

**Responses to Secondary Movements of Refugees:
A Comparative Preliminary Study of State
Practice in South Africa, Spain, and the USA**

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1. Introduction

Some refugees and asylum-seekers are compelled or choose to transit through and/or seek protection in several countries. Such secondary movements of refugees and asylum-seekers can be of concern, both from a protection as well as from a migration control perspective if they take place without the requisite travel documentation. Irregular travel is often dangerous and can place individuals in vulnerable situations. It also feeds the human smuggling and trafficking industries and makes it more difficult for States to manage their asylum systems. In addition, secondary movements have created tensions between affected countries.

Many States have responded to irregular movements, including secondary movements of refugees and asylum-seekers, with restrictive measures such as increased border controls and interception measures, prolonged detention and deportation. Some States have also restricted access to their asylum systems or denied refugee status on the basis that the asylum-seeker could have accessed protection in other country(/ies). Several variations of such “protection elsewhere” notions have emerged. The “country of first asylum” concept is used to reject asylum claims made by individuals who have already been granted asylum by or at least found some form of protection in another State. The broader “safe third country” notion is used to deny refugee status if the asylum-seeker could have found protection in another State. States have also concluded agreements with neighbouring countries to cooperate with regard to border control and to facilitate returns. A number of States have concluded specific agreements determining which State is responsible for consideration of asylum requests.

For refugees to be able to benefit from the standards of treatment provided for by the 1951 Convention Relating to the Status of Refugees (1951 Convention)¹ and/or to its Protocol², or other relevant international and regional instruments, it is essential that they have access to a procedure where the validity of their claims can be assessed. The principle of *non-refoulement* includes the obligation not to reject asylum-seekers at frontiers and to grant them access to a fair and efficient asylum or status determination procedures. There is no duty in international law for an individual to seek asylum in the first country that they enter.³

The UNHCR Executive Committee (Excom) has recommended that States address secondary movements jointly in the spirit of international cooperation. It has set out the circumstances where asylum-seekers and refugees may be returned by one State to another State. Excom has suggested that such returns only be considered where an individual had already found protection in that country. Excom has called on sending States to establish that the country of proposed

¹ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

² Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

³ The principle of *non-refoulement* is enshrined in Article 33 of the 1951 Convention, as well as, e.g., Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987; 1465 UNTS 85) (CAT). For a more detailed discussion of international standards for asylum procedures see UN High Commissioner for Refugees, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, available at: <http://www.unhcr.org/refworld/docid/3b36f2fca.html>.

return ‘will treat the asylum-seeker (asylum-seekers) in accordance with accepted international standards, will ensure effective protection against *refoulement*, and will provide the asylum-seeker (asylum-seekers) with the possibility to seek and enjoy asylum.’⁴ Excom has not, however, defined in further detail what minimum standards, status and rights must be included as part of such transfer arrangements.

This preliminary study has been commissioned by UNHCR for the Expert Meeting on “International Cooperation to Share Burden and Responsibilities” held in Amman, Jordan, on 27 and 28 June 2011 in the context of UNHCR’s commemorations of the 60th Anniversary of the 1951 Convention. It analyses relevant State practice on secondary movements in three destination countries for such movements: the United States, South Africa, and Spain. All three States are parties to the 1951 Convention and/or to its Protocol, as well as to other human rights instruments of international and regional scope.⁵ All three States are experiencing mixed flows in which asylum-seekers and refugees are moving, generally irregularly, alongside other groups of people without international protection needs. The mixed flows in all three regions also include secondary movements.

As part of the analysis of State practice, the study first examines procedural tools which States use to address secondary movements. It highlights converging and diverging trends in the management of secondary movements by these States and examines how far they reflect international law and standards. It also identifies specific areas that deserve further research and/or policy development.

Second, the study examines specific measures taken by the State towards the individual asylum applicant to address secondary movements. This includes the scope and function of the “safe third country” and “country of first asylum” concepts in national legislation, policy and/or practice. These concepts, when used by a State in individual status determination procedures, may prevent access to asylum procedures at the admissibility stage, or act as a basis for rejecting a claim for international protection on substance.⁶ The study will also examine other related practices –notably in the context of border and immigration control- that jeopardize the right to seek asylum based on the assumption that protection is available elsewhere, and that might specifically affect refugees and asylum-seekers in secondary movements.

⁴ Excom Conclusion No. 85 (XLIX) Conclusion on International Protection (1998), Executive Committee - 49th Session, para. (aa). See also, e.g., Excom Conclusion No. 15 (XXX) Refugees without an Asylum Country (1979), Executive Committee – 30th Session, para. (h); Excom Conclusion No. 58 (XL) Problem of Refugees and Asylum-Seekers who Move in an Irregular Manner from a Country in which they had already found Protection (1989) – 40th Session; Excom Conclusion No. 87 (L) General (1999) – 50th Session, paras. (j) and (l).

⁵ These include, at the international level, the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976; 999 UNTS 171) (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987; 1465 UNTS 85) (CAT). At regional level, they include the African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 Oct. 1986; OAU Doc. CAB/LEG/67/3 rev. 5) and the Charter of Fundamental Rights of the European Union ([2007] OJ C 303).

⁶ For a study of the safe third country concept in the context of secondary movements, see S.H. Legomsky, ‘Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection’ (2003) *Legal and Protection Policy Research Series* (PPLA/2003/01).

Finally, the study examines inter-State agreements to allocate responsibility for the examination of asylum applications, as well as readmission agreements through which the safe third country and the country of first asylum concepts are implemented in practice.

Given its preliminary nature, the study has been based primarily on documentary research, including legislation, case-law, policy documents, independent reports, and academic commentaries. The findings of the documentary research were verified through semi-structured interviews with selected actors in the asylum process.

2. Law and Policy of Selected Destination Countries: South Africa, Spain, and the United States of America.

2.1. The Republic of South Africa

According to UNHCR, South Africa receives the largest number of asylum applications in the world, with some 222,000 applications submitted in 2009.⁷ The figure reflects the growing significance of irregular movements more broadly to Southern Africa, whose features are becoming increasingly complex.⁸ In particular, there is evidence that sea routes are increasingly being used for irregular travel from East Africa into Southern Africa for part of the journey as an alternative to land routes, with the additional protection risks and humanitarian concerns that such sea travel implies.⁹

2.1.1. The safe third country and country of first asylum concepts

The safe third country and country of first asylum concepts are not incorporated into the South African asylum legislation, the 1998 Refugees Act.¹⁰ However, it would appear that these concepts are often used as grounds for rejection of asylum applications by the authorities, despite the lack of a legal basis.

This practice may, however, soon become policy following the reform of the 2002 Immigration Act.¹¹ The 2011 Immigration Act introduces “advance passenger processing”, this is, the pre-

⁷ UNHCR, *Global Report 2009* (Geneva, UNHCR, June 2010), p. 135. These numbers include the continuous flight of Zimbabweans. The current regularization process –if properly conducted- should reduce significantly these figures.

⁸ For a broad account of refugee protection in Southern Africa, see B. Rutinwa, ‘Asylum and refugee policies in Southern Africa: A historical perspective’, SARPN Seminar *Regional Integration, Migration and Poverty*, 25 April 2002, available at: <http://www.sarpn.org.za/documents/d0001212>.

⁹ K. Long & J. Crisp, ‘In harms way: the irregular movement of migrants to Southern Africa from the Horn and Great Lakes regions’, *New Issues in Refugee Research*, Research Paper No. 200 (Geneva, UNHCR 2001), p. 10.

¹⁰ Act 130/1998, as amended by the 2008 Refugees Amended Act (Act 33/2008) and the 2011 Refugees Amendment Act (Act 12/2011). For an analysis of the Act at the time of its introduction, see J. Handmaker, ‘Who determines policy? Promoting the right of asylum in South Africa’ (1999) 11(2) *International Journal of Refugee Law* 290-309. The Act was amended in 2008 by Act 33/2008 (not yet in force). The 2010 Refugees Amendment Bill (Bill 30B—2010) is expected to bring the 2008 amendments into force.

¹¹ Act 13/2002, as amended by the 2011 Immigration Amendment Act (Act 13/2011).

clearance of all persons prior to their arrival in South Africa.¹² This process appears to be considered by the Government as a means to apply a so-called “first safe country” concept for persons who otherwise may seek asylum in South Africa. While there is no legal definition of “first safe country”, in practice it seems to involve elements of both safe third country as well as country of first asylum notions.

When questioned about advance passenger processing by the media, the South African Home Affairs Minister referred to the “first safe country” concept:

‘You must remember, international law refers to the first safe country an asylum seeker enters. [...] [W]e must ask if we are the first safe country because international law regulates this matter. [...] But if it is clear that South Africa is the first safe country then you cannot ask. This is all it means [...]’¹³

Likewise, in its response to submissions made on the then Immigration Amendment Bill, the Department of Home Affairs stated that

‘The envisaged pre-screening procedure will not be applicable where [South Africa] is the first safe country of entry from their countries of origin (i.e. neighboring countries that we share borders with). However, it will be applicable where [South Africa] is not the first safe country of entry from a person’s country of origin. If an appeal is lodged same will be made whilst a person is not in [South Africa] as is the case with other applications’.¹⁴

The foundations for this position were further elaborated in March 2011, in answer to a parliamentary question reading as follows:

‘Whether she will implement the principle that refugees be required to seek asylum in the first safe country; if not, why not; if so, (a)(i) how and (ii) when will this principle be implemented and (b) what are the further relevant details?’

The Minister explained that although

‘[T]here is a longstanding first country of asylum principle in international law by which countries are expected to take refugees fleeing from persecution in a neighbouring state, South Africa has not been strictly applying this principle.’¹⁵

¹² Act 13/2002, Section 1(1), as amended by Act 13/2011.

¹³ Department of Home Affairs, *Media Release. Transcript Copy: Interaction with Media by Home Affairs Minister Dr Nkosazana Dlamini Zuma Regarding Amendments to the Immigration Bill and New Permitting Regime*, 8 February 2011.

¹⁴ Response by the [Department] to Submissions Made on the Immigration Amendment Bill, 2010 [B32-2010] on 25 – 27 January 2011 [Portfolio Committee on Home Affairs], 8 February 2011.

¹⁵ ‘Home Affairs to finalise asylum seeker process’, available at: <http://www.buanews.gov.za/news/11/11032408541004>. The Minister also explained that the Department of Home Affairs will be finalising the review of its Asylum Seeker Management Process to address comprehensively challenges related to the management of asylum seekers.

No such principle exists in international law. To the contrary, the pre-screening procedure allows for the expeditious removal of asylum-seekers arriving at South Africa's borders who are not originating from neighbouring countries without further examination of their claims and runs the risk of violating the principle of *non-refoulement*.¹⁶ A serious incident arose soon after the Minister's declarations in relation to Somalis attempting to enter South Africa from Zimbabwe. Both the Governments of South Africa and of Zimbabwe refused entry, reportedly based on the need to fight illegal immigration. While statements were made that individuals applying for protection would be treated in accordance with the 1951 Convention, they were in practice treated as unlawfully present migrants. Both the Governments of South Africa and Zimbabwe argued that the reason for this was that they had not been confirmed as refugees by the first country of safety. Which country, concretely, is considered as the first country of safety in the individual case is, however, not clear. South Africa's Deputy Director General of Immigration is reported to have stated that Somalis were denied entry into South Africa 'because they didn't have the required documents (asylum permits) which they were supposed to acquire from the first country of safety before proceeding to South Africa, including any other country.'¹⁷

Accordingly it appears that the safe third country and country of first asylum concepts hidden in the newly introduced advance passenger processing act as automatic bars for asylum applicants who do not enter South Africa directly from the country of origin. This effectively limits access to asylum in South Africa to applicants from neighbouring countries.

Further, this practice appears to take place in the absence of formal inter-State agreements whereby the proposed country of transfer either confirms that the individual already enjoys protection there or accepts responsibility to process the protection claim in accordance with international standards. It follows that individuals returned to a country where they have previously entered have no guarantee of protection. They also may in turn be removed to other countries, which may result in a violation of States' international obligations including the principle of *non-refoulement*.

This development is especially worrying as it comes amidst reports of *refoulement* of recognized refugees and registered asylum-seekers in South Africa, as exemplified in the *Abdi* case.¹⁸ If such instances are known and documented in relation to individuals already "in the system", the treatment of refugees and asylum-seekers intercepted and removed before they are able to lodge their claims in South Africa is of serious concern.

¹⁶ See above footnote 3.

¹⁷ *SA/Zimbabwean immigration meet over Somali Refugees*, Xogta, 12 May 2011, available at <http://www.xogta.com/2011/05/12/sazimbabwean-immigration-meet-over-somali-refugees>.

¹⁸ *Abdi v Minister of Home Affairs* (734/10) [2011] ZASCA 2 (15 February 2011) involved two people who were, respectively, a recognized refugee and a registered asylum-seeker in South Africa. They entered Namibia from South Africa without informing the authorities. Namibia deported them to their country of origin, Somalia, via South Africa, where they were held in the Inadmissible Facility of the airport. The South African Government attempted to deport them to Somalia arguing that they could not readmit them into South Africa as they were deported from Namibia and therefore under the jurisdiction of that country. The Court ruled that the individuals were entitled to be re-admitted to South Africa with retention of their former status. This practice of directly deporting arrivals without assessment of their protection needs, especially acute for airport arrivals, can partly be explained by the obstacles in accessing legal advice. This is often dependent on agreements between the airport and the detention facility where refugees and irregular arrivals are held.

The absence of a formal legal basis for the “first safe country” concept in South Africa may be explained by previous failed attempts to codify the practice. In 2000, the South African Department of Home Affairs issued a Circular on the “first country of asylum” instructing all relevant authorities to verify the good faith of asylum-seekers and refugees that reach South Africa having transited through numerous “safe neighbouring countries” and further instructing them to refer them back to ‘where they come from. If they insist on entering the Republic, they should be detained.’¹⁹

This Circular was challenged by Lawyers for Human Rights (LHR). LHR argued that the Circular made it impossible for any asylum-seeker travelling to South Africa by land to make an asylum application and created a risk that asylum-seekers will be removed to their country of origin (paras. 17-18). LHR asked the Court for an immediate interdiction of the application of Circular 59 as the instructions it contained were in direct contravention of the Refugees Act and the South African Constitution (paras. 19-20).²⁰ A settlement between all parties was reached and given legal force by the South African Court of Appeal in May 2001. According to the settlement, the Government agreed to withdraw Circular 59 but also to consult with LHR on the terms and wording of any Circular that they may seek to issue in place of Circular 59.

This settlement may explain the existence of the practice of “first safe country” in South Africa without an explicit legal basis. It is too soon to evaluate the advance passenger processing policy or the reaction from South African courts, especially in light of the settlement on Circular 59 and the Government’s understanding that refugees who arrive in South Africa from “first safe countries” without documentation cannot be recognised as refugees.

2.1.2. Other barriers to protection for secondary movers

A further issue of concern in the South African context relates to the limited period that asylum-seekers are given to lodge asylum claims. Section 23 of the 2002 Immigration Act, as amended by Act 13/2011, restricts the period of validity of an “asylum transit permit” to five days. In other words, asylum-seekers must apply for asylum within a maximum of five days after entry into South Africa. If the permit expires before the asylum-seeker lodges his claim, the holder of the permit ‘shall become an illegal foreigner and be dealt with in accordance with this Act.’

The effects of this are tempered by a ruling of the South African Constitutional Court holding that unlawfully present foreigners do enjoy the protection of the Constitution’s Bill of Rights.²¹ Nonetheless, the measure has prompted strong criticisms by non-governmental organisations (NGOs) given the risk of deportation and further *refoulement* this provision creates for refugees, including secondary movers.²²

¹⁹ Departmental Circular 59 of 2000.

²⁰ *Lawyers for Human Rights (Applicant) v. The Minister for Home Affairs, Director-General of Home Affairs, the Standing Committee (Respondents)* (10783/2001), in the High Court of South Africa, February 2001.

²¹ *Lawyers for Human Rights v Ministry of Home Affairs* (Case CCT 18/03) [2004] Constitutional Court (9 March 2004).

²² For a critique of South African legislation regarding the ability to identify refugees in the context of mixed flows, see J.A. Klinck, ‘Recognising Socio-Economic Refugees in South Africa: a Principled and Rights-Based Approach

Further, the consequences of the “illegal foreigner” status are outlined in Section 34(1) of the Immigration Act:

‘Without need for a warrant, an immigration officer may arrest an illegal foreigner [...] and shall [...] deport him or her [...] and may, pending his or her deportation, detain him or her [...] in a manner and at the place under the control or administration of the Department determined by the Director-General’.

Section 34(1)(d) of the Act provides that an “illegal foreigner”

‘may not be held in detention for longer than 30 calendar days without a warrant of a Court which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days’.

However, in practice detention without judicial review may extend for longer periods. This practice has been denounced by human rights organizations,²³ UN human rights monitoring bodies,²⁴ and has been firmly condemned by the South African Courts.²⁵

2.1.3 Conclusion

South African legislation does not expressly include safe third country or country of first asylum concepts. However, the recently introduced “advance passenger processing” policy seems to be considered by the Government as a tool to manage secondary movements by preventing refugees not arriving directly from countries of origin from accessing asylum procedures.

This practice puts refugees at risk of *refoulement*, especially in the absence of international agreements whereby the State to which persons are to be returned confirms that the individual enjoys protection there or will be given access to asylum procedures.

Asylum-seekers who are allowed to enter South African territory in order to lodge an asylum claim may nevertheless not manage to do so. Those who fail to apply for protection within the limited period of five days that the legislation now allows will be considered “illegal foreigners” and be subject to deportation. There are no mechanisms within the deportation process to

to Section 3(b) of the Refugees Act’ (2009) 21(4) *International Journal of Refugee Law* 653-699. Cf. A. Betts, ‘Towards a ‘Soft Law’ Framework for the Protection of Vulnerable Irregular Migrants’ (2010) 22(2) *International Journal of Refugee Law* 209-236.

²³ Lawyers for Human Rights, *Monitoring Immigration Detention in South Africa* (September 2010).

²⁴ *Conclusions and recommendations of the Committee against Torture. South Africa* (CAT/C/ZAF/CO/1) 7 December 2006, para. 16.

²⁵ *Hasani v Minister of Home Affairs* (10/01187) [2010] High Court (5 February 2010); confirmed by the Supreme Court of Appeal in *Arse v Minister of Home Affairs* (25/10) [2010] ZASCA 9 (12 March 2010). See further *Zimbabwe Exiles Forum v Minister of Home Affairs* (27294/2008) [2011] High Court (February 2011), where the Court found that keeping asylum-seekers in detention for the length of their determination process or appeal, as well as the practice of detaining, releasing, and again detaining asylum-seekers, were unconstitutional.

differentiate people who may be in need of international protection from other unlawfully present migrants, putting refugees and asylum-seekers at risk of *refoulement*.

2.2. The Kingdom of Spain

According to UNHCR, Spain received 34% less asylum applications in 2009 in relation to the previous year.²⁶ Recognition rates are low. According to the official figures released by the Spanish Government, only 179 out of all cases examined in 2009 were granted refugee status while 162 persons were granted other forms of protection.²⁷

2.2.1. The safe third country and country of first asylum concepts

The Spanish asylum system is governed by Article 13(4) of the Constitution, as developed by the 2009 Asylum Act.²⁸

Country of first asylum and safe third country concepts, broadly defined, were introduced into Spanish asylum legislation in 1994 as grounds for inadmissibility, i.e., as a basis for denying access to a determination of the claim on the merits. The safe third country concept, on which European regional agreements on the allocation of responsibility to examine asylum claims (currently the so-called Dublin II Regulation²⁹) are based, was also a ground for inadmissibility.

²⁶ 3000 applications for asylum were lodged in 2009. UNHCR, *Asylum Levels and Trends in Industrialized Countries 2009. Statistical Overview of Asylum Applications Lodged in Europe and selected Non-European Countries* (Geneva, UNHCR, 23 March 2010) p. 13. This trend is consistent with that of other Southern European countries. According to UNHCR, in 2010 ‘the largest relative decrease in annual asylum levels was reported by the eight Southern European countries [with] a 33 per cent decrease compared to 2009 [...] Compared to the latest peak in 2008 [...], figures have more than halved (-55%).’ UNHCR, *Asylum Levels and Trends in Industrialized Countries 2010. Statistical Overview of Asylum Applications Lodged in Europe and selected Non-European Countries* (Geneva, UNHCR, 28 March 2011) pp. 5-6.

²⁷ Dirección General de Política Interior. Subdirección General de Asilo (Oficina de Asilo y Refugio), *Asilo en cifras 2009* (Ministerio del Interior, Madrid 2010), pp. 62 & 65.

²⁸ Ley 9/2009 de 30 de octubre, reguladora del derecho de asilo y de la protección subsidiaria; BOE núm. 263, of 31 October. This Act repeals the 1984 Act (Ley 5/1984, de 26 de marzo, reguladora del derecho de asilo y de la condición de refugiado; BOE núm. 74, of 27 March) as amended by the 1994 Act (Ley 9/1994, de 19 de mayo, de modificación de la Ley 5/1984, de 26 de marzo, reguladora del derecho de asilo y de la condición de refugiado; BOE núm. 122, of 23 Mayo) and transposes into the Spanish legal order the relevant EU legislation, namely, the Qualifications and the Procedures Directives: Council Directive 2004/83/EC of 29 April 2004 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 protection granted ([2004] OJ L 304/12) and Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status ([2005] OJ L 326/13). For an overview of the main features of the new asylum system, see A Sánchez Legido ‘Entre la obsesión por la seguridad y la lucha contra la inmigración irregular: a propósito de la nueva ley de asilo’ (2009) 18 *Revista Electrónica de Estudios Internacionales* 1-32. The term “Act” is used to indicate a legally binding instrument of Parliament, as the term is currently used in South Africa and the United States of America. In the case of Spain, the term Act is therefore used instead of “Ley” in this paper.

²⁹ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national; [2003] OJ L 50/1.

These concepts have been retained in the 2009 Act. Therefore, applications which fall under these provisions will not be considered on the merits.³⁰

The actual impact of these concepts is not easy to evaluate. There are no statistics available that break down the reasons for rejection of asylum claims, so it is not possible to know how many applications are rejected on safe third country or country of first asylum grounds. However, although these concepts were widely used when they were first introduced in the mid-nineties, observers note that they have now fallen out of use. An examination of the case law confirms the lack of practical relevance of these concepts. A study published in 2010 examining judicial appeals against asylum refusals showed that all cases examined except one were rejected on credibility grounds.³¹ Anecdotal evidence supports these findings: the Spanish Supreme Court in 2004 noted in one appeal case that the applicant spent nine days in Italy and one day in France, where he could have applied for asylum, however the appeal was rejected on credibility grounds and not by application of the safe third country concept contained in the Dublin II Regulation.³²

2.2.2. Other barriers to access the asylum procedure in safe third country cases

2.2.2.1. Individuals seeking to enter from non EU Member States

The declining reliance, in practice, on the safe third country and country of first asylum concepts in Spanish admissibility procedures should be seen in the light of strengthened border control measures. Indeed, overall, Spain has seen a sharp decrease in asylum applications generally in recent years, reflecting a certain “success” of border control policies including interception at sea.³³ The interception measures are now largely coordinated by Frontex.³⁴

³⁰ Article 20(1)(c) of the 2009 Act enshrines the country of first asylum concept (as established in articles 25(2)(b) and 26 of the Procedures Directive), while article 20(1)(d) enshrines the safe third country concept (as established in article 27 of the Procedures Directive). The 2009 Act still requires implementing regulations, which will develop the actual features and procedure for the effective application of these concepts. In particular, article 27(2) of the Procedures Directive provides that national legislation is to establish rules requiring a connection between the person seeking asylum and the third country concerned, as well as providing for an individual examination of whether the third country concerned is safe for a particular applicant.

³¹ MT Gil-Bazo, “Thou Shalt Not Judge’... Spanish Judicial Decision-Making on Asylum and the Role of Judges in Interpreting the Law’, in H. Lambert and G.S. Goodwin-Gill (eds.) *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (Cambridge University Press, Cambridge 2010) 107-124.

³² STS 6240/2004, of 6 October 2004, para. 2, p. 2.

³³ Since the mid-nineteen eighties, a pattern of increasing immigration has emerged in Spain. The number of non-nationals living in Spain has been rising quickly and at 1 January 2010, about 12% of the Spanish population consisted of non-nationals. This makes Spain the EU Member State hosting the largest percentage of non-EU foreign individuals in 2009, after Estonia and Latvia (whose large foreign population consists mainly of individuals who were once nationals of the former Soviet Union). Eurostat *Statistics in Focus 45/2010* (European Union 2010) p. 2.

³⁴ Council Regulation (EC) 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union ([2004] OJ L 349/25), as amended by Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers ([2007] OJ L 199/30).

Further, the number of international agreements with non-EU countries on migration (including readmission agreements) has increased over the last few years, accompanied by funding to support the efforts of the non-EU countries involved in managing irregular migration.³⁵ These agreements raise concerns at various levels, notably the lack of transparency and accountability of government action.

The Spanish Commission for Refugees (CEAR) argues that this externalisation of border controls reflects a governmental policy to transfer the management of migratory flows to countries outside the EU and results in thousands of individuals fleeing the most serious human rights violations becoming trapped in transit countries and prevented from accessing asylum procedures in Spain.³⁶

This concern is also shared by Amnesty International, which brought the matter before the UN Committee Against Torture in 2009. Amnesty International noted the obstacles to the effective enjoyment of the right to seek asylum created by increasing interceptions at sea, and the limitations on judicial and public accountability that arise in this context.³⁷

Enhanced border control measures have been complemented by amendments to the 2009 Asylum Act, restricting the right to seek asylum to non-EU citizens *who are present* in Spanish territory. The 2009 Asylum Act also restricts applications for protection at Spanish diplomatic representations abroad. It is now left to the Ambassador's discretion whether applicants will be brought into Spanish territory in order to present their claims (article 38 of the 2009 Act).³⁸

It seems that the Spanish government considers that actions conducted outside its territory, in international waters and in the territory of other States, cannot be considered as exercises of its jurisdiction. This position has been supported by the Supreme Court, which has held that despite a well established body of international case law on the extra-territorial application of human rights instruments, the lack of power to act (in the high seas and on foreign territory) necessarily means that no human rights violations can be committed. This includes violations of fundamental rights guaranteed by the Spanish Constitution, such as the right to asylum and the right to an effective remedy.³⁹ The lawfulness of this interpretation is currently pending before the Spanish Constitutional Court under the special procedure for the protection of fundamental rights.

³⁵ The complete list of international migration agreements can be accessed at the website of the Spanish Ministry of Labour and Migration, available at: <http://extranjeros.mtin.es/es/NormativaJurisprudencia/Internacional/ConveniosBilaterales>.

³⁶ CEAR, *La situación de las personas refugiadas en España. Informe 2010* (Entinema, Madrid 2010), p. 46.

³⁷ Amnesty International, *Spain: Briefing to Committee Against Torture* (EUR 41/011/2009) (Amnesty International, London 2009) p. 38. For a detailed critique of the organization of Spanish policy and practice in relation to asylum-seekers and refugees in the context of border control and the fight against illegal immigration, see Amnesty International *ESPAÑA: Personas inmigrantes, refugiadas y solicitantes de asilo. Dossier informativo* (Amnistía Internacional, Madrid 2009).

³⁸ This has been heavily criticised by ECRE; ECRE, *La Situación de las Personas Refugiadas en España... Op. Cit.* pp. 55-60.

³⁹ See judgment by the Spanish Supreme Court on 17 February 2010 (STS 833/2010), confirming the judgment by the *Audiencia Nacional* (the court of highest instance with jurisdiction to examine appeals both on facts and on merits) on the *Marine I* case, issued on 12 December 2007 (SAN 5394/2007).

In short, it appears that the safe third country and country of first asylum concepts have moved from asylum procedures into policies of interception and removal applied *before* individuals have had the opportunity to lodge an asylum claim. In the absence of agreements with third countries on the responsibility to examine asylum applications or the inclusion of protection safeguards in readmission agreements with non-EU States, asylum-seekers are not guaranteed access to a refugee determination procedure, either in Spain or in the country to which they may be removed, and may be subject to *refoulement*.

Given that immigration into Spain is characterised by mixed flows, the impact of the migration control policy just described on refugees and asylum-seekers who seek to enter Spain from non-EU countries can be significant. These policies have been strongly condemned by the UN Committee Against Torture, both in its observations to the last Spanish Regular Report⁴⁰ as well as in individual communications.⁴¹

2.2.2.2. Individuals to whom the Dublin system applies

The so-called “Dublin system” - which establishes a mechanism to determine the EU Member State responsible for examining an asylum application - is based on the premise that all Member States have similar asylum systems and safeguards, and that therefore they are “safe” for all asylum-seekers. The Dublin system was initially welcomed by UNHCR⁴² and some academics⁴³ when it was established in the early nineties, and characterized as ‘commendable efforts to share and allocate the burden of review of refugee and asylum claims, and to establish effective arrangements by which claims can be heard.’⁴⁴ However, it has shortcomings. Notably, it allows States to remove asylum-seekers outside EU territory when a “safe third country” is determined to exist. Furthermore, its implementation over the years has resulted in numerous court challenges, particularly against the presumption of safety in other EU Member States on which the system is based.

EU Member States remain bound by their obligations under international and regional refugee and human rights instruments. The European Court of Human Rights has made several findings on the relationship between the Dublin system and States’ obligations under the European

⁴⁰ In its observations, the Committee took note of the bilateral agreements on the assisted return of minors that Spain has signed with Morocco and Senegal and expressed its concerns ‘about the absence of safeguards ensuring the identification of children who may need international protection and may therefore be entitled to use the asylum procedure’ and called on Spain to ensure ‘protection against the repatriation of [children] who have fled their country because of a well-founded fear of persecution.’ *Concluding observations of the Committee against Torture. Spain* (CAT/C/ESP/CO/5) 9 December 2009, para. 16.

⁴¹ *J.H.A.v. Spain*, Communication No. 323/2007, views of 10 November 2008 (CAT/C/41/D/323/2007), para. 8.3. For a commentary of this decision, see K. Wouters & M. Den Heijer, ‘The Marine I Case: a Comment’ (2009) 22(1) *International Journal of Refugee Law* 1-19.

⁴² UNHCR, *Position on Conventions Recently Concluded in Europe (Dublin and Schengen Conventions)*, 16 August 1991, 3 European Series 2, p. 385, available at: <http://www.unhcr.org/refworld/category,LEGAL,,COMMENTARY,,3ae6b31b83,0.html>.

⁴³ C. Escobar Hernández, ‘El Convenio de Aplicación del Acuerdo de Schengen y el Convenio de Dublín: una aproximación al asilo desde la perspectiva comunitaria’ (1993) 20(1) *Revista de Instituciones Europeas* 53-99.

⁴⁴ See above footnote 42.

Convention on Human Rights.⁴⁵ The Court noted early on that States cannot rely automatically on the Dublin system,⁴⁶ but it has never found that arrangements to allocate responsibility to examine an asylum claim in one EU Member State only (acting on behalf of the rest) are contrary *in principle* to international human rights law.

As the asylum systems in EU Member States converge within the Common European Asylum System (CEAS) - which recognises the right to permanent residence and to freedom of movement for beneficiaries of international protection - it would appear that the Dublin system offers relatively better chances of protection for asylum-seekers than the unilateral application of the safe third country concept pursuant to bilateral readmission agreements with non-EU countries. The Dublin system also facilitates States' management of secondary movements through a regular mechanism (activated through EURODAC), rather than through *ad hoc* agreements and extraordinary budgetary measures.

In 2009, Spain lodged 207 requests to other Member States (152 of which were lodged through the EURODAC system), and 173 of them were accepted:⁴⁷ that is, another EU Member State explicitly accepted responsibility to examine the claim in accordance with the terms of the Dublin II Regulation.

2.2.3. Conclusion

In comparison to the other two countries considered in this study, Spain has the most sophisticated system to address irregular secondary movements of refugees and asylum-seekers, a situation that has developed in the context of Spain's membership of the European Union.

Spain incorporated the safe third country and country of first asylum concepts in its legislation and policy in the 1990s. In the same period, it started to develop inter-State agreements with non-EU countries for the readmission of unlawfully present migrants and it became a party to the Dublin system among European States.

Over time, the safe third country and country of first asylum concepts have lost relevance in the context of admissibility procedures examining claims lodged in Spanish territory or at its borders.

⁴⁵ Despite the various cases brought before the Court, it was only in January 2011 that this body found Member States in violation of their human rights obligations in the context of Dublin removals of asylum-seekers. *M.S.S. v. Belgium and Greece* (Application no. 30696/09), Judgment of 21 January 2011 (not yet reported). An assessment of the Dublin system is also currently before the Court of Justice of the European Union, which has been asked to interpret the scope of Member States obligations under EU law regarding the presumption of safety in Dublin transfers; in particular, the contribution of article 18 of the Charter of Fundamental Rights of the European Union (the right to asylum) to existing human rights obligations under the European Convention on Human Rights; Joined Cases *NS v Secretary of State for the Home Department* (Case C-411/10) and *M.E. and Others v Refugee Applications Commissioner* (Case C-493/10), pending.

⁴⁶ *T.I. v the United Kingdom*, decision of 7 March 2000, 2000-III Reports of Judgments and Decisions, p. 15.

⁴⁷ Dirección General de Política Interior. Subdirección General de Asilo (Oficina de Asilo y Refugio), *Asilo en cifras 2009* (Ministerio del Interior, Madrid 2010), p. 77.

Conversely, these concepts are becoming increasingly relevant as justifications for preventing access to the asylum procedure altogether in the context of interception and removal operations. Removals, in turn, are being conducted in the absence of inter-State agreements that would guarantee access to protection in the third States.

2.3 United States of America (USA)

The foreign population in the USA has been rising since the 1990s. According to the International Organisation for Migration (IOM), there were 48.2 million migrants living in the USA in 2010 (this is, about 14% of the population).⁴⁸ In 2010, the USA registered 13 per cent more asylum applications than in 2009 (approximately 55,500 new applications in 2010, compared to 49,000 in 2009). According to UNHCR ‘[f]or the fifth year running, the United States of America was the largest single recipient of new asylum claims among the group of 44 industrialized countries. [...] Chinese and Mexican asylum-seekers primarily accounted for this recent increase.’⁴⁹

The rapidly increasing foreign population in the USA prompted measures in the mid 1990s for the better control of migration through increased identification, detention, and deportation of unlawfully present immigrants, as well as lawfully present immigrants with criminal convictions. The use of mandatory detention and the grounds for mandatory deportation were expanded dramatically. Likewise, legislative amendments resulted in the introduction of the country of first asylum and safe third country concepts.

2.3.1. The safe third country and country of first asylum concepts

Asylum and immigration legislation in the USA is codified in the 1952 Immigration and Nationality Act (INA).⁵⁰ It has been subject to various amendments, including by the 1980 Refugee Protection Act⁵¹ that established an asylum regime in the USA.⁵²

Accessing protection in the USA can be effectively constrained by the application of the safe third country and the country of first asylum concepts. The law, however, attaches different legal consequences to each concept: the former prevents access to the asylum procedure and may constitute grounds for termination of asylum, while the latter is to be determined within an asylum procedure and may result in the denial of the asylum claim.

⁴⁸ IOM, *Regional and Country Figures*, available at: <http://www.iom.int>.

⁴⁹ UNHCR, *Asylum Levels and Trends in Industrialized Countries 2010. Statistical Overview of Asylum Applications Lodged in Europe and selected Non-European Countries* (Geneva, UNHCR, 28 March 2011) pp. 6-7.

⁵⁰ P.L. 82-414 (66 Stat. 163). Citations in this paper shall be to the INA rather than the US Code.

⁵¹ P.L. 96-212 (94 Stat. 102).

⁵² An attempt to revise the asylum legislation took place in 2010 by the introduction of the Refugee Protection Act (S. 3113). The Bill received a warm welcome by UNHCR and refugee organizations; see for instance, UNHCR, *Letter to the Honorable Patrick Leahy on the Refugee Protection Act of 2010 (S. 3113)*, of 17 May 2010, and Human Rights First, *United States Senate Committee on the Judiciary “Renewing America’s Commitment to the Refugee Convention: The Refugee Protection Act of 2010”*, 19 May 2010. However, after the Bill was referred to the relevant Committee in the Senate, it never moved on from there.

2.3.1.1. The safe third country concept

According to Sec. 208(a)(2)(A) of the INA, asylum applications from individuals to whom the safe third country concept applies are inadmissible, except when the Attorney General finds that it is in the public interest for the individual to receive asylum in the United States:

‘Paragraph (1) 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.’

The safe third country concept may also be invoked as grounds for the termination of asylum. The Act makes it clear that ‘[a]sylum granted [...] does not convey a right to remain permanently in the United States’ (Sec. 208(c)(2)). Accordingly, it may be terminated under Sec. 208(c)(2)(C):⁵³

‘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 is *eligible* to receive asylum or equivalent temporary protection’ (emphasis added).

2.3.1.2. The Canada – USA Safe Third Country Agreement

The only safe third country agreement that the USA currently has concluded is with Canada.⁵⁴ The Agreement is only applicable to refugee status determination claims lodged at a land border port of entry in either Canada or the USA and aims at establishing responsibility in one of these countries for examining the claim. The Agreement contains limited exceptions and provides each party with the possibility to examine the refugee status claim itself. These exceptions take into account family links and other ties to the country in which the individual first applies. The Agreement also allows each Party at its own discretion to examine any refugee status claim made in that Party where it determines that it is in its public interest to do so.

Article 3(1) of the Agreement imposes a duty on each party not to remove applicants transferred under the terms of the Agreement ‘until an adjudication of the person’s refugee status claim has been made.’ The Agreement also establishes in article 3(2) that ‘[t]he Parties shall not remove a refugee status claimant [transferred] under the terms of this Agreement to another country pursuant to any other safe third country agreement or regulatory designation.’ This constitutes a positive feature of the Agreement as it guarantees that all refugee status applications lodged in one of the two States Parties shall be determined in accordance with the national legislation of

⁵³ Termination of asylum, on this or other grounds, is rarely applied in practice.

⁵⁴ 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 (adopted 5 December 2002, entered into force 29 December 2004) (the Agreement).

the responsible country. This system is preferable to the Dublin system, which allows for the removal of applicants before the claim has been examined to a State not party to the Dublin system.

At the same time, both the USA and Canada have certain statutory bars to refugee status under national legislation. These bars are different in each country. The Agreement may require an applicant to apply for asylum in one State Party despite the fact that he or she may be ineligible for asylum there due to the statutory bars, and would be eligible for asylum in the other State Party. Such an effect results in a denial of that applicant's rights under the 1951 Convention and Protocol.⁵⁵

Concerns also arise due to the lack of judicial review of the application of the Agreement. Sec. 208(a)(3) of the INA establishes that 'no court shall have jurisdiction to review any determination of the Attorney General' regarding decisions applying the safe third country concept.⁵⁶ Individuals arriving in the USA from Canada may find that they will not have access to asylum procedures and will instead be returned to Canada without a right to appeal the decisions.

The Canadian Council for Refugees notes that in practice few asylum-seekers move from Canada to the USA to make an asylum claim: rather, the Agreement is about preventing individuals who are in the USA, or travelling through the USA, from making a protection application in Canada. According to the Canadian Council for Refugees, under the Agreement most applicants arriving in Canada at the US border are ineligible to make a claim in Canada and are therefore removed to the USA. The steady decrease in asylum applications in Canada is partly explained by the impact of the Agreement.⁵⁷ Judicial challenges to reverse the Canadian designation of the USA as a safe third country failed when the Canadian Supreme Court refused leave to appeal in 2009.⁵⁸

In its "twelve month report" on the implementation of the Agreement, UNHCR found that the Agreement had generally been implemented appropriately in the USA and appears to be functioning relatively well. The Office noted that the vast majority of applicants affected by the "direct back policy" (that removes automatically any asylum-seeker arriving at a land border from one of the Parties to another until the time of their scheduled asylum interview) did gain access to the Canadian refugee protection system. The Office was nevertheless aware of six cases in which applicants were directed back to the USA, detained and removed without having had an opportunity to pursue a refugee claim in Canada. UNHCR also noted issues in relation to the adequacy of existing reconsideration procedures, delayed adjudication of eligibility under the

⁵⁵ UNHCR, *Comments on the Draft Agreement between Canada and the United States of America for "Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries"* (UNHCR, July 2002).

⁵⁶ Immigration judges have authority to consider these cases but only for foreigners the Department of Homeland Security (DHS) has placed in removal proceedings (8 C.F.R. §1208.4(a)(6)).

⁵⁷ Canadian Council for Refugees, *Closing the Front Door on Refugees. Report on the First Year of the Safe Third Country Agreement* (December 2005).

⁵⁸ For details of the legal challenges and decisions, see Canadian Council for Refugees, *Safe Third Country*, available at: <http://ccrweb.ca/S3C.htm>.

Agreement in the USA, and inadequacy of detention conditions in the USA.⁵⁹ No other reports have followed since 2006, either by UNHCR or USA-based NGOs, which suggests that the overall application of the Agreement may not have created major protection challenges.

3.3.1.1. The country of first asylum concept

The country of first asylum concept is reflected in Sec. 208. (b)(2)(A)(vi) of the INA, which provides an exception to the granting of asylum in the USA if ‘the alien was firmly resettled in another country prior to arriving in the United States.’

This concept was first elaborated in jurisprudence by the USA Supreme Court, and was later introduced into legislation by the 1996 Illegal Immigration Act.⁶⁰

The USA Supreme Court stated that

‘the ‘resettlement’ concept is [...] one of the factors which the Immigration and Naturalization Service must take into account to determine whether a refugee seeks asylum in this country as a consequence of his flight to avoid persecution.’⁶¹

The determining factor in the application of the principle is therefore not the mere presence, transit or temporary stay in a country prior to the applicant’s arrival in the USA. Rather the issue is whether the applicant’s stay in another country constitutes a “termination” of the original flight from persecution, as well as the links that the individual has with the country in question:

‘An alien will not be found to be firmly resettled elsewhere if it is shown that his physical presence in the United States is a consequence of his flight in search of refuge, and that his physical presence is reasonably proximate to the flight and not one following a flight remote in point of time or interrupted by an intervening residence in a third country reasonably constituting a termination of the original flight in search of refuge [...]. The question of resettlement is not always limited solely to the inquiry of how much time has elapsed between the alien’s flight and the asylum application. Other factors germane to the question of whether the alien has firmly resettled include family ties, intent, business or property connections, and other matters.’⁶²

The meaning and scope of this provision has been developed over time to ensure that asylum is not granted to those who have already found protection elsewhere, while acknowledging that flight often takes place over a number of different stages.⁶³ Importantly, mere transit through a country does not make it automatically a country of first asylum.⁶⁴

⁵⁹ UNHCR, *Monitoring Report Canada - United States “Safe Third Country” Agreement 29 December 2004 – 28 December 2005* (UNHCR, June 2006), pp. 6-7.

⁶⁰ P.L. 104-208 (110 Stat. 3009).

⁶¹ *Rosenberg v. Yee Chien Woo* 402 U.S. 49, 91 S.Ct. 1312, 28 L.Ed.2d 592.

⁶² *Ibid.*

⁶³ See, for instance: *Zainab Ali v. Janet Reno, Attorney General, Carol Jenifer, District Director, United States Immigration and Naturalization Service, Immigration and Naturalization Service*, 2001 FED App. 0010P (6th Cir.), United States Court of Appeals for the Sixth Circuit, 10 January 2001; *Kiumars Farbaksh v. Immigration and*

Immigration regulations have incorporated relevant case law, and define “firm resettlement” as follows:

‘An alien is considered to be firmly resettled if, prior to arrival in the United States, he or she entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement unless he or she establishes:

(a) That his or her entry into that country was a necessary consequence of his or her flight from persecution, that he or she remained in that country only as long as was necessary to arrange onward travel, and that he or she did not establish significant ties in that country; or

(b) That the conditions of his or her residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled. In making his or her determination, the asylum officer or immigration judge shall consider the conditions under which other residents of the country live; the type of housing, whether permanent or temporary, made available to the refugee; the types and extent of employment available to the refugee; and the extent to which the refugee received permission to hold property and to enjoy other rights and privileges, such as travel documentation that includes a right of entry or reentry, education, public relief, or naturalization, ordinarily available to others resident in the country.’⁶⁵

2.3.2. Conclusion

The USA introduced the safe third country and country of first asylum concepts in its legislation in the 1990s. The former bars access to an examination of an asylum claim on the merits, while the latter is to be applied as a ground for rejection during the course of a full determination of the asylum claim on the merits.

In practice, the country of first asylum concept is not applied often and the application of the safe third country concept is limited to the Canada-USA Safe Third Country Agreement. The Agreement has received an overall positive evaluation by UNHCR, although some gaps have also been highlighted. A particularly positive feature is the assurance that asylum applications lodged in one of the two countries shall be determined by the responsible State Party, thus excluding the further removal of applicants to third States.

Naturalization Service, 20 F.3d 877, United States Court of Appeals for the Eighth Circuit, 4 April 1994; and *Matter of Soleimani*, United States Board of Immigration Appeals, 13 July 1989.

⁶⁴ *Arout Melkonian v. John Ashcroft*, Attorney General, A73-133-099, United States Court of Appeals for the Ninth Circuit, 4 March 2003.

⁶⁵ 8 C.F.R. §1208.15.

3. Main findings and conclusions

1. The safe third country and country of first asylum concepts were introduced by all three States considered in this study during the 1990s, as a response to growing secondary movements (in 2000 in the case of South Africa, although it was withdrawn formally in 2001 in favour of informal application). Of the countries considered, both the USA and Spain have detailed legislation on the safe third country and country of first asylum concepts, while South Africa may now be developing a policy on countries of first asylum outside of a formal legislative framework.
2. The safe third country concept is used as grounds for the inadmissibility of an asylum claim in Spain and in the USA. In Spain, this is also the case in relation to the country of first asylum concept, while in the USA the country of first asylum is one of the elements to be considered in the assessment of the asylum claim on the merits.
3. The use of these concepts as a basis to reject asylum claims (whether at the admissibility stage or in an examination on the merits) seems to have declined over the years. Today, these notions are implemented more often through interception measures outside State territory in the context of formal or informal, regular or *ad hoc* agreements with third States on border control and readmission of those intercepted. These agreements generally do not include any protection safeguards. This raises issues in so far as it denies access to an asylum procedure in any of the countries involved and may result in *refoulement*. In addition, there are two examples of inter-State agreements on the determination of the State responsible to process an asylum claim (Spain and the USA).
4. South Africa receives the largest number of asylum applications in the world, with 222,000 applications submitted in 2009, while the USA is the industrialised country that receives the largest number of asylum applications (55,500 new applications in 2010). In Spain, there has been a sharp decline in asylum applications in recent years (34% less in 2009 than the year before) – however this may be related to the increasing actions taken by Spain outside of its territory to control its border including interception operations. An assessment of the lawfulness of these policies is currently pending before the country's Constitutional Court. The forthcoming decision of the Court of Justice of the European Union in relation to States' obligations under the EU Charter of Fundamental Rights may also provide further clarity.
5. There are also differences between the States analyzed in this study in terms of the nature and scope of agreements they have concluded with other countries on the allocation of responsibility to examine asylum applications. Of the three countries considered, Spain has, in the context of the Dublin system, the most sophisticated mechanism - it applies among all EU Member States and with third States, it is supported by a common electronic data base, and its application can be challenged before the European Court of Human Rights and the Court of Justice of the European Union. The USA has a bilateral agreement with Canada, while South Africa has no formal agreements of this kind with any country.

6. In Spain the Dublin system is preferable to the practice of interdiction, notably as the system guarantees an examination of the claim by one EU Member State (provided that there is no safe third country outside the EU) according to agreed procedural safeguards, and as it is subject to scrutiny before two regional courts, the ECHR and the Court of Justice of the European Union. The USA-Canada Safe Third Country Agreement is a good practice example in so far it guarantees that all asylum applications lodged will be examined in one of the two State Parties and that applicants will not be removed to other third countries (with some limited exceptions). However, the agreement may force individuals to make asylum claims in a State Party where statutory bars will effectively prevent access to asylum. In addition, access to an effective remedy is limited. It is important to further explore how the fairness of such agreements could be maximised. In particular, it may be necessary to include appropriate safeguards which ensure that protection is provided in spite of discrepancies in the system.

4. Areas for further study

1. Given current legislative changes and pending judicial challenges, monitoring of the implementation and further revision of States' laws and policies on secondary movements deserves further analysis.
2. The increased use of bilateral readmission agreements (formal or informal, regular or *ad hoc*) without protection safeguards guaranteeing that asylum-seekers whose asylum claims have been rejected on the basis of the safe third country principle have access to the asylum system in the third State and will be granted international protection when qualifying for it should be monitored to assess compliance by States with their international and regional obligations.
3. Further research on the functioning of the USA-Canada Agreement and a comparison with the Dublin system might be useful for the development of policy recommendations on the advantages of this type of agreement as a tool for States to respond to irregular secondary movements in a concerted and protection sensitive manner.
4. It is also important to explore further how the fairness of such agreements could be maximised. In particular, research to identify which aspects of the asylum system in the countries concerned may be acting as obstacles to managing irregular secondary movements in a protection sensitive manner would be helpful. Such obstacles could include gaps in reception arrangements, detention practices, statutory bars that prevent access to the procedure altogether, differing recognition practices or protection standards.
5. A detailed study on the categories of individuals (including by country of origin when pertinent) who do not have access to a country's asylum system because of interception measures or other constraints (such as timelines) would be advisable. The study should consider the treatment of these individuals while in the territory of the receiving State or under its jurisdiction, notably in relation to detention (including the conditions of

detention, and access to judicial mechanisms for the examination of their detention and/or removal).

No. 58 (XL) PROBLEM OF REFUGEES AND ASYLUM-SEEKERS WHO MOVE IN AN IRREGULAR MANNER FROM A COUNTRY IN WHICH THEY HAD ALREADY FOUND PROTECTION⁶⁶ (1989)

a) The phenomenon of refugees, whether they have been formally identified as such or not (asylum-seekers), who move in an irregular manner from countries in which they have already found protection, in order to seek asylum or permanent resettlement elsewhere, is a matter of growing concern. This concern results from the destabilizing effect which irregular movements of this kind have on structured international efforts to provide appropriate solutions for refugees. Such irregular movements involve entry into the territory of another country, without the prior consent of the national authorities or without an entry visa, or with no or insufficient documentation normally required for travel purposes, or with false or fraudulent documentation. Of similar concern is the growing phenomenon of refugees and asylum-seekers who willfully destroy or dispose of their documentation in order to mislead the authorities of the country of arrival;

b) Irregular movements of refugees and asylum-seekers who have already found protection in a country are, to a large extent, composed of persons who feel impelled to leave, due to the absence of educational and employment possibilities and the non-availability of long-term durable solutions by way of voluntary repatriation, local integration and resettlement;

c) The phenomenon of such irregular movements can only be effectively met through concerted action by governments, in consultation with UNHCR, aimed at:

- (i) identifying the causes and scope of irregular movements in any given refugee situation,
- (ii) removing or mitigating the causes of such irregular movements through the granting and maintenance of asylum and the provision of necessary durable solutions or other appropriate assistance measures,
- (iii) encouraging the establishment of appropriate arrangements for the identification of refugees in the countries concerned and,
- (iv) ensuring humane treatment for refugees and asylum-seekers who, because of the uncertain situation in which they find themselves, feel impelled to move from one country to another in an irregular manner;

d) Within this framework, governments, in close co-operation with UNHCR, should:

⁶⁶ For interpretative declarations or reservations to this Conclusion, see Doc A/AC.96/737 part N page 23.

- (i) seek to promote the establishment of appropriate measures for the care and support of refugees and asylum-seekers in countries where they have found protection pending the identification of a durable solution and
- (ii) promote appropriate durable solutions with particular emphasis firstly on voluntary repatriation and, when this is not possible, local integration and the provision of adequate resettlement opportunities;

e) Refugees and asylum-seekers, who have found protection in a particular country, should normally not move from that country in an irregular manner in order to find durable solutions elsewhere but should take advantage of durable solutions available in that country through action taken by governments and UNHCR as recommended in paragraphs (c) and (d) above;

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

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

g) It is recognized that there may be exceptional cases in which a refugee or asylum seeker may justifiably claim that he has reason to fear persecution or that his physical safety or freedom are endangered in a country where he previously found protection. Such cases should be given favourable consideration by the authorities of the State where he requests asylum;

h) The problem of irregular movements is compounded by the use, by a growing number of refugees and asylum-seekers, of fraudulent documentation and their practice of willfully destroying or disposing of travel and/or other documents in order to mislead the authorities of their country of arrival. These practices complicate the personal identification of the person concerned and the determination of the country where he stayed prior to arrival, and the nature and duration of his stay in such a country. Practices of this kind are fraudulent and may weaken the case of the person concerned;

(i) It is recognized that circumstances may compel a refugee or asylum-seeker to have recourse to fraudulent documentation when leaving a country in which his physical safety or freedom are endangered. Where no such compelling circumstances exist, the use of fraudulent documentation is unjustified;

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