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Asylum-Seekers are Not Bananas Either: Limitations on Transferring Asylum-Seekers to Third Countries

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ASYLUM-SEEKERS ARE NOT BANANAS EITHER: LIMITATIONS ON TRANSFERRING ASYLUM-SEEKERS TO THIRD COUNTRIES

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ABSTRACT

Despite the similarities between the movement of people and the movement of goods, many developed nations have maintained high barriers to migration even as barriers to trade have fallen sharply. However, as Jennifer Gordon points out, both bilateral and multilateral treaties governing migration have proliferated within this weaker global patchwork of regulation. For example, the ability of developed states to gain concessions on other matters such as trade or investment has led to the proliferation multilateral agreements, while bilateral agreements have arisen due to a desire to refrain from integrating migrant workers in destination states.

This paper focuses on a particular subset of migrants—asylum-seekers—and aims to explain why they should not be treated like bananas, so to speak. Their rights, status, and protection, as well as their transfer from destination countries to third countries, are regulated by multilateral, regional, and bilateral agreements that simultaneously highlight the differences between goods and asylum-seekers while also treating them, in some ways, like objects or commodities. The "bananization" of persons through third-country agreements is a result of these agreements' strong focus on the sovereign interests of destination and third countries instead of on the effects of the transfer on asylum-seekers and refugees.

This paper argues that transfer agreements should require an individualized assessment of the connections between asylum-seekers

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and the destination country and refrain from removing individuals from places where they have relationships and connections to countries where they have significantly fewer networks or none at all. The legal validity of third country agreements should, therefore, be examined through two questions: First, the extent to which the transfer agreement supports (or impedes) the asylum-seeker's autonomy in choosing a state that would grant them surrogate protection; and second, the degree to which relational considerations are given adequate weight prior to the transfer by taking into account global movements and by placing the asylum-seeker in a place where her meaningful relationships would be preserved.

This article undertakes this task and concludes with recommendations for the implementation of future third-country transfer agreements.

INTRODUCTION

In her decade-old seminal article, "People Are Not Bananas: How Immigration Differs from Trade," Jennifer Gordon argues that

> [t]here are similarities between the movement of people and the movement of goods, but the differences between the two are far more apparent. If labor migration and trade are so alike, why have many developed nations maintained high barriers to migration even as barriers to trade have fallen sharply? The contrast between the weak global patchwork governing the movement of people and the strong framework governing the movement of goods is another sign of those distinctions.[1]

Gordon's article, which focuses on labor migration, argues that one of the differences between the governance of international trade and the governance of international migration is that the former is pursued through multilateral, regional, and bilateral agreements, whereas the latter is approached unilaterally.[2] However, she also notes the growth of bilateral and multilateral agreements on international migration.[3] Gordon explains that the increase in multilateral agreements is due to the fact that "in exchange for migration agreements, developed countries can receive concessions on other matters, unrelated to migration," such as trade or investment.[4] On the other hand, she argues that bilateral agreements have grown in number because of

1. Jennifer Gordon, *People Are Not Bananas: How Immigration Differs from Trade*, 104 NORTHWESTERN U. L. REV. 1109, 1110 (2010).

2. *Id.* at 1113.

3. *Id.* at 1141.

4. *Id.* at 1139–40.

a desire to refrain from integrating migrant workers in destination states.[5] The bilateral agreements aim to "shar[e] the responsibility" between the destination state and the state of origin, in the sense that they constitute a commitment by the state of origin to take back undocumented, deported migrants.[6] Bilateral agreements are also formed when the destination state wants to experiment with a new immigration regime or when it reaps some political, historical, or cultural benefits from the bilateral agreements.[7]

This paper focuses on a particular subset of migrants—asylum-seekers—and aims to explain why they should not be treated like bananas either, so to speak. Asylum-seekers' rights, status, and protection are regulated by multilateral conventions: namely the 1951 Convention Relating to the Status of Refugees[8] and the 1967 Additional Protocol,[9] as well as regional agreements.[10] The focus of this paper, however, is on the multilateral, regional, and bilateral agreements that allow the transfer of asylum-seekers from destination countries to third countries (countries asylum-seekers do not originate from).[11] These agreements simultaneously illustrate the differences between goods and asylum-seekers, while at the same time treating asylum-seekers, in some ways, like objects or commodities.[12] In fact, if anything, these agreements expose how the transfer and trade of asylum-seekers is similar to the trade in carbon emission quotas, in which stronger economies buy the ability to pollute the environment from weaker economies.[13] Nonetheless, the transfer agreements are subject to significant *a priori* restrictions in human rights law, namely the restriction of *non-refoulement*: the obligation to refrain from removing asylum-seekers and refugees to places where their lives or liberty are at risk, or to places where they would

5. *Id.*

6. *Id.* at 1141.

7. *Id.* at 1140–41.

8. Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

9. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

10. For the African regional norms, see Convention Governing Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45. For the European regional norms on asylum, see EUR. UNION AGC'Y FOR FUNDAMENTAL RTS. ["FRA"], EUR. CT.HUM. RTS. & COUNCIL EUR., HANDBOOK ON EUROPEAN LAW RELATING TO ASYLUM, BORDERS AND IMMIGRATION (2014), http:// fra.europa.eu/sites/default/files/handbook-law-asylum-migration-borders-2nded_en.pdf. For the American regional norms, see Convention on Territorial Asylum, Mar. 28, 1954, O.A.S.T.S. No. 19; Convention on Diplomatic Asylum, Mar. 28, 1954, 1438 U.N.T.S. 104.

11. As the article shows, the United States, Australia, the European Union ("EU"), and Israel have formed such transfer agreements, among others.

12. On the commodification of asylum-seekers through transfer agreements, see Gerasimos Tsourapas, *How Migration Deals Lead to Refugee Commodification*, NEW HUMANITARIAN (Feb. 13, 2019), http://deeply.thenewhumanitarian.org/refugees/community/2019/02/13/how-migration-deals-lead-to-refugee-commodification.

13. *Cf.* Peter Schuck, *Refugee Burden-Sharing: A Modest Proposal*, 22 YALE J. INT'L L. 243, 273 (1997).

be subject to torture or cruel and inhumane treatment.[14] Unlike the movement of persons that Gordon explores, the movement of persons through third-country agreements is against the current. These agreements often direct people to move from the Global North to the Global South, opposite to their desired direction, in a way that does not follow the movement of goods.[15] This direction of movement also directs people to countries where they may receive fewer protections and less of an ability to sustain their pre-existing relationships. The third countries the asylum-seekers are transferred to–often developing nations–typically join these agreements for political, economic, or military benefits.[16]

The "bananization"[17] of persons through third-country agreements is the result of these agreements' strong focus on the sovereign interests of destination countries and third countries. These agreements focus very little on the effects of the transfer on asylum-seekers and refugees.[18] This article argues that the most compelling reasons to limit third country transfers involve the subjectivity and agency of asylum-seekers, which fall outside the direct scope of international human rights law and can be best understood through a relational autonomy approach. Transfer agreements should be evaluated in light of the context of the migration they regulate, through histories of colonization and neo-colonialism, the governance of labor markets, and the messy, complex international ties between countries. Personal relationships between asylum-seekers and family members, as well as friends, congregations, colleagues, neighbors, and others in destination countries should be evaluated before transfer agreements are implemented. It is often the case that after a long duration of stay in a destination country, an asylum-seeker is likely to have such connections, so transfer agreements should handle long-staying asylum-seekers with greater care by being sensitive to their social embeddedness. Transfer agreements should require an individualized assessment of these connections and should refrain from removing

14. *See* Refugee Convention, *supra* note 8, art.8, art. 33; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85.

15. The movement of goods is generally a movement from the Global South to the markets of the Global North. The agreements that this article looks into concern transfers occurring in the opposite direction—from the United States to Guatemala; from Israel to Rwanda and Uganda, etc.

16. *See* Tsourapas, *supra* note 12; *see, e.g.*, *Israel to Pay Rwanda $5,000 for Every African Refugee It Accepts*, MIDDLE EAST EYE (Nov. 22, 2017), http://www.middleeasteye.net/news/israel-pay-rwanda-5000-every-african-refugee-it-accepts.

17. By "bananization" I mean the process of transferring persons to third countries as if they were good and not persons with agency and individual preferences, typically in rapid processes and as a part of an exchange.

18. GUIDANCE NOTE ON BILATERAL AND/OR MULTILATERAL TRANSFER ARRANGEMENTS OF ASYLUM SEEKERS art. 3.i (3.i, REFWORLD (U.N. High Comm'r Refugees ["UNHCR"], May 2013), http://www.refworld.org/docid/51af82794.html [hereinafter UNHCR GUIDANCE NOTE].

individuals from places where they have relationships and connections to countries where they have significantly fewer networks or none at all. Therefore, the legal validity of third country agreements should be examined through two questions: First, the extent to which the transfer agreement supports (or impedes) the asylum-seeker's autonomy in choosing a state that would grant them surrogate protection; and second, the degree to which relational considerations are given adequate weight prior to the transfer by taking into account global movements and by placing the asylum-seeker in a place where her meaningful relationships would be preserved.

Part I of the article begins with an examination of the international law on transfer agreements. Part II continues by explaining the concept of relational autonomy and how it is applicable to the context of international migration law and policy in general, as well as specifically to transfer agreements. Part III then examines recent third-country transfer agreements in the United States, the European Union ("EU"), Australia, and Israel.[19] In each case, the article will examine the extent to which the agreement considers or reflects relational considerations. The article concludes with recommendations for the implementation of future third-country transfer agreements.

I. THE INTERNATIONAL LAW ON TRANSFER AGREEMENTS

The first third-country transfer agreements were formed in the 1980s within Europe, the United States, and Canada.[20] Since then, much like other exclusionary practices within immigration law, they have spread across jurisdictions and have been nearly normalized through their repetition.[21] In essence, these agreements allow Country A (the destination country) to transfer asylum-seekers from Country C (the origin country) to Country B (the third country), subject to some conditions, in exchange for benefits given to Country B.[22] For example, under the Trump Administration, the United States (the destination country) established a transfer agreement with Guatemala (the third country), where asylum-seekers arriving from El Sal-

19. I chose to focus on these agreements as they attracted a lot of critique and raise multiple questions of international law.

20. YAEL SCHACHER, RACHEL SCHMIDTKE & ARIANA SAWYER, DEPORTATION WITH A LAYOVER: FAILURE OF PROTECTION UNDER THE US-GUATEMALA ASYLUM COOPERATIVE AGREEMENT 6 (2020); Audrey Macklin, *Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims*, 13 GEO. IMMIGR. L.J. 25 (1998).

21. UNHCR GUIDANce Note, supra note 18, art. 3.i; UNHCR, CONSIDERATIONS ON THE "SAFE THIRD COUNTRY" CONCEPT (Refworld July 1996), http://www.refworld.org/docid/3ae6b3268.html [hereinafter SAFE THIRD COUNTRY].

22. *See, e.g.*, Michael D. Shear, Zolan Kanno-Youngs & Elisabeth Malkin, *After Tariff Threat, Trump Says Guatemala Has Agreed to New Asylum Rules,* N.Y. TIMES, Jul. 26, 2019, http://www.nytimes.com/2019/07/26/world/americas/trump-guatemala-asylum.html?action=click&module=RelatedCoverage&pgtype=Article&region=Footer.

vador and Honduras would be sent from the United States back to Guatemala for processing.[23]

Transfer agreements are different from the durable solution of resettlement in several ways.[24] First, resettlement typically involves governments coordinating to move a refugee from her country of first asylum to a country that is capable of giving her better protection.[25] The countries that resettle the most refugees—the United States, Canada, Germany, Australia, and Sweden[26]—are all Global North or high-income countries. They resettle refugees from developing countries, mostly from the Global South.[27] Transfer agreements, on the other hand, usually involve the movement of asylum-seekers from the frontier or interior of a wealthy destination country to a less developed country (for example, from the border of the United States to Guatemala). Second, resettlement is, to some extent, a voluntary arrangement; it affords refugees a degree of (limited) choice on whether to opt to be resettled in a predetermined country or to stay in their current location.[28] Transfer agreements are far less voluntary, though some of them use voluntary language.[29] Third, resettlement is commonly administered by the United Nations High Commission for Refugees ("UNHCR") or a resettlement agency of the receiving state, whereas transfer agreements are implemented by both the transferring and receiving state, without the endorsement or close monitoring of an international organization.[30] In other words, resettlement represents an effort by the Global North to share some of the responsibility of the global refugee crisis by taking in more refugees, even as most refugees are hosted in the Global South.[31] Transfer agreements are exactly the opposite of that—they are attempts to completely confine the responsibility for refugees to countries in the Global South.

Transfer agreements have been met by significant scholarly criticism. For example, transfer agreements have been characterized as attempts "to

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23. *Id.*

24. *Resettlement*, UNHCR, http://www.unhcr.org/resettlement.html (last visited Feb. 21, 2022).

25. Shani Bar-Tuvia, *Australian and Israeli Agreement for the Permanent Transfer of Refugees: Stretching Further the (Il)legality and (Im)morality of Western Externalization Policies*, 30 INT'L J. REFUGEE L. 474, 484–85 (2018).

26. Nayla Rush, *U.S. Was the Number-One Refugee Resettlement Country in the World in 2019*, CTR. FOR IMMIGR. STUD. (Feb. 27, 2020), http://cis.org/Rush/US-Was-NumberOne-Refugee-Resettlement-Country-World-2019.

27. *See Resettlement*, *supra* note 24.

28. *Refugee Resettlement*, UNHCR, http://www.unhcr.org/5fe06e8b4.

29. *See, e.g.*, *"I Was Left with Nothing:" "Voluntary" Departures of Asylum Seekers from Israel to Rwanda and Uganda*, INTERNATIONAL REFUGEE RIGHTS INITIATIVE (Sep. 2015), http://reliefweb.int/sites/reliefweb.int/files/resources/IWasLeftWithNothing.pdf.

30. *See* Bar-Tuvia, *supra* note 25, at 484–85.

31. *See* Eirik Christophersen, *These 10 Countries Receive the Most Refugees*, NOR. REFUGEE COUNCIL (Nov. 1, 2020), http://www.nrc.no/perspectives/2020/the-10-countries-that-receive-the-most-refugees.

circumvent state obligations towards refugees,"[32] as well as efforts to deny access to individualized refugee status determination and judicial review in the transferring countries.[33] Furthermore, these agreements are perceived as an effort to entrench the misconception that international refugee law requires asylum-seekers to seek asylum in the first safe country they enter.[34]

Nevertheless, transfer agreements are not illegal by definition. The UNHCR has even issued some soft law instruments relating to such transfer agreements.[35] The UNHCR justified transfer agreements on two grounds: the need for responsibility-sharing in hosting refugees, and the absence of an unfettered legal right for individuals to choose their country of asylum.[36] I will address each of these justifications.

First, the UNHCR encourages transfer agreements to the extent that they are "aimed at enhancing burden- and responsibility-sharing and international/regional cooperation, and not . . . burden shifting. Transfers to third countries need to contribute to the enhancement of the overall protection space in the transferring state, the receiving state and/or the region as a whole."[37] While in principle transfer agreements may aim to fulfill responsibility-sharing goals, this has not always been the case. [38] Many agreements result in the transferring of asylum-seekers to developing countries, which are often already shouldering a significant share of the global responsibility to refugees relative to their size.

Second, the UNHCR recognizes the fact that asylum-seekers are not obligated to apply for asylum in the first safe country they enter, though it also declares that refugees "should ordinarily be processed in the territory of the State where they arrive, or which otherwise has jurisdiction over them. This is also in line with general State practice. The primary responsibility to pro-

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32. Michelle Foster, *Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State*, 28 MICH. J. INT'L L. 223, 226 (2007).

33. *See* Susan Kneebone, *The Pacific Plan: The Provision of "Effective Protection?"*, 18 INT'L J. REFUGEE L. 696 (2006).

34. *See* MARK SYMES & PETER JORRO, ASYLUM LAW AND PRACTICE 513 (2003).

35. SAFE THIRD COUNTRY, *supra* note 21; *Legal Considerations Regarding Access to Protection and a Connection Between the Refugee and the Third Country in the Context of Return or Transfer to Safe Third Countries,* UNHCR (Apr. 2018), http://www.refworld.org/docid/5acb33ad4.html [hereinafter *Legal Considerations*].

36. UNHCR GUIDANCE NOTE, *supra* note 18, art. 3.i.

37. *See* UNHCR GUIDANCE NOTE, *supra* note 18, art. 3. iv.

38. On responsibility dumping in the context of the Israeli third country transfer agreements, see *Israel: Deportation of African Asylum-Seekers is a Cruel and Misguided Abandonment of Responsibility*, AMNESTY INTERNATIONAL (Mar. 26, 2018), http://www.amnesty.org/en/latest/news/2018/03/israel-deportation-of-african-asylum-seekers-is-a-cruel-and-misguided-abandonment-of-responsibility. On responsibility dumping in the context of the US third country transfer agreements, see Rachel Schmidtke, Yael Shacher & Ariana Sawyer, *Deportation with a Layover: Failure of Protection under the U.S.-Guatemala Asylum Cooperative Agreement*, REFUGEES INTERNATIONAL (May 19, 2020), http://www.refugeesinternational.org/reports/2020/5/8/deportation-with-a-layover-failure-of-protection-under-the-us-guatemala-asylum-cooperative-agreement.

vide protection rests with the State where asylum is sought."[39] Nevertheless, the UNHCR clearly states that asylum-seekers do not have an "unfettered right to choose one's country of asylum."[40] However, the UNHCR has also instructed that "[t]he intentions of the asylum-seeker as regards the country in which they wish to request asylum should as far as possible be taken into account,"[41] and that an asylum-seeker should not be required "to seek asylum in a country with which [they have] not established any relevant links."[42] The UNHCR position rests on two premises. The first premise is the extremely weak right to asylum. International law acknowledges the right to seek asylum in the Universal Declaration of Human Rights, a non-binding instrument that is mostly regarded as reflecting customary international law.[43] There is a non-specific correlative duty on all states to protect asylum-seekers, but no specific country is assigned a duty towards any specific asylum-seeker.[44] The imperfect structure of the right without a correlating duty on any specific party weakens the right to asylum. The second premise is the negative perception of "asylum shopping," a disputed term that relates to asylum-seekers choosing destination countries in which they apply for asylum for reasons including, but not limited to, protection, relationships, or economic opportunity.[45] Rather than being understood as a sign of agency and subjectivity of the asylum-seeker,[46] "asylum shopping" has

39. UNHCR GUIDANCE NOTE, *supra* note 18, arts. 1, 3.i.

40. *Id.* art. 3.i.

41. UNHCR Conclusion No. 15 (XXX), Refugees Without an Asylum Country, Exec. Comm. 30th Session, U.N. Doc. No. 12A A/34/12/Add.1 (Oct. 16, 1979), http://www.unhcr.org/excom/exconc/3ae68c960/refugees-asylum-country.html.

42. UNHCR, Note on Asylum, ¶ 11, U.N. Doc. EC/SCP/12 (Aug. 30, 1979), http://tinyurl.com/UNHCRNoteOnAsylum1979.

43. *See* G.A. Res. 217 (III)A art. 14, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

44. *See* UNHCR GUIDANCE NOTE, *supra* note 18, art. 1.

45. Some of the meanings that were given to the term are, for example, "the ability of asylum seekers to move freely among Member States and file asylum applications in multiple states to increase their chances of being granted asylum." Aileen Tom, *How Stricter Dutch Immigration Policies Are Contributing to Rising Islamic Fundamentalism in the Netherlands and Europe*, 5 WASH. U. GLOB. STUD. L. REV. 451, 457 n.58 (2006); or "when asylum seekers submit asylum applications to member states with the most attractive benefits or member states more likely to accept them." Kimara Davis, *The European Union's Dublin Regulation and the Migrant Crisis*, 19 WASH. U. GLOB. STUD. L. REV. 261, 266 (2020); or "a perceived practice on the part of some refugees and migrants who do not seek asylum in the first country where they may (ostensibly) receive protection, but decide to seek it elsewhere, primarily motivated by economic considerations." Pavle Kilibarda, *Obligations of Transit Countries Under Refugee Law: A Western Balkans Case Study*, 99 INT'L REV. RED CROSS 211, 226 n.99 (2017).

46. *See, e.g.*, Kerry Moore, *"Asylum Shopping" in the Neoliberal Social Imaginary*, 35 MEDIA, CULTURE & SOC'Y 348, 353 (2013).

been wrongfully understood as a sign of a lack of credible fear of being persecuted,[47] or as an administrative imposition.[48]

So, while UNHCR doesn't necessarily think asylum-seekers have a right to choose where to seek asylum, it approves of states using transfer agreements to share responsibility and prevent asylum shopping. Nonetheless, the UNHCR's soft law instruments all repeat several important human rights-related requirements for transfer agreements, according to which it is possible to measure the legality of these agreements.[49]

Throughout the years, the requirements have included: an assessment of the individual's ability to be transferred, with emphasis on the assessment of persons from vulnerable groups (for example, unaccompanied and separated children); the ratification of and compliance with the international refugee instruments and the principle of *non-refoulement*; ratification of and compliance with international and regional human rights instruments; access to basic services in health, education, and more in the third country; readiness of the third country to admit the asylum-seeker and to permit asylum-seekers to remain while their claims are being examined on the merits; adherence to recognized basic human rights standards for the treatment of asylum-seekers and refugees; observance of the best interest of the child as a primary consideration in cases of children; identification and assistance to persons with special needs; the state's practice of considering asylum claims, as well as other protection needs, on the basis of individual assessment, and in a fair manner; and the state's ability to provide effective, efficient, and adequate protection..[50]

The most recent guidance provided by the UNHCR on third country agreements also mentions some considerations external to international human rights, including whether a transferee has had any connection to the country to which he is transferred.[51] Specifically, Paragraph 6 reads:

> According to relevant conclusions of UNHCR's Executive Committee, regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another state. Where, however, it appears that a person, before requesting asylum, already has a connection or close links with another state, s

47. *See, e.g.*, Kalubi v. Ashcroft, 364 F.3d 1134, 1140 (9th Cir. 2004); Maharaj v. Gonzales, 450 F.3d 961, 988–99 (9th Cir. 2006) (O'Scannlain, J., dissenting).

48. *See, e.g.*, Ilias v. Hungary, App. No. 47287/15, ¶ 109 (Nov. 21, 2019), http://hudoc.echr.coe.int/eng?i=001-198760.

49. *See* UNHCR GUIDANCE NOTE, *supra* note 18, art. 3.vi.

50. *See* SAFE THIRD COUNTRY, *supra* note 21; UNHCR, LEGAL CONSIDERATIONS REGARDING ACCESS TO PROTECTION AND A CONNECTION BETWEEN THE REFUGEE AND THE THIRD COUNTRY IN THE CONTEXT OF RETURN OR TRANSFER TO SAFE THIRD COUNTRIES (Ref World Apr. 2018), http://www.refworld.org/docid/5acb33ad4.html [hereinafter LEGAL CONSIDERATIONS]; UNHCR GUIDANCE NOTE, *supra* note 18, art. 3.i.

51. *See* LEGAL CONSIDERATIONS, *supra* note 50.

> /he may if it appears fair and reasonable be called upon first to request asylum from that state.[52]

The UNHCR thus establishes that while there is no principle of international law that requires asylum-seekers to seek asylum at the first opportunity, it might be a reasonable expectation that an asylum-seeker apply for asylum in a country in which he or she has a "connection or close link." These terms are not defined, but it may be possible to give them some meaning on the basis of previous UNHCR instruments on transfer agreements.[53] The term "close link" might refer to having family members in that country, personal or professional ties (that is, academic degrees from an institution in that country; membership in professional guilds, employment or business partnerships there; connections to a religious congregation in it; close friendships, etc.), or even cultural or linguistic affiliations.[54] The term "connection" might refer to having a visa or some temporary status in the country, or having spent a significant period of time in it.[55] Refraining from defining these terms leaves them vague and open to interpretation, which means they could be interpreted broadly or narrowly, depending on the interests and understanding of the interpreter.

Interestingly, while the UNHCR suggests that it may appear to be "fair and reasonable" to expect an asylum-seeker to request asylum from a state with which it has a "connection or a close link," it is not required that transfer agreements remove asylum-seekers to countries with which they have such a connection or link. This reflects an asymmetry: a preference for state freedom to engage in international agreements as it sees fit over the autonomy of the individual asylum-seeker to choose their place of asylum. Sovereignty interests trump the interests of the asylum-seekers. Thus, Paragraph 6 continues:

> Requiring a connection between the refugee or asylum-seeker and the third state is not mandatory under international law. The person may well be returned to a country through which s/he may have passed en route, or the person may be transferred to a country to which s/he has never been but that has agreed, by way of a formal arrangement, to be responsible.[56]

This position retreats from an earlier position of the UNHCR, according to which destination states should weigh the connection of an asylum-seeker to themselves in comparison to the relationship between the asylum-seeker

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52. *See id.*

53. *See, e.g.*, Safe Third Country, *supra* note 21, at 4 ("Special regard should be given to family, cultural and other relevant links.").

54. *See* LEGAL CONSIDERATIONS, *supra* note 50, at 4.

55. *See id.* at 6.

56. *See id.*

and the third country, considering familial and cultural ties.[57] Interestingly, the UNHCR maintains this position despite its awareness that such connections are crucial for the success of the transfer.[58] It states,

> In follow up to relevant conclusions of UNHCR's Executive Committee, the UNHCR has consistently advocated for a meaningful link or connection to exist that would make it reasonable and sustainable for a person to seek asylum in another state. Taking into account the duration and nature of any sojourn, connections based on family or other close ties increases the viability of the return or transfer from the viewpoint of both the individual and the state. As such, it reduces the risk of irregular onward movement, prevents the creation of 'orbit' situations, and advances international cooperation and responsibility sharing. In this context, transfers to third countries should be aimed at enhancing burden- and responsibility-sharing and international/regional cooperation, and not be burden shifting. Transfers to third countries need to contribute to the enhancement of the overall protection space in the transferring state, the receiving state and/or the region as a whole.[59]

To conclude, the approach the UNHCR has taken is biased toward the interests of the destination states, and allows them to contract with third countries to transfer asylum-seekers. The limitations it places on the ability to engage in such agreements are few and human-rights focused. The question of whether a person has any connections in the place to which they are transferred, or which connections a person would be leaving behind, is recommended, but not required, for consideration and does not determine the

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57. *See Id.*("In line with relevant Executive Committee Conclusions *States should . . . give due regard to any links which the applicant has with them as compared with a third country where s/he has no such links. Special regard should be given to family, cultural and other relevant links*. Furthermore, the applicant should not be returned to a country where they have been in mere transit, in particular airport transit.") (emphasis added); UNHCR, *Global Consultations on International Protection: Asylum Processes (Fair and Efficient Asylum Procedures)*, U.N. Doc. EC/GC/01/12 (May 31, 2001) ("Provision is made in certain systems for States to admit and consider the claim in substance, rather than seeking to transfer responsibility for doing so. *This is appropriate if an asylum-seeker has passed through a "safe third country" but has close family and/or significant other ties with the country where asylum is claimed*, or if there are compelling humanitarian reasons (e.g. health). It is also appropriate if the asylum-seeker was merely in transit for a limited period of time in an intermediate country where s/he has no links or contacts, for the sole purpose of reaching his/her destination.") (emphasis added); UNHCR, SUMMARY CONCLUSIONS ON THE CONCEPT OF "EFFECTIVE PROTECTION" IN THE CONTEXT OF SECONDARY MOVEMENTS OF REFUGEES AND ASYLUM-SEEKERS 2 (Dec. 9–10, 2002), http://www.refworld.org/docid/3fe9981e4.html ("*Such arrangements should take account of meaningful links, such as family connections and other close ties, between an asylum-seeker and a particular country.*") (emphasis added).

58. *See Legal Considerations*, *supra* note 35, at 3.

59. *See id.*

validity or legality of a transfer agreement.[60] The broader context of the migration or the relationship between the transferring country and the receiving country is also not considered. Even efforts outside the UNHCR to create guidelines on transfer agreements have only imposed basic human rights limitations.[61]

II. RELATIONAL AUTONOMY

The notion that transfer agreements should take the balance of connections between the asylum-seeker, the destination state, and the third country into account is based on the theory of "relational autonomy."[62] This conceptual framework, developed by feminist legal theorist Jennifer Nedelsky, has already been proposed as the preferred method for analyzing legal concepts in property law, criminal law, and family law, among others, [63] and my proposal is to apply it to legal analysis of immigration and refugee law as well.[64] Relational autonomy[65] views persons – and in this case, asylum-seekers – as autonomous subjects with intrinsic value, while acknowledging that they are embedded in personal relations of various kinds and in a certain sociological context.[66] It then incorporates into the legal analysis of structures, such as transfer agreements, the broader social and political relational context of those individuals subjected to the structures. In the context of refugee law, the theory of relational autonomy would suggest taking the relationships, links, and connections of asylum-seekers into consideration in

60. LEGAL CONSIDERATIONS, *supra* note 50; UNHCR, *Global Consultations on International Protection: Asylum Processes (Fair and Efficient Asylum Procedures)*, *supra* note 57; UNHCR, SUMMARY CONCLUSIONS ON THE CONCEPT OF "EFFECTIVE PROTECTION" IN THE CONTEXT OF SECONDARY MOVEMENTS OF REFUGEES AND ASYLUM-SEEKERS, *supra* note 57.

61. The most notable effort is in James C. Hathaway, *The Michigan Guidelines on Protection Elsewhere, Adopted January 3, 2007*, 28 MICH. J. INT'L L. 207 (2007). These guidelines do not mention any relational considerations.

62. Neil Stammer, *Human Rights and Power*, 41 POL. STUD. 70, 72–73 (1993).

63. JONATHAN HERRING, RELATIONAL AUTONOMY AND FAMILY LAW (2014) (for an application of relational autonomy in family law); ALAN NORRIE, PUNISHMENT, RESPONSIBILITY, AND JUSTICE: A RELATIONAL CRITIQUE (2000) (for an application of relational autonomy in criminal law); Jennifer Nedelsky, *Property in Potential Life? A Relational Approach to Choosing Legal Categories*, 4 CAN. J. L. & JURIS. 343 (1993) (for an application of relational autonomy in property law). There is even some analysis of nationality in the terms of relational autonomy in the literature. *See* Karen Knop, *Relational Nationality: On Gender and Nationality in International Law*, *in* CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES 89 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001).

64. *See* Knop, *supra* note 63, at 90.

65. *See generally* JENNIFER NEDELSKY, LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY AND LAW (2012) (for an overview of the theory).

66. John Christman, *Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves*, 117 PHIL. STUD. 143, 147 (2004).

the formation, interpretation, and application of transfer agreements. I will now explain some of the main components of the theory.

First, relational autonomy assumes that persons are socially embedded, and that their autonomy, identity, choices, and actions are formed and limited within their social context.[67] These relations include both personal relations with family, friends, colleagues, and other people we directly interact with, as well as wider relational patterns, ranging from institutional norms, cultural habits, gender and class relations, interactions with global markets, and more.[68] All of these distinct relations are the context in which one exercises and constitutes their autonomy.[69] While not all relationships should be promoted or protected, they all should be acknowledged.[70]

This acknowledgement of relationships is crucial to understanding and regulating migration in general, and to evaluating transfer agreements in particular. It is important to acknowledge the fact that integration of immigrants is facilitated by networks, and that interpersonal ties play both a social and economic role, diminishing risks and increasing gains for the immigrants, as well as for those with whom they are in a relationship.[71] Transferring asylum-seekers to third countries in which they have no ties impedes their ability to integrate into that society, even if the human rights conditions there are in line with international requirements. The absence of prospects of successful integration in a random third country means that

67. *Id.*

68. *See* NEDELSKY, *supra* note 65, at 20–22, 30–31.

69. *Id.* at 20–22, 32.

70. *Id.*

71. The networks of refugees, asylum-seekers, and immigrants provide assistance that helps individuals find safe ways to immigrate, avoid exploitation and abuse, and connect with jobs, NGOs, etc. For a glimpse of the extensive research on migration networks and their assistance in mobility, knowledge, assimilation, increasing economic gains, etc., see, e.g., Ivan Light, Parminder Bhachu & Stavros Karageorgis, *Migration Networks and Immigrant Entrepreneurship*, *in* IMMIGRATION & ENTREPRENEURSHIP: CULTURE, CAPITAL, & ETHNIC NETWORKS 25 (Ivan Light & Parminder Bhachu eds., 1993); Sara R. Curran & Abigail C. Saguy, *Migration and Cultural Change: A Role for Gender and Social Networks?*, 2 J. INT'L WOMEN'S STUD. 54 (2001); Sarah Dolfin & Garance Genicot, *What Do Networks Do? The Role of Networks on Migration and "Coyote" Use*, 14 REV. DEV. ECON. 343 (2010); Sonja Haug, *Migration Networks and Migration Decision-Making*, 34 J. ETHNIC & RACIAL STUD. 585 (2008); David McKenzie & Hillel Rapoport, *Self-Selection Patterns in Mexico-U.S. Migration: The Role of Migration Networks*, 92 REV. ECON. & STAT. 811 (2010); Bernice A. Pescosolido, *Migration, Medical Care Preferences and the Lay Referral System: A Network Theory of Role Assimilation*, 51 AM. SOC. REV. 523 (1986); Yaohui Zhao, *The Role of Migrant Networks in Labor Migration: The Case of China*, 21 CONTEMP. ECON. POL'Y 500 (2003). For other studies, arguing that the explanatory force of the network theory is limited see Fred Krissman, *Sin Coyote Ni Patrón: Why the "Migrant Network" Fails to Explain International Migration*, 39 INT'L MIGRATION REV. 4 (2005)

some asylum-seekers will continue in onward migration, and that some of them will be effectively compelled to return to their country of origin.[72]

Second, relational autonomy acknowledges the interconnectedness of harm.[73] We are influenced by harm inflicted on someone else, even when this harm is unlikely to be directed towards us; this is an indication of our relational being.[74] Nedelsky illustrates this by pointing to research on how children are harmed when witnessing violence, even when it is not inflicted on them, since exposure to violence and suffering impedes their sense of security and trust.[75] She further discusses the interconnectedness of harm in a situation where the harm is applied to a minority "other" that the majority society has no risk of experiencing. Even in such situations, there can be multiple forms of harm, argues Nedelsky. These forms of harm include bearing witness to the infliction of harm, knowing one's community permits this violence (even if one will not be vulnerable to that form of violence), being the "innocent bystander" who does nothing to stop the violence, and being a perpetrator of the violence or one who reaps its benefits.[76] This theory explains why nationals experience harm by the violation of rights of non-nationals and the exclusion of migrants, even when they are not subjected to the exclusionary practices of immigration law. It suggests that when states are excluding migrants it is not only the migrants who are impacted, but also a much broader circle, including a state's own citizens.

This sentiment should be considered in the design, application, and interpretation of immigration and refugee law in general, but also when it comes to transfer agreements specifically. As mentioned above, these agreements should consider the links, relationships, and connections of migrants, in order to advance the interests and rights of migrants who are likely to be able to integrate better if these connections are maintained, and the agreements should also consider these links and connections in order to minimize the harm to those connected to them.

Third, part of the conceptualization of relationality has to do with acknowledging and embracing human dependency and interdependency. Virtually all people depend on particular others (both generally and in situations of unusual vulnerability like illness or crisis). People also depend on social institutions—including states—and non-specific others.[77] Asylum-seekers are no exception, depending on each other and on their communities

72. For example, this is what Human Rights Watch researchers were able to identify among asylum seekers who were transferred to Guatemala from the US and had no connections there, and thus no likelihood of integrating. SCHACHER ET AL., *supra* note 20, at 8–9.

73. NEDELSKY, *supra* note 65, at 22–23.

74. *Id.* at 22.

75. *Id.*

76. *Id.* at 26.

77. *Id.* at 28–30.

for their emancipation and identification.[78] In immigration law, this dependency is also manifest in the reliance of non-nationals on receiving states for access to rights.[79] This dependency is even stronger when it comes to refugees and asylum-seekers, whose own states have failed to provide protection, and who must completely rely on the country of asylum for protection.[80] The principle of *non-refoulement*,[81] which prevents states from deporting persons whose lives and liberty would be threatened if deported, seems to be grounded in some awareness of this dependence. I would argue that the principle of *non-refoulement* should be applied in the context of transfer agreements in a way that recognizes and respects these pre-existing social connections. It should prevent transfer agreements that leave asylum-seekers unable to rely on those on which they should be able to depend.

Fourth, relational autonomy centralizes the importance of individual autonomy.[82] It represents an aspiration to adhere to the notion of freedom from external forces—the relational context—which limits an individual's choices and possibilities.[83] Autonomy is defined as the "core capacity to engage in the ongoing, interactive creation of ourselves, ourselves that are constituted, yet not determined, by the web of nested relations within which we live."[84] Relational autonomy is concerned with the inequality in "the ability to sustain this illusion of autonomy;" that is, the relational context that renders some people less autonomous and less independent.[85] In the context of migration, the relational autonomy approach would confront the limited range of options and choices asylum-seekers face, along with their particular vulnerabilities,[86] while also acknowledging the agency and subjectivity of the asylum-seeker.[87] Especially when thinking about developing to de-

78. Jaya Ramji-Nogales, *Undocumented Migrants and the Failures of Universal Individualism*, 47 VAND. J. TRANSNAT'L L. 699, 713 (2014).

79. HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 267–306 (rev. ed. 1973).

80. GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 6 (3d ed. 2007).

81. *See* Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (Article 33(1) of the Refugee Convention details the non-refoulement principle and provides that: "No Contracting State shall expel or return ("refouler") 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."); *see also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85. Many refugee law scholars view this as a principle of customary international law.

82. NEDELSKY, *supra* note 65, at 43.

83. *Id.* at 43–44.

84. *Id.* at 45.

85. *Id.* at 43.

86. John Christman, *Relational Autonomy and the Social Dynamics of Paternalism*, 17 ETHICAL THEORY & MORAL PRAC. 369, 381 (2014).

87. *See* Liisa H. Malkki, *Speechless Emissaries: Refugees, Humanitarianism, and Dehistoricization*, 11 CULTURAL ANTHROPOLOGY 377 (1996).

veloped country migration, factors like colonialism and neo-colonialism, immigration regimes, familial situations, social structures, and personal circumstances dictate, to a large extent, one's migratory ability.[88] In light of the myriad constraints and limitations on the asylum-seeker's ability to make meaningful choices in the process of migration, a relational autonomy approach respects the exercise of choice with respect to where asylum is sought, and does not understand this choice through the derogatory concept of "asylum shopping." Asylum-seekers' autonomous choice of destination country is already restricted by various factors, including border regimes, costs, availability of smuggling routes, and physical capabilities. A relational autonomy approach would recognize that transfer agreements are an additional imposition on the autonomy of asylum-seekers. Such imposition on the asylum-seekers' autonomy makes transfer agreements problematic.

This leads us directly to the fifth and final point about the role of law. Law is crucial to the understanding of the relational context since it "very often lies behind, beneath, or around" it.[89] According to Lon Fuller, a leading non-positivist legal philosopher, law intends to solve social problems and define moral relationships.[90] Law, including immigration law, is part of the background against which relationships are constituted.[91] Transfer agreements can undermine or foster relationships between asylum-seekers and individuals, and between asylum-seekers and social institutions such as states, depending on the extent to which they are willing to include relational considerations.

A relational autonomy approach could–and arguably should–be incorporated into the way transfer agreements are conceived, formed, interpreted, and implemented. A relational approach to transfer agreements could mean different things, and I will iterate a few of the main ones. First, under transfer agreements, some weight needs to be given to the autonomous decisions of asylum-seekers. Their autonomy is already very limited, as they are fleeing persecution, not choosing to leave their country freely, and are facing a constrained choice about where to go. While asylum-seekers may not have an "unfettered right to choose their country of asylum,"[92] their choices are still meaningful, as they reflect their preferences, and there needs to be some justification for transferring them to alternative countries against their will.

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88. *See* NEDELSKY, *supra* note 65, at 49. For a discussion on the problematic concept of choice in the context of immigration, and for the problematic distinction between economic migrants and refugees, see Tally Kritzman-Amir, Socio-Economic Refugees (2009) (Ph.D. dissertation, Tel-Aviv University) (on file with author).

89. NEDELSKY, *supra* note 65, at 65.

90. LON L. FULLER & KENNETH I. WINSTON, THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER 13–14 (rev. ed. 2001).

91. Tally Kritzman-Amir, *Parents and Children: Family Reunification in Israel*, 44 MISHPATIM 361, 362 (2014).

92. Observations by the UNHCR Regional Representation of northern Europe on the Draft Law Proposal of 05 Dec 2014 Amending the Act on Granting International Protection to Aliens.

Transfers which do not consider the asylum-seekers choices jeopardize the autonomy and the dignity of the asylum-seeker.[93] Second, transfer agreements ought to take into account the global context in which migration occurs. As Thomas Spijkerboer asserts:

> Most refugees have become adrift as a result of military interventions by rich countries (Afghanistan, Iraq, Libya), or because of conflicts that go on endlessly because rich countries support their local bosses, but not enough to win the war (Syria, Somalia, Yemen). Not only those countries themselves, but also entire regions are destabilized in this way . . . [94]

This means receiving states should take responsibility for asylum-seekers, rather than transferring them, especially when the crisis in the asylum-seekers' home country was actively induced by the receiving state.[95] It also means that countries should acknowledge the interdependency between states and this interdependency's impact on migration and the formation of transfer agreements. [96] Third, contextualizing transfer agreements also suggests taking into account connections between asylum-seekers and former colonizers and neo-colonizers, which result in relevant language skills, access to status in the colonizing state, cultural and educational affinities, and personal connections with employers and other members of the society.[97] Fourth, social networks and personal connections, broadly speaking, in the transferring state and the third states should be weighed because they are crucial to the success of a person's migration.[98]

Keeping the characteristics of relational autonomy in mind, I will now analyze transfer agreements to which the United States, the EU, Australia, and Israel are parties to see to what degree they account for issues of relational autonomy at all. I chose to focus on agreements signed by geograph-

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93. *See* Lynn S. Hodgens, *Domestic Silence: How the U.S.-Canada-Safe-Third-Country Agreement Brings New Urgency to the Need for Gender Based Asylum Regulations*, 30 VT. L. REV. 1045, 1048 (2006) ("Ultimately, depriving a refugee of the choice of where an asylum claim can be brought can lead to the deprivation of basic human rights-namely, the provision of asylum for those who are truly persecuted.").

94. Thoams Spijkerboer, *Is Europa een Verwende Kleuter?*, DE GROENE AMSTERDAMMER (June 16, 2021), http://www.groene.nl/artikel/is-europa-een-verwende-kleuter.

95. Karen Musalo, *El Salvador: Root Causes and Just Asylum Policy Responses*, 18 HASTINGS RACE & POVERTY L.J. 178 (2021).

96. Seyla Benhabib, *The End of the 1951 Refugee Convention? Dilemmas of Sovereignty, Territoriality, and Human Rights*, 2 JUS COGENS 75 (2020).

97. *Tendayi Achiume, Migration as Decolonization, 71 STAN. L. REV. 1509 (2019).*

98. *See generally* Light et al., *supra* note 71; Curran & Saguy, *supra* note 71; Dolfin & Genicot, *supra* note 71; Haug, *supra* note 71; McKenzie & Rapoport, *supra* note 71; Pescosolido, *supra* note 71; Zhao, *supra* note 71(for glimpses of the extensive research on migration networks and their assistance in mobility, knowledge, assimilation, increasing economic gains, etc.). *Contra* Krissman, *supra* note 71(arguing that the explanatory force of the network theory is limited).

ically diverse countries that share democratic political structures with the idea that they would be more likely to take relational autonomy into consideration.

III. THE UNITED STATES' TRANSFER AGREEMENTS

The United States is a party to two types of transfer agreements, which will be discussed in this section.[99] The first is a mutual readmission agreement with Canada that regularizes transfers of persons from Canada to the United States and vice versa to their country of last presence, subject to a few exceptions.[100] Second is a set of transfer agreements between the United States and Guatemala, Honduras, and El Salvador, which authorize a one-way transfer of asylum-seekers from the United States to one of these Central American countries, irrespective of whether the asylum-seeker has been to that country before. I will review each of these agreements in turn.

A. *The Transfer Agreement with Canada*

In December 2002, Canada signed a transfer agreement with the United States; it was subsequently implemented in December 2004.[101] Under this transfer agreement, an individual who has applied for asylum at a land border checkpoint along the United States-Canada border may be transferred back to their country of last presence.[102] Canada had been trying to negoti-

99. This paper will not review a third type of agreement that the United States initiated during the Trump administration, the Migration Protection Protocol with Mexico. *See* PENN STATE L., CTR. FOR IMMIGRS.' RTS. CLINIC, MIGRANT PROTECTION PROTOCOLS ("REMAIN IN MEXICO POLICY") (June 11, 2019), http://pennstatelaw.psu.edu/sites/default/files/Remain%20in%20Mexico%20Fact%20Sheet%2062019.pdf. The policy set in this agreement, which the Biden administration has tried to reverse, authorized the transfer of asylum-seekers from the United States to Mexico as they awaited the adjudication of their asylum application. It resulted in a prolonged stay of asylum-seekers in Mexico, but did not shift the responsibility for either the adjudication of the asylum application or the long-term resettlement of asylum-seekers from the United States to Mexico. Therefore, it would not be accurate to classify the agreement as a transfer agreement *per se*, and since it raised human rights and relational concerns that are different from those brought up by other transfer agreements, this agreement will not be analyzed in this paper. *See* Dareh Gregorian, *Biden Administration Officially Ends Trump's Remain in Mexico Asylum Policy,* NBC NEWS (Jun. 1, 2021), http://www.nbcnews.com/politics/immigration/biden-administration-officially-ends-trump-s-remain-mexico-asylum-policy-n1269262.

100. *See infra* Part III(A).

101. *See* Safe Third Country Agreement, Can.-U.S., Dec. 5, 2002, T.I.A.S. No. 94-1229.

102. *Id.*, art. 4. Transfers do not take place, however, for people who have entered Canada in airports or ferry ports, or those who have entered through the land borders but have applied for asylum after. *See* Angus Grant & Sean Rehaag, *Unappealing: An Assessment of the Limits on Appeal Rights in Canada's New Refugee Determination System*, 49 U.B.C. L. REV. 203, 227 (2016). This led asylum seekers to choose more dangerous routes and try to cross into Canada not through a border checkpoint, to avoid being returned to the United States. *See* Laura Macdonald & Jeffrey Ayres, *The Safe Third Country Agreement Must End*, CAN. CTR.

ate memoranda on this issue since 1995 because a significant number of their asylum-seekers were arriving from the United States.[103] The September 11, 2001 attacks presented an opportunity to promote cooperation and coordination on immigration matters, which at the time, perhaps more than ever, were perceived as matters of national security (though they are still perceived that way to some extent today).[104] Essentially, transfers were bartered for security coordination.[105] To authorize these transfers, the United States introduced an amendment to section 208(a)(2)(A) of the Immigration and Nationality Act ("INA"), discussed below,[106] and Canada designated the United States as a safe third country.[107]

Due to the relative generosity of Canada's asylum regime,[108] many more asylum-seekers cross from the United States into Canada than vice versa.[109] The agreement between the United States and Canada was aimed at

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FOR POL'Y ALTS. (Oct. 15, 2020), http://www.policyalternatives.ca/publications/monitor/safe-third-country-agreement-must-end; *see also* UNHCR, 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" (Refworld July 26, 2002), http://www.refworld.org/docid/3d4e69614.html (warning that clandestine border crossings may increase as a result of the agreement prior to its entry into force). As a result, Canada has attempted to revise the agreement so that it would apply to all asylum seekers coming through the land border. Jackson Lewis, *Pressure Mounting in Canada to End Canada-U.S. 'First Safe Country' Refugee Agreement*, NAT'L L. REV. (July 5, 2018), http://www.natlawreview.com/article/pressure-mounting-canada-to-end-canada-us-first-safe-country-refugee-agreement. The term "country of last presence" refers to the country in which the asylum seeker was present prior to applying for asylum at the border.

103. Macklin, *supra* note 20, at 25 n.2 ("On February 24, 1995, the United States and Canada announced negotiations on a Memorandum of Agreement entitled "Canada-U.S. Accord on Our Shared Border," designed to accomplish a similar goal with respect to asylum seekers arriving in Canada and the United States. Progress on the Memorandum was suspended indefinitely.

104. *See* Cara D. Cutler, *The U.S.-Canada Safe Third Country Agreement: Slamming the Door on Refugees*, 11 INT'L L. STUDENTS ASS'N J. INT'L & COMPAR. L. 121, 122 (2004).

105. Grant & Rehaag, *supra* note 102, at 226.

106. *See infra* Part III(B).

107. Immigration and Refugee Protection Act, S.C. 2001, c. 27 § 102 (Can.).

108. Some of the reasons for migration from the United States to Canada include Canada's higher acceptance rates of asylum applications, for women in particular; Canada's humanitarian process; the fewer bars to asylum in Canada, in comparison with the United States; and the better protection of socio-economic rights that Canada provides. Andrew F. Moore, *Unsafe in America: A Review of the U.S.-Canada Safe Third Country Agreement*, 47 SANTA CLARA L. REV. 201, 208-10 (2007).

109. Stephen Legomsky, *Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection*, 15 INT'L J. REFUGEE. L. 567, 582 (2003) ("In the year 2001, about 60 per cent of the individuals who filed asylum claims at Canada's ports of entry (that is, excluding inland claims) arrived in Canada from the United States. The corresponding mid-year figure for 2002 was 72 per cent. In absolute numbers, approximately 15,000 people per year apply for asylum in Canada after passing through the United States; in contrast, only about 200 per year do the reverse.").

decreasing the number of asylum-seekers in Canada, and has achieved this goal quite successfully.[110] The agreement was also presented as an effort to prevent "asylum shopping."[111]

The transfer agreement between the United States and Canada has been criticized for violating the rights of asylum-seekers. The main critiques relate to the accusation that the United States holds returnees in harsh conditions in immigration detention and imposes limitations on access to asylum.[112] Canada itself has recognized that the transfer agreements violate the rights of asylum-seekers. For example, *the Canadian Federal Court held the United States-Canada Safe Third Country Agreement unconstitutional,*[113] declaring that it violated Article 7 of the Canadian Charter of Rights and Freedoms, which states that "[e]veryone has the right to life, liberty and security of the person and the right not be deprived thereof except in accordance with the principles of fundamental justice."[114] The case was brought before the court on behalf of individuals who were barred from the United States asylum system due to either the exclusionary policies of the Trump administration or the procedural limitations of the asylum system, and, as such, were subject to prolonged detention.[115] The court pointed to the fact

110. Grant & Rehaag, *supra* note 102(arguing that the agreement between the United States and Canada "produced a precipitous drop in refugee claims made in Canada. In the first full year following the STCA's implementation, Canada received only 20,786 claims, compared to an average of 35,095 claims per year in the prior 5 years," although the numbers grew over the years).

111. *See* Hodgens, *supra* note 93, at 1057; UNHCR, *supra* note 102, at 1.

112. *See, e.g.*, EFRAT ARBEL & ALLETTA BRENNER, BORDERING ON FAILURE (Harv. Immigration Clinic 2013), http://harvardimmigrationclinic.files.wordpress.com/2013/11/bordering-on-failure-harvard-immigration-and-refugee-law-clinical-program1.pdf; UNHCR, MONITORING REPORT CANADA - UNITED STATES "SAFE THIRD COUNTRY" AGREEMENT 29 DECEMBER 2004 – 28 DECEMBER 2005 (2006), http://www.unhcr.org/protection/operations/455b2cca4/unhcr-monitoring-report-canada-united-states-safe-third-country-agreement.html.

113. Can. Council for Refugees v. Minister for Immigration, 2020 F.C. 770 (Can.).

114. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

115. Tally Kritzman-Amir, *Taking the Rights of Asylum Seekers Seriously: A Judicial Review of The US-Canada Safe Third Country Agreement in Canadian Federal Court*, B.U. INT'L L.J. VOICES (July 27, 2020), http://www.bu.edu/ilj/2020/07/27/taking-the-rights-of-asylum-seekers-seriously ("The applicants in this case represent some of the groups whose protection as refugees in the US became jeopardized during the era of the Trump administration. One family was a woman and her children who were fleeing gender-based persecution and gang violence. Protection for persons whose applications were based on either of those persecution grounds have been under constant threat, especially since 2018. Some of the other applicants were from countries of origin which were covered under the travel bans instated by Trump as soon as he entered office and banning entry of persons coming from them. Others were unable to apply for asylum in the US due to the one-year bar, requiring asylum applications to be filed within a year of arrival to the US, or were unable to receive protection under DACA – the Deferred Action for Childhood Arrivals, which the Trump administration was determined to rescind but was stopped by the US Supreme Court. The applicants were detained once returning to the US, where the use of immigration detention has become pervasive and widespread, almost routinely normalized, despite continuous reports of severe human

that "the US 'now operates the largest immigration detention system in the world'" and acknowledged the fact that immigration detention was degrading and dehumanizing, compromised asylum-seekers' mental health, traumatized them, and restricted their access to medical care, food, or legal counsel.[116] The court also acknowledged that asylum-seekers in the United States can be detained for months without review of their detention and may face a heightened risk of *refoulement*.[117] The Canadian government appealed the decision[118] on the basis that, in previous litigation, the Canadian Federal Court had held that the United States had not complied with its international human rights and refugee law obligations.[119] However, the decision declaring the United-State Canada Safe Third Country Agreement unconstitutional was overturned in the Federal Court of Appeal on procedural grounds, thus the agreement is still in effect.[120] The Inter-American Commission on Human Rights also criticized the application of the agreement, requiring that Canada conduct an individualized assessment prior to returning an asylum-seeker to the United States.[121]

In addition to the human rights issues raised by the agreement, there are also reasons to doubt that it adequately weighs relational concerns. It is true that, as mentioned before, the agreement between Canada and the United States is in essence a readmission agreement.[122] As such, it reflects, albeit inadvertently, a certain consideration of the relationship an individual has to the country where they first arrived.

Further, traces of relational considerations can be found in the exceptions to the United States-Canada readmission scheme. One such exception in the agreement states that persons who have certain family members in the receiving country will be processed in the receiving country, rather than returned to their country of last presence.[123] This exception is widely used. Over ninety-eight percent of those exempt from being transferred from Canada back to the United States in 2013 relied on it.[124] In order to be exempt from the return to the country of last presence, an asylum-seeker needs to

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rights violations in detention facilities."). In the past, UNHCR had held the position that where an asylum seeker would be barred from applying for asylum, she should not be returned to her country of last presence, and that immigration detention of returnees should be avoided.

116. Can. Council for Refugees v. Minister for Immigration, 2020 F.C. 770, ¶ 82.

117. *Id.* ¶ 136.

118. Macdonald & Ayres, *supra* note 102.

119. Can. Council for Refugees v. Minister for Immigration, 2020 F.C. 770, ¶ 239.

120. Queen v. Can. Council for Refugees 2008 F.C.A. 229, ¶¶ 80, 100 (Can.); *see* Can. Council for Refugees v. The Queen, 2009 CanLII 4204 (S.C.C.) (denying leave to appeal).

121. Doe et al. v. Can., Merits, Inter-Am Comm'n H.R., No. 132 (Mar. 23, 2011).

122. *See supra* p. 15.

123. "Family member" is relatively broadly defined in art. 1 of the agreement ("spouse, sons, daughters, parents, legal guardians, siblings, grandparents, grandchildren, aunts, uncles, nieces, and nephews"). Safe Third Country Agreement, art. 1, Can.-U.S., Dec. 5, 2002 [hereinafter Canada-U.S. Agreement].

124. Grant & Rehaag, *supra* note 102, at 16.

have "at least one family member who has had a refugee status claim granted or has been granted lawful status, other than as a visitor, in the receiving Party's territory" or "at least one family member who is at least 18 years of age and is not ineligible to pursue a refugee status claim in the receiving Party's refugee status determination system and has such a claim pending."[125] This exception regarding family members reflects a notion that family connections are central for the constitution of the self and for the success of integration.[126] However, the age limitation detracts from the relational approach, which takes relationships with minors seriously, and would not limit the exception to relations with individuals over 18. Nonetheless, the term "family member" is otherwise broadly defined in the agreement, and includes "spouse, sons, daughters, parents, legal guardians, siblings, grandparents, grandchildren, aunts, uncles, nieces, and nephews."[127] It does not, however, include common law spouses or other persons who serve as the "primary source of emotional and/or material support."[128] The agreement, therefore, does not make it possible for individuals to prove that they have extra-familial relations in the receiving country that are more meaningful than any relations they might have in the state of last presence.[129]

Another exception with traces of relational considerations in the United States-Canada readmission scheme is for persons who travel to the receiving state "[w]ith a validly issued visa or other valid admission document, other than for transit, issued by the receiving Party" or for persons who are not "required to obtain a visa by only the receiving Party."[130] This exception recognizes a pre-existing relationship between the receiving state and the asylum-seeker, which is embodied in a permit allowing the asylum-seeker to enter it. The basis for such a permit is often found in relationships with employers, family members, or local communities. However, less formal connections between asylum-seekers and the receiving state are overlooked, though they may very well be a part of the relational context. For example, many French-speaking asylum-seekers have linguistic ties to Canada, where French is an official language, and therefore may have a reasonable preference to seek asylum in Canada over the United States.[131] This type of preference is not considered worthy of an exception to the transfers.

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125. Canada-U.S. Agreement, *supra* note 123, arts. 4.2(a),(b).

126. *See generally id.* (referring to the importance of considering family units in the refugee status determination procedure).

127. Canada-U.S. Agreement, *supra* note 123, art. 1(b).

128. UNHCR, *supra* note 102, at 4.

129. *See* Legomsky, *supra* note 109, at 582.

130. Canada-U.S. Agreement, *supra* note 123, art. 4(2)(d).

131. Legomsky, *supra* note 109, at 582–83; Hodgens, *supra* note 93, at 1047–48.

B. *Transfer Agreements Between the United States, Guatemala, Honduras, and El Salvador*

During the Trump administration, the United States signed "Asylum Cooperative Agreements" ("ACAs") with Guatemala, Honduras, and El Salvador.[132] Unlike the United States' agreement with Canada, these agreements were neither readmission agreements (since asylum-seekers might have been transferred to countries where they had never entered) nor reciprocal agreements (since transfers would be unidirectional, from the Unites States to other countries). During the first days of the Biden administration, amidst the restructuring of the United States asylum system, these agreements were terminated.[133] The agreement with Guatemala, which was the only one ever implemented (due to COVID-19)[134] was the first to be terminated,[135] followed by the agreements with Honduras and El Salvador.[136] Although these agreements have ended, they are still relevant to this article since they represent an explicit codification of "refugee distancing" (that is, acts aiming to erode the duty to provide protection to refugees by excluding them). These types of acts were part of U.S. asylum law before the Trump administration and remain part of the system.[137]

The legal basis for these three agreements was found in section 208(a)(2)(A) of the Immigration and Nationality Act.[138] This section creates

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132. Agreement Between the Government of the United States of America and the Government of the Republic of Guatemala on Cooperation Regarding the Examination of Protection Claims, U.S.-Guat, Jul. 26, 2019, T.I.A.S. No. 19-1115 (entered into force Nov. 15, 2019) [hereinafter U.S.-Guatemala Agreement]; 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, U.S.-Hond., Sept. 25, 2019, T.I.A.S. No. 20-325 (entered into force Mar. 25, 2020); Agreement Between the Government of the United States of America and the Government of the Republic of El Salvador for Cooperation in the Examination of Protection Claims, U.S.-El Sal., Sept. 20, 2019, T.I.A.S. 20-1210 (entered into force Dec. 10, 2020). The United States attempted negotiating a similar agreement with Panama, but was unsuccessful. Jean Galbraith, *Contemporary Practice of the United States Relating to International Law: Trump Administration Further Restricts Asylum Seekers at the Southern Border Through the Migrant Protection Protocols, Asylum Cooperative Agreements and COVID-19 Procedures*, 114 AM. J. INT'L L. 504, 507–08 (2020).

133. Exec. Order No. 14,010, 86 Fed. Reg. 8267 (Feb. 2, 2021).

134. Press Release, Antony J. Blinken, U.S. Secretary of State, Suspending and Terminating the Asylum Cooperative Agreements with the Governments El Salvador, Guatemala and Honduras (Feb. 6, 2021),

http://www.state.gov/suspending-and-terminating-the-asylum-cooperative-agreements-with-the-governments-el-salvador-guatemala-and-honduras.

135. Melissa Angell, *US Exits Trump Admin.'s Guatemala Asylum Agreement*, LAW360 (Feb. 5, 2021).

136. Sabrina Rodriguez, *Biden Administration Takes Steps to Dismantle Trump-Era Asylum Agreements*, POLITICO (Feb. 6, 2021), http://www.politico.com/news/2021/02/06/biden-dismantle-trump-era-asylum-agreements-466565.

137. Geoffrey Heeren, *Distancing Refugees*, 76 DENV. L. REV. 761, 761 (2020).

138. Immigration and Nationality Act, 8 U.S.C § 208(a)(2)(A).

an exception to the right to apply for asylum for "[a]ny alien who is physically present in the United States or who arrives in the United States" but who can be returned to a safe third country.[139] Under this exception, an

> alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) 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 . . .[140]

After the passage of the ACAs described above, various human rights organizations contested that the three above-mentioned countries with which the United States contracted could not be defined as meeting these requirements, and would be unable to provide adequate protection to the transferees.[141] The agreements were also criticized as having fewer safeguards and protections for the transferred asylum-seekers than the United States-Canada agreement, which at that point was already found to be contributing to the *refoulement* of some asylum-seekers.[142]

The authority for the ACAs was also based, arguably, on the federal regulation which states: "Nothing in this section or § 208.17 [deferral of removal] shall prevent [U.S. Citizenship and Immigration Services] from removing an alien to a third country other than the country to which removal has been withheld or deferred."[143] Sarah Sherman-Stokes argues that

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139. *Id.* §§ 208(a)(1)–(a)(2)(A).

140. *Id.* § 208(a)(2)(A).

141. SCHACHER ET AL., *supra* note 20, at 4–5 (May 2020); WASH. OFF. ON LATIN AM. ["WOLA"], FORCED RETURN TO DANGER CIVIL SOCIETY CONCERNS WITH THE AGREEMENTS SIGNED BETWEEN THE UNITED STATES AND GUATEMALA, HONDURAS, AND EL SALVADOR 4–7 (Dec. 5, 2019), http://www.wola.org/wp-content/uploads/2019/12/Forced-Return-to-Danger-STC-Civil-Society-Memo-12.4.19.pdf; Sarah Shaunoudy, *Current Developments 2019-2020: Government Gray Spaces: Exploring Government Legal Ethics Through the U.S. Agreements with the Northern Trangle Countries*, 33 GEO. J. LEGAL ETHICS 807, 819–20 (2020); Expert Declaration of Lisa Frydman, U.T. v. Barr, No. 1:20-cv—-116 (D.D.C. filed on Feb. 28, 2020); Expert Declaration of Dr. Eric Hershberg, U.T. v. Barr, No. 1:20-cv—-116 (D.D.C. filed on Feb. 28, 2020). HUM. RTS. WATCH & REFUGEE INT'L, DEPORTATION WITH A LAYOVER: FAILURE OF PROTECTION UNDER THE US-GUATEMALA ASYLUM COOPERATIVE AGREEMENT 1–2, (May 2020), http://www.refugeesinternational.org/reports/2020/5/8/deportation-with-a-layover-failure-of-protection-under-the-us-guatemala-asylum-cooperative-agreement.

142. SCHACHER ET AL., *supra* note 20, at 8–9 (citing the UNHCR report on the implementation of the agreement with Canada, which pointed to several problems, while also suggesting that the situation in Honduras, El Salvador and Guatemala is far less stable than in Canada).

143. *See* 8 C.F.R. § 208.16(f) (2019).

more and more removals to third countries have occurred under these regulations. She explains that the removals are carried out in the shadows, often without due process protections and adequate court supervision, perhaps more so than other removals.[144] This lack of transparency and adequate processing is concerning in its own right. But what's more, the result, according to Sherman-Stokes, is not only a violation of the human rights of those removed, but also a disruption of meaningful personal connections the individual has in the United States (for example, with United States nationals, family members, workplaces, etc.).[145]

The Interim Final Rule,[146] on the basis of which the agreements were implemented, justified the agreements as a burden-sharing effort[147]—though it actually shifted responsibility to countries that were less capable of providing protection to the asylum-seekers.[148] Shifting responsibility in this way is particularly concerning since there is evidence suggesting that the United States bears some responsibility, through its political choices over the years, for the refugee crises in some of these countries.[149] It was also presented as an effort to "reduce the flow" of asylum-seekers, which at that point had been severely limited since the implementation of the Migration Protection Protocols ("MPP") in 2019.[150] Finally, it relied on the fact that asylum-seekers do not have an unfettered right to choose their country

144. Sarah Sherman-Stokes, *Third Country Deportations*, 53 IND. L. REV. 333 (2020).

145. *Id.* at 340–41 (telling the story of an individual whose removal was attempted but fought against).

146. An interim final rule is issued when an agency finds that it has good cause to issue a final rule without publishing a proposal first. OFFICE FED. REG., A GUIDE TO THE RULEMAKING PROCESS, http://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (last visited Mar. 14, 2022).

147. The explanation went to great lengths to lay out the alleged burden of asylum-seekers on the United States. It included references to immigration detention centers reaching capacity and high administrative costs on the Department of Homeland Security and the Department of Justice. Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act, 84 Fed. Reg. 63,994 (Nov. 19, 2019) (to be codified at 8 C.F.R. pt. 208).

148. HUM. RTS. WATCH & REFUGEE INT'L, *supra* note 141, at 4.

149. Musalo, *supra* note 95. Musalo argues that U.S. support of militant groups during the civil war in El Salvador was one of the factors that caused forced migration from the country.

150. The Migration Protection Protocols ("MPP"), also known as the "remain in Mexico" policy, allows U.S. border officers to return non-Mexican asylum seekers to Mexico while their claims are adjudicated in U.S. immigration courts. U.S. Dep't Homeland Sec., Press Release, Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration (Dec. 20, 2018), http://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration.

of asylum.[151] There was little explanation for how the country to which a person would be sent would be determined.

Because the agreement with Guatemala was the only one of the ACAs to be executed,[152] the rest of this section will focus on the nuances of this specific agreement. The agreement required pre-screening of the individuals transferred to Guatemala, and stated that Guatemalan nationals, unaccompanied minors,[153] and persons who entered the United States with a visa or other admission document would remain under the responsibility of the United States.[154] It also included a commitment to uphold international and domestic human rights standards with respect to the transferees.[155] The agreement was met with significant opposition in Guatemala and was challenged in the Guatemalan Constitutional Court, which placed a preliminary injunction on the agreement for a few months.[156] In November 2019, as the agreement was pending before the Guatemalan court, the United States started implementing the agreement despite warnings from the UNHCR and the U.S. State Department.[157] In response to the implementation of the agreement, a group of immigrant rights organizations in the United States filed a lawsuit in January 2020 on behalf of some of the first asylum-seekers transferred to Guatemala through the ACA.[158] Although the United States suspended further transfers of asylum-seekers to Guatemala due to the COVID-19 outbreak in March 2020,[159] and the Biden administration terminated the agreement in February 2021,[160] the litigation remains pending as

151. Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act, 84 Fed. Reg. 64,000 (Nov. 19, 2019) (to be codified at 8 C.F.R. pt. 208).

152. Press Release, Antony J. Blinken, *supra* note 134.

153. This exception is in accordance with statutory requirements. *See* 8 U.S.C. § 1158(a)(2)(E) 2012; *see also* Jesse Imbiano, *From Humanitatian Crisis to Marauding Hordes: A Manufactured Outcome* 50 CAL. W. INT'L L.J. 23, 55–56 (2019). Imbiano suggested that unaccompanied children were not excluded from these agreements, which made almost the entire population of unaccompanied minors ineligible for asylum in the United States. This has since been proven wrong. However, compare this contention to the Expert Declaration of Eric Hershberg, U.T. v. Barr, No. 1:20-cv-116 (D.D.C. filed on Feb. 28, 2020), ¶ 44, which raises concerns that the hasty process of reviewing whether a person is an unaccompanied minor could "result in *bona fide* unaccompanied children being sent to Guatemala in contravention of the Safe Third Country International principles on child welfare and best interests of the child."

154. U.S.-Guatemala Agreement, *supra* note 132, art. 4.

155. *Id.* pmbl.

156. SCHACHER ET AL., *supra* note 20, at 6.

157. WOLA, *supra* note 141, at 2; Shear et al., *supra* note 22.

158. Complaint for Declaratory and Injunctive Relief, U.T. v. Barr, No. 1:20-cv-116 (D.D.C., Jan. 15, 2020).

159. Press Release, Antony J. Blinken, *supra* note 134.

160. *Id.*

the parties explore settlement.[161] In the few months that this agreement was in effect, 945 asylum-seekers were transferred to Guatemala, and none of them were granted asylum.[162]

Little is known about the implementation of the agreement, since parts of the annexes are confidential and not publically available.[163] What is known is that during the period the agreement was in effect, the United States transferred almost one thousand asylum-seekers from Honduras and El Salvador to Guatemala, most of whom were women and children.[164] A report published in May 2020 by Human Rights Watch and Refugees International showed that Guatemala does not meet the standard of a "safe third country" since it is unable to guarantee "access to full and fair procedure for determining a claim to asylum or equivalent temporary protection" and is generally unsafe.[165] Its asylum system is ineffective and clogged with hundreds of pending and delayed cases.[166] The vast majority of the transferred asylum-seekers, namely ninety-eight percent, were forced to abandon their asylum claims, and only two percent applied for asylum, even though the UNHCR assessed that many have viable asylum claims.[167] Many were unable to support themselves or obtain access to basic services.[168] Reports on reception conditions showed that reception procedures were inadequately prolonged and that refugees did not have access to information, medical care, or food while awaiting adjudication of their claims.[169] Once the deportees arrived in Guatemala, they were given three days to decide whether to stay in Guatemala, travel to their home country, or another country.[170] In

161. *See U.T. v. Barr*, CENTER FOR GENDER & REFUGEE STUD., http://cgrs.uchastings.edu/our-work/ut-v-barr.

162. *See Cruelty, Coercion and Legal Contortions: The Trump Administration's Unsafe Asylum Cooperative Agreements with Guatemala, Honduras and El Salvador*, U.S. SENATE COMM. ON FOREIGN REL., 117TH CONG., DEMOCRATIC STAFF REP. 26 (Jan. 18, 2021), http://www.foreign.senate.gov/imo/media/doc/Cruelty,%20Coercion,%20and%20Legal%20Contortions%20—%20SFRC%20Democratic%20Staff%20Report.pdf.

163. WOLA, *supra* note 141, at 2 (criticizing the lack of transparency around the ACA).

164. SCHACHER ET AL., *supra* note20, at 3; *see also* Letter to Secretary of State Michael R. Pompeo, Attorney General William P. Barr, & Acting Secretary of Homeland Security Chad F. Wolf Regarding the "Asylum Cooperative Agreements" (Feb. 5. 2020) (on file with author). Transfers were halted in March 2020 following the Coronavirus outbreak. SCHACHER ET AL., *supra* note 20, at 4.

165. Immigration and Nationality Act, § 208(a)(2)(A). *See* SCHACHER ET AL., *supra* note 20, at 1, 4; *see also id.* at 23–27 on the particular situation encountered by vulnerable populations, such as women and LGBTQ persons, in Guatemala. *See* World Relief Comment Letter on Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under Immigration and Nationality Act (Dec. 19, 2019), http://www.regulations.gov/comment/USCIS-2019-0021-0087.

166. SCHACHER ET. AL., *supra* note 20, at 30–33.

167. *See id.* at 1–3.

168. *See id.* at 33.

169. *See id.* at 2.

170. *See id.* at 27.

these circumstances, many felt forced to return to their home countries, thinking they would find inadequate protection in Guatemala.[171]

One thing that was not predetermined about the application of any of the ACAs was a mechanism to determine which asylum-seekers would be transferred to which country. The implementing rule illustrates that there were hardly any relational considerations applied in the creation of the agreements.[172] As mentioned above, unlike the United States' agreement with Canada, these agreements were not about readmission. In many cases, the transferred persons would have never previously been to the receiving countries.[173] In addition, experts testified during litigation against these policies that sending people to Guatemala "without sufficient knowledge of Guatemalan communities" would impede their ability to "safely navigate from one gang-controlled neighborhood to another without suffering serious harm or death."[174]

In addition, these agreements were assumed to not require collection of very detailed information about the individual transferees, and thus could not substantiate relational exceptions.[175] This is implied from a footnote in the Interim Final Rule, which juxtaposes the ACAs against the United States-Canada agreement, saying that

> [a]pplicability of the exceptions at issue in the non-Canada ACAs generally can be evaluated through records checks and by asking straightforward biographic questions. Conversely, the exceptions to the U.S.-Canada Agreement required more detailed information from the alien, such as whether certain family members of the applicant are present in the United States, the immigration status of those family members, and whether the family members have pending asylum applications.[176]

Thus, it seems that relationships in the United States were not considered justification for an exception to the general rule of transferring asylum-seekers to Guatemala. Nonetheless, relational considerations were mentioned by expert witnesses during the litigation against the ACAs. For example, one expert in gender and asylum law mentioned the importance of a

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171. *See id.* at 34–35.

172. *See, e.g.*, Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act, 84 Fed. Reg. 63994 (Nov. 19, 2019).

173. *See* PENN STATE LAW, CENTER FOR IMMIGRANTS' RIGHTS CLINIC, MIGRANT PROTECTION PROTOCOLS ("REMAIN IN MEXICO POLICY") (June 11, 2019), http://pennstatelaw.psu.edu/sites/default/files/Remain%20in%20Mexico%20Fact%20Sheet%2062019.pdf.

174. Expert Declaration of Dr. Eric Hershberg, U.T. v. Barr, No. 1:20-cv-116 (D.D.C. filed February 28, 2020).

175. Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act, 60 Fed. Reg. 63994 (Nov. 19, 2019) (to be codified at 8 C.F.R. pt. 208).

176. *Id.* at 64003 n.11.

supportive family or community for protecting women from gender-based violence, which should justify exceptions to the transfer agreements.[177]

Additionally, the agreements did not consider the broader context in which they were operationalized. This context is important for evaluating the impact of these agreements. It means that the United States cannot really see itself as disconnected from the asylum-seekers when it is so heavily politically involved in these countries. Karen Musalo, founding director of the Center for Gender and Refugee Studies, mentions that the United States played a "role in contributing to the current situation in El Salvador - whether by supporting the brutal military during El Salvador's civil war, deporting gang members back to a country ill-equipped to deal with them, or encouraging neoliberal economic policies that deepened inequality."[178] Similarly the United States has also interfered in Guatemalan politics, and during the Trump administration retracted various forms of economic support to Guatemala.[179]

To conclude, there are significant differences between the agreements the United States has with Canada and the agreements it had with Guatemala, Honduras, and El Salvador. The agreement with Canada is a *de jure* reciprocal readmission agreement (although *de facto* it was mostly unidirectional) which takes into account relational interests to a significant degree. The agreements with Guatemala, Honduras, and El Salvador allow only for unidirectional transfers and failed to account for almost any relational considerations. While there are several possible explanations for the stark differences between the agreements, including the very different administrations that initiated them, one particularly important difference has to do with the difference in bargaining power between Canada, on the one hand, and Guatemala, Honduras and El Salvador, on the other hand. That difference is in itself a part of the relational context of the agreements, given the abovementioned U.S. involvement in the internal affairs of Central American countries, and has a clear impact on the human rights and autonomy of the asylum-seekers.

IV. THE EUROPEAN UNION'S TRANSFER AGREEMENTS

Like the United States, European countries have actively pursued the transfer of asylum-seekers to third countries, both through bilateral[180] and

177. Expert Declaration of Lisa Frydman, ¶ 15, U.T. v. Barr, No. 1:20-cv-116 (D.D.C. Feb. 28, 2020).

178. Musalo, *supra* note 95.

179. MAUREEN TAFT-MORALES, CONG. RSCH. SERV., R42580, GUATEMALA: POLITICAL AND SOCIOECONOMIC CONDITIONS AND U.S. RELATIONS (2019).

180. *Denmark Asylum: Law Passed to Allow Offshore Asylum Centres*, BBC (June, 3 2021), http://www.bbc.com/news/world-europe-57343572.

multilateral agreements.[181] In this section, I will focus on transfers by EU states to other states within the EU.

EU Regulation No. 604/2013, or the Dublin Regulation, establishes the criteria and mechanism to determine which EU Member State is responsible for examining an asylum-seeker's application for international protection when it is lodged in one of the Member States.[182] Chapter III of the Dublin regulation sets out the criteria for determining the Member State responsible.[183]

The default rule is that the Member State where an asylum-seeker first enters the EU is responsible for reviewing the individual's asylum application.[184] Yet, many asylum-seekers continue to travel within the EU, moving on to third countries. For this location-transfer to be deemed legitimate by the EU, there is a requirement of "a connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country."[185] This connection is the reason for the third country to share the responsibility for the asylum-seeker, and it makes the travel of the asylum-seeker to the third country more reasonable. This policy attempts to prevent "asylum shopping" on the asylum-seeker's part, by making sure asylum-seekers only go to third countries with which they have a connection, rather than try their luck in any number of random countries.

However, since the default rule assigns responsibility for the asylum-seeker to the state through which she enters the EU, more often than not, the Dublin Regulation rule does not rely on a meaningful nexus to the country to which asylum-seekers are transferred. As such, it fails to take a relational approach, since for many asylum-seekers the first country through which they entered the EU may be a country with which they do not have a meaningful relationship. For many asylum-seekers, the decision of where to enter Europe is a constrained decision, limited by geography (which states are

181. For example, multiple European Countries which are members of the European Union formed a transfer agreement with Turkey, but this agreement was not attributable to the European Union itself, since it was not adopted by the institutions of the European Union. *See* Case T-192/16, NF v. Eur. Council, ECLI:EU:T:2017:128 (Feb. 18, 2017); Case T-193/16, NG v. Eur. Council, ECLI:EU:T:2017:129 (Feb. 28, 2017); Case T-257/16, NM v. Eur. Council, ECLI:EU:T:2017:130 (Feb. 28, 2017).

182. European Parliament and Council Regulation No. 604/2013 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 O.J. (L 180) 31, 35 [hereinafter "Dublin Regulations"]. The Dublin Regulation was initially passed in 1990 (Dublin I), but it has been revised twice, in 2003 (Dublin II) and 2013 (Dublin III) respectively.

183. *Id.* at 39.

184. *Id.*; *see also* Lana Maani, *Refugees in the European Union: The Harsh Reality of the Dublin Regulation*, 8 NOTRE DAME J. INT'L & COMPAR. L. 83, 97 (2018).

185. European Parliament and Council Directive 2013/32/EU of 26 June 2013, Common Procedures for Granting and Withdrawing International Protection, 2013 O.J. (L 180) 80.

closer or easier to travel to),[186] finances (where they would be able to travel with the resources at their disposal),[187] border regimes (which borders are porous and which are hermetically shut),[188] and smuggling routes (where their smuggler can take them).[189] Many asylum-seekers only spend a short time in their country of arrival in the EU, viewing it as a country of transit rather than a place for integration.[190] For many asylum-seekers, all they have had with the first country through which they entered the EU, was not a relationship, but rather, in Itamar Mann's terms, an encounter.[191] Mann discusses the encounter between a state and a refugee, focusing mostly on encounters at sea, but in a way that would be applicable to many such interactions of asylum-seekers with the EU frontline states.[192] Mann mentions that

> [T]he "rights of encounter" are those rights that stem not from inclusion in particular political communities but from the bare life of humans as such, as experienced by those of us who are bound by human rights law. These rights arise when refugees make demands in the name of their own humanity and authorities are pressed to respond.[193]

Unlike a relationship, which may carry with it a broad and wide set of human rights obligations, an encounter is the basis only for some thin, emergency-based forms of human rights claims.[194] The encounter between the asylum-seeker and the first safe country they enter has a sense of urgency and immediacy to it, which can be articulated in Mann's term, as a statement from the refugee to the state: "you [the state], and no one else, will decide if I will have a life worth living."[195] That is a different question than the one the EU method of responsibility allocation asks, which is instead "*who will decide* if a refugee has a life worth living," and is asked in a bureaucratic setting. The difference between these two questions stems from the dif-

186. Fabian Barthel & Eric Neumayer, *Spatial Dependence in Asylum Migration*, 41 J. ETHNIC & MIGRATION STUD. 1131 (2014).

187. Tetty Havinga, Anita Böcker, *Country of Asylum by Choice or by Chance: Asylum-Seekers in Belgium, the Netherlands and the UK*, 25 J. ETHNIC & MIGRATION STUD. 43 (1999).

188. Cevat Giray Aksoy & Panu Poutvaara, *Refugees' Self-Selection into Europe: Who Migrates Where?* (EBRD Working Paper, 2019), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3373580.

189. Aspasia Papadopoulou, *Smuggling into Europe: Transit Migrants in Greece*, 17 J. REFUGEE STUD. 167, 181 (2004).

190. *See, e.g.*, Pavle Kilibarda, *Obligations of Transit Countries under Refugee Law: A Western Balkans Case Study*, 99 INT'L REV. RED CROSS 211 (2017).

191. ITAMAR MANN, HUMANITY AT SEA: MARITIME MIGRATION AND THE FOUNDATIONS OF INTERNATIONAL LAW (2017).

192. *Id.*, at 11.

193. *Id.* at 13.

194. *Id.*

195. *Id.* at 48.

ferent normative settings in which they are embedded: the first is founded on the encounter and the second, I argue, should be founded on the relationship. The first safe country to which an asylum-seeker arrives owes it to her not to leave her exposed, on the basis of that encounter. But sometimes it is a different country that has a broader duty to adjudicate the asylum application and integrate her, to unravel its social contract and include her, on the basis of a relationship.[196]

The fact that the preferences of asylum-seekers, reflections of their autonomy, are not considered as part of the default rule (despite the UNHCR guidance to the contrary[197]) reflects a notion that individual autonomy is perceived as secondary to state interests, such as sovereignty and the façade of responsibility sharing between EU members. Nor did the default rule of the Dublin Regulation consider in its calculus which host country would provide the best conditions for the asylum-seeker to enjoy a less constrained autonomy or give the best substantive range of protections. [198] While in principle the regulations were implemented to promote a more just approach to responsibility sharing, they were actually criticized for doing just the opposite: placing a heavier burden on the frontline countries bordering the perimeters of Europe, especially the southern ones, where most asylum-seekers enter Europe.[199]

However, there are a few exceptions to the Dublin Regulation, some of which are based on a limited relational approach.[200] For example, the regulations allocate responsibility to a Member State where the refugee has a legally present family member, acknowledging the significance of family life and the importance of family unity.[201] This definition of family membership is even narrower than the one in the United States-Canada transfer agreement, which allows exceptions for more distant relatives, although under the Dublin Regulation common law marriages qualify.[202] This definition is very limited and leaves many family ties outside the scope of this exception, despite the recognized right to family life and the fact that family connections assist asylum-seekers in their community integration.[203] As mentioned

196. *Cf. id.* at 13.

197. Foster, *supra* note 32.

198. *See, e.g.*, Jan-Paul Brekke & Grete Brochmann, *Stuck in Transit: Secondary Migration of Asylum Seekers in Europe, National Differences, and the Dublin Regulation*, 28 J. REFUGEE STUD. 145, 146 (2015).

199. Ashley Binetti Armstrong, *You Shall Not Pass! How the Dublin System Fueled Fortress Europe*, 20 CHI. J. INT'L L. 322 (2020).

200. Dublin Regulations, *supra* note 182, at 39–41; Maani, *supra* note 184.

201. Dublin Regulations, *supra* note 182, pmbl, arts. 14–16, ch. II, arts. 9–11; Gordon, *supra* note 1, at 39–40.

202. Canada-U.S. Agreement, *supra*, note 123.

203. The legal bases for the right to family life are different for different members of the EU. *See, e.g.*, International Covenant on Civil and Political Rights art. 16, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

above, other persons who serve as the "primary source of emotional and/or material support" are not included in the exception.[204]

Before the responsible Member State is first decided, Article 17 of the Dublin Regulation allows a Member State to request that another Member State take charge of an asylum applicant "in order to bring together any family relations, on humanitarian grounds based in particular on family or cultural considerations," when outside the nuclear family criteria.[205] Procedurally, this clause requires a request to take charge to be filed with the Member State in question and a reply be filed within two months.[206] This clause was interpreted to impose an obligation on states, rather than as leaving them to consider the humanitarian issue in a discretionary manner. In *K v. Bundesasylamt*,[207] which was decided on the basis of the earlier version of the Dublin Regulation from 2003, K applied for asylum in Poland before continuing to Austria and reapplying there to be with family. During K's time in Austria, her daughter-in-law became dependent upon K. The Court of Justice of the European Union ("CJEU") held that when the conditions of the humanitarian clause were satisfied the Member State "is obliged to take charge of an asylum-seeker,"[208] thus lessening state discretion.

To make sure the Dublin rules are implemented in a uniform manner among the EU Member States, the European Commission passed Implementing Regulation No. 118/2014, which lays out specific procedural rules for the Dublin Regulation, along with applicable forms and information for asylum-seekers.[209] Even with such a unified system, national practices between Member States differ regarding procedural safeguards. For example, to determine familial connections, interviews with asylum applicants are conducted in accordance with Article 5. However, according to the UNCHR Study on the Implementation of the Dublin Regulation, state practice in the type of questioning and specificity varies across EU Member States.[210] Additionally, findings among several Member States indicate that Dublin Regulation transfer criteria "may not always be respected in practice" for a variety of reasons, including differing national guidelines.[211] In practice, the

204. UNHCR, *supra* note 102.

205. Dublin Regulations, *supra* note 182, at 41.

206. *Id.* at 42.

207. Case C-245/11, K. v. Bundesasylamt, ECLI:EU:C:2012:685 (Nov. 6, 2012).

208. *Id.* ¶ 47.

209. Comm'n Implementing Regulation No. 118/2014 of 30 January 2014, Amending Regulation (EC) No 1560/2003 Laying Down Detailed Rules for the Application of 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,2014 O.J. (L 39) 1–43.

210. UNHCR, LEFT IN LIMBO: UNHCR STUDY ON THE IMPLEMENTATION OF THE DUBLIN III REGULATION 38, n.137 (June 2014) (noting that Denmark, Germany, and Italy were asking whether an applicant has family members within the EU and demonstrating that these countries were following different scripts).

211. *Id.* at 87.

Dublin system has low transfer rates between Member States.[212] Responsibility is primarily maintained by the Member State of first entry, rather than using Dublin's hierarchy to send an asylum-seeker to another Member State for application processing.

The Dublin Regulation has multiple safeguards in place to ensure the safety and wellbeing of applicants in the asylum process. Under Article 6(3), the best interests of minors is a primary consideration under all procedures, presumably defined and interpreted in a manner that takes into account relational autonomy considerations.[213] Both accompanied and unaccompanied minors undergo best interests assessments to determine: "(a) family reunification possibilities; (b) the minor's well-being and social development; (c) safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking; the views of the minor, in accordance with his or her age and maturity."[214] Thus, children are assessed in a much broader relational way than adults. For example, in *MA, BT, DA v. Secretary of State for the Home Department*, which was based on a similar clause in an earlier version of the Dublin Regulation, the CJEU ruled that the Member State responsible for an unaccompanied minor who had filed applications for asylum in multiple Member States was the Member State where the minor resided after application.[215] The court relied on the best interest of the child standard as basis for its decision.[216] Although this standard does not explicitly incorporate relationality, it allows for greater recognition of the connection the minor asylum-seeker has to the state where she applied. If these asylum-seekers had been adults, the first state of entry and application would have instead been responsible for reviewing the application.

The best interest of the child considerations are not the only ones which might carry a relational autonomy dimension. Other considerations include attention to where the asylum-seeker was previously issued a valid visa, and whether the asylum-seeker had entered a Member State illegally.[217] If a visa was indeed issued, than it is possible that an asylum-seeker could maintain some sort of a relationship with the issuing Member State.

The increased number of individuals seeking asylum in Europe in 2015 disproportionately impacted the frontline southern EU Member States such as Greece and Italy, and led to massive critique of the Dublin regime.[218] In

212. GOODWIN-GILL & MCADAM, *supra* note 80, at 70.

213. Dublin *Regulations, supra* note 182, at 38.

214. *Id.*

215. Case C-648/11, Queen v. Sec'y of State for Home Dep't, ¶ 67, ECLI:EU:C:2013:367 (June 6, 2013).

216. *Id.*

217. Dublin Regulations, *supra* note 182, at 40-41.

218. *See, e.g.*, Susan Fratzke, *Not Adding Up: The Fading Promise of Europe's Dublin System*, MIGRATION POL'Y INST. (2015); Blanca Garcés-Mascareñas, *Why Dublin "Doesn't Work,"* 135 NOTES INTERNACIONALS CIDOB 2–3 (Nov. 2015), http://perma.cc/A2HP-DQS8.

response to these critiques, one European Parliament proposal attempted to establish a crisis relocation mechanism using a specific formula based on factors like Member State population, total GDP, average number of asylum applications, and unemployment rate to move refugees from southern border states of the EU, without regard for any individual connections between refugees and EU Member States.[219] In 2019 the proposal was withdrawn.[220] This type of attempt to address the critiques illustrates that the EU was still prioritizing state-level interests over the relational autonomy of a asylum-seekers.

Attempts to reform the Dublin Regulation[221] have involved discussions of broader reforms to the conditions allowing transfer with the EU but have not born fruit yet. A report on the reform attempts shows proposed amendments broadening the connections available for transfer within the EU.[222] Within the explanatory statement for one of these reforms, the European Parliament states that the "Dublin Regulation needs a fundamental reform in order to enable a structured and dignified reception of asylum-seekers in Europe, whilst at the same time allowing member states to effectively manage their borders."[223] The proposal included a "permanent and automatic relocation mechanism, without thresholds" where asylum applicants with family members or links to a particular Member State would be automatically transferred there.[224] The most recent adopted language of the reform attempts to allows humanitarian transfer based only on family reasons. However, one amendment would allow applicants to request transfer based on "extended family, cultural or social ties, language skills or other meaningful links which would facilitate his or her integration into a specific Member State."[225] This last amendment seems to take more of a relational approach.

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219. *Proposal for a Regulation of the European Parliament and of the Council Establishing a Crisis Relocation Mechanism and Amending 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*, COM (2015) 450 final (Sept. 9, 2015).

220. European Parliament, *2015/0208(COD): International Protection: Crisis Relocation Mechanism,* LEGIS. OBSERVATORY, http://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2015/0208(COD) (last visited Mar. 14, 2022).

221. *Proposal for a Regulation of the European Parliament and of the Council Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third Country National or a Stateless Person (Recast)*, COM (2016) 270 final (May 4, 2016).

222. *Report on the Proposal for a Regulation Determining the Member State Responsible for Examining an Application for International Protection Lodged in one of the Member States by a Third Country National or a Stateless Person (Recast)*, COM (2017) A8-0345 final (Nov. 6, 2017).

223. *Id.* at 112.

224. *Id.*

225. *Id.* at 12.

In September 2020, the European Commission proposed a new Pact on Migration and Asylum, which attempts to create a "comprehensive European approach to migration."[226] Within the new proposal, relocation of refugees would move away from prioritizing the country of first arrival and EU Member States could choose between relocation or financial assistance from other Member States in dealing with the refugee influx. The new Pact is not yet in force, but it represents a potential shift from the Dublin logic, though it may not be more in line with relational autonomy.

V. AUSTRALIA'S TRANSFER AGREEMENTS

Much like the United States and the EU,[227] Australia has carried out a multi-faceted and long-term effort to deter and prevent the arrival of asylum-seekers to its shores by boat,[228] which included several forms of "outsourcing" its duties to refugees, including through transfer agreements. Australia's transfer agreements have evolved from the previously existing arrangements it had with Papua New Guinea ("PNG") and Nauru from August 2012, which authorized it to establish Regional Processing Centres ("RPCs") for offshore processing of asylum applications.[229] From July 2013, the agreements also included provisions for so-called resettlement of those who are found to be refugees (the resettlement would, however, only occur in PNG or Nauru–not Australia).[230] Despite not having being implemented in recent years, and notwithstanding legal challenges to the initial

226. European Commission Press Release IP/20/1706, A Fresh Start on Migration: Building Confidence and Striking a New Balance between Responsibility and Solidarity (Sep. 23, 2020).

227. *See, e.g.*, Azadeh Erfani, *President Biden, It Is Time to Protect Haitian Asylum Seekers,* NAT'L IMMIGR. JUST. CENTER, http://immigrantjustice.org/staff/blog/president-biden-it-past-time-protect-haitian-asylum-seekers.

228. *See, e.g.*, Amy Nethery, Brynna Rafferty-Brown & Savitri Taylor, *Exporting Detention: Australia Funded Immigration Detention in Indonesia*, 26 J. REFUGEE STUD. 88 (2012); Daud Hassan & Hassan Al Imran**,** *Boat Refugees, International Law and Australia's Commitment: An Analysis*, 51 J. MARINE L. & COM. 235 (2020).

229. Bar-Tuvia, *supra* note 25, at 475; *Offshoring Practices: An Overview*, KALDOR CTR. FOR INT'L REFUGEE L. (Aug. 20, 2021), http://www.kaldorcentre.unsw.edu.au/publication/offshore-processing-overview. Interestingly, in these RPCs, the vast majority of applicants were found to be refugees— seventy-nine percent in Nauru and eighty-two percent in PNG. Elibritt Karlsen, *Australia's Offshore Processing of Asylum Seekers in Nauru and PNG: A Quick Guide to Statistics and Resources*, PARLIAMENTAY LIBRARY INFO., ANALYSIS, ADVICE QUICK GUIDE (Dec. 19, 2016), http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/Offshore.

230. Regional Resettlement Arrangement Between Australia and Papua New Guinea, Austl.-Papua N.G., July 19 2013, http://www.dfat.gov.au/sites/default/files/regional-resettlement-arrangement-20130719.pdf [hereinafter Australia – Papua New Guinea Arrangement]; Memorandum of Understanding Between the Republic of Nauru and the Commonwealth of Australia, Relating to the Transfer and Assessment of Persons in Nauru and Related Issues, Austl.-Nauru, Aug. 3 2013, http://www.dfat.gov.au/geo/nauru/Pages/memorandum-of-understanding-between-the-republic-of-nauru-and-the-commonwealth-of-australia-relating-to-the-transfer-to-and [hereinafter Australia – Nauru Memorandum].

agreements on the establishment of the RPCs, these agreements are still in place.[231] In addition, Australia had an informal political transfer agreement with Malaysia for a brief period in 2011 that enabled Australia to transfer 800 asylum seekers to Malaysia in exchange for 4000 recognized refugees.[1] To allow for more asylum-seekers to be resettled outside of Australia, Australia also signed an agreement with Cambodia in 2014 to transfer asylum-seekers from Nauru.[232] That agreement was in force until 2018.[233] In recent years, refugees have been resettled from Nauru to the United States, moving to yet another receiving country, bringing this arrangement with Cambodia to an end.[234] However, this agreement was found to be in violation of international and domestic law.[235]

Scholars criticized the agreements with PNG, Nauru, and Cambodia for violating the principle of *non-refoulement*, given the difficult conditions in the RPCs and in the receiving countries.[236] High crime levels; police violence; and discrimination against LGBTQ people, Muslims, and people with disabilities made PNG unsafe for transferees.[237] In Nauru, transferees were met with hostility and harassment, and many, including children, experienced severe human rights violations.[238] Cambodia was undergoing so much political turmoil and had such a poor human rights record—which included discrimination against various minority groups, torture, and violation of the principle of *non-refoulement*—that it was not a safe country for the asylum-seekers transferred to it either.[239] The agreement was also severely criticized by the UNHCR as shifting responsibility rather than sharing re-

231. *See* Australia – Papua New Guinea Arrangement, *supra* note 230; *see also* Australia – Nauru Memorandum, *supra* note 230. The legality of the agreement with PNG was challenged in the PNG Supreme Court, and it was found to violate the principle of personal liberty under the PNG constitution. *Namah v. Pato*, 84 SCA 2013, ¶ 16 (2016) (Papua N.G.), http://www.lawsociety.org.nz/assets/news-files/0020-100568-Namah-v-Pato-2016-PGSC-13.pdf; *Plaintiff S195/2016 v Minister for Immigration and Border Protection* [2017] HCA 31, ¶ 25 (Aug. 17 2017) (Austl.).

232. Bar-Tuvia, *supra* note 25, at 491.

233. David Boyle & Hul Reaksmey, *Australia's Cambodia Refugee Deal is Dead*, VOA NEWS (Nov. 1, 2018), http://www.voanews.com/a/australia-s-cambodia-refugee-deal-is-dead/4638263.html.

234. KALDOR CTR. FOR INT'L REFUGEE L., THE AUSTRALIA – UNITED STATES REFUGEE RESETTLEMENT DEAL (2021), http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/factsheet_US_resettlement_deal.pdf.

235. Bar-Tuvia, *supra* note 25, at 478; *Harriet Spinks*, *Australia-Malaysia Asylum Seeker Transfer Agreement*, PARLIAMENT AUSTL. (July 27, 2011), http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2011/July/Australia-Malaysia_asylum_seeker_transfer_agreement.

236. *See, e.g.*, Bar-Tuvia, *supra* note 25, at 493–94.

237. *Id.*

238. *Id.* at 494–95; *Human Rights Watch Submission to the Committee on the Rights of the Child Concerning Nauru,* HUM. RTS. WATCH (Sept. 13, 2016), http://www.hrw.org/news/2016/09/13/human-rights-watch-submission-committee-rights-child-concerning-nauru.

239. Bar-Tuvia, *supra* note 25, at 495.

sponsibility.[240] Nonetheless, Australia insisted on these agreements despite the extremely high costs to Australia associated with their implementation, especially in relation to the number of people actually transferred per these agreements.[241]

In addition, the agreements were also a stark example of a total failure to take into account any relational considerations. Refugees were transferred to countries they had never been to, did not speak the language of, and had no connections in.[242] The context of their migration was not considered in any way. The implementation of the agreements was characterized as arbitrary, lacking in transparency, and constantly changing.[243] In different periods, asylum-seekers arriving by boats were able to remain in Australia, and in other times they were sent to Nauru or PNG. People coming on the same boat were even treated differently, with some being allowed to stay in Australia and others sent to the off-shore locations.[244] At different times women, children, and families were sent only to PNG or only to Nauru.[245] Some families were kept together, but others were not, and it seems that family unity has not been a key consideration or concern of the government in implementing these policies.[246] The arbitrary nature of the transfers, which cannot be justified on any basis but for Australia's interest in deterring asylum-seekers from reaching its shores, carried a price in terms of the dignity of the asylum-seekers,[247] and in turn, impacted their autonomy. Australia may have considered some *ex-post* relational considerations, like assuming that transferred asylum-seekers would have formed enough support networks in the transfer countries to no longer be dependent on the Australian government assistance after a period of a few years.[248] However, the asylum-seekers' actual lack of relations in the transfer country played no role in the implementation of the transfer agreements, even as (sometimes un-

240. MADELINE GLEESON, KALDOR CTR. FOR INT'L REFUGEE L., RESEARCH BRIEF: THE AUSTRALIA-CAMBODIA REFUGEE DEAL 2 (2019).

241. Hassan & Al Imran, *supra* note 228, at 231–32 (mentioning that only seven refugees were transferred to Cambodia, but that the cost of the implementation of the agreement was roughly fifty-five million Australian dollars); SELECT COMM. ON RECENT ALLEGATIONS RELATING TO CONDITIONS & CIRCUMSTANCES REG'L PROCESSING CTR. NAURU, PARLIAMENT AUSTL., TAKING RESPONSIBILITY: CONDITIONS AND CIRCUMSTANCES AT AUSTRALIA'S REGIONAL PROCESSING CENTER IN NAURU 50–52 (Aug. 2015).

242. Bar-Tuvia, *supra* note 25, at 488.

243. Email from Madeline Gleeson, Senior Rsch. Assoc., Kaldor Ctr. for Int'l Refugee L., to Tally Kritzman-Amir, Visiting Assoc. Professor, Harv. Univ. (June 8, 2021, 10:51 PM) (on file with author).

244. *Id.*

245. *Id.*

246. *Id.*

247. Bar-Tuvia, *supra* note 25, at 488.

248. *See, e.g.,* Liam Cochrane*, Last Nauru Refugee in Cambodia Resettlement Program Set to Lose Australian Assistance*, ABC NEWS (June 2, 2016), http://www.abc.net.au/news/2016-06-03/nauru-refugee-in-cambodia-could-have-australian-funding-cut/7472966.

founded) presumptions on relationality formed the basis for withholding assistance from individuals who were supposed to have been integrated in the third countries.

VI. ISRAEL'S THIRD COUNTRY AGREEMENTS

Much like Australia, Israel has struggled to come to terms with its obligations under the Refugee Convention, which clash with its ethno-national character, and has made various efforts to prevent and deter non-Jewish asylum-seekers from both arriving and staying.[249] For example, once Israel managed to prevent entry of asylum-seekers by constructing a border wall along its southern border,[250] it continued its efforts to remove asylum-seekers (which at their peak numbered sixty thousand) from its territory through joining confidential third country agreements and through imposing poor conditions.[251] Under these agreements, which Israel signed in 2013 and implemented shortly thereafter,[252] Israel could remove asylum-seekers from Eritrea and Sudan to Rwanda and Uganda, which would allow these individuals to reside and work in Rwanda and Uganda.[253] Although over the course of time it became well known that Israel had transfer agreements with Rwanda and Uganda,[254] it still continues not to disclose the identity of these countries.[255] Initially, the agreements required that those transferred to

249. Tally Kritzman Amir & Kayle Rothman-Zecher, *Mainstreaming Refugee Women's Rights Advocacy*, 42 HARV. J.L. & GENDER 501, 533–35 (2019).

250. Reuven (Ruvi) Ziegler, *Deportation of Eritrean and Sudanese Asylum Seekers from Israel and the Legality of Relocation/Transfer Agreements*, REFUGEE L. INITIATIVE BLOG ON REFUGEE L. & FORCED MIGRATION (Feb. 2, 2018), http://rli.blogs.sas.ac.uk/2018/02/02/deportation-of-eritrean-and-sudanese-asylum-seekers-from-israel-and-the-legality-of-relocation-transfer-agreements (noting that since the erection of a physical barrier along the Israeli-Egyptian border "there have been virtually no new arrivals").

251. Sheldon Gellar, *Israel Needs to Treat African Asylum Seekers Better*, JERUSALEM POST, Aug. 17, 2021, http://www.jpost.com/opinion/needed-better-treatment-of-african-asylum-seekers-opinion-676888.

252. LIOR BIRGER, SHAHAR SHOHAM & LIAT BOLZMAN, BETTER PRISON IN ISRAEL THAN DYING ON THE WAY 7 (2018), http://hotline.org.il/wp-content/uploads/2018/02/Testimonies-of-refugees-departed-Israel-to-Rwanda-and-Uganda-who-reached-Europe-research-report-Birger-Shoham-and-Bolzman-Jan-2018-ENG.pdf.

253. *See* AdminA (Jerusalem) 8101/15 Zegete v. Minister Interior, Nevo Legal Database (Aug. 28, 2017) (Isr.). According to the press, the two countries are Rwanda and Uganda, despite the two countries' denials. *See, e.g.,* Lee Yaron & Noa Landau, *Israel Releases Asylum Seekers Jailed for Refusing Deportation to Rwanda*, HAARETZ (Apr. 4, 2018), http://www.haaretz.com/israel-news/uganda-no-deal-with-israel-for-them-to-dump-their-refugees-here-1.5976136; *see also* Ruvi Ziegler, *Benjamin Netanyahu's U-turn: No Redemption for Asylum Seekers in Israel*, CONVERSATION (Apr. 9, 2018), http://theconversation.com/benjamin-netanyahus-u-turn-no-redemption-for-asylum-seekers-in-israel-94441.

254. Bar-Tuvia, *supra* note 25, at 481.

255. Yotam Gidron, *Israel's High Court Allows Transfers of Sudanese and Eritreans to Rwanda and Uganda But Strikes Down Indefinite Imprisonment: An Analysis*, INT'L REFUGEE RTS. INITIATIVE (Sept. 21, 2017), http://refugee-rights.org/israels-high-court-allows-transfers-

third countries under these agreements would consent to the transfer.[256] While this might seem like a requirement that upholds the autonomy of the asylum-seekers, the consent requirement was formally taken and often not genuine.[257] Israel offered monetary awards of $3,500 U.S. dollars to those who left in order to encourage departures,[258] and announced that those who refused removal would be detained. This policy was later prohibited by the Israeli Supreme Court.[259] According to the data available from the Israeli Population and Border Authority, roughly 5,000 people were transferred to Uganda and Rwanda between 2014 and 2020.[260]

It seems hard to justify these agreements with responsibility-sharing arguments. The share of asylum-seekers Israel had to take responsibility for was relatively small, especially in comparison to other neighboring countries and the countries to which it transferred asylum-seekers.[261] However, over the course of the litigation on the legality of the agreements, the Supreme Court seemed to think that Israel faced a unique situation, given its small size and unique geopolitical constraints, which forced it to balance various considerations and interests in light of its resources and national interests.[262]

The removal scheme evolved over time and resulted in several petitions and an appeal to the Israeli High Court of Justice until it was effectively nullified when the third countries, Uganda and Rwanda, backed out of the

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of-sudanese-and-eritreans-to-rwanda-and-uganda-but-strikes-down-indefinite-imprisonment-an-analysis.

256. Zegete v. Minister Interior, ¶ 5 (Naor, J., Opinion).

257. BIRGER, SHOHAM, & BOLZMAN, *supra* note 252, at 16.

258. *Id.*

259. *Id.* at 8.

260. POPULATION & IMMIGR. AUTH., STATISTICS OF FOREIGNERS IN ISRAEL (Jan. 2018), http://www.gov.il/BlobFolder/generalpage/foreign_workers_stats/he/foreigners_in_Israel_data_2017.pdf; POPULATION & IMMIGR. AUTH. STATISTICS OF FOREIGNERS IN ISRAEL (Mar. 2021), http://www.gov.il/BlobFolder/generalpage/foreign_workers_stats/he/ZARIM_q4_2020.pdf.

261. Israel has a population of 8.7 Million and had no more than 64,000 asylum seekers. In comparison, at the same time, neighboring Jordan has a population of 9.5 million and roughly ten times as many refugees. *World Report, Jordan*, HUM. RTS. WATCH (2016), http://www.hrw.org/world-report/2016/country-chapters/jordan. Israel transferred asylum seekers to Rwanda, a developing country coping with the social and economic consequences of a long civil war, which has a population of 11.9 million and more than 150,000 asylum seekers. U.S. STATE DEP'T, RWANDA 2016 HUMAN RIGHTS REPORT (2016), **Error! Hyperlink reference not valid.**http://www.state.gov/wp-content/uploads/2019/01/Rwanda-1.pdf. Uganda, on the other hand, was one of the leading host countries of refugees in the world, in relation to its Gross Domestic Product ("GDP"). Evan Easton-Calabria, *Uganda Has a Remarkable History of Hosting Refugees, But its Efforts are Underfunded*, CONVERSATION (Aug. 26, 2021, 9:34 AM), http://theconversation.com/uganda-has-a-remarkable-history-of-hosting-refugees-but-its-efforts-are-underfunded-166706.

262. AdminA (Jerusalem) 8101/15 Zegete v. Minister Interior, ¶ 1, Nevo Legal Database (Aug. 28, 2017) (Rubinstein, E., Opinion) (Isr.).

agreement.[263] As a result, the Court heard only the first appeal regarding the third country agreements and rendered the rest of the petitions redundant with the nullification of the agreement.[264] The Court held that the state of Israel is authorized to individually remove asylum-seekers on the basis of transfer agreements,[265] noting that "there is no rule of international law that prohibits the transfer of asylum-seekers to a third country" and that such agreements are common.[266] The Court did, however, hold that the state was not authorized to detain people in order to compel them to agree to their removal, since the particular third country agreements required that removal only be done with the consent of the "undocumented entrant."[267] In late 2017, the Israeli government responded by removing the consent requirements in the agreement to allow it to carry out forced transfers, which were set to begin in early 2018.[268] However, due to international and domestic pressure, the agreements fell through by April 2018.[269] Another change in the policy was that whereas initially only individuals who failed to submit an asylum application were transferred, as of late 2017 the intention was to also transfer those whose asylum applications were submitted after January 2018.[270]

In the implementation of the transfer agreements, relational and human rights considerations were few and far between. The agreements were implemented for several years, despite information on human rights violations of the transferred asylum-seekers.[271] There is ample evidence suggesting that asylum-seekers who were transferred to Rwanda and Uganda discovered that they had their documents and belongings taken away; were not re-

263. Michael Schaeffer Omer-Man, *Rwanda Is out, but Israel Says It Can Still Deport Refugees to — Uganda?*, +972 MAGAZINE (Apr. 4, 2018), http://www.972mag.com/rwanda-is-out-but-israel-says-it-can-still-deport-refugees-to-uganda; Yotam Gidron, *How Israel's Secret Refugee Deals Collapsed in the Light of Day*, NEW HUMANITARIAN (May 2, 2018), http://deeply.thenewhumanitarian.org/refugees/community/2018/05/02/when-refugees-lead-conversation-with-german-politician-omid-nouripour.

264. *Id.* One of the petitions required primary legislation to execute the removal of undocumented migrants under the non-delegation doctrine. HCJ 679/18 Avivi v. Prime Minister, Nevo Legal Database (Apr. 10, 2018) (Isr.).

265. Avivi v. Prime Minister, ¶¶ 30–32, 38.

266. *Id.* ¶¶ 39, 77.

267. *Id.* ¶ 124.

268. Gidron, *supra* note 263.

269. Bar-Tuvia, *supra* note 25, at 482.

270. There were many reasons for individuals to refrain from submitting an asylum application that do not indicate a lack of a well-founded fear of being persecuted. Until 2013 Eritreans and Sudanese did not have access to the refugee status determination process, as Israel prevented those under temporary protection from applying for asylum. Asylum applications also needed to be submitted by hand, and the authorities would only accept a few each day, meaning that in order to apply for asylum a person needed to spend a few days in line. Finally, Israel had a 0.1% acceptance rate of asylum applications, so it seemed rather pointless to apply. *Id.* at 488–89.

271. BIRGER, SHOHAM, & BOLZMAN, *supra* note 252.

ceiving access to refugee or any other legal status, employment authorization, or durable protection; were subject to limitations on their freedom of movement; and in light of this, had to engage in onward migration.[272] These human rights violations impeded the ability of those transferred to form meaningful networks and connections in the third countries to which they were transferred. Nevertheless, when the human rights violations of the transfer agreements were at the core of the litigation in the Israeli Supreme Court, the petitioners did not meet the burden of convincing the Court that the human rights violations rendered Uganda and Rwanda unsafe due to the state's contradicting data.[273]

Regardless of human rights considerations, the general scheme of the transfer plan was devoid of relational considerations. The receiving states were ones the transferred asylum-seekers had no connection with, and had not even transited through.[274] Generally speaking, Sudanese asylum-seekers were sent to Uganda and Eritrean asylum-seekers were sent to Rwanda, though this was not a consistent practice, and at one point all asylum-seekers were sent to Uganda.[275] This meant that asylum-seekers transferred to Rwanda and Uganda could not rely on any connections and networks they had there. Additionally, the transferred asylum-seekers did not even speak the local languages of those countries, which made it hard for them to integrate.[276] In contrast, all of those who were transferred from Israel had been in the country for at least a few years as beneficiaries of temporary protection, and thus likely formed connections and relationships in Israel.[277] Israel focused first on removing the most recent arrivals, though most candidates for removal had still spent at least a few years in Israel.[278] Israel focused on transferring single men,[279] which could have been useful in keeping families together, but this category was interpreted to include men who

272. *Id.*

273. AdminA (Jerusalem) 8101/15 Zegete v. Minister of the Interior, ¶¶ 56, 74 Nevo Legal Database (Aug. 28, 2017) (Isr.). The Court held that these countries were parties to the Refugee Convention, had UNHCR offices, and allowed the undocumented migrants access to their court system. *Id.* ¶¶ 86, 101.

274. Since the transferred asylum seekers had not transited through the third countries it is not possible to argue that the transfers were justified as a means for the prevention of asylum shopping.

275. Interview with Ms. Sigal Rosen, Pub. Pol'y Coordinator, Hotline for Refugees and Migrants (Oct. 5, 2020) (notes on file with author).

276. BIRGER, SHOHAM, & BOLZMAN, *supra* note 252271, at 17.

277. On the constitutional law significance of the duration of time, see Rivka Weill & Tally Kritzman-Amir, *Between Institutional Survival and Human Rights Protection: Adjudicating Landmark Cases of African Undocumented Migrants in Israel in a Comparative and International Context*, 41 U. PA. J. INT'L L. 43, 74–79 (2020).

278. *Id.* at 100.

279. Liat Bolzman, Are We Not Human? The Journey of Eritrean Refugees Who Left Israel Under the "Voluntary Return Scheme"— From Human Experience to Human Rights 29 (May 2018) (M.A. thesis, University of Applied Sciences Berlin) (on file with author).

were accused of domestic violence offenses.[280] This both cut out parents from their children's lives, prevented all possibility of rehabilitation, and created incentives for victims of domestic violence to refrain from reporting, because of the harsh consequences that reporting entailed.

VII. CONCLUSION

Transfer agreements of asylum-seekers, which often take place between developed democracies and their (often less-democratic) developing counterparts have become part of the legal landscape of refugee law. While on many occasions the details of the transfer agreements are subject to judicial review and criticized for violating human rights standards, the core notion that transfers are, in principle, allowed remains. This paper not only suggests that transfer agreements regularly violate human rights standards, but also that human rights should not be the only issues considered.

In addition to human rights, transfer agreements should evaluate relational autonomy considerations. Considering relational autonomy does not mean that, as a whole, transfer agreements should be prohibited. However, such considerations may limit the ability to morally and legally justify the transfer agreements and would render some of the existing agreements socially illegitimate.

Relational autonomy considerations in transfer agreements include consideration of asylum-seekers' choices and necessitate justifications for deviating from those choices. The agreements mentioned throughout this article have failed to fully take these choices into account, , instead relying on the absence of an "unfettered right to choose their country of asylum," while neglecting the dignity loss that comes with the arbitrary removals of persons against their choice.[281] The various agreements are applied to broad populations, with little reference to individual considerations.

Transfer agreements should also incorporate the global context in which migration occurs. This means that the United States should assume responsibility for its contribution to the violence and instability in the Golden Triangle, protecting asylum-seekers from the damages of its own policies instead of returning them to the area. Europe should acknowledge its colonial past rather than shifting asylum-seekers from former colonial states to the less desired, less stable frontline states. Israel should realize that its close connections with African tyrannies like the Eritrean government come with

280. Tally Kritzman-Amir, *Mainstreaming Refugee Women's Rights Advocacy*, FRESH IDEAS FROM HADASSAH-BRANDEIS INST. (Apr. 13, 2018), http://blogs.brandeis.edu/freshideasfromhbi/mainstreaming-refugee-womens-rights-advocacy.

281. Lynn S. Hodgens, *Domestic Silence: How the U.S.-Canada-Safe-Third-Country Agreement Brings New Urgency to the Need for Gender Based Asylum Regulations*, 30 VT. L. REV. 1045, 1048 (2006) ("Ultimately, depriving a refugee of the choice of where an asylum claim can be brought can lead to the deprivation of basic human rights-namely, the provision of asylum for those who are truly persecuted.").

responsibility to the individuals fleeing the country.[282] All of the above-mentioned countries should acknowledge their role in the process of forming transfer agreements, a role impacted by their excessive power, which in turn makes their counterparts to the transfer agreements devoid of free choice in their engagement with them.[283] There is no match between the bargaining power of Australia and Nauru, Malaysia, Cambodia, or Papua New Guinea; the United States and Guatemala, El Salvador, and Honduras; Israel and Uganda and Rwanda; most of the northern non-frontline European states and the southern frontline ones. The United States' agreement with Canada is exceptional in that it was formed between two countries of relatively comparable bargaining power and considers relational autonomy the most. Finally, responsibility-sharing considerations should be applied, rather than just mentioned and taken over by responsibility-shifting considerations, under which developing countries shoulder a bigger, even more disproportionate share of the responsibility for refugees in the world.

In addition, the agreements should acknowledge connections between asylum-seekers, former colonizers, and neo-colonizers, which result in shared language, access to status, cultural and educational affinities, and personal connections with employers and other members of the destination state.[284] Social networks and personal connections, broadly speaking, in the transferring state and the receiving states should be weighed because they are detrimental to a person's migration.[285] Some of the above-mentioned agreements allow the transfer of migrants to places they have never been to (for example, the agreements of Australia, Israel, and the United States). Others allow transferring persons to places they might have a minimal connection to (e.g. the agreements of the United States with Canada and the European Union). They all consider family connections, education, and other factors to a varying degree. As a general principle, transferring a person against their will to a place where they have no connections and with which they are not familiar seems cruel and cuts against the logic of relational autonomy, even if it is hard to pinpoint a concrete human rights violation that it triggers.[286] Therefore, such personal connections are crucial considerations in the application of transfer agreements.

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282. Karen Musalo, *El Salvador: Root Causes and Just Asylum Policy Responses*, 18 HASTINGS RACE & POVERTY L.J. 178, 216 (2021).

283. *See* Seyla Benhabib, *The End of the 1951 Refugee Convention? Dilemmas of Sovereignty, Territoriality, and Human Rights*, 2 JUS COGENS 75, 96 (2020).

284. *See Tendayi Achiume, Migration as Decolonization, 71 STAN. L. REV. 1509 (2019).*

285. For a glimpse of the extensive research on migration networks and their assistance in mobility, knowledge, assimilation, increasing economic gains, etc., see, for example, Light, Bhachu & Karageorgis, *supra* note 71; Curran & Saguy, *supra* note 71; Dolfin & Genicot, *supra* note 71; Haug, *supra* note 71; McKenzie & Rapoport, *supra* note 71; Pescosolido, *supra* note 71; Zhao, *supra* note 71. For another study arguing that the explanatory force of the network theory is limited, see also Krissman, *supra* note 71.

286. In some cases, this could, however, be a violation of the right to family life.

Without taking relational autonomy considerations into account, the transfer agreements treat asylum-seekers, as per Jennifer Gordon's description, like bananas.[287] The transfer agreements, in some cases, create a market for asylum-seekers, in which developing countries are pressured to accept asylum-seekers, presumably in return for political, economic, or military benefits—though information on the concrete benefits third countries are receiving is generally unavailable. In many cases, this market operates in an opposite direction from the market of goods—from developed to developing countries (and not vice versa, as with goods). However, in this market, asylum-seekers are treated as commodities susceptible to marketization; as objects lacking agency, subjectivity, and dignity; and as disposable when not meeting the perceived national political economy and political identity interests. In other words, taking relational autonomy considerations seriously within the framework of transfer agreements would likely have positive spillover effects on the human rights of asylum-seekers, and on their social perception as full human beings whose choices and needs should be taken seriously.

287. Gordon, *supra* note 1.