are being litigated and will remain in the short or long term, the battle to establish bedrock principles of asylum and refugee protection will continue, and hard-fought lessons must be more closely appreciated on both sides of the Atlantic.

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[293] *See E. Bay Sanctuary Covenant*, 964 F.3d at 838, *aff'g* 385 F. Supp. 3d at 951. The Ninth Circuit Panel recognized international legal implications of the rule's implementation. E. Bay Sanctuary Covenant v. Trump, 950 F.3d 1242, 1274-75 (9th Cir. 2020).

APPENDIX: CONSEQUENCES FOR MIGRANTS AT THE U.S.-MEXICO BORDER, AS OF FEBRUARY 2020[294]

Initiative	Date Enacted	Details	Migrants Affected
Metering	Mid-2018	U.S. Customs and Border Protection (CBP) officials limit the number of migrants who can make asylum claims each day at ports of entry, leading to waits to enter the United States that can last days or months	All nationalities; all family compositions (Single adults, families, and unaccompanied children)
Migrant Protection Protocols (MPP, also known as Remain in Mexico)	Jan. 29, 2019	CBP returns migrants to Mexico to await their U.S. immigration court hearings and final adjudication; the waits can last months.	Migrants from Spanish-speaking countries other than Mexico; Brazilians; single adults and families
Transit-Country Asylum Ban	July 16, 2019	This regulation makes ineligible for asylum all migrants who crossed through third countries on their way to the U.S.-Mexico border and who fail to present formal determinations that they applied for and were denied asylum in one of those countries	All nationalities other than Mexicans; all family compositions
Prompt Asylum Case Review (PACR)	Oct. 7, 2019	Claimants for humanitarian protection have cases adjudicated rapidly, with the goal of removal within 10 days	Non-Mexicans; single adults and families
Humanitarian Asylum Review Program (HARP)	Oct. 7, 2019	Asylum seekers have cases adjudicated rapidly, with the goal of removal within 10 days	Mexicans; single adults and families
Asylum Cooperation Agreements (ACAs, also known as Safe Third-Country Agreements)	Nov. 20, 2019	U.S. asylum seekers may be deported to Guatemala to seek asylum there. (ACAs with El Salvador and Honduras have been signed but not yet implemented.)	Hondurans and Salvadorans (with the possibility of future inclusion of other nationality groups); Single adults and families

[294] Chishti & Bolter, *supra* note 62.