

# THE SAFE THIRD COUNTRY CONCEPT IN INTERNATIONAL AGREEMENTS ON REFUGEE PROTECTION

ASSESSING STATE PRACTICE

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## *Abstract*

*One of the expressions of international cooperation among States in the field of refugee protection is the adoption of international agreements that implement the “safe third country” and the “country of first asylum” concepts. This paper examines the legal background to these concepts and State practice by considering three selected case studies (Spain, South Africa and the US). The paper analyses the legal implications and significance of issues arising and provides a critique of the system and its premises. In particular, the paper considers whether a multilateral arrangement – such as the Dublin III Regulation or the Canada-US Agreement – has the potential to become a model for the development of an inter-State agreement whereby one of the State Parties effectively delivers all relevant international obligations (including the right to asylum) on behalf of all States bound by such system. The dual nature of the system is analysed, as an operational instrument creating obligations between States while at the same time allowing for the delivery of States’ international obligations towards refugees.*

**Keywords:** asylum; Canada-US Safe Third Country Agreement; Dublin Regulation; First Country of Asylum; international cooperation; refugees; Safe Third Country; South Africa; Spain; US

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**Mots-clés:** Afrique du Sud, asile, coopération, Entente entre le Canada et les États-Unis sur les tiers pays sûrs, Espagne, États-Unis, international, pays de premier asile, pays tiers sûr, réfugiés, Règlement Dublin

## 1. INTRODUCTION

When the international regime for the protection of refugees was born in the early twentieth century, it was driven by the need of States to work together towards a solution of the refugee plight. The first international treaty on the status of refugees, the 1933 Convention Relating to the International Status of Refugees,<sup>1</sup> refers to the Preamble to the Covenant of the League of Nations<sup>2</sup> (the predecessor of the United Nations), which includes the promotion of international cooperation among the purposes of the League. The Preamble of the 1933 Convention also takes note of the establishment of the Nansen International Office for Refugees (the predecessor of the UNHCR) under the authority of the League of Nations. The two elements of the refugee protection system, namely, an international agreement between States and an agency under the authority of the international community, were present then as they are today.

The United Nations still calls on international cooperation as a necessary requirement for the adequate fulfilment of States' obligations towards refugees. The Preamble of the Convention Relating to the Status of Refugees<sup>3</sup> (hereinafter, 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'. The Conference of Plenipotentiaries that drafted the Refugee Convention also included a plea in Recommendation D 'that Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international cooperation in order that these refugees may find *asylum* and the possibility of resettlement' (emphasis added).

Despite the long standing recognition of international cooperation as a necessary prerequisite for the satisfactory solution to the plight of refugees, its actual implementation remains one of the most complex issues in refugee protection. One of the expressions of international cooperation among States is the adoption of international agreements that implement the "safe third country" and the "country of first asylum" concepts, whose lawfulness is presumed on the grounds that protection has already been found or can be found elsewhere.

The most sophisticated mechanism developed by States to embody the "safe third country" notion is currently contained in the so-called Dublin III Regulation of the

<sup>1</sup> Adopted 28 October 1933, entered into force on 13 June 1935; 159 LNTS 3663.

<sup>2</sup> Adopted 28 April 1919, entered into force on 10 January 1920.

<sup>3</sup> Adopted 28 July 1951, entered into force 22 April 1954; 189 UNTS 137.

European Union (EU).<sup>4</sup> This Regulation is the third generation instrument aimed at determining the EU Member State responsible to examine an asylum application on behalf of all other EU Member States. The Dublin system has been subject to criticism from its inception and to scrutiny by domestic and international courts. The only consensus among all actors involved seems to be its unsatisfactory performance and its continuous need for reform.<sup>5</sup> Yet, the Dublin III Regulation does not appear better equipped than its predecessors to provide an appropriate response to EU Member States obligations of protection, as interpreted by the European Court of Human Rights (ECtHR) in the *M.S.S. v. Belgium and Greece*<sup>6</sup> case and by the Court of Justice of the European Union (CJEU) in the joined cases of *N.S. and M.E.*<sup>7</sup>

Scholarly legal debates on the “safe third country” concept have focused on “effective protection” and on the requirements for a third country to be considered safe,<sup>8</sup> but they have not questioned the lawfulness of the premise on which the “safe third country” concept is based. Indeed, the “safe third country” concept is founded on the notion that States’ obligations towards refugees who have not been granted the right to enter and/or stay in the country where they seek asylum do not go beyond the principle of *non-refoulement*, that is, the prohibition not to be returned to a territory where they may face prohibited treatment. States would be obliged to allow refugees to seek asylum – in order to respect the principle of *non-refoulement* – but its granting would be a discretionary act of the State (in accordance with their domestic legislation) rather than a right of the individual to receive it (in accordance with international law).<sup>9</sup>

<sup>4</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L 180/31.

<sup>5</sup> V. Moreno Lax, ‘Dismantling the Dublin System: *M.S.S. v Belgium and Greece*’ (2012) 14(1) *European Journal of Migration and Law* 1; R. Bieber and F. Maiani, ‘Sans solidarité point d’Union européenne. Regards croisés sur les crises de l’Union économique et monétaire et du Système européen commun d’asile’ (2011) 48(2) *Revue trimestrielle de droit européen* 295, 317–318.

<sup>6</sup> (2011) 53 EHRR 2.

<sup>7</sup> Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department & M.E. and Others v Refugee Applications Commissioner* [2011] ECR I-13905.

<sup>8</sup> H. Lambert, “Safe third country” in the European Union: an Evolving Concept in International Law and Implications for the UK’ (2012) 26(4) *Journal of Immigration Asylum and Nationality Law* 318; G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, OUP 2007) 391 & 393; C. Phuonng ‘The concept of “effective protection” in the context of irregular secondary movements and protection in regions of origin’ (2005) Global Migration Perspectives No. 26 <[www.refworld.org/docid/42ce51df4.html](http://www.refworld.org/docid/42ce51df4.html)>, accessed 2 September 2014; S. 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) <[www.refworld.org/docid/3f4de85d4.html](http://www.refworld.org/docid/3f4de85d4.html)>, accessed 2 September 2014 – a summary version can be found at S. Legomsky, ‘Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection’ (2003) 15(4) *International Journal of Refugee Law* 567.

<sup>9</sup> A. Hurwitz, *The Collective Responsibility of States to Protect Refugees* (OUP 2009) 16.

I have challenged this presumption arguing that ‘the status of refugees under international law is defined [...] by the interaction of the different legal orders that may be applicable to any given refugee in any given circumstances, both of universal and regional scope’.<sup>10</sup> It follows that ‘the transfer of responsibility from a State to another State, even admitting that such State be a “safe third country”, raises issues of State responsibility to fulfil all the obligations towards refugees under international refugee and human rights law that have been engaged by its exercise of jurisdiction’.<sup>11</sup> Following from this analysis, Foster argues that far from merely circumscribed to the principle of *non-refoulement* (enshrined in Article 33 of the Refugee Convention), the lawfulness of “safe third country” practice requires States ‘to consider rights other than Article 33 of the Refugee Convention alone’<sup>12</sup> and therefore that ‘the assumption that nothing other than Article 33 is relevant is clearly unsustainable as a matter of international law’.<sup>13</sup> In her view, ‘once a refugee has acquired rights in the sending state, the sending state must ensure that those rights are respected in the receiving state’ (the receiving State being a “safe third country”, rather than the country of origin).<sup>14</sup>

Therefore, the analysis of the international cooperation of States on refugee matters needs to be grounded on a holistic approach to the rights of refugees under international law, including the right of qualifying individuals *to be granted* asylum enshrined in international human rights instruments of regional scope.<sup>15</sup> If the premise in the analysis of international cooperation among States is that individuals (who meet the criteria) have a right to be granted asylum (and not merely the right to seek it), the discussion then shifts from the notion of “effective protection” in *another* safe country to the way in which States may cooperate to establish a system among themselves that allows one of them effectively to discharge all international obligations (including the granting of asylum) on behalf of all States bound by such system.

<sup>10</sup> M.T. Gil-Bazo, ‘The Practice of Mediterranean States in the context of the European Union’s Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited’ 2006 18(3–4) *International Journal of Refugee Law* 571, 597.

<sup>11</sup> *Ibid* 599.

<sup>12</sup> M. Foster, ‘Responsibility Sharing or Shifting? “Safe” Third Countries and International Law’ 2008 25(2) *Refugee* 64, 69.

<sup>13</sup> *Ibid*.

<sup>14</sup> *Ibid* at 67. For an analysis of the rights involved in a “safe third country” transfer other than Article 33 of the Refugee Convention, see M. Foster, ‘Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State’ (2006–2007) 28 *Michigan Journal of International Law* 223, 263–268.

<sup>15</sup> For an analysis of asylum as a right of individuals in International Law of regional scope (Europe, Latin America and Africa), see M.T. Gil-Bazo, ‘The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union’s Law’ (2008) 27(3) *Refugee Survey Quarterly* 33, 37–41 and M.T. Gil-Bazo, ‘Asylum in the practice of Latin American and African States’, (2013) *New Issues in Refugee Research*, Research Paper No. 249, 8–14 <[www.unhcr.org/50e6d9a69.html](http://www.unhcr.org/50e6d9a69.html)>, accessed 2 September 2014.

This paper examines State practice on the “safe third country” and “country of first asylum” concepts, examining their origin. The paper considers three selected case studies by examining the practice of three States: Spain, South Africa and the US. The three cases have been selected in order to allow for the examination of both the law and practice of States within the broader framework of international regional systems where they take place (the Americas, Africa and Europe), as well as to identify the current trends that such practice shows. Patterns of transnational movement in all three States are characterised by mixed flows of protection-seekers and other migrants, as well as by the use of the “safe third country” and “country of first asylum” concepts as a response both within the domestic determination procedure as well as by means of international cooperation agreements with other States. The US and South Africa both receive large numbers of migrants and of asylum seekers. In Europe, the study of Spain allows one to consider a number of matters: it receives a large number of migrants; it is bound under EU Law (due to its geographic position) to control the external borders of the Union; it applies the “safe third country” concept as a matter of domestic legislation, in the context of a multilateral intra-EU agreement; and it is the EU Member State with the largest number of international agreements with countries outside the EU on migration matters (also based on the “safe third country” and “country of first asylum” concepts). This paper analyses the legal implications and significance of issues arising and provides a critique of the system and its premises from a perspective of international refugee and human rights Law. In all three cases, the selected countries are parties to the Refugee Convention and/or to its Protocol,<sup>16</sup> as well as to international human rights instruments of universal and/or regional scope. More precisely, all three States considered must respect the right to seek asylum<sup>17</sup> and the principle of *non-refoulement* enshrined in Article 33 of the Refugee Convention and in other international human rights instruments of universal and regional scope that they are Parties to,<sup>18</sup> notably Article 3 of the UN Convention Against Torture,<sup>19</sup> which is accepted by States as customary international law.<sup>20</sup> Beyond the duty to respect the right to seek asylum and the principle of non-

<sup>16</sup> Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

<sup>17</sup> Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res. 217 A(III)) Article 14.

<sup>18</sup> For a comprehensive study of the principle of *non-refoulement*, see Sir E. Lauterpacht and D. Bethlehem, ‘The Scope and Content of the Principle of Non-Refoulement: Opinion’, in E. Feller, V. Türk and F. Nicholson (eds), *Refugee Protection in International Law* (CUP 2003) 89–177.

<sup>19</sup> 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.

<sup>20</sup> Declaration of States Parties to the 1951 Convention and/or Its 1967 Protocol relating to the Status of Refugees, Adopted on 13 December 2001 at the Ministerial Meeting of States Parties to the 1951 Convention and/or Its 1967 Protocol relating to the Status of Refugees (HCR/MMSP/2001/09), Preamble, para 4.

*refoulement*, the three States considered are also parties to international instruments of regional scope that guarantee the right to be granted asylum.<sup>21</sup>

## 2. INTERNATIONAL COOPERATION AND PROTECTION ELSEWHERE

The background to the “safe third country” and “country of first asylum” concepts is to be found in EXCOM Conclusion 58(XL).<sup>22</sup> This instrument addresses the phenomenon of refugees and 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’.<sup>23</sup> The defining elements of the phenomenon under consideration are the following ones:

- 1) The movement does not originate in countries of origin, but rather in countries where protection has already been found;
- 2) The purpose of the movement is to seek asylum or permanent resettlement in another country; and
- 3) The movement is irregular.

<sup>21</sup> African Charter on Human and Peoples’ Rights on the right to seek and obtain asylum (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3 rev. 5, Article 12(3) and 2000 Charter of Fundamental Rights of the European Union on the right to asylum [2007] OJ C 303, Article 18. While the United States of America signed but did not ratify the American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 114 UNTS 123, and therefore it is not bound by Article 22 on the right to seek and be granted asylum, it is nevertheless bound to refrain from acts which would defeat its object and purpose (Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force on 27 Jan. 1980) 1155 UNTS 331, Article 18. Furthermore, the Inter-American Commission on Human Rights (IACHR) has also found that article XXVII of the American Declaration on Human Rights on the right to seek and receive asylum applies to the US (as a Member of the Organisation of American States) and that this provision produces legal effects; *The Haitian Centre for Human Rights et al. v. United States*, Report No. 51/96 – Case 10.675, Inter-American Commission on Human Rights OEA/Ser.L/V/II.95 Doc. 7 rev. (13 March 1997) 550.

<sup>22</sup> EXCOM is the Executive Committee of the High Commissioner’s Programme, established the United Nation’s Economic and Social Council (ECOSOC) Resolution 672 (XXV) (30 April 1958). One of EXCOM’s roles is to advise UNHCR on international protection and to this effect a number of conclusions have been adopted over the years. For a thematic compilation of EXCOM conclusions on international protection see UNHCR/DIP, *A Thematic Compilation of Executive Committee Conclusions* (7<sup>th</sup> edn, UNHCR 2014) <[www.unhcr.org/53b26db69.html](http://www.unhcr.org/53b26db69.html)>, accessed 2 September 2014. For an analysis of the status and role of EXCOM Conclusions in refugee protection, see J. Sztucki, ‘The Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme’ (1989) 1(3) *International Journal of Refugee Law* 285.

<sup>23</sup> UNHCR 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), para a.

Consequently, Conclusion 58(XL) allows for the return of individuals to the country where they have already found protection (para f).<sup>24</sup> And, it is this return that States have sought to facilitate by the conclusion of international bilateral and multilateral agreements.

The Conclusion characterises the phenomenon as the movement of individuals *who have already found* protection. Yet, it does not define what protection means. The inherent tension in the debate is enshrined in this conceptualisation of secondary movements, which gave rise to divergent positions already at the time of its adoption, expressed by means of interpretative declarations and reservations.<sup>25</sup>

In relation to the scope of application of the Conclusion, namely, who is to be considered as *having already found protection*, Turkey made it clear that the Conclusion did not apply to refugees and asylum seekers who were *merely in transit* in another country. Italy wanted further clarification that the Conclusion was only applicable to recognised refugees within the meaning of the Refugee Convention and its Protocol, as well as to asylum seekers who have already found protection in the *first country of asylum* in line with the principles in the said instruments.<sup>26</sup> In relation to the criteria allowing the country of final destination to return a refugee or asylum seeker to the country of first asylum, Germany (joined by Austria) stated that the words ‘permitted to remain there’ in paragraph (f) did not require a formal residence permit.<sup>27</sup> Likewise, the issue of losing the protection already found also emerged at this time, as Tanzania stated that it construed its responsibility to protect a refugee as ceasing from the moment he *voluntarily* leaves the country, and accordingly accepted no obligation to readmit such refugee.<sup>28</sup>

These debates show that the “safe third country” and “first country of asylum” concepts were key from the beginning in the attempts to articulate the phenomenon of international cooperation to address secondary movements of refugees. More recently, debates hosted by UNHCR have highlighted that defining secondary movements, and with it, the assessment of States’ cooperation in relation to them, remain controversial.<sup>29</sup>

<sup>24</sup> The Conclusion nevertheless recognises 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’, para (g).

<sup>25</sup> UNHCR, ‘Interpretative declarations or reservations relating to the conclusions and decisions of the committee – Conclusions on the Problem of Refugees and Asylum-Seekers who move in an Irregular Manner from a Country in which they had already found Protection’ reprinted at (1990) 2(1) *International Journal of Refugee Law* 156.

<sup>26</sup> *Ibid* at 156.

<sup>27</sup> *Ibid* at 157.

<sup>28</sup> *Ibid* at 156.

<sup>29</sup> UNHCR, ‘Summary Conclusions’ (Expert Meeting on International Cooperation to Share Burdens and Responsibilities, Amman, Jordan, 27 and 28 June 2011) <[www.unhcr.org/4ea0105f99.html](http://www.unhcr.org/4ea0105f99.html)>, accessed 2 September 2014. The concept of “effective protection” was not examined in this instance, given the difficulties encountered at an Expert Roundtable in Lisbon in 2002 to do so,

UNCHR's Executive Committee (EXCOM) has called on States to take account of burden sharing obligations noting the advisability of States agreeing on common criteria to determine the State responsible to process protection claims:

The Executive Committee

[...]

recognizes the advisability of concluding agreements among States directly concerned, in consultation with UNHCR, to provide for the protection of refugees through the adoption of common criteria and related arrangements to determine which State shall be responsible for considering an application for asylum and refugee status and for granting the protection required, and thus avoiding orbit situations.<sup>30</sup>

It is precisely here where the core of the controversy lies, namely, in the difficulty of articulating concerted inter-State action effectively and in a manner that guarantees the adequate fulfilment of States' obligations.

### 3. LAW AND POLICY OF SELECTED DESTINATION COUNTRIES: SOUTH AFRICA, SPAIN, AND THE UNITED STATES OF AMERICA

#### 3.1. THE REPUBLIC OF SOUTH AFRICA

According to the UNHCR, in 2011 and for the fourth consecutive year, South Africa continued to be the country that received the largest number of asylum applications in the world, with some 106,900 applications submitted.<sup>31</sup> The figure reflects the growing significance of irregular movements to Southern Africa, whose features are becoming increasingly complex. In particular, there is growing evidence to indicate that sea routes are increasingly being used to travel from East Africa into Southern Africa as an alternative to the land routes for part of the journey, with the protection

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in the context of the Agenda for Protection goal of 'protecting refugees within broader migration movements', UNHCR, 'Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers' (Lisbon Expert Roundtable, 9–10 December 2002), February 2003 <[www.refworld.org/docid/3fe9981e4.html](http://www.refworld.org/docid/3fe9981e4.html)>, accessed 2 September 2014. Further discussions also led in 2005 to a joint statement adopted in the context of Convention Plus that highlighted again the difficulties in defining the concept. UNHCR, 'Convention Plus Core Group on Addressing Irregular Secondary Movements of Refugees and Asylum-seekers: Joint Statement by the Co-chairs' (FORUM/2005/7), 8 November 2005 <[www.refworld.org/docid/46b6ee6a2.html](http://www.refworld.org/docid/46b6ee6a2.html)>, accessed 2 September 2014.

<sup>30</sup> UNHCR EXCOM Conclusion No. 71(XLIV) General (1993), para (k). See also UNHCR EXCOM Conclusion No. 15(XXX) 'Refugees Without an Asylum Country' (1979), para (h), on the principles that States should follow when establishing common criteria to determine the country responsible to consider protection applications.

<sup>31</sup> UNHCR, *Global Report 2011* (UNHCR 2012) 133.

risks and humanitarian concerns that such sea travel implies.<sup>32</sup> While there was a significant drop in the figures in 2012, South Africa still remained the world's third largest recipient of new asylum applications, with 61,500 new asylum applications,<sup>33</sup> and again in 2013, with 70,000 new asylum applications.<sup>34</sup>

Asylum seekers have the right to work and to access basic social services during the time of the procedure. But in practice, high levels of unemployment and widespread xenophobia mean that asylum seekers often have difficulty in accessing the job market and effectively benefitting from public services.<sup>35</sup>

South Africa's protection system is articulated in the 1998 Refugees Act.<sup>36</sup> The "safe third country" and "country of first asylum" concepts are not incorporated into the South African legislation. However, these concepts are often used as grounds for rejection of asylum applications, despite the lack of legal basis. This practice may become policy in the context of the reform of the 2002 Immigration Act.<sup>37</sup> The 2011 Immigration Amendment Act introduced advance passenger processing, this is, the pre-clearance of persons prior to their arrival in South Africa,<sup>38</sup> which seems to be construed by the government as a tool to apply the so-called "first safe country" concept, a notion that in absence of a legal definition could include both the "safe third country" as well as the "country of first asylum".

When questioned about the pre-screening procedure by the media, the South African Home Affairs Minister referred to the first safe country:

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 [...]<sup>39</sup>

<sup>32</sup> K. Long and J. Crisp, 'In harms way: the irregular movement of migrants to Southern Africa from the Horn and Great Lakes regions' (2011) *New Issues in Refugee Research*, Research Paper No. 200, 10 <[www.refworld.org/pdfid/4d887a0f2.pdf](http://www.refworld.org/pdfid/4d887a0f2.pdf)>, accessed 2 September 2014.

<sup>33</sup> UNHCR, *Global Trends 2012* (UNHCR 2013) 3.

<sup>34</sup> UNHCR, *Global Trends 2013* (UNHCR 2014) 3.

<sup>35</sup> For an overview of refugee protection in Southern Africa, see B. Rutinwa, 'Asylum and refugee policies in Southern Africa: A historical perspective', SARP Seminar *Regional Integration, Migration and Poverty*, 25 April 2002 <[www.sarpn.org.za/documents/d0001212](http://www.sarpn.org.za/documents/d0001212)> accessed 2 September 2014.

<sup>36</sup> 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.

<sup>37</sup> Act 13/2002, as amended by the 2007 Immigration Amendment Act (Act 3/2007) and the 2011 Immigration Amendment Act (Act 13/2011), both of which were proclaimed on 16 May 2014, published on 22 May 2014, and entered into force on 26 May 2014; Republic of South Africa Government Gazette, Regulation Gazette, Vol. 587, No. 37679, 22 May 2014.

<sup>38</sup> Act 13/2002, Section 1(1), as amended by Act 13/2011.

<sup>39</sup> 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*

Likewise, in its response to submissions made on the 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. neighbouring 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.<sup>40</sup>

The foundations for this position were further elaborated in March 2011, in answer to a parliamentary question which reads 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?'<sup>41</sup> 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'.<sup>42</sup>

The implication of this statement seems to be that *only* neighbouring countries have obligations towards refugees, a position unsupported by international law. The pre-screening procedure therefore 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*. A serious instance arose soon after the Minister's declarations in relation to Somalis attempting to enter South Africa from Zimbabwe. Both governments reportedly argued that the refusal of entry was prompted by the need to fight illegal immigration. It was reported that while statements were made that individuals applying for protection would be treated in accordance with the Refugee Convention, instead they were being treated as unlawfully present migrants by both governments on the grounds that they have not been confirmed as refugees by the first country of safety. South Africa's Deputy Director General of Immigration is

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*New Permitting Regime*, 8 February 2011 < <http://images.businessday.co.za/Home%20Affairs.pdf>>, accessed 2 September 2014.

<sup>40</sup> 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 < [www.pmg.org.za/report/20101102-response-department-home-affairs-submissions-made-refugees-amendment-](http://www.pmg.org.za/report/20101102-response-department-home-affairs-submissions-made-refugees-amendment-)>, accessed 2 September 2014.

<sup>41</sup> South African National Assembly, [No 2 - 2011] Third Session - Fourth Parliament, 'Question Paper', 6 < [www.parliament.gov.za/live/commonrepository/Processed/20130507/332279\\_1.pdf](http://www.parliament.gov.za/live/commonrepository/Processed/20130507/332279_1.pdf)>, accessed 2 September 2014.

<sup>42</sup> South African Government News Agency, 'Home Affairs to finalise asylum seeker process', 24 March 2011 < [www.buanews.gov.za/news/11/11032408541004](http://www.buanews.gov.za/news/11/11032408541004)>, accessed 2 September 2014. The Minister also explained that the Department of Home Affairs will be finalising the review of its Asylum Seeker Management Process to address challenges related to the management of asylum seekers holistically.

reported to have stated that Somalis were denied entry into South Africa because they did not have the required documents (asylum permits) which they were expected to acquire from the first country of safety before proceeding to South Africa.<sup>43</sup>

It would therefore appear that the “safe third country” and “country of first asylum” concepts hidden behind the newly introduced advance passenger processing would act as automatic tools to bar asylum applications by individuals who do not enter South Africa directly from the country of origin (effectively limiting access to asylum to applicants from neighbouring countries). And this appears to be done in absence of *formal* inter-State agreements whereby the receiving country either confirms that the individual already enjoys protection there or accepts responsibility to process the protection claim in accordance with international standards.

This development is especially worrying in the light of reports that *refoulement* of recognised refugees and asylum seekers whose applications are pending constitutes a worrying practice.<sup>44</sup> 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.

As it has been noted, a striking feature of this development is the absence of formal legal grounds to apply the first safe country concept. The background to such omission may be found in previous 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 ‘from where they come from. If they insist on entering the Republic, they should be detained’.<sup>45</sup>

This Circular was challenged by the organisation 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 that therefore they run the risk of being 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 unlawful for being in direct contravention of the Refugees Act and the South African Constitution (paras 19–20).<sup>46</sup>

<sup>43</sup> For an account of this incident, see *SA/Zimbabwean meet over Somali Refugees*, Xogta, 12 May 2011 [www.xogta.com/2011/05/12/sazimbabwean-immigration-meet-over-somali-refugees](http://www.xogta.com/2011/05/12/sazimbabwean-immigration-meet-over-somali-refugees), accessed 2 September 2014.

<sup>44</sup> See *Abdi v Minister of Home Affairs* (734/10) [2011] ZASCA 2 (15 February 2011). This practice, especially acute in airport facilities, can partly be explained by the obstacles faced by individuals to access legal advice, a practice not subject to scrutiny and often dependent on agreements between the airport and the detention facility where refugees and asylum seekers are held.

<sup>45</sup> Departmental Circular 59 of 2000.

<sup>46</sup> *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.

A settlement between all parties was reached that was 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 of 2000.

This settlement may explain the existence of a policy without an explicit legal basis. However, the Immigration Regulations published in May 2014<sup>47</sup> refer in some way to the “safe third country” and the “country of first asylum”. Regulation 22 establishes that

- (1) A person claiming to be an asylum seeker [...] shall apply, in person at a port of entry, for an asylum transit visa [...] and have his or her biometrics taken.
- (2) An asylum transit visa may not be issued to a person who-  
[...]
  - (b) already has refugee status in another country; or
  - (c) is a fugitive from justice.

This provision is problematic. As LHR noticed at the time the Draft Immigration Rules were presented:

[i]t may not always be possible for an official at a port of entry to determine whether a person seeking admission already has refugee status in another country or is a fugitive from justice. [...] In addition, the Refugees Act does not permit an immigration officer to determine the merits of an application for asylum.<sup>48</sup>

including whether the asylum seeker already enjoys refugee status in another country or falls under the exclusion clauses of the Refugee Convention on account of criminal activity.

As the amended Act and its Immigration Regulations have only entered into force in May 2014, it is too soon to evaluate the extent and context of the advance passenger processing policy and the application of Immigration Rule 22 on asylum transit visas, as well as the response that their implementation will have from South African courts. All the more as the application of the legislation as well as the courts’ assessment will have to be considered against the settlement on Circular 59 of 2000 and in relation to the government’s apparent understanding that returning refugees who reach South Africa from first safe countries without documentation recognising their refugee status is a requirement of International Law. However, it is necessary to note that – as it has been said above – the number of asylum seekers dropped by half

<sup>47</sup> Republic of South Africa Government Gazette, Regulation Gazette Vol. 587, No. 37679, 22 May 2014.

<sup>48</sup> Lawyers for Human Rights, ‘Submission on the Draft Immigration Act Regulations, 2014’ <[www.lhr.org.za/sites/lhr.org.za/files/lhr\\_submission\\_on\\_immigration\\_act\\_regulations\\_feb\\_2014.pdf](http://www.lhr.org.za/sites/lhr.org.za/files/lhr_submission_on_immigration_act_regulations_feb_2014.pdf)>, accessed 2 September 2014.

in 2011 in relation to 2010<sup>49</sup> and again, by more than 40 per cent in 2012 in relation to 2011.<sup>50</sup>

A further issue of concern arises in relation 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 visa (should it be issued), allowing entry of asylum seekers to a maximum of five days in order to apply for asylum. 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 consequence of such status as an “illegal foreigner” is given by 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.

The Act further establishes under Section 34(1)(d) 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,<sup>51</sup> UN human rights monitoring bodies,<sup>52</sup> and has been firmly condemned by the South African courts.<sup>53</sup>

The effects of this legislation, which may result in refugees being forced into a situation of illegality as a result of the very short deadline of just five days to apply for asylum, 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.<sup>54</sup> Nonetheless, the very short deadline of five days (which is extreme in relation to other countries, notably the ones considered in this paper) has prompted strong criticism by non-governmental organisations (NGOs) given the risk of deportation

<sup>49</sup> See UNHCR (n 31).

<sup>50</sup> See UNHCR (n 33).

<sup>51</sup> Lawyers for Human Rights, *Monitoring Immigration Detention in South Africa* (September 2010).

<sup>52</sup> UN Committee Against Torture, *Conclusions and recommendations of the Committee against Torture. South Africa*, UN Doc. CAT/C/ZAF/CO/1, 7 December 2006, para 16.

<sup>53</sup> *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 also *Zimbabwe Exiles Forum v Ministry of Home Affairs* (27294/2008) [2011] High Court (10 February 2011), where the Court found that keeping asylum seekers in detention during the length of their determination process or appeal, as well as the practice of detaining, releasing, and detaining asylum seekers again, were unconstitutional.

<sup>54</sup> *Lawyers for Human Rights v Ministry of Home Affairs* (Case CCT 18/03) [2004] Constitutional Court (9 March 2004).

and further *refoulement* this provision creates for refugees, including secondary movers.<sup>55</sup>

### 3.2. THE KINGDOM OF SPAIN

According to the UNHCR, Spain received 25 per cent less asylum applications in 2012 in relation to the previous year (with 2,580 applications lodged, the lowest figure in the last 25 years).<sup>56</sup> According to official data released by the Spanish Ministry of Interior, during that year 233 applications were recognised refugee status, while 287 were granted subsidiary protection.<sup>57</sup> The decreasing trend of the last few years has been reversed in 2013 when, according to the UNHCR, Spain received 74 per cent more asylum applications than the previous year (4,500 applications), the highest figure in the last five years, which is explained by the increase in asylum application from Syria and Mali.<sup>58</sup> Despite the increase in applications for protection in 2013, according to provisional figures released by the Spanish Commission for Refugees (CEAR), only 206 claims examined in 2013 were recognised refugee status, a decrease of 12 per cent in relation to the previous year, while 357 claims were granted other forms of protection.<sup>59</sup> The decreasing recognition rates show that a worrying trend has been developing in the provision of protection by this country.

The Spanish asylum system is governed by Article 13(4) of the Constitution (on the right of asylum), as developed by the 2009 Asylum Act, which in turn transposes into the domestic legal order the EU Qualifications Directive and the EU Procedures Directive (prior to their recast in 2011 and 2013, respectively).<sup>60</sup> The “country of first

<sup>55</sup> For a critique of South African legislation’s 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 to Section 3(b) of the Refugees Act’ (2009) 21(4) *International Journal of Refugee Law* 653. But Cf. A. Betts, ‘Towards a ‘Soft Law’ Framework for the Protection of Vulnerable Irregular Migrants’ (2010) 22(2) *International Journal of Refugee Law* 209.

<sup>56</sup> UNHCR, *Asylum Trends 2012. Levels and Trends in Industrialized Countries* (UNHCR 2013) 20.

<sup>57</sup> Dirección General de Política Interior. Subdirección General de Asilo (Oficina de Asilo y Refugio), *Asilo en cifras 2012* (Ministerio del Interior 2013) 58.

<sup>58</sup> UNHCR, *Asylum Trends 2013. Levels and Trends in Industrialized Countries* (UNHCR 2014) 22.

<sup>59</sup> CEAR, *La situación de las personas refugiadas en España. Informe 2014* (Catarata 2014) 175.

<sup>60</sup> Ley 12/2009 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 at the time, 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

asylum” and “safe third country” concepts, broadly defined, were introduced into Spanish asylum legislation in 1994 as grounds for inadmissibility, namely, 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 are based (currently the so-called Dublin III Regulation), was also a ground for inadmissibility. These concepts have been retained in the 2009 Act – which adds an express reference to their legal basis in the EU Procedures Directive – as grounds for inadmissibility. Therefore, applications which fall under these provisions shall not be considered on the merits.<sup>61</sup>

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-1990s, 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. Research examining judicial appeals against asylum refusals showed that all cases examined except one were rejected on credibility grounds.<sup>62</sup> Anecdotal evidence does not add much to this picture; in one judgment of the Spanish Supreme Court in 2004 on appeal, the Court noted 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 inherent to the Dublin Regulation.<sup>63</sup>

The lack of current relevance of the “safe third country” and “country of first asylum” concepts in admissibility procedures examining claims lodged in

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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.

<sup>61</sup> 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). At the time of writing, the 2009 Act is still waiting for the adopting of its implementing regulations, where the actual features and procedure for the effective application of these concepts will be developed, in particular giving content to the mandate in article 27(2) of the Procedures Directive for national legislation to establish rules requiring a connection between the person seeking asylum and the third country concerned, as well as rules allowing an individual examination of whether the third country concerned is safe for a particular applicant. Please, note that in the Spanish legal system (as it is common in civil law countries), the lack of implementing regulations does not prevent the implementation of the Act itself, which is interpreted in accordance with other relevant legislation, notably the Constitution, relevant international treaties to which Spain is Party (and which according to Article 96(1) of the Spanish Constitution form part of the Spanish legal order), and general principles of law (which according to Article 1(4) of the Spanish Civil Code apply in absence of law and custom).

<sup>62</sup> M.T. 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. Goodwin-Gill (eds), *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (CUP 2010) 107.

<sup>63</sup> STS 6240/2004, of 6 October 2004, para 2, at 2.

Spanish territory or at its borders needs to be read in light of developments on border and migration control. The constraints in the effective enjoyment of the right to seek asylum introduced by the 1994 Act responded to enhanced efforts by Spain in the control of the EU's external borders, which have become increasingly sophisticated, prompting a reaction by human rights organizations and the Spanish *Ombudsman*.<sup>64</sup>

As it has been said above, with the exception of 2013, Spain has seen a sharp decrease in asylum applications in recent years,<sup>65</sup> showing a correlation between increased border control operations and a decline in asylum applications that seems to speak to the success of the border control policies and the increased interception at sea operations – now largely coordinated by Frontex<sup>66</sup> – through which Spain has attempted to curb the significant increase in its foreign population.<sup>67</sup> Indeed, the number of international agreements with third countries on migration (including readmission agreements) has increased over the last few years, accompanied by funding measures,<sup>68</sup> raising concerns at various levels.

The Spanish Commission for Refugees (CEAR) argues that the externalisation of border controls reflects a governmental policy to transfer to third countries the management of migratory flows and results in thousands of individuals fleeing the

<sup>64</sup> See Gil-Bazo (n 10) at 576–578.

<sup>65</sup> It is too soon to tell whether the increase in figures in 2013 reverses this trend or whether it is a reflection of the larger figures of globally displaced as a result of armed conflict.

<sup>66</sup> 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, and by Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2011] OJ L 304/1.

<sup>67</sup> Since the mid-nineteen eighties, a pattern of increasing immigration emerged in Spain. The number of non-nationals living in Spain rose very quickly and at 1 January 2010, about 12% of the Spanish population was made of non-nationals. This figure made of Spain the EU Member State hosting the largest percentage of non-EU citizens in 2009 after Estonia and Latvia (whose large foreign population is mainly made of individuals who were once nationals of the former Soviet Union). Eurostat, *Statistics in Focus 45/2010* (European Union 2010) 2. The financial crises as well as the nationalisation of long term residents in Spain has reversed that trend in recent years, and at 1 January 2014 the foreign population in Spain amounted to 10.7% of the total – source: Instituto Nacional de Estadística (INE) <[www.ine.es/prensa/np838.pdf](http://www.ine.es/prensa/np838.pdf)>, accessed 2 September 2014. Yet, in 2013 Spain was still the second country (after Germany) in hosting non-EU nationals – source: Eurostat: <[http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php/Migration\\_and\\_migrant\\_population\\_statistics](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Migration_and_migrant_population_statistics)>, accessed 2 September 2014.

<sup>68</sup> The list of international migration agreements can be accessed at the website of the Spanish Ministry of Labour <[http://extranjeros.empleo.gob.es/es/normativa/internacional/marco\\_cooperacion/index.html](http://extranjeros.empleo.gob.es/es/normativa/internacional/marco_cooperacion/index.html)>, accessed 2 September 2014 and <<http://extranjeros.empleo.gob.es/es/normativa/internacional/readmision/index.html>>, accessed 2 September 2014.

most serious human rights violations trapped in transit countries and prevented from accessing asylum procedures in Spain.<sup>69</sup> This concern is also shared by Amnesty International, which brought the matter before the UN Committee Against Torture at the time of its consideration of Spain's last periodic report in 2009. Amnesty International noted the obstacles to the effective enjoyment of the right to seek asylum posed by increasing interceptions at sea,<sup>70</sup> which add to the limitations for judicial and public accountability that arise in this context.<sup>71</sup>

This picture is further compounded by the restrictions introduced in the 2009 Asylum Act on the right to seek asylum. While Article 1 of the 1984 Act established that 'aliens are recognised the right to seek asylum',<sup>72</sup> the 2009 Act qualifies this provision restricting it to non-EU citizens *who are present* in Spanish territory. The provision no longer recognises the right to seek asylum, but rather the right to seek "international protection", in accordance with EU Law: 'Third country nationals and stateless persons present in Spanish territory have the right to apply for international protection in Spain' (Article 16(1)). The 2009 Asylum Act also restricts the application for protection at Spanish diplomatic representations abroad, which used to be automatically processed in accordance with Article 4(4) of the 1984 Asylum Act, as amended by the 1994 Act. This system has been replaced by the mere *possibility*, at the Ambassador's discretion, for applicants to be brought into Spanish territory in order to present their claims there (Article 38 of the 2009 Act).<sup>73</sup>

It would appear that the developing Spanish policy to externalise border controls outside its own territory, which results in refugees and others in need of protection being deprived from the right to seek asylum, is coupled with a sense of impunity for the human rights violations that may take place outside Spanish territory, but still within its effective power or control, within the framework of those border and migration control operations. Indeed, the Spanish government seems to have developed a line of argument whereby it considers that its increased action outside its territory, in international waters and in the territory of other States, cannot be considered an exercise of jurisdiction and that accordingly no human rights can be engaged by its external action. This position has been accepted so far by the Spanish Supreme Court. Despite the well established body of international decisions on the extra-territorial application of human rights instruments (most recently the *Hirsi*

<sup>69</sup> CEAR, *La situación de las personas refugiadas en España. Informe 2010* (Entinema 2010) 46.

<sup>70</sup> Amnesty International, 'Spain: Briefing to Committee Against Torture' (EUR 41/011/2009) (Amnesty International, London 2009) 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 2009).

<sup>71</sup> V. Moreno Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' (2011) 23(2) *International Journal of Refugee Law* 174.

<sup>72</sup> The original text is worded as follows: 'Se reconoce a los extranjeros el derecho a solicitar asilo.'

<sup>73</sup> This has been heavily criticised by CEAR; CEAR (n 69) at 55–60.

case<sup>74</sup>), the Spanish Supreme Court found that the lack of powers to act (in the high seas and on foreign territory) forcibly leads to the conclusion that no human rights violations can be derived thereon, including violations of fundamental rights guaranteed by the Spanish Constitution, such as the right to asylum and the right to an effective remedy.<sup>75</sup> At the time of writing, the lawfulness of this interpretation is pending before the Spanish Constitutional Court under the special procedure for the protection of fundamental rights.

In short, it would appear that the application of the “safe third country” and “country of first asylum” concepts has moved away from the procedural framework of asylum determination into a policy of interception and removals pursuant to readmission agreements to countries considered safe (but without protection safeguards) *before* individuals have had the chance to lodge an asylum claim. This policy offers asylum seekers no guarantee of having access to a determination procedure, either in Spain or in the “safe third country” or “country of first asylum” where they may be removed and runs the risk of resulting in *refoulement*. It is not surprising that the impact of this trend on the protection of asylum seekers and refugees has received a strong rejection by the UN Committee Against Torture, both in its observations to the last Spanish periodic report<sup>76</sup> as well as in individual communications.<sup>77</sup>

<sup>74</sup> *Hirsi and others v. Italy* Application No. 27765/09, Grand Chamber Merits/Just Satisfaction, ECtHR judgment of 23 February 2012. See also UN Human Rights Committee, *General Comment No. 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para. 10. For an analysis of the extraterritorial application of human rights treaties, see R. Wilde, ‘The extraterritorial application of international human rights law on civil and political rights’, in N. Rodley and S. Sheeran (eds), *Routledge Handbook on Human Rights* (Routledge 2013). For a discussion of the territorial scope of the Refugee Convention, including extraterritorially, see M.T. Gil-Bazo, *Article 40 1951 Convention (Territorial application clause)*, in A. Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011).

<sup>75</sup> 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).

<sup>76</sup> 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.’ UN Committee Against Torture, *Concluding observations of the Committee against Torture. Spain*, UN Doc. CAT/C/ESP/CO/5, 9 December 2009, para 16.

<sup>77</sup> UN Committee Against Torture, *J.H.A. v. Spain*, Communication No. 323/2007, UN Doc. CAT/C/41/D/323/2007, 21 November 2008, para 8.3. For a commentary of this decision, see K. Wouters and M. Den Heijer, ‘The Marine I Case: a Comment’ (2009) 22(1) *International Journal of Refugee Law* 1.

### 3.3. UNITED STATES OF AMERICA (US)

The foreign population in the US has been rising since the 1990s. According to the United Nations Department of Economic and Social Affairs (DESA), there were 45.8 million migrants living in the US in 2013 (about 14 per cent of its population), which makes this country home to the largest migrant population in the world, hosting about 20 per cent of the world's migrants.<sup>78</sup> In 2012, the US registered approximately 10 per cent more asylum applications than in 2011 (83,430 new applications in 2012, compared to 76,000 in 2011). According to the UNHCR in 2012 'the United States of America was the largest single recipient of new asylum claims among the 44 industrialised countries for the seventh consecutive year'.<sup>79</sup> This trend was reversed in 2013, when the US became the second recipient of asylum claims among industrialised countries that year (with an estimate 88,400 applications).<sup>80</sup>

The rapidly increasing arrival of foreign population to the US prompted a response in the mid-1990s to increase efforts to identify, detain, and deport unlawfully present immigrants, as well as lawfully present immigrants with criminal convictions in an attempt to control migration. 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.

Asylum and immigration legislation in the US is codified in the 1952 Immigration and Nationality Act (INA)<sup>81</sup> that gathers the various existing provisions on the matter. It has been subject to amendments over the years, including by the 1980 Refugee Protection Act<sup>82</sup> that enacted an asylum regime in the US.<sup>83</sup> The Act establishes that

<sup>78</sup> UN DESA figures <<http://esa.un.org/unmigration/wallchart2013.htm>>, accessed 2 September 2014.

<sup>79</sup> See UNHCR (n 56) at 3.

<sup>80</sup> Germany received 109,600 new asylum applications in 2013, becoming 'for the first time since 1999 the largest single recipient of new asylum claims among the group of industrialised countries'; UNHCR (n 58) at 3.

<sup>81</sup> P.L. 82-414 (66 Stat. 163). Citations in this paper shall be to the INA rather than the US Code.

<sup>82</sup> P.L. 96-212 (94 Stat. 102).

<sup>83</sup> An attempt to revise asylum legislation took place in 2010 by the introduction of the Refugee Protection Act (S. 3113). The proposed 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)', 17 May 2010 <[www.rcusa.org/uploads/pdfs/UNHCR%20RPA%20Letter,%205-17-10.pdf](http://www.rcusa.org/uploads/pdfs/UNHCR%20RPA%20Letter,%205-17-10.pdf)>, accessed 2 September 2014 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 <[www.humanrightsfirst.org/wp-content/uploads/pdf/hrf-testimony-may-2010.pdf](http://www.humanrightsfirst.org/wp-content/uploads/pdf/hrf-testimony-may-2010.pdf)>, accessed 2 September 2014. However, although the Bill was referred to the US Senate Committee on the Judiciary, it never moved from there. The Bill was reintroduced in 2011 (S. 1202) following the same fate. In March 2013, the Bill was introduced again (S. 645) and in April 2013 it was referred to the Subcommittee on Immigration And Border Security, where it is still pending at the time of writing. Source: US Library of Congress <<https://beta.congress.gov/>>, accessed 2 September 2014.

protection may be granted to those who meet the criteria in Sec. 101(a)(42)(A), that reflects the definition in article 1A:

Any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of *persecution or a well-founded fear of persecution* on account of race, religion, nationality, membership in a particular social group, or political opinion (emphasis added).

Accessing protection on the Act's grounds may however be effectively constrained by the application of the "safe third country" and "country of first asylum" concepts, which the law embraces, although it 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.

Sec. 208(a)(2)(A) excludes asylum applications from individuals to whom the "safe third country" concept applies, except when the Attorney General finds that it is in the public interest for the alien to receive asylum in the US:

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 termination of asylum. Sec. 208(c)(2) of the Act makes it clear that '[a]sylum granted [...] does not convey a right to remain permanently in the United States'. Accordingly, it may be terminated under Sec. 208(c)(2)(C):<sup>84</sup>

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)

The only "safe third country" agreement that the US has is with Canada.<sup>85</sup> The agreement is only applicable to refugee status determination claims lodged at a land

<sup>84</sup> Termination of asylum, for this or other grounds, is rarely raised, and therefore, it has little relevance in practical terms.

<sup>85</sup> 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).

border port of entry in one of them and aims at establishing responsibility in one of the parties to examine the claim. Accordingly, 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’.

The “safe third country” concept has limited application as it currently only applies to Canada and only in relation to land entries. An issue of concern, however, arises from the lack of judicial review of its application, as Sec. 208(a)(3) establishes that ‘no court shall have jurisdiction to review any determination of the Attorney General’ regarding decisions applying the “safe third country” concept.<sup>86</sup>

Therefore, individuals arriving into the US from Canada may find that they will not be given access to a determination procedure and instead be removed back to Canada without a right to appeal the decisions. As the UNHCR already noted in relation to the draft Agreement, statutory bars in both jurisdictions (which are not identical) may mean that applicants may be required under the Agreement to make a claim in a jurisdiction where they would be ineligible for refugee protection, and therefore be denied rights under the Refugee Convention and its Protocol that otherwise would be available to them.<sup>87</sup>

Serious concerns arise in relation to the impact of the Agreement on the other State Party: Canada. The Canadian Council for Refugees notes that in practice few asylum seekers move from Canada to the US to make a refugee claim and that the Agreement is about preventing individuals who are in the US, or travelling through the US, from making a protection application in Canada. According to this organisation, 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 US, where some of them are not able to receive protection due to existing law and policy (including statutory bars, such as the one-year deadline to lodge an application). The steady decrease in asylum applications in Canada is partly explained by the impact of the “safe third country” Agreement.<sup>88</sup>

At the time of its twelve month report on the implementation of the agreement, the UNHCR expressed concern that while the vast majority of applicants affected by the so-called 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

<sup>86</sup> Immigration judges however, have authority to consider these cases but only in relation to aliens whom DHS has chosen to place in removal proceedings (8 C.F.R. §1208.4(a)(6)).

<sup>87</sup> 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).

<sup>88</sup> Canadian Council for Refugees, *Closing the Front Door on Refugees. Report on the First Year of the Safe Third Country Agreement* (December 2005).

scheduled interview) did gain access to the Canadian refugee protection system, the Agency was nevertheless aware of six cases in which applicants were directed back to the US, where they were detained and removed without having had an opportunity to pursue a refugee claim in Canada. Other primary areas of concern for the UNHCR included the adequacy of existing reconsideration procedures, delayed adjudication of eligibility under the Agreement in the US, inadequacy of detention conditions in the US, and generally, lack of resources, communication, and training.<sup>89</sup>

Judicial challenges to reverse the Canadian designation of the US as a “safe third country” failed when the Canadian Supreme Court refused leave to appeal in 2009.<sup>90</sup> However, developments within the Inter-American human rights system suggest that some elements of the Agreement fall short of international human rights standards (this will be considered in the following section).

As far as the “country of first asylum” is concerned, Sec. 208. (b)(2)(A)(vi) of the Act construes it an exception to asylum if ‘the alien was firmly resettled in another country prior to arriving in the United States’. This concept is a jurisprudential construction of the US Supreme Court that was later introduced in the legislation by the 1996 Illegal Immigration Act.<sup>91</sup> The US 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’.<sup>92</sup> The determinant 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 US; it is not even determined by the lapse of time, but rather by whether that stay in another country constitutes a termination of the original flight for protection, 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.<sup>93</sup>

<sup>89</sup> UNHCR, *Monitoring Report Canada – United States “Safe Third Country” Agreement 29 December 2004 – 28 December 2005* (UNHCR 2006) 6–7.

<sup>90</sup> For details of the legal challenges and decisions, see Canadian Council for Refugees, *Safe Third Country* <<http://ccrweb.ca/S3C.htm>>, accessed 2 September 2014.

<sup>91</sup> P.L. 104–208 (110 Stat. 3009).

<sup>92</sup> *Rosenberg v. Yee Chien Woo* 402 U.S. 49, 91 S.Ct. 1312, 28 L.Ed.2d 592.

<sup>93</sup> *Ibid.*

The meaning and scope of this provision has been built over time to ensure that asylum is not granted to those who have already found protection, while acknowledging that flight often takes place in different stages.<sup>94</sup> What is relevant is the understanding that mere transit through a country does not make it automatically a country of first asylum.<sup>95</sup>

Immigration regulations have incorporated relevant case law, and define “firm resettlement” as follows:<sup>96</sup>

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 re-entry, education, public relief, or naturalization, ordinarily available to others resident in the country.

In sum, while the application of the “safe third country” concept in the US seems to be of limited scope (as it only applies to Canada), practice under the Canada-US Agreement shows that concern arises as a result of the difference in legislation in both countries (and in particular, in relation to statutory bars), as well as the lack of jurisdiction by courts to examine the application of the “safe third country” concept. The next section will consider the lawfulness of inter-State agreements based on the “safe third country” concept from a perspective of international human rights and refugee law.

<sup>94</sup> 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 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, to name a few.

<sup>95</sup> *Arout Melkonian v. John Ashcroft, Attorney General*, A73-133-099, United States Court of Appeals for the Ninth Circuit, 4 March 2003.

<sup>96</sup> 8 C.F.R. §1208.15.

#### 4. A COLLECTIVE MECHANISM FOR INTERNATIONAL PROTECTION?

The previous section has shown the way in which States have developed legislation aiming at rejecting asylum applications on the grounds that another country is “safe”. It has also shown the variety of ways in which States have articulated these concepts in policies vis-à-vis other States with which they have entered into formal and informal agreements allowing them to return asylum seekers to other States.

What emerges clearly from the picture just presented is a trend whereby the States considered seem to be making less use of the legislative concept of the “safe country” concept in determination procedures (which are subject to judicial scrutiny) in favour of operational arrangements (that is, formal or informal, regular or *ad hoc* cooperation/readmission agreements) in absence of guarantees that refugees will be treated in accordance with international standards, including the right to be granted asylum enshrined in international human rights instruments in all three regions considered.

In this context it is worth examining the two existing inter-State agreements for the processing of asylum claims based on the “safe third country” concept, namely the intra-EU mechanism enshrined in the Dublin III Regulation and the Canada-US, and in particular, their ability to provide a model for international cooperation which effectively delivers on the international obligation towards refugees of its State Parties.<sup>97</sup>

##### 4.1. THE DUBLIN SYSTEM

The so-called Dublin III Regulation is a multilateral instrument which establishes a mechanism for the allocation of responsibility in the processing of asylum claims among EU Member States. The system is far from being a novelty. The decision that only one Member State would be responsible for the examination of asylum claims lodged in any of the Member States was first agreed within the framework of the 1990 Schengen Convention,<sup>98</sup> which developed the 1985 Schengen Agreement commitment to abolish internal border control among Member States by harmonising the relevant

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<sup>97</sup> To be clear, these agreements are not examined here insofar as they apply to two of the countries examined in this paper (Spain and the US), but rather for the purposes of exploring whether existing State practice within inter-State agreements may constitute a model for the articulation of international cooperation based on the “safe third country” concept which may address the concerns posed by the current practice of States, as they emerge from the analysis of the three countries considered in the previous section of this paper.

<sup>98</sup> Title II Chapter 7 Convention Applying the Schengen Agreement of 14 Jun 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at the Common Frontiers [2000] OJ L 239/19.

national and adopting the necessary measures to prevent illegal immigration.<sup>99</sup> These provisions (agreed among some EU Member States within a purely inter-governmental framework outside the EU) were later replaced by the 1990 Dublin Convention among all EU Member States,<sup>100</sup> which was subsequently replaced by the so-called Dublin II Regulation,<sup>101</sup> which in turn has been replaced by the Dublin III Regulation.

The Dublin system was welcomed by the UNHCR<sup>102</sup> and some academics<sup>103</sup> at the time when it was established in the early nineties as it was understood to ‘represent 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’.<sup>104</sup> The fundamental feature of the Dublin system is that it recognises explicitly an obligation of *all* Member States to examine an asylum application lodged in EU territory,<sup>105</sup> an obligation that will be discharged by one of them only on behalf of the rest:

Member States *shall* examine *any* application for international protection by a third-country national or a stateless person who applies on the territory of *any one of them*, including at the border or in the transit zones. The application shall be examined by *a single Member State* [...] (Article 3(1) Dublin III Regulation, emphasis added).

The Dublin system is based on the underlying premise that all State Parties have similar asylum systems and safeguards, and that therefore they are safe for all asylum seekers.<sup>106</sup> At the same time, all EU Member States remain individually bound by their obligations under international refugee and human rights instruments. The result of

<sup>99</sup> ‘With regard to the movement of persons, the Parties shall endeavour to abolish checks at common borders and transfer them to their external borders. To that end they shall endeavour first to harmonise, where necessary, the laws, regulations and administrative provisions concerning the prohibitions and restrictions on which the checks are based and to take complementary measures to safeguard internal security and prevent illegal immigration’; Title II Article 17 Schengen Agreement Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at the Common Frontiers [2000] OJ L 239/13.

<sup>100</sup> Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities – Dublin Convention [1997] OJ C 254/1.

<sup>101</sup> Council Regulation (EC) No 343/2003 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.

<sup>102</sup> UNHCR, *Position on Conventions Recently Concluded in Europe (Dublin and Schengen Conventions)* (1991) 3(2) European Series 385.

<sup>103</sup> 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.

<sup>104</sup> UNHCR (n 102) para 2.

<sup>105</sup> Although this only applies in cases where the “safe third country” concept is not triggered, allowing Member States to remove the applicant to a third country outside the EU; Article 3(3) Dublin III Regulation.

<sup>106</sup> ‘Member States, all respecting the principle of *non-refoulement*, are considered as safe countries for third country nationals’ (Recital 3 Dublin III Regulation).

such duality is the existence of a parallel system of obligations, at one level among Member States in relation to each other, and at another between Member States and refugees.<sup>107</sup> Evidence of such duality of obligations is the fact that despite inter-State agreements about the processing of their asylum claims, asylum seekers themselves may challenge the concrete applicability of the Dublin system to their circumstances before national courts and before the ECtHR, and indeed the latter has pronounced itself on it on several occasions.<sup>108</sup> Furthermore, the Member State that needs to undertake the determination of a claim which was not its own responsibility under Dublin would then be able to bring a case against the responsible Member State before the CJEU under Article 259 of the Treaty on the Functioning of the European Union (TFEU)<sup>109</sup> for failure to fulfil its obligations under the Charter of Fundamental Rights of the European Union and/or Article 6 of the Treaty on European Union (TEU).<sup>110</sup> However, this is an unlikely scenario.

The Dublin III Regulation is an operational instrument that establishes obligations among Member States towards the effective fulfilment of the substantive obligation of each one of them to examine an asylum application. As an operational instrument, rather than a substantive one, it cannot trump subjective rights of individuals recognised by EU Law, notably the right to asylum, either by secondary legislation (such as Articles 13 and 18 of the Qualifications Directive imposing an obligation to grant asylum to qualifying individuals)<sup>111</sup> or even less so by primary law obligations of Member States (such as Article 18 of the Charter of Fundamental Rights of the European Union).

The joined cases of *N.S.* and *M.E.* already mentioned<sup>112</sup> illustrate this duality of relationships and the way in which they are articulated among EU Member States. The cases concerned the removal of asylum seekers from the UK and Ireland to Greece in application of the Dublin II Regulation. The asylum seekers challenged the presumption of safety in Greece and argued that as a consequence, it was the

<sup>107</sup> The articulation of this dual model was first elaborated upon by this author in a note to UNHCR in relation to the *N.S.* case (n 7) on 1 December 2010 (copy on file with author).

<sup>108</sup> Despite the various instances brought before the Court, it was only in January 2011 that this body found Member States in violation of its international human rights obligations in the context of Dublin removals of asylum seekers for the first time; *M.S.S. v. Belgium and Greece* (2011) 53 EHRR 2. [2010] C 83/47.

<sup>109</sup> [2010] C 83/13.

<sup>110</sup> For a construction of the right to be granted refugee status and the right to be granted subsidiary protection as a right to be granted asylum, see M.T. Gil-Bazo, 'Refugee Status and Subsidiary Protection under EC Law: The Qualification Directive and the Right to Be Granted Asylum', in A. Baldaccini, E. Guild, and H. Toner (eds), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* (Hart Publishing 2007) 229, 237. Likewise, Advocate General Maduro refers to the right to asylum as a general principle (and therefore legally binding) in a case concerning subsidiary protection: 'The Directive pursues the objective of developing a fundamental right to asylum which follows from the general principles of Community law'; Advocate General Maduro's Opinion in case C-465/07, *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-921, para 21.

<sup>112</sup> See n 7.

responsibility of the UK and Ireland respectively to examine their protection requests.

Article 3(2) of the Dublin II Regulation of the Dublin II Regulation allowed Member States to derogate from the system in order to examine an asylum application, even when they were not responsible under the criteria established in the Regulation, under the so-called sovereignty clause:

By way of *derogation* from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State *shall become the Member State responsible* within the meaning of this Regulation and *shall assume the obligations associated with that responsibility* (emphasis added).

The sovereignty clause was at the time the procedural tool allowing the Member State where the application was lodged to fulfil effectively *its own obligations* towards refugees when the Member State responsible by application of the general criteria was in breach of its obligations *towards other Member States*.

There seemed to be sufficient consensus among Member States engaged in the *N.S.* case that when there was a failure to guarantee fundamental rights in the Member State responsible to determine an asylum application, asylum seekers should not be removed to that Member State. However, there were divergent opinions regarding the consequence of the prohibition of forced removal to the responsible State. Belgium, France and Finland agreed with the applicants that in such cases, the Member State where the application was lodged would be obliged to apply the sovereignty clause and process asylum applications themselves. On the contrary, the Netherlands objected to the compulsory nature of Article 3(2) Dublin II Regulation.<sup>113</sup> Interestingly, while the UK rejected that the application of the sovereignty clause was a matter of EU Law, it did accept that – should the Court found otherwise – there may be an obligation for the Member State where the application was lodged to consider an asylum request where it is ‘manifestly clear that the presumption of mutual compliance with EU law and international obligations [between the Member State responsible and that where the asylum-seeker finds himself] has been rebutted’ and provided that ‘the scheme of the Dublin Regulation is not undermined’.<sup>114</sup> As for the European Commission, it argued (in line with Belgium, France and Finland), that ‘where there is clear evidence to demonstrate that the applicant would, in the responsible Member State, be exposed to a serious risk of treatment that infringes his relevant rights under the Charter’, the

<sup>113</sup> Court of Justice of the European Union, *Report for the Hearing in Joined Cases C-411/10 and C-493/10*, June 2011, para 103.

<sup>114</sup> United Kingdom, *In the Court of Justice of the European Communities – Cases C-411/10 and 493/10 NS and Others – Written Observations of the United Kingdom*, 1 February 2011, para 64.

Member State where the application is lodged *must* exercise the discretion provided in Article 3(2) Dublin II Regulation.<sup>115</sup> Ultimately, the Court found that

The Member State in which the asylum seeker is present must ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, the first mentioned Member State must itself examine the application in accordance with the procedure laid down in Article 3(2) of Regulation No 343/2003.<sup>116</sup>

This decision effectively amounts to a reversal of the foundation of the Dublin system, namely, the principle of mutual trust among Member States that they are all safe. Indeed, the Dublin system amounts to the ‘mutual recognition of rejection decisions among EU Member States (given that the asylum claim can only be considered once in the EU) which is not mirrored by the mutual recognition of decisions recognizing refugee status and other protection needs’.<sup>117</sup> The Court thus safeguards the dual nature of obligations that Member States have in this context by guaranteeing the rights of individuals when the inter-State agreement fails to deliver on purpose. This brings the case-law of the CJEU in line with that of the ECtHR, which already stated early on that States cannot rely *automatically* on the Dublin system and that their obligations towards individuals under the ECHR remain in place.<sup>118</sup>

The Court’s decision constitutes an acknowledgment that the “safe third country” concept expressed in the principle of mutual trust among Member States regarding the protection of fundamental rights, including the right to asylum, which is at the heart of the Dublin system may sometimes be inapplicable, and, accordingly, its failure precludes the application of the intra-EU mechanism for international cooperation on asylum. Article 3(2) of the Dublin II Regulation therefore provided the procedural tool for the derogation of the system, thus allowing Member States to comply with their obligations towards refugees under public international law and under EU primary legislation (notably, the Charter of Fundamental Rights) and EU secondary legislation, including by undertaking the determination of an asylum claim even if they are not responsible to do so under the ordinary rules established by the Dublin system. Furthermore, the Court’s position seems to be supported at least by some Member States and the European Commission, which suggests that the EU and its Member States are aware of the dual nature of the obligations that arise

<sup>115</sup> European Commission, *To the President and the Members of the Court of Justice of the European Union – Written Observations Submitted by the European Commission in Joined Cases C-411/10 and C-493/10*, 28 January 2011, para 94.

<sup>116</sup> See n 7 para 2.

<sup>117</sup> M.T. Gil-Bazo, ‘The Protection of Refugees under the Common European Asylum System. The Establishment of a European Jurisdiction for Asylum Purposes and Compliance with International Refugee and Human Rights Law’ (2007) 36 *Cuadernos Europeos de Deusto* 153, 175.

<sup>118</sup> *T.I. v the United Kingdom*, ECHR 2000-III, 15.

from international and EU law in relation to refugees in the context of the Dublin system.

The Dublin III Regulation has consolidated this view, by incorporating the essence of the CJEU's ruling into its provisions. Article 3(2) of the recast instrument establishes clearly that when the Member State responsible is not delivering its obligations under the Dublin system, the Member State who is determining the responsibility to examine the claim shall become the Member State responsible:

Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible.

Where the transfer cannot be made pursuant to this paragraph to any Member State designated on the basis of the criteria set out in Chapter III or to the first Member State with which the application was lodged, the determining Member State shall become the Member State responsible.

As the Dublin system is continuously being reformed, the question remains as ever the advisability of this model. In 1999, at the time when the Dublin system abandoned its nature as an international treaty among EU Member States to enter the domain of the European Union legislation strictly speaking, the European Commission suggested a change of approach: 'It is appropriate to use the opportunity provided by the transition to new treaty arrangements to consider whether a fundamentally different approach is required to the question of responsibility for considering asylum applications',<sup>119</sup> and in particular, the Commission suggested that responsibility be allocated according to where the first asylum claim was lodged.<sup>120</sup>

Although Member States have categorically refused to accept such an approach as a matter of law, evidence shows that, *in practice*, the Dublin system has surprisingly low application rates. The case of Spain illustrates this point. According to the latest available figures at the time of writing, in 2012 Spain lodged 80 requests to other Member States under the Dublin system and received 77 replies to its requests, but although 59 of them were accepted, only 22 transfers took place.<sup>121</sup> Likewise, although Spain received 2,510 requests in 2012 and accepted 2,082, only 728 transfers took

<sup>119</sup> Commission staff working paper, 'Revisiting the Dublin Convention: developing Community legislation for determining which Member State is responsible for considering an application for asylum submitted in one of the Member States' SEC (2000) 522, para 55.

<sup>120</sup> Ibid para 59.

<sup>121</sup> See Dirección General de Política Interior (n 57) at 70–71.

place.<sup>122</sup> Statistics for other Member States show similar low rates.<sup>123</sup> The sharp contrast between the principle that Member States wish to see legally enshrined in their cooperation agreement and the effective use that they make of it begs the question as to the purpose of maintaining a system which is costly both in Member States' resources as well as in time delays and uncertainty for asylum seekers.

#### 4.2. THE CANADA-US AGREEMENT

The Canada-US Agreement is the other existing inter-State agreement aimed at the determination of a State responsible to process asylum applications. As it has been noted above, the Canada-US Agreement imposes a duty on each party not to remove applicants transferred under the terms of the agreement to any other country until an adjudication of the person's refugee status claim has been made, and in any case, unlike in the case of the Dublin system, it precludes the application of the "safe third country" concept to asylum seekers transferred under the Agreement in relation to third States (Article 3).

Judicial challenges to reverse the Canadian designation of the US as a "safe third country" failed when the Canadian Supreme Court refused leave to appeal in 2009.<sup>124</sup> However, in March 2011, the Inter-American Commission on Human Rights (IACHR) decided on a case against Canada which also applies the "safe third country" concept embodied in the Canada-US Agreement.

In the *John Doe et al* case, the IACHR found that Canada was in violation of Articles XXVII (on the right to asylum) and XVIII (on the right to a fair trial) of the American Declaration on Human Rights, as a result of Canada's application of its "direct-back policy" to three individuals who, having arrived into Canada from the US, were removed back to the US.<sup>125</sup> Under the "direct-back policy", asylum seekers arriving into Canada through a land border with the US are removed back to the US if Canada cannot process their claims at that time and without any immediate consideration of their merits. Asylum seekers are required to remain temporarily outside Canada until the dates for their asylum interviews. The IACHR found that Canada had denied the three claimants the right to seek asylum, exposed them to indirect *refoulement* and deprived them from due process.<sup>126</sup> The IACHR determined that the question before it was to examine whether the right to asylum enshrined in Article XXVII of the American Declaration on Human Rights 'obligates a state to afford each refugee claimant the opportunity to seek asylum or whether that responsibility can be shared

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<sup>122</sup> Ibid at 74.

<sup>123</sup> Asylum statistics for EU Member States are available at Eurostat: <<http://epp.eurostat.ec.europa.eu>>.

<sup>124</sup> Canadian Council for Refugees (n 90).

<sup>125</sup> *John Doe et al v. Canada*, Report N. 78/11 – Case 12.586, Inter-American Commission on Human Rights (21 July 2011) para 128.

<sup>126</sup> Ibid para 128.

through inter-State agreements'.<sup>127</sup> The IACHR concluded that under Article XXVII of the American Declaration

*every Member State has the obligation to ensure that every refugee claimant has the right to seek asylum in foreign territory, whether it be in its own territory or a third country to which the Member State removes the refugee claimant. To the extent that the third country's refugee laws contain legal bars to seeking asylum for a particular claimant, the Member State may not remove that claimant to the third country. [...] [T]he Member State must conduct an individualized assessment of a refugee claimant's case [...]. If there is any doubt as to the refugee claimant's ability to seek asylum in the third country, then the Member State may not remove the refugee claimant to that third country. (emphasis added)*<sup>128</sup>

Although this case concerns Canada, as it has been noted above, the IACHR already found in 1997 that Article XXVII of the American Declaration on Human Rights on the right to seek and receive asylum applies to the US (as a Member of the Organisation of American States).<sup>129</sup> And, the Inter-American Court of Human Rights already declared the legal effect of the Declaration in relation to the OAS Member States in its advisory opinion on the interpretation of the Declaration. In the Court's view, although the Declaration is not an international treaty as such, this cannot 'lead to the conclusion that it does not have legal effect'.<sup>130</sup> In the Court's view, 'the American Declaration is for [OAS member] states a *source of international obligations* related to the Charter of the Organization' (emphasis added).<sup>131</sup>

Likewise, the IACHR itself recalls that despite the non-binding nature of its recommendations, the human rights obligations that OAS Member States have agreed to are indeed legally binding. In its view

Under Article 106 of the OAS Charter the Inter-American Commission is the organ charged by the member states with the function of promoting the observance and protection of human rights; and pursuant to Article 20 of its Statute, this organ is vested with the authority to examine communications and issue recommendations to bring about more effective observance of fundamental human rights.<sup>132</sup>

Accordingly,

In order for the provisions of Article 106 of the OAS Charter to have an *effet utile* and for Inter-American Commission to effectively carry out its function of promoting the

<sup>127</sup> Ibid para 93.

<sup>128</sup> Ibid para 94.

<sup>129</sup> See *The Haitian Centre for Human Rights et al. v. United States* (n 21).

<sup>130</sup> *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights Requested by the Government of the Republic of Colombia*, Advisory Opinion OC-10/89, Inter-American Court of Human Rights Series A No 10 (14 July 1989) para. 47.

<sup>131</sup> Ibid para 45.

<sup>132</sup> See (n 125) at para 129.

observance and the defence of human rights, OAS Member States must comply in *good faith* with its recommendations (emphasis added).<sup>133</sup>

The significance of the IACHR decision is that it rejects the lawfulness of an inter-State system based on the *automatic* application of the “safe third country” concept. If the US and Canada are to comply with their international obligations under the American Declaration, the Canada-US Agreement must be amended to guarantee that no removals between the countries take place before an assessment of the safety of the other State Party, in particular in relation to the right to seek and receive asylum, the principle of *non-refoulement* and the right to an effective remedy. Likewise, any decisions made under the Agreement must be judiciable if the right to an effective remedy is to be guaranteed.<sup>134</sup>

#### 4.3. ELEMENTS OF A SYSTEM FOR THE INTERNATIONAL COOPERATION OF STATES ON REFUGEE PROTECTION

The starting point for a discussion on the way in which States may reach international agreements among themselves to process asylum claims must be the acknowledgment that (as already explored earlier in this paper) States’ international obligations towards refugees go well beyond *non-refoulement*. Any agreements must therefore be based on the understanding that any system designed to articulate international cooperation in this field must always guarantee the full range of refugee rights, including the right to asylum. The system should therefore articulate the separate nature of the obligations that States have towards refugees and other persons whose protection grounds are recognised by international human rights law (as a result of the subjective rights that international law both of universal as well as regional scope recognizes to individuals) from the obligations that States may acquire towards each other within international agreements, as these two sets of obligations are of a very different legal nature.

The system established should include a clear rejection of the application of the “safe third country” concept in relation to States outside the agreement, as is currently the case in the Canada-US Agreement. A unilateral application of the “safe third country” concept in relation to other States in absence of their agreement to guarantee the application of international refugee and human rights law, may result in *refoulement*, which is further compounded by the lack of accountability that results from States acting outside well-established legal systems (as the case of Spain’s policy

<sup>133</sup> Ibid para 131. On the relevance of the principle of Good Faith in States’ compliance with their obligations under International Refugee Law, see G.S. Goodwin-Gill, ‘State Responsibility and the ‘Good Faith’ Obligation in International Law’, in M. Fitzmaurice & D. Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (Hart Publishing 2004).

<sup>134</sup> For an analysis of the applicability of the *John Does* decision to the Canada-US Agreement, see R. Gonzalez Settlage, ‘Indirect Refoulement: Challenging Canada’s Participation in the Canada-United States Safe Third Country Agreement’, (2012) 30(1) *Wisconsin International Law Journal* 142.

in relation to cooperation with third countries outside the EU examined earlier in this paper shows).

If State Parties are to comply with their international human rights obligations, including the right to asylum and the right to an effective remedy, it is essential that the system enshrine a robust right of judicial appeal (as it is envisaged in Article 27 of the Dublin III Regulation) and that no removal take place while the judicial body is considering the merits of the claim.<sup>135</sup>

A further essential element of any such agreement needs to ensure that if the system aims at allocating the responsibility to determine asylum claims to one State only, the decision of that State must be recognised by *all* other State Parties to the mechanism. Yet, the Dublin system is based on the mutual recognition of rejection decisions, which is not mirrored by the mutual recognition of recognition decisions.<sup>136</sup> The same applies to the Canada-US Agreement. This constitutes a fundamental flaw in the system which is contrary to the purpose of the Refugee Convention.

Indeed, EXCOM Conclusion No. 12 (XXIX) 'On the extraterritorial effect of the determination of refugee status'<sup>137</sup> noted that several provisions of the 1951 Convention 'enable a refugee residing in one Contracting State to exercise certain rights – as a refugee – in another Contracting State and that the exercise of such rights is not subject to a new determination of his refugee status'.<sup>138</sup> The Conclusion further noted that 'the very purpose of the 1951 Convention and the 1967 Protocol implies that refugee status determined by one Contracting State will be recognised also by the other Contracting States'.<sup>139</sup> The UN Committee Against Torture has already found that the lack of recognition by a State Party to the Refugee Convention of the refugee status recognised by another State Party and the subsequent removal of the individual to her country of origin constitutes a violation of the principle of non-*refoulement* enshrined in Article 3 of the Convention Against Torture.<sup>140</sup>

The mutual recognition of positive decisions among all State Parties to any such system should eventually result in the recognition of a right to freedom of movement for the refugee to other State Parties when such right is recognised to citizens, as is the case in the EU for nationals of its Member States and for nationals of other States having an agreement with the EU to that effect (such as Switzerland, for instance). In fact, the EU already recognises the right to freedom of movement for beneficiaries of

<sup>135</sup> As explained by the ECtHR in relation to an expulsion case, 'the notion of an effective remedy [...] requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible [...]. Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention', *Čonka v. Belgium* (2002) 34 EHRR 54, para 79.

<sup>136</sup> See Gil-Bazo (n 117).

<sup>137</sup> See UNHCR/DIP (n 22).

<sup>138</sup> Ibid para (c).

<sup>139</sup> Ibid para (f).

<sup>140</sup> UN Committee Against Torture, *Elif Pelit v. Azerbaijan*, Communication No. 281/2005, UN Doc. CAT/C/38/D/281/2005, 5 June 2007, para 11.

international protection.<sup>141</sup> A clause to this effect needs to ensure that when refugees move among State Parties to the agreement, the country of destination ‘acquire[s] the protection obligations that the Member State of origin had in the international sphere’.<sup>142</sup>

Although developments in the last few years seem to suggest that international human rights monitoring bodies and other international judicial bodies with jurisdiction to interpret inter-State refugee determination agreements (such as the CJEU) do not reject the application of the “safe third country” in principle, the safeguards that the body of case-law has developed so far suggest that *in practice* the duality of relationships that these agreements speak to (among State Parties and between each one of them and a given refugee) makes it very difficult for any international agreement of this kind to meet the standards derived from international human rights and refugee law. While a certain degree of harmonization among State Parties’ legislation (as it is the case in the EU) might facilitate the operation of a collective mechanism for refugee determination, the issues arising from the practice of the Canada-US Agreement suggest that when asylum systems are significantly divergent the chances of State Parties delivering on their obligations towards refugees – a necessary condition for the application of the agreement – are seriously diminished. Yet, similar asylum systems are not necessarily a guarantee that the agreement can be effectively implemented, as the *N.S.* case shows.

## 5. CONCLUSIONS

This paper has examined the practice of States in the field of international cooperation. It has explored the “safe third country” and “country of first asylum” concepts, their background and current role in the asylum determination procedures. These concepts were introduced by all three States considered in this paper in 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 an informal application and it has been reinstated in 2014 through the Immigration Act Implementing Regulations). Of the countries considered, both the US and Spain have detailed legislation on the “safe third country” and “first country of asylum” concepts, while South Africa may be developing now a policy on first countries of asylum outside the legislation and within the context of the Immigration Act Implementing Regulations.

The “safe third country” concept is used as grounds for the inadmissibility of the claim in Spain and in the US, departing from the standards in EXCOM conclusions. In Spain, the same is true in relation to the country of first asylum, while in the US,

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<sup>141</sup> Directive 2011/51/EU amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection [2011] L 132/1.

<sup>142</sup> See Gil-Bazo (n 117) at 180.

this concept only constitutes one of the elements to be considered in the assessment of the claim on the merits.

The application of the concepts *within* the asylum determination procedure (whether at the admissibility stage or in an examination on the merits) seems to have declined over the years in favour of inter-State agreements on the determination of the State responsible to process an asylum claim (Spain and the US) as well as in readmission agreements – formal or informal, regular or *ad hoc* – in the context of migration control policies (Spain and South Africa). The practice of informal agreements raises particular issues in so far it denies access to an asylum procedure in any of the countries involved and may result in *refoulement*.

Furthermore, the ability of these concepts to produce the desired effect is questionable. The US is the country that receives the second largest number of asylum applications in the world, while South Africa ranks third. Although in Spain there has been a sharp decline in asylum applications in recent years (notwithstanding the significant increase in 2013), the success of the Spanish policy seems to be based on the abandonment of the “safe third country” enshrined in domestic legislation in application of EU Law in favour of legal restrictions to the right to seek asylum and on the shifting of protection to third countries through bilateral readmission agreements.

The practice of States in relation to international agreements on the allocation of responsibility to examine an asylum application is uneven. Of the three countries compared, Spain is party to the most sophisticated mechanism – enshrined in the Dublin III Regulation among EU Member States – while the US has a bilateral agreement with Canada, and South Africa has no formal agreements of this kind with any country so far.

This research shows that the practice of States is unsatisfactory and that serious gaps remain in the accountability of States’ obligations in relation to refugees as a result of the application of the “safe country” concepts. The Dublin system, despite its grounding in the whole machinery of EU Law, sees a very small number of transfers every year. The case of Spain illustrates how this EU Member State only implements a small number of transfers to other EU Member States, while it is increasingly engaged in formal and informal cooperation with third countries outside the EU, instances when its national courts have so far found that no international responsibility arises for its actions.

Given the very low transfer rates and the right to long term residence and freedom of movement that EU Law grants to refugees and beneficiaries of subsidiary protection (after a number of years of regular lawful residence), the Dublin system should by nature become redundant. Yet, Member States feel very strongly about maintaining the system in its current form.

If States choose to enter into international cooperation agreements on refugee determination, they need to ensure that the international obligations of *each one of them* under international refugee and human rights law are *discharged effectively* by one of them and that when a positive refugee determination decision is made, such

decision is mutually recognised by the rest. At a minimum, any such system must guarantee that any asylum claim will be examined in one of the State Parties, an effective remedy against measures undertaken under the relevant agreement and the mutual recognition of positive decisions.

Yet, the structural flaws in inter-State agreements (notably arising from different asylum legislations), the lack of success in their actual implementation (as shown by the low transfer rates), as well as the judicial challenges before international courts and other human rights monitoring bodies suggest that a collective mechanism for international cooperation among States has little future as a mechanism for the *effective* delivery of State obligations towards refugees. States seem to be aware of this. This research has shown an increase in the use of the “safe country” concept in the context of bilateral readmission agreements (formal or informal, regular or *ad hoc*) in absence of formal guarantees that asylum seekers shall be treated in accordance with international standards. As States move to act outside their borders, judicial scrutiny of their actions becomes more difficult, a picture that challenges not only the proper functioning of the asylum system but also the very nature of liberal-democratic States based on the rule of law.