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The ACAs between the United States and the northern countries of Central America in light of international law and comparative experience

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## I. Introduction

In 2019, the human rights outlook for persons in situations of human mobility in the Mesoamerican region was impacted by a series of policies that limit the possibility of accessing international protection and considerably reduce the space for protection in the region, including the adoption of three bilateral cooperation agreements regarding requests for protection<sup>2</sup>. Despite their formal name as Asylum Cooperation Agreements (ACAs), various sources have referred to the agreements as 'safe third country agreements', both in the context of litigation and public policy, as well as in media coverage and popular debate<sup>3</sup>, using a term that appears in the US regulatory framework and in the lexicon of international law, but with different definitions.

This brief seeks to situate the concept of 'safe third country' in international law, outline the criteria for its use and analyze some experiences in which the figure has been used in different geographical and political contexts. Each of these issues is addressed below, before offering some conclusions.

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<sup>2</sup> Agreement between the Government of the United States of America and the Government of the Republic of Guatemala concerning Cooperation on Applications for Protection, July 26, 2019. Available at: <https://mingob.gob.gt/wp-content/uploads/2019/07/20190726181932114.pdf>; Agreement between the Government of the United States of America and the Government of the Republic of El Salvador on Cooperation regarding Requests for Protection, September 20, 2019. Available at: [https://elfaro.net/es/201909/el\\_salvador/23670/El-acuerdo-que-convirti%C3%B3-a-El-Salvador-en-otro-c%C3%B3mplice-de-Trump.htm?st-full\\_text=all&tpl=11](https://elfaro.net/es/201909/el_salvador/23670/El-acuerdo-que-convirti%C3%B3-a-El-Salvador-en-otro-c%C3%B3mplice-de-Trump.htm?st-full_text=all&tpl=11); Federal Register. Agreement Between the Government of the United States of America and the Government of the Republic of Honduras for Cooperation in the Examination of Protection Claims. May 30, 2020 (With Agreement in Annex, signed September 25, 2019). Available at: <https://www.federalregister.gov/documents/2020/05/01/2020-09322/agreement-between-the-government-of-the-united-states-of-america-and-the-government-of-the-republic>.

<sup>3</sup> See, for example, BBC. Safe Third Country: How the U.S.-Guatemala pact hurts migrants from Honduras and El Salvador. July 30, 2019. Available at: <https://www.bbc.com/mundo/noticias-america-latina-49173143>; Susan Gzesh. "Safe Third Country" Agreements with Mexico and Guatemala would be Unlawful. 15 July 2019. Available at: <https://www.justsecurity.org/64918/safe-third-country-agreements-with-mexico-and-guatemala-would-be-unlawful/>.

## II. The concept of 'safe third country' in international law

The concept of 'safe third country' is not made explicit in any instrument of international law. However, according to the office of the United Nations High Commissioner for Refugees (UNHCR), the concept "has been applied in cases where a person could have or could find protection in a third State<sup>4</sup>. It is, in essence, a figure through which it is determined that a person can access international protection in a third State, other than the State in which the person has requested such protection.

Thus, the concept of 'safe third country' is closely linked to the State's international obligations in the field of international protection. The concept of international protection envisions the guarantee of human rights by the State where a person arrives to seek asylum, or another available category of protection, when their own State is unable or unwilling to protect them.

Under international refugee law and international human rights law, a fundamental element of international protection is the principle of non-refoulement to the country of origin. The 1951 Convention Relating to the Status of Refugees provides for such protection in its article 33(1):

No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion.

Also, article 3(1) of the Convention against Torture provides that

No State Party shall expel, return ["reofuler"] or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

There are many rights that guarantee access to international protection in its broadest sense. Article XXVII of the American Declaration on the Rights and Duties of Man states that "[e]veryone has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with

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<sup>4</sup> UNHCR. Legal considerations on access to protection and the relationship between refugees and the third country in the context of return or transfer to safe third countries. April 2018. Para. 4. Available at: <https://www.refworld.org/es/pdfid/5adf72014.pdf>

the laws of each country and international conventions.” Likewise, Article 22(7) of the American Convention on Human Rights recognizes the right of every person to seek and receive asylum. According to the interpretation of this right by the Inter-American Commission on Human Rights (IACHR), states cannot “exclude broad groups of refugees through their domestic legislation without complying with their obligations”<sup>5</sup>. According to the Inter-American Court of Human Rights (IACtHR), “the State must allow entry to the territory and provide access to the procedure for determining the status of asylum or refugee” and that “third States may not take actions whose purpose is to prevent persons in need of international protection from going to other territories in search of protection, or to hide behind legal fictions, in order not to provide access to the corresponding protection procedures”<sup>6</sup>.

In this sense, the UNHCR affirms “the primary protection responsibility of the State to which a person arrives and seeks international protection”<sup>7</sup>. This responsibility - according to the IACHR - consists of “each Member State's obligation to ensure that each applicant for refugee status has the right to seek asylum in a foreign territory, whether this be its own territory or the territory of a third country”<sup>8</sup>. Thus, “the State could not take an action that would impede applicants from seeking asylum in a foreign territory”<sup>9</sup>.

However, the IACHR has stated that “the right to seek asylum in a country of one's choice is not an absolute in international refugee law”<sup>10</sup>. Likewise, according to the UNHCR, the right to international protection does not entail “an unrestricted right to choose the ‘country of asylum’”<sup>11</sup>.

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<sup>5</sup> IACHR. *John Doe and Others v. Canada*. Report No. 78/11, Case 12.586 - Merits, July 21, 2011. Para. 92.

<sup>6</sup> IACHR. *The institution of asylum and its recognition as a human right in the inter-American protection system* Advisory Opinion OC-25/18 of May 30, 2018. Para. 122.

<sup>7</sup> *Idem*.

<sup>8</sup> IACHR. *John Doe and Others v. Canada*. Op. cit. Para. 94

<sup>9</sup> *Idem*. para. 95.

<sup>10</sup> *Idem*. para. 94.

<sup>11</sup> UNHCR. *Legal considerations on access to protection and the relationship between refugees and the third country in the context of return or transfer to safe third countries*. Op. cit. Para. 2; UNHCR. *Guidance Note on Irregular Successive Movements of Refugees and Asylum Seekers*. September 2019. Para. 5. Available at: <https://www.refworld.org/es/pdfid/5dd426844.pdf>

UNHCR recognizes that, under international refugee law, "refugees may be returned or transferred to a State where they have found, could have found, or, under a formal arrangement, may find international protection"<sup>12</sup>. Nevertheless, any transfer must

respect the principle of non-refoulement and avoid indirect refoulement, in addition to being consistent with State human rights obligations.

To guide State practice with respect to international protection, the UNHCR has developed a set of criteria that should govern the transfer of persons seeking protection to third States.

### III. Criteria for the use of the 'safe third country' category

#### General considerations

As a basis for the use of the figure of 'safe third country', the UNHCR considers the relevant conclusions of its Executive Committee, which recognize the possibility of transfer "in cases where it would appear that a person, before applying for asylum, already has a contact or close links with another State"<sup>13</sup>. However, it points out that "[t]he requirement of a relationship between the refugee or asylum-seeker and the third State is not mandatory under international law. The person may be transferred to a country in which he or she has never been but has accepted through a formal agreement to become responsible"<sup>14</sup>.

However, the UNHCR states that "asylum should not be denied solely on the grounds that it might be sought in another State"<sup>15</sup>. Indeed, "[t]he fact that a refugee or asylum-seeker has continued to move does not affect either his right to treatment under international human rights law or his potential need for international protection, nor does it affect the rights granted by international human rights and refugee law"<sup>16</sup>.

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<sup>12</sup> UNHCR. Legal considerations on access to protection and the relationship between refugees and the third country in the context of return or transfer to safe third countries. Op. cit. Para. 2.

<sup>13</sup> *Idem.* para. 2.

<sup>14</sup> *Idem.* para. 6.

<sup>15</sup> *Idem.*

<sup>16</sup> UNHCR. Guidance note on the successive irregular movements of refugees and asylum seekers. Op. cit. para. 11.

### **Availability of international protection and guarantee of rights in the third country.**

For the UNHCR, access in the country of transfer to treatment in accordance with international human rights standards and international refugee protection law is a *precondition* for such transfer<sup>17</sup>. While protection from refoulement is essential,

minimum guarantees are considered to go beyond this, including, for example, access to sufficient livelihoods to maintain an adequate standard of living and progressively achieve self-reliance<sup>18</sup>. For the purposes of making this determination, "the State's international legal obligations, its domestic laws and current practice of implementation will have to be verified. Access to human rights norms and standards of treatment consistent with the 1951 Convention and its 1967 Protocol can only be effectively and durably ensured when the State is obliged to provide this access under international treaty law, has adopted national laws to implement the relevant treaties, and can build on existing practice by pointing to the State's consistent compliance with its international legal obligations<sup>19</sup>."

Thus, the fact that a State has ratified the relevant international instruments is considered an indicator of human rights compliance, "and when it has adopted national laws to implement the relevant treaties, in addition to having a history of implementation of those treaties that reveal that the State has been consistent with the fulfilment of international legal obligations<sup>20</sup>."

According to UNHCR, "[t]he treatment in accordance with international human rights standards includes appropriate reception mechanisms that address the basic and specific needs of individuals while determining status. International refugee law provides for the application of legal and procedural safeguards during the asylum procedure and the extension of international protection to those who are recognized as refugees<sup>21</sup>."

In this regard, it is recognized that a precondition for the transfer of persons seeking international protection - including when this occurs under a bilateral agreement - is the practical compliance with a number of standards, including that "protection from persecution and threats to freedom and physical integrity must be provided," "access to a fair and efficient asylum procedure must be guaranteed," and

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<sup>17</sup> UNHCR. Legal considerations on access to protection and the relationship between refugees and the third country in the context of return or transfer to safe third countries. Op. cit. Para. 7.

<sup>18</sup> *Idem.* para. 9.

<sup>19</sup> *Idem.* para. 10.

<sup>20</sup> UNHCR. Guidance note on the successive irregular movements of refugees and asylum seekers. Op. cit. para. 21.

<sup>21</sup> *Idem.* para. 12.

"standards of treatment in accordance with the 1951 Convention and international human rights law, including, inter alia, protection against refoulement, must be applied"<sup>22</sup>.

On the other hand, international standards recognize that "[r]efugees and asylum seekers also need access to sufficient means of subsistence to maintain an adequate standard of living and to take actions that allow them to achieve self-reliance.

Standards of treatment consistent with international human rights principles include primarily those applicable to persons with specific needs"<sup>23</sup>.

The Inter-American standard goes along the same lines: "To the extent that the refugee laws of the third country contain legal impediments for a particular applicant to seek asylum, the Member State may not expel the applicant to the third country", and therefore, "before sending the applicant to a third country, the Member State shall make an individualized assessment of the refugee's case, taking into consideration all known facts of the claim in light of the refugee laws of the third country. If there is any doubt about the applicant's ability to seek asylum in the third country, the Member State may not send the claimant to that third country"<sup>24</sup>.

### **Fair and efficient procedure to access protection**

In order to be considered a 'safe third country', the State must have a fair and efficient procedure that allows the applicant to access international protection. The UNHCR considers that "[a]n equitable and efficient asylum procedure requires, inter alia, access in practice to the means necessary to make an application for international protection and relevant supporting evidence, as well as ensuring objective and timely determination of the application and appeal or review of the decision, if it is negative. It also requires that international protection be available to all refugees in need of it in accordance with widely accepted international standards"<sup>25</sup>.

It is also relevant to use regional standards for due process in asylum proceedings. For its part, the IACHR considers that the right to seek and receive asylum encompasses certain substantive and procedural guarantees, ensuring the asylum seeker at least a minimum time to be heard in a hearing to determine whether there is a risk of persecution, in addition to compliance with basic standards of due

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<sup>22</sup> *Idem.* para. 18.

<sup>23</sup> *Idem.* para. 20.

<sup>24</sup> IACHR. *John Doe and Others v. Canada.* Op. cit. Para. 94

<sup>25</sup> UNHCR. *Guidance note on the successive irregular movements of refugees and asylum seekers.* Op. cit. para. 19.

process in such a hearing<sup>26</sup>. The IACHR has considered that the right to seek and receive asylum "guarantees effective access to a fair and efficient procedure for determining refugee status, so that the person seeking refugee status is heard by the State to which he or she is applying, with due guarantees through the respective procedure"<sup>27</sup>. According to IACHR jurisprudence, these due guarantees consist of, at least: the services of a competent interpreter, access to legal advice and

representation, guidance on the procedure in a language and manner which he or she can understand, the opportunity to contact the UNHCR, objective examination of the application by a competent authority through a personal interview, a duly substantiated decision, protection of confidentiality and data of the applicant, and the opportunity to appeal a decision within a reasonable time and to have the decision formally reconsidered, among others<sup>28</sup>.

### **Individualized evaluation**

In general terms, the determination of whether a country can be considered a 'safe third country' must be individualized and according to the particular situation of each applicant. According to the UNHCR, "[b]efore the transfer, it is important, in accordance with the relevant rules of international law, to assess individually whether the third State will be able to:

- (re)admit the person,
- grant the person access to a fair and efficient procedure for the determination of refugee status and other international protection needs,
- allow the person to remain in the country while the determination is made, and
- accord the person standards of treatment consistent with the 1951 Convention and with international human rights law including, but not limited to, protection from refoulement"<sup>29</sup>.

In this regard, the UNHCR considers that the transfer of a person seeking protection in the absence of an individual assessment can only be based on "the existence and availability of certain objective standards of protection in the third State, as well as a firm commitment from that country in which these returnees will have access to

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<sup>26</sup> IACHR. *John Doe and Others v. Canada*. Op. cit. Paras. 90 and 92.

<sup>27</sup> IACHR. *Rights and guarantees of girls and boys in the context of migration and/or in need of international protection* Advisory Opinion OC-21/14 of 19 August 2014. Series A No. 21. Para 98.

<sup>28</sup> IACHR. *Case of the Pacheco Tineo Family v. the Plurinational State of Bolivia*. Judgment of November 25, 2013. Preliminary Objections, Merits, Reparations and Costs. Series C, No. 272. Para. 159.

<sup>29</sup> UNHCR. *Legal considerations on access to protection and the relationship between refugees and the third country in the context of return or transfer to safe third countries*. Op. cit. Para. 4.



protection, assistance and solutions" in accordance with the guarantees set out above<sup>30</sup>.

However, when dealing with vulnerable groups - including unaccompanied children – the UNHCR insists that such individualized assessments are necessary to ensure that a relocation is in their best interests<sup>31</sup>.

#### **IV. Comparable experiences of the use of the 'safe third country' figure**

##### **A. Dublin System: European Union Member States**

In the European Union, a series of successive regulations constitute the so-called Dublin System for determining the responsibility of the organization's Member States for asylum applications. With the aim of guaranteeing rapid access to asylum procedures and ensuring that only one Member State reviews the substance of an application, the regulations establish a number of factors that dictate which of all the EU Member States has that responsibility.

The first instrument of the Dublin system, the Dublin Convention, was signed in June 1990 and entered into force for the signatory countries in September 1997. It was within this framework that the Common European Asylum System (CEAS) began to be consolidated among the Member States. In this first stage<sup>32</sup>, it focused on the harmonization of minimum standards for the reception of asylum seekers and the creation of EURODAC, a biometric database of migrants and asylum seekers shared among the States Parties<sup>33</sup>.

The second instrument, the Dublin II Regulation, was adopted in 2003 and extended to some other countries in the Schengen area. At this stage, progress was made in consolidating the CEAS, with the adoption of the first guideline on asylum procedures. Since July 2013, the Dublin III Regulation has been implemented, although proposals for reforming the CEAS and adopting a Dublin IV Regulation are

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<sup>30</sup> *Idem.* para. 5

<sup>31</sup> *Idem.*

<sup>32</sup> For the UNHCR's position on the first stage of the Dublin system, see New Review of the Dublin Convention: UNHCR's reflections on the Commission's working document. January 2001. Available at: <https://www.acnur.org/fileadmin/Documentos/BDL/2002/1212.pdf?file=fileadmin/Documentos/BDL/2002/1212>.

<sup>33</sup> European Commission: Migration and Home Affairs. Common European Asylum System. Available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm).

also progressing<sup>34</sup>. It was in 2015, after revisions to the multiple guidelines, that the full application of the CEAS was achieved<sup>35</sup>.

While the Dublin System operates on the premise that all EU countries can guarantee international protection in accordance with international standards, it currently requires that the first EU country that an applicant for protection enters exercise jurisdiction over the application for protection. For the applicant who has

transited through multiple EU countries prior to filing his or her application, the Dublin System triggers his or her return to the first country to process the application with its institutions. However, both the UNHCR and organizations have pointed out that there are still significant differences in the asylum systems and protection available in the various Member States<sup>36</sup>.

In the same vein, the European Court of Human Rights (ECtHR) has considered numerous cases alleging human rights violations following the implementation of the Dublin System<sup>37</sup>. Although many decisions have declared the petitions inadmissible, through other cases, the European Court has developed jurisprudence with respect to the Dublin System.

In the first case, *T.I. v. United Kingdom*, the Court held that compliance with the Dublin system would not absolve a State party of responsibility for an indirect refoulement that might occur when sending an asylum seeker to another Member State that did not guarantee sufficient protection against refoulement. However, the ECtHR considered that interpretations of international obligations do not have to be the same between the two countries. This is in contrast to the reasoning in some domestic decisions in the UK which have concluded that differences in interpretation can lead to gaps in protection that make a receiving State unsafe.

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<sup>34</sup> Council of the European Union. Reform of EU asylum rules. June 16, 2020. Available at: <https://www.consilium.europa.eu/en/policies/ceas-reform/>

<sup>35</sup> Michigan Journal of International Law. The Common European Asylum System: Its History, Content and Shortcomings. February 9, 2016. Available at: [http://www.mjilonline.org/the-common-european-asylum-system-its-history-content-and-shortcomings/#\\_ftnref15](http://www.mjilonline.org/the-common-european-asylum-system-its-history-content-and-shortcomings/#_ftnref15)

<sup>36</sup> UNHCR. UNHCR comments on the European Commission's Proposal for the reform of the Regulation of the European Parliament and of the Council establishing 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 (Dublin II) and the European Commission's Proposal for the reform of the Regulation of the European Parliament and of the Council concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin II Regulation. March 18, 2009. Available at: <https://www.refworld.org/docid/49c0ca922.html>

<sup>37</sup> European Court of Human Rights. Factsheet - "Dublin" Cases. June 2016. Available at: [https://www.echr.coe.int/Documents/FS\\_Dublin\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Dublin_ENG.pdf).

In another case, *M.S.S. v. Belgium and Greece*, the ECtHR found that the transfer of an applicant from Belgium to Greece under the Dublin system had violated his human rights because of the detention and living conditions he faced in the receiving country. In this case, the Court affirmed Belgium's obligation to verify how the Greek authorities implement their asylum law in practice before carrying out a transfer. The ECtHR therefore held both countries internationally responsible for various human rights violations.

Similarly, in the *Sharifi and Others v. Italy and Greece* case, the European Court noted that automatic return from one country to another could violate procedural and substantive rights, and it stated that the Dublin System must be applied in accordance with States' other human rights obligations to ensure that no applicant is returned to his or her country of origin without an analysis of the risks involved.

In other cases, the ECtHR has emphasized the importance of the sending country of an applicant receiving specific assurances from the receiving country that the latter would take on the responsibility for international protection - including access to due process - in accordance with the specific needs of the applicants.

In addition to the European Court, both the national courts of the various European Union Member States and the European Court of Justice contribute to the development of interpretations on the compatibility between the implementation of the Dublin system and human rights standards<sup>38</sup>.

Likewise, the Dublin System, through the guideline on asylum procedures, provides that Member States use the safe third country figure in the framework of the processing of applications. The directive establishes five criteria for designating another State as a safe third country<sup>39</sup>. This power has been analyzed by the ECtHR, including in the case of *Ilias and Ahmed v. Hungary*, in which the Court pointed out that before transferring an applicant to a safe third country, access to protection in the third country must be analyzed and it must be ensured that there is no risk of a chain of return<sup>40</sup>.

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<sup>38</sup> European Database of Asylum Law. EDAL Case Summaries: Dublin Transfer. Available at: [https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field\\_keywords%3A1213](https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A1213)

<sup>39</sup> European Council on Refugees and Exiles. Debunking the "Safe Third Country" Myth: ECRE's Concerns about EU Proposals for Expanded Use of the Safe Third Country Concept. 2017. Available at: <https://www.ecre.org/wp-content/uploads/2017/11/Policy-Note-08.pdf>.

<sup>40</sup> European Court of Human Rights. Case of Ilias and Ahmed v. Hungary. App. No. 47287/15. Grand Chamber. Grand Chamber. November 21, 2019. Available at: <https://www.refworld.org/cases,ECHR,5dd6b4774.html>

## B. Safe Third Country Agreement: United States - Canada

The Safe Third Country Agreement (STCA) between the United States and Canada was adopted in December 2002 and entered into force in December 2004<sup>41</sup>. The STCA seeks to share responsibility for the consideration of refugee status applications between the two countries, based on a determination that the other country complies with relevant international conventions and has an acceptable record of ensuring human rights<sup>42</sup>. In practical terms, the STCA prevents a person who presents him or herself at one of the land entry points at the border between the two countries from applying for protection in the country of destination, on the premise that the first of these two countries in which the person has been has exclusive jurisdiction over the application.

Organizations in Canadian civil society-initiated litigation against the STCA, challenging that the agreement with the United States violated Canadian law inasmuch as the United States fails to adequately guarantee protection against refoulement. In 2007, after a thorough analysis of the US protection system, the district court of first instance issued a favorable decision on the merits, finding that the US did not comply with the prohibition of refoulement set out in international conventions, and therefore could not be considered a safe third country<sup>43</sup>. However, in 2008, the Federal Court of Appeal overturned that decision, finding that the litigation, advanced primarily by organizations, did not present specific facts in violation of Canadian law, but rather a hypothetical situation<sup>44</sup>. In February 2009, the Supreme Court of Canada declined to consider the organizations<sup>45</sup> appeal, leaving the Federal Court of Appeal's decision in effect.

In new litigation initiated years later, in July 2020, a Canadian federal court judge declared that the implementation of the STCA with the United States is contrary to the Canadian Constitution, while the US policy of detention of applicants is far from the basic rights guaranteed by Canada<sup>46</sup>. Specifically, the judge noted that the detention of asylum seekers was the most significant harm, although she also considered the harmful effects caused by the conditions of detention and the increased risk of refoulement<sup>47</sup>. In addition to the deprivation of liberty that detention entails, the judge considered that barriers to accessing legal assistance and obtaining evidence to demonstrate eligibility for asylum in the United States

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<sup>41</sup> Canadian Council for Refugees Vs. Canada, 2007 FC 1262. Reasons for Judgment. November 29, 2007. Para. 8. Available at: [https://www.refworld.org/cases,CAN\\_FC,474fe8d62.html](https://www.refworld.org/cases,CAN_FC,474fe8d62.html).

<sup>42</sup> Canada Vs. Canadian Council for Refugees, 2008 FCA 229. Reasons for Judgment. June 27, 2008. Párr. 75. Available at: [https://www.refworld.org/cases,CAN\\_FCA,497f38fa2.html](https://www.refworld.org/cases,CAN_FCA,497f38fa2.html).

<sup>43</sup> Canadian Council for Refugees Vs. Canada, 2007 FC 1262. Op. Cit.

<sup>44</sup> Canada Vs. Canadian Council for Refugees, 2008 FCA 229. Op. Cit. Párr. 103

<sup>45</sup> IACHR. John Doe and Others v. Canada. Op. cit. Para. 30.

<sup>46</sup> Canadian Council for Refugees Vs. 2020 FC 770. Judgment and Reasons. July 22, 2020. Available at: <https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/482757/index.do>.

<sup>47</sup> *Idem.*, para. 94.

increased the risk of refoulement<sup>48</sup>. Although the STCA had the legitimate objective of sharing responsibility for the protection of refugees, the judge considered that the implementation of the STCA did not guarantee access to a fair determination procedure<sup>49</sup>. She concluded that the importance of shared responsibility cannot outweigh the risks of detention, the effects of cruel conditions of confinement and the risk of refoulement<sup>50</sup>. For these reasons, the judge overturned the Canadian regulatory framework implementing the STCA, but she suspended her decision for a period of six months to allow the legislature an opportunity to respond<sup>51</sup>. The

Canadian government appealed this decision<sup>52</sup> and managed to have the Federal judge's decision suspended while the STCA remained in force for the time being<sup>53</sup>.

### C. European Union - Turkey Declaration

Adopted in March 2016, the European Union (EU)-Turkey Declaration (hereafter "Declaration") is a key element of the European response to the increase of migrants and refugees entering the EU from Turkey. In the framework of the regional crisis of people fleeing from Syria, Afghanistan, and other countries in Asia and the Middle East, and entering Europe through the Greek islands after crossing the Mediterranean Sea, European countries sought to prevent irregular entry into European territory. Under the Declaration, people who arrive irregularly to the Greek islands beginning March 20, 2016 are declared inadmissible and returned to Turkey. Applications from persons in need of international protection are declared inadmissible under the concept of 'safe third country', and those from persons of Syrian nationality are also declared inadmissible under the close concept of 'first country of asylum'<sup>54</sup>. In addition, the Declaration states that for each Syrian person returned to Turkey from the Greek islands, another Syrian person can be directly resettled from Turkey to the European Union<sup>55</sup>.

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<sup>48</sup> *Idem.*, para. 106.

<sup>49</sup> *Idem.*, para. 128.

<sup>50</sup> *Idem.*, para. 136.

<sup>51</sup> *Idem.*, para. 163.

<sup>52</sup> The Court.ca, "Federal Court Declares the STCA Unconstitutional", October 2, 2020. Available at: <http://www.thecourt.ca/federal-court-declares-the-stca-unconstitutional/>

<sup>53</sup> Global News, "Government wins court challenge to keep Safe Third Country Agreement in place - for now", October 26, 2020. Available at: <https://globalnews.ca/news/7422641/government-wins-court-challenge-safe-third-country-agreement/>

<sup>54</sup> UNHCR. Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept. March 23, 2016. Available at: <https://www.refworld.org/country,,UNHCR,,TUR,,56f3ee3f4,0.html>

<sup>55</sup> European Commission. Implementing the EU-Turkey Agreement - Questions and Answers, April 20, 2016. Available at: [https://ec.europa.eu/commission/presscorner/detail/it/MEMO\\_16\\_1494](https://ec.europa.eu/commission/presscorner/detail/it/MEMO_16_1494).

The premise that Turkey can be considered a safe third country has been challenged by numerous sources which point out, firstly, that Turkey applies international refugee law only with respect to certain nationalities, and that this geographical limitation does not guarantee full compliance with this body of law<sup>56</sup>. Furthermore, organizations have pointed out that the shortened procedures at the border to determine whether an application is inadmissible under the EU-Turkey Declaration do not respect the minimum guarantees to protect the person seeking return<sup>57</sup>. In this sense, damaging deficiencies have been noted in the attitudes of officials at the European Asylum Support Office (EASO)<sup>58</sup>. An organization accompanying asylum seekers in the Greek islands has indicated that EASO applies the concept of 'safe third country' without adequate legal analysis or individualized analysis of the facts and objective information about the country of origin, but instead adopts a reasoning based on stereotypes and general statements.

Although multiple organizations have initiated litigation against the EU-Turkey Declaration, no court has ruled against the legality of the agreement. Although the European Court of Human Rights has considered at least one case arising in the framework of the implementation of the EU-Turkey Declaration, in its ruling in the case of *J.R. and others v. Greece*, it is considered that the detention of the victims - asylum seekers in Greece - was not arbitrary as long as the deprivation of liberty was justified by the agreement.

Currently, the EU-Turkey Declaration continues to be implemented. According to official sources, a total of 2,735 people have been returned to Turkey under the Declaration. However, it is reported that, in the same four years, more than 18,000 people have voluntarily returned from Greece to their countries of origin under an assisted voluntary return program<sup>59</sup>. It is understood that these persons have chosen to return to their countries of origin rather than being returned to Turkey.

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<sup>56</sup> Research Social Platform on Migration and Asylum. Asylum: The Role and Limits of the Safe third Country Concept in EU Asylum. July 2018. Available at: [http://www.resoma.eu/sites/resoma/resoma/files/policy\\_brief/pdf/Policy%20Briefs\\_topic3\\_Safe%20third%20country\\_0.pdf](http://www.resoma.eu/sites/resoma/resoma/files/policy_brief/pdf/Policy%20Briefs_topic3_Safe%20third%20country_0.pdf).

<sup>57</sup> European Council on Refugees and Exiles. Debunking the "Safe Third Country" Myth: ECRE's Concerns about EU Proposals for Expanded Use of the Safe Third Country Concept. Op. Cit.

<sup>58</sup> Greek Refugee Rights Initiative, HIAS y Islamic Relief USA. EASO's Operation on the Greek Hotspots: An Overlooked Consequence of the EU-Turkey Deal, March 2018. Available at: [https://www.hias.org/sites/default/files/hias\\_greece\\_report\\_easo.pdf](https://www.hias.org/sites/default/files/hias_greece_report_easo.pdf).

<sup>59</sup> European Commission. EU-Turkey Statement Four Years On, March 2020. Available at: [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20200318\\_managing-migration-eu-turkey-statement-4-years-on\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20200318_managing-migration-eu-turkey-statement-4-years-on_en.pdf).



#### **D. Asylum Cooperation Agreements: United States with Guatemala, Honduras, and El Salvador (Bilaterally)**

Although Guatemala, Honduras, and El Salvador are the main countries of origin for people arriving in the United States seeking international protection, between July and September 2019, each of the governments of these three Central American States adopted an Asylum Cooperation Agreement (ACA) with the United States. The ACA allows the transfer of persons seeking protection in the United States to the signatory third country, under the premise that these persons can access protection in this third country. Although the text of the ACAs does not expressly refer to the concept of a safe third country, the regulatory framework that authorizes such agreements and facilitates their implementation by the United States refers to the principle as codified in US law.

Although only the ACA with Guatemala was implemented - before it was suspended because of the Coronavirus pandemic - the ACAs with El Salvador and Honduras have already been formalized. In the months after its implementation, it is estimated that over 900 people were transferred to Guatemala under the ACA. However, very few of these people sought protection in Guatemala - an estimated 2% - and the vast majority have been forced to return to their countries of origin.

#### **V. Final Considerations**

It is clear that, insofar as they establish mechanisms for the transfer of asylum seekers to a country other than the one where they requested such protection, the Asylum Cooperation Agreements reached in 2019 between the United States and three Central American countries constitute 'safe third country' agreements. However, to date, discussions on the legality of these agreements have focused on whether or not they meet the criteria of the US regulatory framework or the constitutional procedures in the countries of northern Central America with little attention to international obligations.

While international law does not preclude the transfer of asylum seekers from the State where they applied for asylum to another State through a 'safe third country', any transfer framework must be consistent with States' international protection and human rights obligations. In this regard, the general criteria set forth by the UNHCR and the development of jurisprudence and analysis with respect to previous experiences of 'safe third countries' establish parameters that should guide the use of this figure in other contexts.

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mediante el derecho internacional de los  
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Specifically, in light of these parameters, it is clear that the Asylum Cooperation Agreements are incompatible with the international obligations of the States involved and should be annulled, as has been repeatedly requested by the Inter-American Commission and numerous human rights organizations.