BUYING YOUR WAY OUT OF THE CONVENTION: EXAMINING THREE DECADES OF SAFE THIRD COUNTRY AGREEMENTS IN PRACTICE

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INTRODUCTION

In the last decade, the world has seen an historic increase in the number of displaced persons. By the end of 2010, there were 43.7 million forcibly displaced people worldwide—what was then the highest number in 15 years.[1] By 2019, the number of displaced persons had nearly doubled to 79.5 million.[2] With many asylum systems overwhelmed,[3] States have increasingly sought to construct alternatives to the traditional asylum regime by externalizing the processing of asylum applications through bilateral and multilateral agreements, wherein a designated safe third country processes asylum applications. Although initially conceived as burden-sharing systems, after three decades of implementation in different States, these "safe third country agreements" ("STCAs") have generally failed to provide sustainable solutions to mass flows of refugees. Instead, STCAs with significant power and wealth disparities between parties have allowed wealthy States to clandestinely buy their way out of their obligations under the 1951 Refugee Convention[4] and have resulted in the direct and indirect *refoulement*, or return,[5] of millions of asylum seekers, despite these agreements purportedly protecting against it.

This Note examines the expansion of STCAs in the last three decades, focusing on the American and European systems, analyzing their efficacy at providing sustainable solutions to unprecedented displacement. Section I will discuss the history and purpose of STCAs. Section II will outline the

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1. U.N. HIGH COMM'R FOR REFUGEES, GLOBAL TRENDS 2010 (2011), https://www.unhcr.org/statistics/country/4dfa11499/unhcr-global-trends-2010.html.

2. U.N. HIGH COMM'R FOR REFUGEES, GLOBAL TRENDS 2019 (2020), https://www.unhcr.org/5ee200e37.pdf.

3. *See, e.g.*, Daphne Panayotatos, *Reform Past Due: Covid-19 Magnifies Need to Improve Spain's Asylum System*, REFUGEES INT'L (July 27, 2020), https://www.refugeesinternational.org/reports/2020/7/22/reform-past-due-covid-19-magnifies-need-to-improve-spains-asylum-system; Doris Meissner, Faye Hipsman & T. Alexander Aleinikoff, *The U.S. Asylum System in Crisis: Charting a Way Forward*, MIGRATION POL'Y INST. (Sept. 2018), https://www.migrationpolicy.org/sites/default/files/publications/MPI-AsylumSystemInCrisis-Final.pdf; Anthony Faiola, *A global surge in refugees leaves Europe struggling to cope*, WASH. POST (Apr. 21, 2015), https://www.washingtonpost.com/world/europe/new-migration-crisis-overwhelms-european-refugee-system/2015/04/21/3ab83470-e45c-11e4-ae0f-f8c46aa8c3a4_story.html.

4. Convention Relating to the Status of Refugees, *adopted* July 28, 1951, art. 1, 19 U.S.T. 6259, 189 U.N.T.S. 137, 150 (entered into force Apr. 22, 1954) [hereinafter Refugee Convention].

5. Return to a State where the asylum seeker is placed at risk of persecution or torture.

international and domestic legal frameworks surrounding STCAs and the status of legal challenges to these types of agreements in these regions. Section III will compare the current practice of STCAs in Europe and the Americas, analyzing the difference in treatment of STCAs in the American and European systems. Finally, Section IV will conclude with a discussion of the lessons learned from these comparisons and the way forward for these agreements.

I. THE SAFE THIRD COUNTRY CONCEPT AND ITS EARLY IMPLEMENTATION

Under an STCA, asylum seekers are required to make their claims in the first country they enter that is a party to the Agreement. If they fail to do so, the other State or States party to the Agreement may dismiss their claims and transfer them to that first country to have the opportunity to seek asylum there.[6] These agreements, however, do not remove a State's obligations to asylum seekers and refugees under the Refugee Convention. Therefore, transfer of asylum seekers is considered appropriate only where the asylum seeker would be protected against *refoulement*, that is, return to a country where they would face persecution or torture, and where they would receive fair asylum proceedings in the third country.[7]

The safe third country concept originally developed as a tool of international cooperation that would allow burden-sharing among States and address the phenomenon of asylum seekers moving from States where they have found protection to seek refugee status elsewhere.[8] This stated goal of the safe third country concept has generally been endorsed by the entities governing refugee protection. For example, the Preamble of the Refugee Convention acknowledges that "[. . .] the grant of asylum may place unduly heavy burdens on certain countries, and [that] a satisfactory solution of a problem of which the United Nations has recognised the international scope and nature cannot therefore be achieved without international co-operation."[9] The U.N. High Commissioner of Refugees ("UNHCR"), the U.N. agency

6. *See, e.g.*, Claire Feltham & Amelia Cheatham, *Can 'Safe Third Country' Agreements Resolve the Asylum Crisis?*, COUNCIL ON FOREIGN RELS. (Aug. 29, 2019), https://www.cfr.org/in-brief/can-safe-third-country-agreements-resolve-asylum-crisis ("Asylum seekers are required to make their claims in the first country they enter that is a party to the safe third country agreement. If they don't, the other countries in the agreement can dismiss their claims and send them back to that country.").

7. *See, e.g.*, U.N. HIGH COMM'R FOR REFUGEES, GUIDANCE NOTE ON BILATERAL AND/OR MULTILATERAL TRANSFER ARRANGEMENTS OF ASYLUM-SEEKERS (May 2013), www.refworld.org/docid/51af82794.html [hereinafter U.N. Guidance Note]; 8 U.S.C. § 1158(a)(1) (2019).

8. U.N. HIGH COMM'R FOR REFUGEES, *Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection* (Oct. 13, 1989), https://www.unhcr.org/excom/exconc/3ae68c4380/problem-refugees-asylum-seekers-move-irregular-manner-country-already-found.html; María-Teresa Gil Bazo, *The Safe Third Country Concept in International Agreements on Refugee Protection: Assessing State Practice*, 33/1 NETHERLANDS QUARTERLY OF HUMAN RIGHTS 42, 47 (2015), https://www.unhcr.org/en-us/59c4be077.pdf; U.N. HIGH COMM'R FOR REFUGEES, BACKGROUND NOTE ON THE SAFE THIRD COUNTRY CONCEPT AND REFUGEE STATUS (July 26, 1991), https://www.unhcr.org/excom/scip/3ae68ccec/background-note-safe-country-concept-refugee-status.html [hereinafter UNHCR Background Note].

9. Refugee Convention, *supra* note 4, at 13.

charged with protecting asylum seekers and refugees' rights,[10] affirms the need for international cooperation in the context of States' obligations to refugees, stating "international problems require an international solution."[11] The theory behind cooperation efforts is that splitting flows of asylum seekers between multiple countries, rather than allowing large amounts of claims to accumulate in one State where many asylum seekers are entering, prevents any individual State from being overburdened. Theoretically, all States could play their part in refugee protection, and asylum seekers' claims could be resolved more quickly and efficiently by reducing backlogs.

However, in the words of Dr. María-Teresa Gil-Bazo, Senior Lecturer at Newcastle Law School and professor of international law, the implementation of international cooperation, including its manifestation through the safe third country concept, has become "one of the most complex issues in refugee protection"[12]—and one of the most controversial. Despite STCAs' initial conception as tools of international cooperation, their contemporary application often serves mixed motives. Recently, States have used STCAs to block flows of unwanted asylum seekers by creating buffer zones outside the territory of their State.[13] They have instead become a part of States' arsenals to externalize migration controls outside of their territory in an attempt to avoid the triggering of asylum seekers' rights and States' attendant obligations.[14] Ultimately, these States' goals appear to be to generally discourage or halt unwanted migration altogether.[15]

Regardless of their controversial history, STCAs have been an established practice in Europe and the Americas since the late 1980s.[16] The Schengen Convention, the earliest agreement that incorporated the safe third country concept and which would later form the foundation for the Dublin Regulation, developed in Western Europe as a result of an influx in migrants

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10. U.N. HIGH COMM'R FOR REFUGEES, HISTORY OF UNHCR, https://www.unhcr.org/en-us/history-of-unhcr.html (last visited Nov. 9, 2020).

11. UNHCR Background Note, *supra* note 8.

12. Gil Bazo, *supra* note 8, at 43.

13. *See* Susan Gzesh, *Safe Third Country Agreements with Mexico and Guatemala would be Unlawful*, JUST SECURITY (July 15, 2019), https://www.justsecurity.org/64918/safe-third-country-agreements-with-mexico-and-guatemala-would-be-unlawful/.

14. *See id.*

15. *See, e.g.*, Remarks by President Trump at Signing of Safe Third Country Agreement with Guatemala, OFF. OF THE PRESS SEC'Y, EXEC. [OFF.] OF THE PRESIDENT (July 26, 2019), https://gt.usembassy.gov/remarks-by-president-trump-at-signing-of-safe-third-country-agreement-with-guatemala/ (referring to the signing of the Safe Third Country Agreement with Guatemala, "And the fact that they do have, really, a big slowdown coming in from Guatemala at the border, because we have, again, 6,000 Mexican troops at the border of Guatemala. So that helps. But this will really help. This is something that's going to be rather incredible. So the numbers are going down.").

16. Rachel Schmidtke, Yael Schacher & Ariana Sawyer, *Deportation with a Layover: Failure of Protection Under the U.S.-Guatemala Asylum Cooperative Agreement*, REFUGEES INT'L (May 19, 2020) [hereinafter Deportation With a Layover] ("Beginning in the late 1980s, several European countries, the United States, and Canada began signing bilateral or multilateral agreements and adopting domestic laws to enable countries with comparable asylum standards and procedures to transfer asylum seekers to countries designated as "safe" where they would be guaranteed access to full and fair examination of claims for international protection.").

requesting asylum between 1985 and 2000.[17] In order to manage the influx, several countries within the European Union entered into the Schengen Convention, which allowed for free movement within the Union, but permitted asylum applicants to only seek protection in one of the countries party to the Convention, subject to several criteria guiding the decisions on which country held the responsibility of determining the status of the individual.[18] The Schengen Convention also permitted a party to return an asylum seeker to a third country based on the criteria.[19] The safe third country concept was further crystallized in the Dublin Convention and subsequent Regulation, which also permitted the rejection of an asylum seeker's claim if the application should have been made in a third country.[20] Notably, the earliest implementation of the safe third country concept in the Americas, the STCA between the United States and Canada, developed under similar pressures throughout the 1990s where the countries faced a sharp increase in migration flows.[21] Now, nearly three decades after these early agreements, a significant number of States, including South Africa, Spain, Norway, Turkey, Canada, and the United States, have all participated in some form of the safe third country concept.[22] Most recently, the United States has sought out, in some cases successfully, STCAs with several Central American countries,[23] making the need for an evaluation of the efficacy and legal integrity of these types of agreements particularly pressing.

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17. Schengen Agreement on the Gradual Abolition of Checks at Their Common Borders, June 14, 1985, Belg.-Fr.-F.R.G.-Lux.-Neth., 30 I.L.M. 68 (1991) (Convention applying the Agreement enacted June 19, 1990) [hereinafter Schengen Agreement and Convention]; *See* Andrew F. Moore, *Unsafe in America: A Review of the U.S.-Canada Safe Third Country Agreement*, 47 SANTA CLARA L. REV. 201, 205–06 (2007).

18. Schengen Agreement and Convention, *supra* note 17.

19. *Id.*

20. *See* Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Community, Aug. 19, 1997, 1997 (C254) 1 [hereinafter Dublin Convention]; Council Regulation 343/2003, art. 10(1), 2003 O.J. (L 50) 1 (EC) [hereinafter Dublin Regulation] (establishing the criteria and mechanisms for determining the Member States responsible for examining an asylum application lodged in one of the Member States by a third-country national); Jason Mitchell, *The Dublin Regulation and Systemic Flaws*, 18 SAN DIEGO INT'L L.J. 295, 298–301 (2017) (citing Susan Fratzke, *Not Adding Up: The Fading Promise of Europe's Dublin System*, MIGRATION POL'Y INST. (Mar. 2015)).

21. *See* Moore, *supra* note 17, at 208 (citing U.N. HIGH COMM'R FOR REFUGEES, STATISTICAL YEARBOOK 2001 80, 112-13 annexes C1 & C2 (Nov. 9, 2002)).

22. Susan Fratzke, *International Experience Suggests Safe Third-Country Agreement Would Not Solve the U.S.-Mexico Border Crisis*, MIGRATION POL'Y INST. (June 2019), https://www.migrationpolicy.org/news/safe-third-country-agreement-would-not-solve-us-mexico-border-crisis.

23. Kevin Sieff, *The U.S. is Putting Asylum Seekers on Planes to Guatemala — Often Without Telling Them Where They're Going*, WASH. POST (Jan. 14, 2020) ("The United States has signed similar 'safe third country' agreements with El Salvador and Honduras, but they have not yet been implemented.").

II. LEGAL FRAMEWORK AND GUIDING PRINCIPLES

A. *International Framework*

The primary legal principle governing STCAs is *non-refoulement* as outlined in the Refugee Convention and the Convention Against Torture ("CAT"), prohibiting the return of individuals to States where they would face persecution or torture. Under CAT, a State must not return an individual to a country where "there are substantial grounds for believing that [s/]he would be in danger of being subjected to torture."[24] The Committee Against Torture, the body monitoring the implementation of CAT, has further clarified that the protection against *refoulement* includes the danger of torture by non-State actors where the receiving State has no or only partial de facto control, or where the State is unable to prevent or counter those non-State actors.[25] The Refugee Convention further prohibits returns of individuals to States where "his/her life or freedom would be threatened on account of his/her "race, religion, nationality, membership of a particular social group or political opinion."[26] In the context of STCAs, these prohibitions mean that a State may not transfer an asylum seeker to a third country where they would face torture or where their life or freedom would be threatened on a protected ground. Nearly all STCAs protect against this explicitly within the body of the agreement or its implementing regulations, at least on paper. In practice, however, a lack of procedural safeguards, or failure to consistently implement safeguards in place, leads to an increased risk that individuals are transferred to a State where they will face persecution or torture.[27]

Beyond guaranteeing *non-refoulement*, the UNHCR developed additional guidelines regarding STCAs designed to ensure that they conform with other international obligations.[28] Although non-binding on States, these guidelines give States direction on best practices to implement these agreements. According to UNHCR, prior to transferring asylum seekers pursuant to an agreement, it is important to provide an individual assessment regarding the transfer's appropriateness, subject to procedural safeguards, noting that these

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24. United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3(1), Dec. 10, 1984, 1465 U.N.T.S. 85, 113, S. Treaty Doc. No. 100-20 (1988) [hereinafter Convention against Torture].

25. U.N. Committee Against Torture, General Comment No. 4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22, ¶ 30, U.N. Doc. CAT/C/GC/4 (Feb. 9, 2018) [hereinafter U.N. Committee Against Torture General Comment 4].

26. Refugee Convention, *supra* note 4, art. 33(1); *see also* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Refugee Protocol].

27. *See, e.g.*, Deportation with a Layover, *supra* note 16; Grace Fuscoe, Teressa Hamsher, Jacqueline Lewis, Claire McMullen, Justine Tixhon, & Ashlee Uren, *Dead Ends: No Path to Protection for Asylum Seekers Under the Guatemala Asylum Cooperative Agreement 2020*, GEO. L. HUM. RTS. INST. (2020) [hereinafter Dead Ends].

28. U.N. Guidance Note, *supra* note 7; U.N. HIGH COMM'R FOR REFUGEES, 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, ¶ 4 (2018), www.refworld.org/docid/5acb33ad4.html [hereinafter Legal Considerations Regarding Access to Protection].

pre-transfer assessments are particularly important for vulnerable groups.[29] In addition to the individual assessment, States must also consider whether the asylum procedure provided by the third country will be fair and efficient.[30] To be fair and efficient, UNHCR suggests that procedures must include an independent body that assesses appeals to ensure an effective remedy against a negative decision in the first instance, and an allocation of sufficient personnel and resources to these authorities.[31]

Additionally, UNHCR provides guidelines to assist in the sustainability of the transfers. For example, UNHCR has consistently advocated for the existence of a meaningful connection between the asylum seeker and the third State where it would be reasonable for a person to seek asylum there.[32] UNHCR notes that taking into account family connections and other close ties increases the viability of the return or transfer, reduces the risk of irregular onward movement, prevents the creation of 'orbit' situations, and advances international cooperation and responsibility-sharing.[33] In addition to considering links between the applicant and the third country, UNHCR also advises States to take into account work opportunity, that those transferred will be treated in accordance with accepted international standards regarding reception arrangements, and have access to health, education, and basic services; safeguards against arbitrary detention; and access to durable solutions.[34]

B. *Legal Framework in the United States*

Prior to the Biden administration's suspension of U.S. STCAs with Central American countries,[35] the United States was one of the most recent and most aggressive States pursuing these agreements.[36] The US-Canada Agreement remains controversial. Therefore, it is critical to examine U.S. law surrounding the safe third country concept. Following the 1967 ratification of the

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29. *See, e.g.*, U.N. HIGH COMM'R FOR REFUGEES, GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION: ASYLUM PROCESSES (FAIR AND EFFICIENT ASYLUM PROCEDURES), ¶ 13 (May 31, 2001), http://www.unhcr.org/refworld/docid/3b36f2fca.html; U.N. Guidance Note, *supra* note 7, ¶¶ 3–4, 6.

30. U.N. Guidance Note, *supra* note 7, ¶¶ 3–4, 6; Legal Considerations Regarding Access to Protection, *supra* note 28, ¶ 4.

31. U.N. HIGH COMM'R FOR REFUGEES, GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION: ASYLUM PROCESSES (FAIR AND EFFICIENT ASYLUM PROCEDURES), ¶ 13 (May 31, 2001), http://www.unhcr.org/refworld/docid/3b36f2fca.html; U.N. Guidance Note, *supra* note 7.

32. Legal Considerations Regarding Access to Protection, *supra* note 28; U.N. HIGH COMM'R FOR REFUGEES, CONCLUSION NO. 15 (XXX), ¶¶ (h), (iv) (1979).

33. Legal Considerations Regarding Access to Protection, *supra* note 28, ¶ 6.

34. U.N. Guidance Note, *supra* note 7, ¶ 3 (vi).

35. *Biden administration suspends Trump asylum deals with El Salvador, Guatemala, Honduras*, REUTERS (Feb. 6, 2021), https://www.reuters.com/article/us-usa-immigration-centralamerica/biden-administration-suspends-trump-asylum-deals-with-el-salvador-guatemala-honduras-idUSKBN2A702Q.

36. In the summer of 2019, the United States began pursuing STCAs with Guatemala, El Salvador, Honduras, and Mexico. The United States successfully executed agreements with Guatemala, El Salvador, and Honduras, but only the U.S.-Guatemala Agreement was implemented. *See* Nicolas Narea, *Trump's agreements in Central America are dismantling the asylum system as we know it*, VOX (Nov. 20, 2019), https://www.vox.com/2019/9/26/20870768/trump-agreement-honduras-guatemala-el-salvador-explained.

Protocol to the Refugee Convention, the United States Congress enacted the Refugee Act in 1980, which established broad eligibility for non-nationals to apply for asylum in the United States.[37] The Act allowed any non-national physically present in the United States, irrespective of their status, to apply for asylum.[38] However, the Act provides for a number of exceptions, including where an STCA exists. The statute defines an appropriate STCA as one where a bilateral or multilateral agreement exists the life or freedom of the alien would not be threatened in the third country on account of race, religion, nationality, membership in a particular social group, or political opinion and where the alien would have "access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection."[39] The U.S.-Canada Agreement provides guidance as to how "full and fair" may be interpreted, indicating that asylum systems that are "generous" and "consistent with principles of protection" and meet international standards and obligations, may be considered "full and fair."[40] The U.S. framework notably does not incorporate all of the considerations outlined by UNHCR but rather focuses on its obligations under the Refugee Convention to provide guarantees against *refoulement* and that applicants may find full and fair procedures in the third country. However, individual agreements, such as the U.S.-Canada Agreement, do incorporate some of the additional non-binding protections recommended by UNHCR, like the consideration of connections between the asylum seeker and the third country.[41]

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37. 8 U.S.C. 1158 (a)(1) (2019).

38. *Id.* ("Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum . . .").

39. 8 U.S.C 1158 (a)(1) (2019) (stating that the Act "shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country . . . in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection . . .").

40. Agreement between the Government of Canada and the Government of the United States of America, For Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, Can.-U.S., Dec. 5, 2002, 2002 U.S.T. LEXIS 125 [hereinafter U.S.-Canada Agreement]; Implementation of the Agreement Between the Government of the United States of America and the Government of Canada Regarding Asylum Claims Made in Transit and at Land Border Ports-of-Entry, 69 Fed. Reg. 10620 (proposed Mar. 8, 2004) ("[W]hile the asylum systems in Canada and the U.S. are not identical, both country's asylum systems meet and exceed international standards and obligations . . .").

41. U.S.-Canada Agreement, *supra* note 40, art. 4 (2) (allowing the receiving country to adjudicate the asylum claim if the arriving alien has at least one lawfully residing family member in the country of the receiving state, has at least one family member in the receiving state who is eligible to pursue an asylum claim and is over the age of eighteen, is an unaccompanied minor, or has already entered the territory of the receiving state legally, either through a visa granted by that state or because no such visa was required).

III. THE SAFE THIRD COUNTRY CONCEPT IN EUROPE AND THE AMERICAS

A. *European Agreements*

As discussed above, Europe has a decades-long history of incorporating the safe third country concept into its migration policies. This section will focus on Europe's most comprehensive STCA—the Dublin Regulation, and one of its most controversial—the EU-Turkey Agreement.

1. *The Dublin Regulation*

Although the Dublin Regulation was originally enacted in 1990, it has been reformed twice.[42] The Regulation creates criteria to determine which member state is responsible for an asylum application and grants the State the authority to return asylum seekers to the designated responsible member state.[43] The Dublin Regulation's goals are those common to most STCAs, including the mitigation of "asylum shopping," where asylum seekers seek to apply in the most desirable States, with the best benefits or the highest likelihood that they will be granted refugee status.[44] The Dublin Regulation also sought to prevent asylum seekers from placing multiple applications in different countries, limiting backlogs and prohibiting states from pushing their responsibilities onto other members.[45]

The Regulation requires that migrants register and apply for asylum in the E.U. member state they first enter.[46] The Dublin Regulation III, the latest amendment to the Regulation, provided additional protections to asylum seekers and sought to increase efficiency.[47] These amendments included ensuring free legal counsel to asylum seekers, limiting the duration of detention, and establishing the European Asylum Support Office under CEAS, which provides asylum support teams through the Asylum Intervention Pool to member States who lie on common paths of entry and receive a disproportionate number of asylum applications.[48] Under the current Dublin Regulation, State responsibility for asylum claims is determined through a hierarchy of criteria. The Regulation considers where the applicant has a family member legally present in a member State;[49] where the applicant has received a visa or residence document from a member State;[50] where the applicant illegally

42. Council Regulation 604/2013, 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), 2013 O.J. (L 180) 31, 37 (EU) [hereinafter Dublin III]; *see also* Dublin Convention, *supra* note 20.
43. Dublin III, *supra* note 42.
44. Mitchell, *supra* note 20, at 298–300.
45. *Id.*
46. Dublin III, *supra* note 42.
47. Mitchell, *supra* note 20, at 298.
48. Dublin III, *supra* note 42.
49. *Id.*
50. *Id.*

entered the E.U.;[51] where a member State has waived the need for the applicant to have a visa;[52] and where the applicant lodges a claim in an international transit area of an airport.[53]

Scholarship has produced an abundance of critiques of the Dublin Regulation over the course of its lifetime,[54] chief of which is the disproportionate responsibility placed on member States of first entry.[55] For instance, when over a million people arrived in Europe in 2015,[56] Italy, Greece, and Hungary received the bulk of arrivals by a significant number—Italy received 153,842; Hungary received 441,515; and Greece received 861,630.[57] Unable to process the sudden spike in arrivals, these border States turned to alternative measures to manage migration. One method employed by these States was to simply wave the arrivals through their borders into States deeper within Europe without documenting their arrival through fingerprinting.[58] Another strategy was to maintain an asylum system with "systemic deficiencies" that would prevent other States from legally performing transfers.[59] Some States resorted to building physical barriers to stop the flow of arrivals.[60] These strategies to circumvent the system further exacerbated the risk to asylum seekers by subjecting them to defective asylum proceedings or denying them any assessment altogether.

The Dublin Regulation has also generated a number of legal challenges. For example, in the landmark case, *M.S.S. v. Belgium and Greece*, the European Court of Human Rights ("ECtHR") held that a member State

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51. *Id.*
52. *Id.*
53. *Id.*
54. *See, e.g.*, Kimara Davis, *The European Union's Dublin Regulation and the Migrant Crisis*, 19 WASH. U. GLOBAL STUD. L. REV. 261 (2020).
55. *See, e.g.*, Ashley Binetti Armstrong, *You Shall Not Pass! How the Dublin System Fueled Fortress Europe*, 20 CHI. J. INT'L L. 332 (2020); Maryellen Fullerton, *Refugees and the Primacy of European Human Rights Law*, 21 UCLA J. INT'L L. & FOREIGN AFF. 45, 56 (2017) ("[T]he EU asylum system allows wealthier northern EU states to avoid determining asylum applications. As a result, these northern EU states send asylum seekers back to the poorer southern and eastern EU states, which are less equipped to manage large numbers of applicants."); Lillian M. Langford, *The Other Euro Crisis: Rights Violations Under the Common European Asylum System and the Unraveling of E.U. Solidarity*, 26 HARV. HUM. RTS. J. 217, 224, 238 (2013) ("[T]his rule has shifted a grossly disproportionate share of the burden for handling claims to the southern EU border states.").
56. U.N. HIGH COMM'R FOR REFUGEES, OPERATIONAL PORTAL REFUGEE SITUATIONS: MEDITERRANEAN SITUATION, https://data2.unhcr.org/en/situations/mediterranean (last visited Mar. 11, 2021).
57. *Migration Issues in Hungary*, INT'L ORG. FOR MIGRATION, http://www.iom.hu/migration-issues-hungary (last visited Nov. 11, 2020); U.N. HIGH COMM'R FOR REFUGEES, OPERATIONAL PORTAL REFUGEE SITUATIONS: MEDITERRANEAN SITUATION, https://data2.unhcr.org/en/situations/mediterranean (last visited Mar. 11, 2021).
58. Florian Eder & Vassili Golod, *Austria's Kurz: Close E.U.'s External Borders, Not Internal Frontiers*, POLITICO (Apr. 19, 2019), https://www.politico.eu/article/austria-sebastian-kurz-close-the-eus-external-borders-not-its-internal-frontiers-migration-dublin-asylum/.
59. Joined Cases C-411/10 & C-493/10, N. S. v. Sec'y of State for the Home Dep't, 2011 E.C.R. I-13991, I-14027, ¶¶ 105–06.
60. *See* Armstrong, *supra* note 55 (arguing that the "recent proliferation of walls and fences in Europe" is "grounded in the Dublin Regulation's failure to distribute responsibility for asylum seekers equitably among European states.").

effecting a transfer could be held responsible if the destination State exposes the asylum seeker to treatment in violation of European Convention on Human Rights Article 3, prohibiting torture, cruel, inhuman, or degrading treatment.[61] There, an Afghani man had applied for asylum in Belgium, but, pursuant to the Dublin Regulation II, was transferred to Greece where he faced appalling conditions in detention. When released, he was forced to live on the streets, often fearing for his health and safety.[62] Following *M.S.S.*, the European Court of Justice ruled in the joined cases of *N.S. v. Secretary of State* and *M.E. v. Refugee Applications Commissioner* that a transferring Member State under the Regulation is obliged to assess the compliance of the receiving Member State with Article 18 of the E.U. Charter of Fundamental Rights, and if a Member State knows of systemic flaws in another Member State's asylum procedures, then the first Member State may not transfer an asylum seeker back to the flawed State.[63]

In 2014, Dublin Regulation III incorporated *M.S.S.* and *N.S.* to prohibit Dublin transfers to member States with "systemic flaws" in their asylum system. Subsequent cases in the ECtHR focused on determining what constituted "systemic flaws." For example, the Court has found systemic flaws where there are significant shortcomings of the asylum procedure, such as a shortage of interpreters and the absence of legal aid, or where refugee camps have created a state of utter destitution and lack of essential services.[64] Additionally, in determining what conditions would fall within an ECHR Article 3 violation, the Court held that the ill-treatment of asylum seekers must attain a minimum level of severity and that the circumstances of the case, such as the duration of the treatment and its physical or mental effects, and, in some instances, the sex, age, and state of health of the victim, should be taken into account.[65] However, even where a State has been determined to have systemic flaws in the past, there is no absolute bar to transfer to these States.

2. *E.U.-Turkey Agreement*

In order to cope with the mass influx of Syrian, Iraqi, and Afghani asylum seekers, on March 18, 2016, the E.U. and Turkey reached an agreement purportedly to enhance migration cooperation with the aim of reducing the large-scale irregular movement of refugees and migrants from or through Turkey to Greece.[66] Under the Agreement, irregular migrants who cross from

61. M.S.S. v. Belgium & Greece, 2011-I Eur. Ct. H.R. 255, ¶¶ 233, 360 (2011).
62. *Id.* ¶ 258.
63. *See* Joined Cases, *supra* note 59.
64. Mitchell, *supra* note 20, at 308.
65. *See* Tarakhel v. Switzerland, App. No. 29217/12, Eur. Ct. H.R. at 47 (2014).
66. *See* Press Release, European Council, European Council Conclusions (Mar. 17-18, 2016), http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-european-council-conclusions/; *see also* Press Release, European Council, EU-Turkey Statement (Mar. 18, 2016), http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/; Press Release, European Comm'n, Fact Sheet, EU-Turkey

Turkey to Greece are returned to Turkey after an individualized assessment.[67] In exchange for each Syrian who arrives in Greece that is transferred to Turkey, another Syrian refugee living in Turkey would be resettled within the E.U.[68] To close the deal, the E.U. promised Turkey around €6 billion in aid, in part, to support Syrians in Turkey by providing access to food, shelter, education, and healthcare.[69] The E.U. also offered to help prevent new sea or land routes from opening up to irregular migration and accelerate the fulfillment of the visa liberalization roadmap for Turkey.[70]

At face value, the Agreement appears to have been "successful" at decreasing the number of asylum seekers arriving in Europe,[71] but at a significant cost to the life and liberty of refugees that the Agreement purportedly protects. This is because, at the most foundational level, Turkey is unable to provide effective protection to refugees.[72] Although Turkey is party to the Refugee Convention, Turkey denies full refugee status to non-Europeans, meaning that Syrian refugees receive only temporary protection and do not have full access to work, education, or other long-term solutions.[73] In addition to struggling to meet people's basic needs, human rights organizations have documented instances where Turkey has returned asylum-seekers and refugees to countries where they are at risk of serious human rights violations such as Syria, Iraq, and Afghanistan, in violation of their obligation to protect against *refoulement*.[74]

In the months following the deal, Greece's asylum appeals committees ruled in many instances that Turkey does not provide effective protection for refugees. Instead, all asylum applications had to be assessed in Greece, and refugees were kettled on the Greek islands in unsafe conditions.[75] In June 2016, however, new Greek asylum appeals committees decided that Turkey

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Agreement: Questions and Answers (Mar. 19, 2016), http://europa.eu/rapid/press-release_MEMO-16-963_en.htm.

67. EU-Turkey Statement, *supra* note 66; *see also* Directive 2013/32/EU, of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (recast), 2013 O.J. (L 180) [hereinafter *The Asylum Procedures Directive*].

68. EU-Turkey Statement, *supra* note 66.

69. *Id.*

70. *Id.*

71. European Commission, *EU-Turkey Statement: Two Years On*, at 1 (Apr. 2018), ("Two years later, irregular arrivals remain 97% lower than the period before the Statement became operational.").

72. Isabel Mota Borges, *The EU-Turkey Agreement: Refugees, Rights and Policy*, 18 RUTGERS RACE & L. REV. 121 (2017); Manuel P. Schoenhuber, *The European Union's Refugee Deal With Turkey: A Risky Alliance Contrary to European Laws and Values*, 40 HOUS. J. INT'L L. 633 (2018).

73. Kondylia Gogou, *The E.U.-Turkey Deal: Europe's Year of Shame*, AMNESTY INT'L (Mar. 20, 2017), https://www.amnesty.org/en/latest/news/2017/03/the-eu-turkey-deal-europes-year-of-shame/; *See* AMNESTY INT'L, NO SAFE REFUGE – ASYLUM SEEKERS AND REFUGEES DENIED EFFECTIVE PROTECTION IN TURKEY (2016), https://amnesty.dk/media/2400/eu_turkey.pdf.

74. Gogou, *supra* note 73.

75. Nikolaj Nielson, *Greek court halts Syrian deportations to 'unsafe' Turkey*, E.U. OBSERVER (June 3, 2016), https://euobserver.com/migration/133691; *Communication from the Commission to the European Parliament, the European Council and the Council Second Report on the progress made in the implementation of the EU-Turkey Statement*, COM (2016) 349 final (June 15, 2016); Gogou, *supra* note 73.

was no longer "unsafe" for returnees.[76] But the same conditions that led to the initial assessment that Turkey was unsafe had not changed.[77] Turkey still does not provide full protection to non-Europeans, only a dismal amount of refugees had been resettled into Europe,[78] and Turkey has complained about insufficient funding to support the refugees that are there, with too much of the aid going to the overhead costs of international organizations.[79]

At the end of February 2020, Turkish President Recep Tayyip Erdoğan announced that he had opened his country's borders for migrants to cross into Europe, saying that Turkey could no longer handle the numbers fleeing the war in Syria, triggering a diplomatic crisis between the E.U. and Turkey.[80] The President hoped that the announcement would spur on the E.U. to support Turkey's actions in Syria, provide additional financial assistance for Syrian refugees in Turkey, and fulfill its promises under the STCA.[81] On March 9, 2020, following a meeting between President Erdoğan and European Commission President Ursula von der Leyen in Brussels, both sides reiterated their commitment to the deal and expressed interest in improving it.[82] President Erdoğan criticized the E.U. for trying to get "unfair gains" using its current position, and the E.U. similarly criticized Turkey for using migrants as a bargaining chip, which Turkey alleged was hypocritical.[83] However, even months after the diplomatic crisis, basic protection needs had not improved, and the Covid-19 pandemic severely impacted the already dismal situation, with many encountering problems accessing online education, being subjected to overcrowded and unsanitary conditions, and losing what informal work they had.[84]

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76. Gogou, *supra* note 73.

77. *Id.*

78. 20,292 Syrian refugees have been resettled to EU members states as of 2019, compared to the 3 million that currently reside there. U.N. HIGH COMM'R FOR REFUGEES, OPERATIONAL PORTAL, https://data2.unhcr.org/en/situations/syria/location/113 (last updated Mar. 3, 2021); European Commission, *EU Turkey Statement, Three Years On* (Mar. 2019), https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20190318_eu-turkey-three-years-on_en.pdf; Gogou, *supra* note 73.

79. Matina Stevis-Gridneff & Carlotta Gall, *Erdogan Says, 'We Opened the Doors,' and Clashes Erupt as Migrants Head for Europe,* N.Y. TIMES (Feb. 29, 2020), https://www.nytimes.com/2020/02/29/world/europe/turkey-migrants-eu.html.

80. *Id.*

81. Berkay Mandiraci, *Sharing the Burden: Revisiting the EU-Turkey Migration Deal*, CRISIS GRP. (Mar. 13, 2020), https://www.crisisgroup.org/europe-central-asia/western-europemediterranean/turkey/sharing-burden-revisiting-eu-turkey-migration-deal.

82. Kemal Kirişci & Başak Yavçan, *As COVID-19 worsens precarity for refugees, Turkey and the EU must work together*, BROOKINGS INST. (June 11, 2020), https://www.brookings.edu/blog/order-from-chaos/2020/06/11/as-covid-19-worsens-precarity-for-refugees-turkey-and-the-eu-must-work-together/.

83. *Erdogan Demands More Support from EU and Allies*, FRANCE24 (Mar. 9, 2020), https://www.france24.com/en/20200309-erdogan-demands-more-support-from-eu-and-nato-allies.

84. Kirişci & Yavçan, *supra* note 82.

B. *American Agreements*

1. *U.S.-Canada Agreement*[85]

The influx of asylum seekers in the years prior to 2000 was not unique to Europe. Between 1985 and 2000, over 1.6 million asylum claims reached the United States and Canada.[86] And even though the United States receives more asylum claims than Canada overall, asylum seekers leave the United States to apply in Canada nearly forty times more than they leave Canada to go to the United States.[87] This disparity is likely due to the perception that Canada is more likely to grant protective status due to fewer legal barriers and the additional support mechanisms like social assistance for living expenses, medical care, and free legal representation.[88]

Under the STCA, a claim for protection must be made in the first country in which an applicant enters, granting the third country the responsibility to make a refugee status determination and prohibiting removal until the decision is made.[89] The STCA also limits its application to only applicants who arrive at land border ports of entry on the United States/Canada border, meaning that if an asylum seeker arrives in Canada from the United States by sea or air, or any point other than a designated border crossing, that applicant may apply for asylum in Canada and will not be returned to the United States.[90] The Agreement also provides for certain exceptions to those with family members with lawful status in one of the parties to the Agreement or adult family members who have filed a valid application for refugee status.[91] The Agreement further exempts unaccompanied minors, members of designated nationalities, and allows for discretionary exceptions in the public interest.[92]

The Agreement has since been criticized for risking the chain *refoulement* of asylum seekers due to the more limited protections for asylum seekers in the United States compared to those in Canada, most notably the unique heightened burden of proof for demonstrating *refoulement* compared to the

85. U.S.-Canada Agreement, *supra* note 40.
86. *See* Moore, *supra* note 17, at 207.
87. CANADIAN COUNCIL FOR REFUGEES, CLOSING THE FRONT DOOR ON REFUGEES: REPORT ON THE FIRST YEAR OF THE SAFE THIRD COUNTRY AGREEMENT 27 (2005), http://www.web.ca/~; ccr/closingdoordec05.pdf; U.N. HIGH COMM'R FOR REFUGEES, STATISTICAL YEARBOOK 2001 80, 112-13 annexes C1 & C2 (Nov. 9, 2002).
88. *See* GOV'T OF CAN., FINANCIAL HELP – REFUGEES (Feb. 21, 2018), https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/help-within-canada/financial.html [https://perma.cc/C8PM-8MH2]; GOV'T OF CAN., HEALTH CARE – REFUGEES (Mar. 31, 2017), https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/help-within-canada/health-care.html [https://perma.cc/Q5LV-2CFC]; *see also* Tom Clark, *Legal Aid, International Human Rights & Non-Citizens*, 16 WINDSOR Y.B. ACCESS JUST. 218, 222–23 (1998).
89. U.S.-Canada Agreement, *supra* note 40.
90. *Id.*
91. *Id.*
92. *Id.*

lower burden of proof for those who directly apply for asylum.[93] Specifically, applicants for withholding of removal must show a greater than fifty percent chance that their life or freedom would be threatened in the country to which they would be returned.[94] By contrast, under the asylum system, the risk of persecution could be considerably less than fifty percent, but still satisfy the reasonable possibility of persecution to qualify for refugee status.[95] The need to apply for withholding rather than for asylum arises where categories of individuals are barred from seeking asylum, including those who apply more than one year after arriving in the United States or where they have engaged in criminal conduct.[96] Critics have also noted that the "particularly serious crime" bar runs contrary to the accepted understanding of the Refugee Convention, as articulated by the UNHCR guidelines and other countries' practices, including Canada.[97] These scholars argue that *refoulement* based on criminality should only be a "last resort" and that the Refugee Convention requires an independent assessment of risk to the community, not a near-absolute bar.[98] Additionally, critics have also pointed to the lack of free legal representation for asylum seekers and conditions in detention that risk violations of procedural and substantive rights.[99] However, defenders of the Agreement argue that these understandings are not required by the text of the Refugee Convention, its Protocol, and CAT, but rather reflect more expansive policy preferences of other Western democracies.[100]

This Agreement has also faced significant legal challenges. In 2007, five years after the Agreement was signed, in *Canadian Council for Refugees, et al. v. Her Majesty the Queen*, the Canadian federal court ruled that the STCA was invalid, reasoning that the United States was violating its obligations under Article 33 of the Refugee Convention and Article 3 of CAT.[101] The Canadian Government appealed the case to the Canadian Federal Court of

93. *See, e.g.*, Moore, *supra* note 17 ("Scholars and critics point out that the United States is alone in imposing a different burden of proof for *non-refoulement* than for asylum."); Leena Khandwala, Karen Musalo, Stephen Knight & Maria Anna K. Hreshchyshyn, *The One-Year Bar: Denying Protection to Bona Fide Refugees, Contrary to Congressional Intent and Violative of International Law*, 05-08 IMMIGR. BRIEFINGS 1 (2005) (citing Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERKELEY J. INT'L L. 1, 3 (1997)).

94. *See* INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) (holding that, consistent with the 1967 Protocol, it is enough to show that persecution is a reasonable probability).

95. *See* James C. Hathaway & Anne K. Cusick, *Refugee Rights Are Not Negotiable*, 14 GEO. IMMIGR. L.J. 481, 485–86 (2000).

96. *See* 8 U.S.C. § 1158(a)(2)(B) (2019).

97. *See, e.g.*, Moore, *supra* note 17, at 227–29; Kathleen M. Keller, *A Comparative and International Law Perspective on the United States (Non)Compliance with Its Duty of Non-Refoulement*, 2 YALE HUM. RTS. & DEV. L.J. 183, 198–200 (1999); JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 249–52 (2005).

98. *See, e.g.*, Moore, *supra* note 17, at 229–30; Keller, *supra* note 97, at 189; Hathaway, *supra* note 97, at 352.

99. *See, e.g.*, Moore, *supra* note 17, at 250–53, 260–70.

100. *See generally* Patrick J. Glen, *Is the United States* Really *Not a Safe Third Country?: A Contextual Critique of the Federal Court of Canada's Decision in Canadian Council for Refugees, et al. v. Her Majesty the Queen*, 22 GEO. IMMIGR. L.J. 587 (2008).

101. Canadian Council for Refugees v. Her Majesty the Queen, [2007] F.C. 1262 (Can.).

Appeal, which overturned the decision on separate grounds, not disputing the lower court's finding of non-compliance but ruling "that the U.S. does not 'actually' comply is irrelevant" and that the judge overstepped his bounds by ruling on "wide swaths of U.S. policy and practice." The Supreme Court denied leave to appeal in 2009.

But in July 2020, a federal court in Canada ruled that the Agreement violates Canada's own charter of human rights because it returns asylum-seekers to the United States, where they are "immediately and automatically imprisoned" by U.S. authorities, often under inhumane conditions.[102] The Court considered the automatic detention, particularly in "cruel and unusual" conditions, to be a penalty for merely attempting to seek asylum, in contravention with the spirit and intent of the STCA and the Canadian constitution's promise of "life, liberty, and security of the person."[103] The Government of Canada then appealed the decision on August 21, 2020,[104] and the judgment of the Federal Court was stayed, meaning that the Agreement will remain in effect until a final determination is made.[105]

2. *U.S.-Guatemala Agreement*[106]

On July 26, 2019, the United States and Guatemala entered into a STCA wherein persons seeking protection subject to the Agreement who have entered the United States through a point of entry or between points of entry, may be transferred to Guatemala.[107] The Agreement also places an explicit obligation on Guatemala not to return or expel asylum applicants transferred to Guatemala.[108] The Agreement does not apply to Guatemalan citizens, unaccompanied minors, or those with valid visas or documentation, but notably does not provide an exception for those with legal family ties, in contrast with the U.S.-Canada Agreement.[109]

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102. Canadian Council for Refugees v. Canada (Immigration, Refugees and Citizenship), [2020] F.C. 770 (Can.); Matthew S. Schwartz, *U.S.-Canada Asylum Treaty Unconstitutional, Judge Finds, Citing 'Cruel' U.S. Behavior*, NPR (July 23, 2020, 6:07 PM), https://www.npr.org/2020/07/23/894859694/u-s-canada-asylum-treaty-unconstitutional-judge-finds-citing-cruel-u-s-behavior.

103. *Canadian Council for Refugees*, [2020] F.C. 770; Schwartz, *supra* note 102.

104. Press Release, Gov't of Can., Government of Canada to Appeal the Federal Court Decision on the Safe Third Country Agreement (Aug. 21, 2020), https://www.canada.ca/en/public-safety-canada/news/2020/08/government-of-canada-to-appeal-the-federal-court-decision-on-the-safe-third-country-agreement.html.

105. Brian Hill, *Government Wins Court Challenge to Keep Safe Third Country Agreement in Place — for Now*, GLOBAL NEWS (Oct. 26, 2020, 4:00 PM), https://globalnews.ca/news/7422641/government-wins-court-challenge-safe-third-country-agreement/.

106. Agreement Between the Government of the United States of America and the Government of the Republic of Guatemala on Cooperation Regarding the Examination of Protection Claims, Guat.- U.S., July 26, 2019, T.I.A.S. No. 19-1115 [hereinafter Guatemala ACA]; Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act, 84 Fed. Reg. 63,994 (Nov. 19, 2019) [hereinafter Interim Final Rule] (proposing an interim final rule and requesting comments).

107. Guatemala ACA, *supra* note 106.

108. *Id.*

109. *Id.*

Human rights advocates have criticized the Agreement for failing to protect against both direct and indirect *refoulement* through a lack of procedural safeguards and the common risks of persecution and torture by transnational gangs in Guatemala to those in the asylum seekers' countries of origin.[110] Specifically, the United States modified the expedited removal process to require a higher burden of proof and fewer procedural safeguards, ultimately failing to adequately assess an asylum seeker's fear of transfer to Guatemala.[111] Asylum seekers must show that it is "more likely than not" (a higher burden of proof than the equivalent credible fear interview for those not subject to the Agreement) that they would be persecuted on account of a protected ground or tortured in Guatemala without the right to legal representation and without the ability to present evidence.[112] Although this system is used in other situations in U.S. immigration law, it is insufficient to protect against *refoulement* in practice due to the unique situation of transferees, particularly in that any evidence or knowledge brought by the asylum seekers would be to demonstrate risks of persecution or torture in their countries of origin, not Guatemala. Additionally, reports from human rights watchdogs suggest that individual officers failed to provide the notice required to asylum seekers that they were even being transferred to Guatemala, making it nearly impossible to assert a fear.[113] When compounded with the lack of procedural safeguards and high burden of proof, asylum seekers are placed at high risk of *refoulement*, despite the protections on paper.

This system is particularly troubling because Guatemala poses similar risks of persecution or torture as the countries of origin of the majority of asylum seekers subject to the Agreement, notably, violence from non-state actors like MS-13. Persecution and torture resulting from gang violence are one of the driving factors of migration from Central America, and these gangs operate transnationally, meaning, for example, that a Salvadoran national fleeing from MS-13 in his home country could also be found by the gang in Guatemala.[114] In part because of this risk, the vast majority of those who are transferred to Guatemala "voluntarily" return to their home

110. *See generally* Schmidtke et al., *supra* note 16; Dead Ends, *supra* note 27.

111. Interim Final Rule, *supra* note 106, at 63,997.

112. 8 C.F.R. § 208.30(e)(7) (2021) (specifying that § 208.30(d)(2) and (4) do not apply).

113. Dead Ends, *supra* note 27; Sieff, *supra* note 23 ("They arrive here without being told that Guatemala is their destination.").

114. *See, e.g.*, Thomas Boerman & Adam Golob, *Gangs and Modern-Day Slavery in El Salvador, Honduras and Guatemala: A Non-Traditional Model of Human Trafficking*, J. HUM. TRAFFICKING (2020), https://www.tandfonline.com/doi/full/10.1080/23322705.2020.1719343; Azam Ahmed, *"Either They Kill Us or We Kill Them*," N.Y. TIMES (May 5, 2019), https://www.nytimes.com/ interactive/2019/05/04/ world/americas/honduras-gang-violence.html; Jason Motlagh, *Inside El Salvador's battle with violence, poverty, and U.S. policy*, NAT'L GEOGRAPHIC MAG. (Mar. 2019), https:// www.nationalgeographic.com/ magazine/2019/03/el-salvador-violence-poverty-united-states-policy-migrants; *MS13 in the Americas: How the World's Most Notorious Gang Defies Logic, Resists Destruction*, INSIGHT CRIME & CTR. FOR LATIN AM. & LATINO STUD., https://www.justice.gov/eoir/page/file/1043576/download; Juan J. Fogelbach, *Gangs, Violence, and Victims in El Salvador, Guatemala, and Honduras*, 12 SAN DIEGO INT'L L.J. 417 (2010–2011).

country.[115] But this does not indicate that their initial claims were fraudulent. When asylum seekers were interviewed about their decision-making process, they generally stated that they felt that they were asked to make an impossible choice—to either return home to the same conditions they fled, or seek to remain in Guatemala, where they might not only face those same risks but will have to do so without support and in a foreign country.[116] Instead, asylum seekers return home where they can draw on resources from family and friends to have enough to flee North again.[117] Not only does this mean that often no State ever assesses these asylum seekers' claims, but this indicates that the system ultimately leads to asylum seekers being summarily returned to their home countries—a clear example of indirect *refoulement*.

On January 15, 2020, immigrant rights organizations challenged the STCA through the interim final rule in *U.T. v. Barr*,[118] arguing that the rule creates a procedural framework inconsistent with the safeguards required in removal proceedings, that Guatemala is unsafe for asylum seekers and lacks full and fair asylum proceedings, and that the Agreement is inconsistent with international requirements for STCAs.[119] In February 2021, the Biden administration suspended the Agreement as part of its effort to address forced displacement without placing undue burdens on Guatemala. Affirming the dubious efficacy of STCAs, the Biden administration stated that they believed that there were "more suitable ways to work with [their] partner governments to manage migration across the region."[120]

IV. FINDINGS: STCAS HAVE FAILED TO EFFECTIVELY AND HUMANELY ADDRESS MASS MIGRATION

A. *Consistent Problems with Refoulement & Chain Refoulement*

Implementation of the STCAs has consistently posed risks of *refoulement* and chain *refoulement*, contravening the basic protections guaranteed by the Refugee Convention and its protocol. First, STCAs are frequently made with States that have fewer protections for asylum seekers, refugees, or other human rights protections, or fewer resources to implement these protections than the asylum seeker's intended destination country.[121] This increases the risk that asylum seekers will face persecution or torture in the third country,

115. Deportation with a Layover, *supra* note 16; Dead Ends, *supra* note 27.
116. *Id.*
117. *Id.*
118. U.T. v. Barr, No. 1:20-cv-00116 (D.D.C. Jan. 15, 2020).
119. Complaint, U.T. v. Barr, No. 1:20-cv-00116 (D.D.C. Jan. 15, 2020).
120. Press Statement, U.S. Sec'y 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/.
121. *See, e.g.,* Guatemala ACA, *supra* note 106; EU-Turkey Statement, *supra* note 66; *see also* Directive 2013/32/EU, of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (recast), 2013 O.J. (L 180) 60.

in violation of the destination State's obligations of *non-refoulement*. Further, these agreements also increase the risk of chain *refoulement*. Chain *refoulement*, also called indirect *refoulement*, occurs when an asylum seeker is transferred by a destination country to a third country, and that third country subsequently *refoules* the asylum seeker to their country of origin where they would face persecution or torture, either by failing to complete a refugee status determination altogether, or providing a determination with insufficient resources or protection systems to make an adequate determination under international standards. There are also instances where risks of *refoulement* subsequently lead to indirect *refoulement,* such as in the implementation of the U.S.-Guatemala STCA where asylum seekers are returned to Guatemala, but ultimately return to their countries of origin without a refugee status determination because they also fear persecution or torture in Guatemala.[122] This consistent risk posed in the implementation of these agreements should at minimum create pause in future pursuits of these endeavors and increase scrutiny on Agreements where there are clear disparities in capacity and legal protections between the parties.

B. *STCAs May Actually Be Less Efficient Than Intended*

Despite that one of the purported goals of STCAs is to increase efficiency in international cooperation for determining asylum claims, STCAs have proven to be less efficient than initially supposed, even where STCAs have actually decreased migration flows.[123] Specifically, these agreements tend to generate significant legal challenges, both regarding the agreement's validity and on the basis of an individual's risk of *refoulement*. As discussed above, the Dublin Regulation, the U.S.-Canada Agreement, and the U.S.-Guatemala Agreement have all generated broad challenges as to their validity. Even though once these cases are resolved, future challenges will usually be summarily dismissed, they still require the diversion of resources to defend these inevitable lawsuits, and significant changes in a party's asylum system may reopen challenges, such as was the case in the U.S.-Canada Agreement. This demonstrates that even States with facially comparable systems like the United States and Canada are not immune to these inefficiencies.

In addition, widespread individual appeals may also bog down a party's courts. For example, in Greece, cases processed under the EU-Turkey deal have been widely appealed due to the individual vulnerabilities of applicants and the ineffectiveness of Turkey's asylum system, which could put refugees at risk of *refoulement* in contravention of E.U. and international asylum law.[124] These appeals have quickly overwhelmed the Greek court system, further slowing down any transfers and taking up capacity needed to process

122. Deportation with a Layover, *supra* note 16; Dead Ends, *supra* note 27.
123. Fratzke, *supra* note 22.
124. *Id.*

other asylum cases.[125] However, failing to have the right to appeal these determinations may lead to insufficient protections against *refoulement*, such as in the U.S.-Canada Agreement, calling into question the State's compliance with its international obligations. This demonstrates how STCAs, their legal challenges, and their propensity to pose risks of *refoulement*, can actually decrease the efficiency of asylum systems, particularly if States do require an individualized assessment as obliged by UNHCR standards. All in all, STCAs may become more trouble than they are worth.

C. *STCAs May Incentivize Increased Irregular and Riskier Migration*

Because asylum seekers must seek asylum in the first country in which they arrive, applicants have a strong incentive to avoid detection in transit countries in order to be able to seek asylum in their preferred country. Under the Dublin Regulation,[126] this incentive has created a market for smuggling networks to extend their services deeper into Europe. Additionally, to avoid detection, individuals are incentivized to destroy documents or other evidence of their presence in a third country. Proponents of STCAs might argue that asylum seekers' riskier attempts to avoid finding themselves subject to the Agreement confirms that these individuals do not truly seek relief from persecution or torture. Instead, they are simply attempting to migrate to the country with the most benefits. But this is not necessarily the case. This is because, as discussed above, some transit countries (like Guatemala) may present similar risks as those in the country that the asylum seeker is fleeing, or like Turkey, fail to provide them protection as refugees or pose other dangers to their life or freedom.[127] Simply because it may be true that Canada, the U.S., or Germany may provide better benefits to refugees which may in part influence an asylum seeker's decision to avoid transfer, does not mean that they may not also be motivated by a risk to their life or freedom in the third country. Rather than producing multilateral cooperation for refugee protection, forcing States on regional borders to bear the weight of processing asylum claims has instead often created a system of incentives that drives riskier migration patterns and pushes border States to, by a lack of capacity or by choice, create gaps in protection for asylum seekers by maintaining systemic flaws or failing to document transit.

D. *Buying Your Way Out of the Convention*

In most cases, STCAs inevitably push large swaths of asylum seekers from large, wealthy States onto States that already often have ill-equipped asylum systems. Threats of withholding aid, and the promise to receive aid force less wealthy countries to take on additional asylum seekers. Wealthy States

125. *Id.*
126. *Id.*
127. *See supra* Part IV.

should not be able to pay to shirk their obligations under the Refugee Convention. For example, when the United States began seeking STCAs with Central American countries, it threatened Guatemala with tariffs, a travel ban, and a tax on remittances if it did not sign on to the Agreement.[128] Another example can be found in the E.U.-Turkey Agreement. Even prior to the Agreement, Turkey was the largest host State of Syrian refugees, as well as the largest host State of refugees overall.[129] As an incentive to sign on to the Agreement, the E.U. promised Turkey around €6 billion in aid (€3 billion under the Facility for Refugees in Turkey to support Syrians in Turkey by providing access to food, shelter, education, and healthcare and an additional €3 billion at the end of 2018). Other incentives were also offered, including a lifting of visa restrictions.[130] Although States *should* provide aid and other support when transferring asylum seekers under a STCA, Turkey was already hosting the largest number of refugees and should therefore receive that support regardless of the existence of an agreement. Additionally, the allure of other diplomatic and political benefits, like the lifting of visa requirements, makes clear that the E.U. used its political and economic position to bring Turkey on board.[131]

Even though international cooperation, including transfer and resettlement, is imperative in ensuring the protection of the rights of asylum seekers and refugees, the fact that STCAs so often exacerbate existing disparities in the burden-sharing of States, particularly less wealthy States, is no coincidence. Although States use their political weight to strike bargains all the time, there is something particularly sinister about bargaining your way out of your obligations to protect refugees and using refugees themselves as a bargaining chip. This common practice in the creation of STCAs allows wealthier States to use their wealth and political power to push their responsibilities under the Refugee Convention on to States with fewer resources and less political pull that might not have the capacity to protect the rights of asylum seekers and refugees effectively. This leads to a perpetual cycle where these States are overburdened with a disproportionate number of individuals for whom they must provide support and protection, leaving wealthier States to pursue only what they consider to be "desirable" migration. Although this may pose less of a problem in STCAs between States with relatively comparable asylum systems and comparable wealth and power (such as the U.S.

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128. *See* John Wagner, Mary Beth Sheridan, David J. Lynch, & Maria Sacchetti, *Trump threatens Guatemala after it backs away from 'safe third country' asylum deal*, WASH. POST (July 23, 2019), https://www.washingtonpost.com/politics/trump-threatens-guatemala-over-delay-in-safe-third-country-asylum-deal/2019/07/23/cc22417e-ad45-11e9-bc5c-e73b603e7f38_story.html.

129. U.N. HIGH COMM'R FOR REFUGEES, TURKEY OPERATIONS, https://reporting.unhcr.org/turkey (last visited Mar. 11, 2021) ("Since 2014, Turkey has been the country hosting the largest number of refugees under UNHCR's mandate in the world – with the vast majority being nationals of the Syrian Arab Republic.").

130. EU-Turkey Statement, *supra* note 66.

131. Turkey certainly has leverage of its own, but it is clear that in this case, the E.U. used their political position to strike a bargain that would let it block refugee flows.

and Canada), the vast majority of these agreements have undermined international cooperation in refugee protection through the bribing of States to trade refugees for economic or political benefits.

V. RECOMMENDATIONS WHERE STATES MAINTAIN STCAS

Despite the significant shortcomings of STCAs, it is unlikely that States or regions will be quick to abandon the safe third country concept. Building political will and devising alternatives for determining States responsible for adjudicating asylum claims and increasing fairness and efficiency will take time. Pragmatism suggests that smaller steps may be taken in the meantime to mitigate the shortcomings common to STCAs and improve the likelihood that asylum seekers may find a genuine opportunity to seek protection.

First, agreements should be made only where there are comparable wealth and political power between the parties to the Agreement; a soft presumption should be made against the validity of an Agreement where there is a significant disparity in leverage. As seen in the EU-Turkey deal, the Dublin Regulation, and the U.S.-Guatemala STCA, wealthier and more influential States have placed significant pressure on States with fewer resources and less political pull to sign on to these agreements through both the carrot and the stick, resulting in overburdened asylum systems that create perverse incentives and often fail to protect asylum seekers and refugees. A soft presumption of invalidity where there are significant disparities in political pull between parties would mitigate the risk that people seeking protection would be pushed on to weak asylum systems without sufficient evaluation. Second, States should agree to follow guidelines issued by UNHCR regarding the implementation of the agreements, including taking into consideration family ties, availability of work and education, as well as the third State's compliance with other human rights obligations. Although these changes may not ultimately fix the root of the problem with STCAs, they may help bring their creation and implementation more in line with human rights norms.

VI. CONCLUSION

STCAs have had three decades to demonstrate that they are an effective tool at managing mass migration. And over three decades, they have largely failed to lighten the load on key States who bear the brunt of processing mass migration flows and failed to provide adequate protection for refugees and asylum seekers. Instead, STCAs have allowed wealthier and more insulated States to buy their way out of their obligations under the Refugee Convention and CAT by shunting their responsibilities to border States with already struggling asylum systems, exacerbating existing inadequacies and creating new ones. Most significantly, STCAs have allowed States to circumvent protections required by the Refugee Convention, ultimately increasing the risk to asylum seekers that they will face threats to their life and freedom.

Although STCAs are not inherently problematic, State practices have demonstrated that these agreements tend to arise from perverse incentives and fail to protect refugees. It is time to let go of the STCA as a tool of international cooperation and look for alternative solutions. As the Biden administration stated in their withdrawal from the U.S.-Guatemala STCA, there are "more suitable ways" to manage migration.[132] In the meantime, States should, at a minimum, face high scrutiny when they pursue STCAs with States with fewer resources and globally fall into compliance with guidance provided by UNHCR on cooperative agreements. History has shown that it is time to put asylum seekers first.

132. Press Statement, *supra* note 120.