STATE PRACTICE WITH RESPECT TO THE SAFE THIRD COUNTRY CONCEPT: CRITERIA FOR DETERMINING THAT A STATE OFFERS EFFECTIVE PROTECTION FOR ASYLUM SEEKERS AND REFUGEES

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ABSTRACT

The 1951 Refugees Convention constitutes the core instrument of international refugee law. In the years since its adoption, signatory states have come to exploit an apparent loophole: nothing in the text prevents a state from transferring asylum seekers to other states that it deems to be safe. The text does not indicate how a state is to determine whether another state is safe. Academic literature and guidance from the United Nations Human Rights Committee have sought to fill this void, enumerating factors that states should consider before transferring an asylum seeker elsewhere. But guidance and academic commentary do not on their own constitute international law. States are not bound by academic commentaries or guidance of U.N. bodies. While states comply with some portion of the non-binding guidance, they do not comply with it in its entirety. This Article describes the current state of international refugee law as it operates in state practice, not the idealized form of international law described in legal journals. In particular, decisions of domestic courts interpreting the 1951 Refugees Convention provide strong evidence of what states view as legally obligatory in this context. For that reason, this study surveys how various domestic courts interpret and apply the 1951 Refugees Convention to constrain their respective states in the arena of transferring asylum seekers to other states. The result is a standard that is authoritative and that has been incorporated into the state practice of the leading rule of law nations. Where states fail to live up to their international obligations to asylum seekers and refugees, it is this standard that they should be held to, rather than the admirable but perhaps overly ambitious standard embodied in the non-binding guidance.

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Introduction

States have increasingly sought means to reallocate the burdens of fulfilling their protection obligations under the 1951 Refugees Convention (as amended by the 1967 Protocol) (hereinafter, the Convention). Among other strategies, states often seek to transfer asylum seekers, who cannot be returned to their country of origin, to third countries.[1] The practice of removing asylum seekers to third states is not directly addressed on the face of the Convention, but rather arises from the fact that states are not specifically obligated to actually grant an asylum seeker access to a refugee status determination so long as the asylum seeker is granted effective protection, either in the state of arrival or elsewhere.[2] Thus, removal to a third state is permissible under the 1951 Convention only where the receiving state is a safe third state (also known as a "safe third country"). What criteria must a sending state consider in determining whether a potential receiving state would be a safe third state? The academic literature, United Nations High Commissioner for Refugees (UNHCR) documents, and case law from various domestic courts of law list a number of criteria that a safe third state must satisfy. This Article lays out these criteria, identifying the basis for each criterion in turn.

Only limited academic literature addresses whether and how these criteria are implemented by states in practice.[3] For that reason, this Article augments that literature with conclusions based on the state practice of leading liberal democratic states, focusing on opinions of the supreme (or, where applicable, the high, or constitutional) courts of the surveyed states. This approach seeks to identify the *opinio juris*, that is, what states undertake to perform out of a sense of legal obligation with respect to refugees.

I. Academic Literature on Minimum Criteria Required in Safe Third State Determinations

Stephen Legomsky provides one of the most comprehensive and authoritative overviews of the criteria to be considered in safe third

1. María-Teresa Gil-Bazo, *The Safe Third Country Concept in International Agreements on Refugee Protection*, 33 Neth. Q. Human Rts. 42, 49–64 (describing the use of deflection and removal of asylum seekers from the United States, South Africa, and Spain).

2. *See* Michelle Foster, *Responsibility Sharing or Shifting? "Safe" Third Countries and International Law*, 25 Refuge 64, 65–66 (2008).

3. For an example of an academic survey of state practice in this space, see Michelle Foster, *The Implications of the Failed 'Malaysian Solution': The Australian High Court and Refugee Responsibility Sharing at International Law*, 13 Melbourne J. Int'l L. 395 (2012). *See also* Gil-Bazo, *supra* note 1.

state determinations.[4] He bases this list, in large part, on publications of the UNHCR rather than on the views and practices of states.[5] He provides two sets of criteria: (1) the minimum standards that are legally required of states that are party to the Convention,[6] and (2) additional criteria that states should consider as a matter of best practice.[7] For the purposes of this Article, only the minimum, legally binding standards are included. Legomsky's list of minimum substantive standards is as follows:

1. Advance consent to readmit and to provide a fair refugee status determination (or effective protection even without such a determination);
2. No *refoulement* to persecution in the third country (the applicant has no well-founded fear of being persecuted in the third country on any of the Convention grounds);
3. Assurance that the third country will respect Convention rights;
4. Respect for international and regional human rights standards;
5. Assurance that the third country will provide a fair refugee status determination (or effective protection absent such a determination), including:
   a. Refugee access to UNHCR;
   b. Preservation of the asylum seeker's privacy in making a claim (to ensure full testimony);
   c. The determination process must take account of the special vulnerabilities of the individual refugee (e.g., women who are survivors of rape or other sexual violence, who are pregnant, or who are single heads of households; children, especially where unaccompanied; and stateless persons); and
   d. Absent from Legomsky's requirements, but considered relevant in a Canadian trial court's consideration of the issue, is the requirement that asylum seekers be provided state-funded representation at all stages of the refugee status determination process[8];
6. The third country is a party to the 1951 Convention and 1967 Protocol (or provides comparable protection); and

4. *See* Stephen H. 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 (2003); *see also* Lisbon Expert Roundtable, United Nations High Commissioner for Human Rights, Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (2002) [hereinafter Lisbon Expert Roundtable].

5. *See generally* Legomsky, *supra* note 4.

6. *See id.* at 673.

7. *See id.* at 675.

8. *See* The Queen v. Canadian Council for Refugees, [2009] 3 F.C.R. 229, ¶ 22 (Can.).

7. A durable solution is available in the third country.[9]

According to Legomsky, each of these criteria must be satisfied for a safe third state determination to be lawful under the Convention.[10] He views the ultimate burden of proof, regarding whether a third state is safe with respect to each individual refugee, to rest with the sending state.[11] He does not take the view that this prohibits the use of reasonable rebuttable presumptions where, for example, the state produces evidence of previous effective protection in the third state.[12] Under such a presumption, the individual would then bear the burden of producing additional evidence that circumstances have changed such that effective protection would not be available in the proposed state.[13]

Legomsky cites the UNHCR, which likewise states that any presumption that certain countries are safe must be rebuttable.[14] Procedurally, the UNHCR states that decisions to remove an individual to a third country should be appealable and that the appeal should have suspensive effect with respect to removal.[15] However, the UNHCR defines the burden of proof somewhat differently, stating that "[t]he burden of proof is shared between the individual and

9. *See* Legomsky, *supra* note 4, at 673–74.

10. *See id.* at 673.

11. *See id.* at 671.

12. *See id.* at 671–72; U.N. High Comm'r for Refugees, Background Paper No. 2: The Application of the "Safe Third Country" Notion and its Impact on the Management of Flows and on the Protection of Refugees 3 (2001), http://www.refugeelawreader.org/en/en/english/section-v-european-framework-for-refugee-protection/v2-the-european-union/v24-procedures-for-granting-protection/v244-minimum-standards-for-specific-procedures/v2443-safe-third-country/unhcr-documents-42/ (last visited Mar. 28, 2018) [hereinafter UNHCR, Background Paper No. 2] ("UNHCR has often pointed out that the question of whether a particular third country is 'safe' for the purpose of returning an asylum seeker is not a generic question, which can be answered for any asylum seeker in any circumstances. This is why the UNHCR insists that the analysis of whether the asylum seeker can be sent to a third country for determination of his/her claim must be done on an individualised basis, and has advised against the use of 'safe third country lists.'") [https://perma.cc/8YPG-YHPG]; U.N. High Comm'r for Refugees, Global Consultations on International Protection, Asylum Processes (Fair and Efficient Asylum Procedures) ¶ 14 (2001), http://www.refworld.org/docid/3b36f2fca.html [hereinafter Global Consultations, Asylum Processes] ("Any list-based general assessment of safety of the third country needs to be applied flexibly, and ensure due consideration of that country's safety for the individual asylum-seeker.") [https://perma.cc/H4FT-E6HF].

13. *See* Legomsky, *supra* note 4, at 671.

14. *See* U.N. High Comm'r for Refugees, Global Consultations on International Protection, Regional Meeting: Budapest 6–7 June 2001: Conclusions ¶ 15 (2001), http://www.refworld.org/docid/3b36f29b1.html [hereinafter Global Consultations, Regional Meeting: Budapest] [https://perma.cc/5VMD-9MV4].

15. *See id.*

the State in acknowledgement of the vulnerable situation of the asylum-seeker."[16]

Michelle Foster, citing *Canadian Council of Refugees v. R*, argues that the sending state not only has the initial burden of proof at the time of transfer, but must also conduct ongoing monitoring to ensure that the receiving state remains in compliance with its international obligations.[17] Citing the U.N. Human Rights Committee decision in *Mohammed Alzery v. Sweden*, she states that this requires the sending state to "institute credible mechanisms" to monitor and enforce respect for the rights of transferred individuals.[18]

Appellate decisions reflecting state practice regarding the burden of proof are rare. In the British case *R (Yogathas) v. Secretary of State for the Home Department*, Lord Bingham stated that the sending state is under a "duty to inform [itself] of the facts and *monitor the decisions made by a third country* in order to satisfy [itself] that the third country will not send the applicant to another country otherwise than in accordance with the Convention."[19] However, the British judiciary, following the European Court of Justice, requires a showing that the receiving state's asylum system is systemically deficient.[20] Under this standard, individual instances of violations are insufficient to establish that the receiving state is not a safe state to which refugees may be transferred. The U.S. Supreme Court held that the standard of proof was that the individual subjectively feared persecution in the third state, and that this fear was objectively well-founded (not that persecution be objectively more likely than not to in fact occur).[21]

Another academic survey of the principles applicable to the safe third country concept resulted in the Michigan Guidelines (Guidelines).[22] These Guidelines lay out the underlying concepts and criteria applicable to safe third country practice. Compared to Legomsky, the Guidelines deal more broadly with concepts gov-

16. Global Consultations, Asylum Processes, *supra* note 12, ¶ 50(k).

17. *See* Foster, *supra* note 2, at 72.

18. *Id.* (internal citation omitted).

19. R v. Sec'y of State for the Home Dep't [2003] 1 AC (HL) 920, 927 (appeal taken from Eng.) (emphasis added). *But see* MT v. Sec'y of State for the Home Dep't [2003] UKIAT 00130 1, 3 (holding that an asylum seeker failed to carry the burden of proof with respect to claims that removal to Germany would violate his rights under Articles 3 and 8 of the European Convention on Human Rights (ECHR)).

20. *See, e.g.*, R v. Sec'y of State for the Home Dep't [2012] EWCA (Civ) 1336, [2013] 1 WLR 576 [577] (Eng.).

21. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 428 (1987).

22. *See* James C. Hathaway, *The Michigan Guidelines on Protection Elsewhere, Adopted January 3, 2007*, 28 Mich. J. Int'l L. 207 (2007).

erning safe third country practice rather than dealing specifically with those criteria applicable to determining that a third country is safe. The Guidelines include the following points:

1. "[A]ny sharing-out of protection responsibility must take place between and among states" because "the Convention does not contemplate the devolution of protection responsibilities to a non-state entity."[23]
2. "While it is preferable that the [. . .] ('receiving state') be a party to the Convention, such status is not a requirement for implementation of a protection elsewhere policy which respects international law."[24]
3. The sending state must make a good faith empirical assessment that the receiving state will in practice afford Article 1 refugees those rights granted under Articles 2–34. Formal agreements and assurances may be relevant to this inquiry, though they alone are insufficient.[25] The sending state must inform itself of all relevant facts and decisions.[26]
4. Any transfer of protection responsibility to a receiving state must be predicated on a commitment to afford the transferred person a meaningful legal and factual opportunity to make a claim for protection. The only exception to this requirement is where the receiving state acknowledges the refugee status of the transferred person, or will in fact ensure that all the rights provided for in Articles 2–34 will be granted without need for recognition of refugee status. "The sending state must . . . satisfy itself that the receiving state interprets refugee status in a manner that respects the true and autonomous meaning of the . . . [Article 1] definition."[27]
5. The sending state may not transfer a lawfully present refugee, having rights under Article 32, absent individuated evidence of a risk to national security or public order. Whether a refugee is lawfully present is to be determined in good faith and in accordance with international law.

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23. *Id.* at 211.

24. *Id.*

25. Agreements, such as the Canada-U.S. Safe Third Country Agreement do not contain robust oversight mechanisms. *See* Agreement for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, Can.-U.S., art. 8(3), Dec. 5, 2002, T.I.A.S. No. 04-1229 (providing for the parties to review the agreement together, along with UNHCR); Council Regulation 604/2013 of June 26, 2013, Establishing the Criteria and Mechanisms For Determining the Member State Responsible For Examining an Application For International Protection Lodged in One of the Member States by A Third-Country National or A Stateless Person (Recast), 2013 O.J. (L 180) ¶ 38 ("The effective monitoring of the application of this Regulation requires that it be evaluated at regular intervals.").

26. *See* Hathaway, *supra* note 22, at 211.

27. *Id.*

Lawful presence must be established at least by the time a decision is reached regarding the claim for protection.[28]

6. Protection against *refoulement* includes protection from the risk of both indirect (or "chain") and direct *refoulement*. Thus, Article 33 bars transfer to a state where there is a foreseeable risk of subsequent *refoulement* to the frontiers of a territory where life or freedom would be threatened.[29]
7. A state is responsible for a violation of Article 33 even where a state official acts in excess of authority or in contravention of official instruction. The state is also responsible for violations by officials or organs of another state placed at the disposal of the state.[30]
8. Beyond protection against *refoulement*, the refugee may not be transferred to a state where he or she will be denied any of the rights provided in Article 2–34: "[A]ny refugee transferred must benefit in the receiving state from all Convention rights to which he or she is entitled at the time of transfer." Certain entitlements and protections arise only after the refugee has remained in a country for some time. In general, the refugee's rights increase as the connection to the country of residence deepens. Any such rights the refugee becomes entitled to in the sending state should be taken into account in transferring the refugee to a receiving state. These acquired rights may include a right to identity documents, self-employment, and access to public housing or welfare.[31]
9. Certain rights under the Convention are relative rather than absolute. For example, a refugee is entitled to access to education on equal terms with others in the country. A refugee is also entitled to the same employment rights as are enjoyed by most-favored non-citizens, and the same freedom of movement as is accorded to aliens generally.[32]
10. The sending state must ensure that the receiving state meets standards of international and human rights law. This requires that transfer to the receiving state not provide a means for the sending state to circumvent any of its own obligations under international law. Protection against torture is an example of such a constraint that would bar transfer to a country that otherwise respects the rights of refugees.[33]
11. Refugees must be accorded a procedurally fair opportunity to challenge the legality of the transfer and must have

28. *See id.* at 213.
29. *See id.*
30. *See id.*
31. *See id.* at 215.
32. *See id.*
33. *See id.*

access to effective remedy. Such challenges must be considered in good faith.[34]

12. Under Article 31(2), the sending state must afford the individual to be transferred sufficient time and resources to seek entry elsewhere before being transferred.[35]
13. The sending state retains an ongoing obligation to the transferred individual. Where the receiving state violates any of the rights provided in Article 2–34 with respect to an individual falling under the Article 1 definition of "refugee," the sending state should facilitate the return and readmission of the refugee in question to its territory.[36]
14. "A sending state whose officials or decision-makers have actual or constructive knowledge" that a receiving state is in breach of its obligations under Articles 1–34 will be unable to assert that the receiving state complies with its international obligations. As such, the sending state must cease any further transfers to that state under a protection elsewhere policy until and unless there is clear evidence that the state is no longer in breach of its obligations.[37]
15. It is recommended that transfer occur only pursuant to a written agreement between the states in question. The agreement should, at a minimum, provide that the receiving state is obligated with respect to refugees under Article 1 to provide those rights laid out in Articles 2–34. The agreement should obligate the receiving state to grant refugees with access to the UNHCR to report any violations of their rights. The UNHCR should be entitled to unhindered access to the country to monitor the situation of refugees there. The agreement should also contain a mechanism for resolving disputes regarding the interpretation or implementation of the agreement.[38]

Of these guidelines, only points (12) and (13) (that the asylum seeker be afforded the opportunity to seek admission to another state of his or her choice, and that the sending state facilitate readmission to its territory should effective protection be inadequate in the receiving state, respectively) are substantive criteria that Legomsky did not specifically enumerate in his survey. Both of these points are essentially procedural in nature and do not relate directly to the question at hand: what criteria are relevant to the identification of a safe third state? For this reason, the analysis below draws heavily on the Legomsky criteria, augmenting or revising the criteria to reflect additional findings from case law and

34. *See id.* at 217.
35. *See id.*
36. *See id.*
37. *See id.*
38. *See id.* at 219.

UNHCR publications. This analysis addresses many of the same considerations that Michelle Foster addressed in a detailed 2012 academic study of the international law norms governing safe third country practice.[39]

In a 2008 survey, Foster, like Legomsky and the Guidelines, stated that safe third states must comply not only with the *non-refoulement* principle but, more broadly, must also respect international human rights and provide a fair and effective status determination process.[40] She suggests that a sending state should assess the effectiveness of a receiving state's refugee status determination procedures by analyzing the acceptance rates and country conditions as reflected in UNHCR reports. Citing *Canadian Council for Refugees v. R*, she underscores that the effectiveness of the refugee status determination process also requires that the individual actually have access to that process (and not be denied the opportunity to bring a claim for protection merely due to an arbitrary time bar).[41]

The analysis below covers a range of liberal democratic jurisdictions, including Australia, the United Kingdom, Germany, New Zealand, Canada, and the United States.[42] This Article pays particular attention to Australia and the United Kingdom, where the courts have had repeated occasions to consider whether a state was properly determined to be safe.

II. State Practice Supports Academic Literature Only Partially

UNHCR documents and state practice, as well as the standards set by the European Union, generally support the Legomsky criteria. The case law surveyed does not, however, provide specific support for the view that refugee status determinations must preserve the privacy of the proceedings. The case law does not indicate that courts disregard this requirement, but merely that in the surveyed material they did not apply it in determining whether a country was safe. This may be because states generally conform to this standard with little variation. Evidence of state practice with respect to the application of this requirement is, for that reason, inconclusive.

39. *See generally* Foster, *supra* note 3.

40. *See* Foster, *supra* note 2, at 69–71.

41. *See id.* at 70.

42. Certain states are omitted because the courts in those states have not weighed in on the question. Others are omitted due to the linguistic limitations of the author.

Those of the Legomsky criteria supported by the case law are the following:

1. Assurance the country will respect all of the applicable provisions of the Convention;
2. Respect right to freedom from torture and cruel, inhuman or degrading treatment;
3. Assurance that the country will provide a fair refugee status determination (or effective protection absent such a determination);[43]
4. Availability of a durable solution in the country (unless the individual is transferred to another state that provides a durable solution); and
5. That the state is party to the 1951 Convention and 1967 Protocol is probative, per Legomsky, but not specifically required.

The case law additionally supports the *limited* inclusion of the following criteria:

1. Respect for human rights: This is not required broadly, but rather only with respect to protection against *refoulement* and the violation of certain other rights such as the right to freedom from torture and cruel, inhuman or degrading treatment. In the United Kingdom, receiving states have also been required to respect the right to private life/family life, as provided in the European Convention on Human Rights (ECHR). Courts have not explicitly limited the scope of human rights obligations that merit protection in this way. However, they have not generally applied this principle broadly to all manner of human rights. Nevertheless, Legomsky's sliding scale of certainty remains a useful and legally tenable method for determining which human rights are sufficiently important to serve as the basis for barring removal in any particular case.
2. Advance consent to readmit the refugee and advance consent to consider the refugee's claim: The case law supports the more limited requirement that there be substantial or clear evidence of admissibility (rather than specific consent), and that the possibility exists to request refugee status (rather than that the state specifically consented to make a determination). While the UNHCR and academic literature support a more robust view of this requirement, and phrase it as consent to *readmit* the individual, state practice reflects a more limited version of this criterion, sometimes phrasing it as consent to *admit* the individual. Additionally, Australian case law has required merely substantial evidence that the individual is entitled to admission, rather than any

43. *See* The Queen v. Canadian Council for Refugees, [2009] 3 F.C.R. 229, ¶ 22 (Can.).

specific consent by the receiving state.[44] Under this approach, it is possible that a standing policy such as Israel's Law of Return could satisfy this requirement.

Jurisdictions such as Switzerland and the United Kingdom also considered the criteria for safe third country determinations but focused on the material conditions that the individual would encounter in the receiving state.[45] For this reason, this Article adds an eighth criterion to Legomsky's list of seven: that the individual have access to means of subsistence and an adequate standard of living in the receiving country.[46]

Canadian and French trial court decisions support the view that the receiving state should provide representation for the asylum seeker for all stages of the refugee determination process, although it is unlikely that this can be viewed as a mandatory requirement.[47] While this is not generally articulated internationally as a requirement for a fair refugee status determination, it may be highly relevant in assessing the fairness of a state's refugee status determination process.

III. Criteria for Safe Third State Determinations

The Section below proceeds criterion by criterion, discussing the extent to which each is supported by UNHCR documents, substantial academic literature, or the case law of surveyed states.

A. *Advance Consent to Readmit and to Provide a Fair Refugee Status Determination (or Effective Protection Even Without Such a Determination)*

Whether an individual will be admitted to the third country is a necessary precondition for effective removal. As such, it sometimes

44. *See generally NAGV v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] HCA 6 (Austl.) (finding that no extra evidence is needed beyond that sufficient to prove that person is a refugee).

45. *See, e.g.*, R v. Sec'y of State for the Home Dep't [2012] EWCA (Civ) 1336, [2013] 1 WLR 576 [582] (Eng.); Bundesverwaltunggericht [BVGE] [Federal Administrative Court] June 6, 2014, D-1938/2014 (Switz.).

46. While Legomsky does not include these criteria among those required under the Convention, he states that "knowingly sending the applicant to a third country where he or she will lack wither physical security or basic subsistence can be 'cruel, inhuman or degrading treatment' for purposes of the various [other] human rights agreements that use that term." Legomsky, *supra* note 4, at 674.

47. *See* Tribunal administratif de Paris, No. 0912495-3/3 (3d section, 3d chambre) (2009) (considering, among other factors, the lack of access to public counsel and interpreters as relevant to a finding that Greece was not a safe third country to which France could remove an asylum seeker); *Canadian Council for Refugees*, [2009] 3 F.C.R. 229, ¶ 22 (noting the lack of access to representation).

is overlooked as a distinct requirement of its own. Legomsky, however, includes this criterion in his list of legally mandatory minimum criteria. It is worth noting, as further discussed below, that the way Legomsky (and the UNHCR) phrases this requirement (as advance consent to *readmit*) implies a separate requirement that the asylum seeker have some prior connection to the third state. According to Legomsky, the receiving state should acknowledge that it will admit the individual and consider his or her claim for protection. This criterion, while not specifically listed in the Guidelines, is implicitly encompassed by the broader requirement that any transfer be predicated on the receiving state's commitment to make a legal and factually meaningful claim for refugee protection.

The UNHCR provides support for Legomsky's inclusion of this criterion, stating the following:

> Governments should apply the "safe third country" notion only if they have received, on a bilateral basis, the explicit or implicit consent of the third State to *take back* the asylum-seeker and to grant him/her access to a fair asylum procedure, so as to ensure that the application will be examined on its merits.[48]

The UNHCR clarifies that admissibility in this context entails not merely consent by the receiving state to permit the individual to enter, but rather "admission for the purpose of considering his/her claim."[49] Additionally, the UNHCR states that consent to readmit the individual should include agreement to "provide any needed protection."[50] This applies to both the protection due to an asylum seeker with a pending claim as well as to the protection due to one determined to be a refugee.[51]

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48. U.N. High Comm'r for Refugees, Considerations on the "Safe Third Country" Concept 3 (1996) (emphasis added) [hereinafter UNHCR, Considerations]; *see also* UNHCR, Background Paper No. 2, *supra* note 12, at 3 (arguing explicit third country consent is necessary to the overall protection of the asylum seeker); U.N. High Comm'r for Refugees, Background Paper No. 3: Inter-State Agreements for the Re-Admission of Third Country Nationals, Including Asylum Seekers, and for the Determination of the State Responsible for Examining the Substance of an Asylum Claim ¶ 3 (2001) [hereinafter UNHCR, Background Paper No. 3] ("Where third country nationals are concerned, however, and in particular third country nationals seeking asylum, the nature and scope of such commitments need to be spelled out. . . . [C]riteria must be agreed upon, beyond the possession of a particular nationality, on which to base an expectation of readmission. Such criteria will normally include lawful residence in, or other demonstrable connections with, the country into which re-admission is sought.").

49. UNHCR, Background Paper No. 3, *supra* note 48, ¶ 4; *see* UNHCR, Considerations, *supra* note 48, at 3.

50. Global Consultations, Regional Meeting: Budapest, *supra* note 14, ¶ 15.

51. *See* Lisbon Expert Roundtable, *supra* note 4, ¶ 15(d).

As noted above, state practice supports a slightly modified version of this requirement. For example, in *CPCF v. Minister for Immigration and Border Protection*, the High Court of Australia considered this requirement by assessing evidence of the individual's entitlement to enter the safe third state.[52] This formulation of the criterion differs slightly from advance consent to readmit the individual in two respects: (1) it does not imply a required prior nexus with the third state, and (2) it requires mere evidence that the individual is legally entitled to enter rather than any specific consent to readmit the individual and to consider the claim for protection.

In *NAGV and NAGW of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs*, the High Court of Australia held, on domestic law grounds, that a Russian Jewish man and his non-Jewish family were entitled to protection visas notwithstanding the fact that, in its view under international law, Australia likely could have transferred its obligations to Israel, where the family was entitled to enter by virtue of the Law of Return even though the family had no prior connection to Israel whatsoever.[53] Thus, the question of whether international law, as interpreted by the High Court of Australia, permits the per se exclusion of all asylum seekers who are *zakai aliya* (entitled to Israeli citizenship upon arrival) under the Law of Return remains open. In light of this, the criterion, as supported by Australian case law, may be re-phrased as "evidence that the state will *admit* the individual" rather than "advance consent to *readmit* the individual." It is not clear that the Australian view conforms fully with international law. The UNHCR and others take the view that a nexus linking the individual to the third state is strongly recommended.[54]

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52. To decide whether detention of the asylum seekers was lawful under domestic law, the High Court considered whether they were detained incident to lawful removal to India. Ultimately, Australia was unable to obtain India's agreement to receive the Sri Lankan asylum seekers. *See CPCF v Minister for Immigration & Border Prot.* [2015] 255 CLR 514, 560, 574 (Austl.).

53. *See NAGV v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] HCA 6, ¶ 96 (Austl.). Subsequent lower court determinations in Australia have applied the safe third country concept to exclude asylum seekers based on the fact that the individual possessed a right to enter and reside in a third country, regardless of the fact that the individual was not a national of that state and had not previously resided there. *See* Decision Record 1201040 [2012] RRTA 638, ¶ 66 (Austl.) (finding that Nepalese asylum seekers were entitled by treaty to enter and reside in India and were therefore not entitled to protection visas in Australia); Decision Record 1404235 [2014] RRTA 645, ¶¶ 66–68 (Austl.) (the same outcome as Decision Record 1201040).

54. *See* UNHCR, Considerations, *supra* note 48, at 4 ("[T]he applicant should not be returned to a country where they have been in mere transit, in particular airport transit."); UNHCR, Background Paper No. 2, *supra* note 12, at 3 ("[T]he transfer from one State to

A number of bilateral and multilateral arrangements have been employed to facilitate the reallocation of asylum seekers and refugees among states. These agreements, such as the Dublin scheme,[55] the Canada-U.S. Safe Third Country Agreement,[56] and the various arrangements Australia has pursued with Southeast Asian states,[57] are one way to fulfill the requirement that the receiving state accept responsibility to admit the individual and to process the claim for protection. Within the European framework, removal of asylum seekers to third countries may only occur pursuant to such an agreement.[58]

Likewise, the UNHCR strongly encourages the use of such agreements, absent which its view is that the sending state must obtain individualized case-by-case acceptance of responsibility by the receiving state.[59] Agreement among states is vital to avoid the problem of so-called "refugee orbit," whereby individuals seeking protection are repeatedly transferred among countries, potentially orbiting through any given country multiple times without being granted access to a refugee status determination process.[60] To avoid this outcome, the UNHCR strongly urges that transfer agree-

another of the responsibility for considering an asylum request may *only* be justified in cases where the applicant has meaningful links or connections (e.g. family or cultural ties, or legal residence) with that other state." (emphasis added)); UNHCR, BACKGROUND PAPER NO. 3, *supra* note 48, ¶¶ 14–15 (listing the Dublin Convention criteria as an example of factors to be considered in determining whether there is a sufficient connection between the individual and the receiving state); UNHCR, BACKGROUND PAPER NO. 3, *supra* note 48, ¶ 19 ("[T]ransfers of responsibility for considering asylum applications should *only* be explored in cases where the applicant has a connection or close link with another state." (emphasis added)); UNHCR, BACKGROUND PAPER NO. 3, *supra* note 48, ¶ 22 ("[L]inguistic, cultural or historical ties, are key considerations."); *see also* U.N. High Comm'r for Refugees, *Convention Plus Issues Paper Addressing Irregular Secondary Movements of Refugees and Asylum-Seekers*, ¶ 17, U.N. Doc. FORUM/CG/SM/03 (Mar. 11, 2004) ("Furthermore, family links between a person seeking asylum and his/her intended country of destination are important and *should* be given due weight in State responses. The protection of the family as the natural and fundamental group unit of society is a widely recognized principle of human rights." (emphasis added)).

55. Council Regulation 343/2003, 2003 O.J. (L 50) 1.

56. Agreement for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, Can.-U.S., Dec. 6, 2002, State Dep't 05-35 (entered into force Dec. 29, 2004), available at https://www.state.gov/s/l/38616.htm [https://perma.cc/7LYW-943F].

57. *See* Susan Kneebone, *Australia as a Powerbroker on Refugee Protection in Southeast Asia: The Relationship with Indonesia*, 33 REFUGE 29, 29 (2017).

58. *See* Resolution on Assessment of Transit and Processing Centres as a Response to Mixed Flows of Migrants and Asylum Seekers, EUR. PARL. RESOLUTION 1569, ¶ 13.6 (2007).

59. *See* UNHCR, BACKGROUND PAPER NO. 2, *supra* note 12, at 3.

60. *See id.* ("Unilateral actions by States to return asylum seekers to countries through which they have passed, without the latter's agreement, carries the risk of refoulement or placing the refugee into an endless 'orbit' between States.").

ments "must be clear as to the division of responsibilities between the different actors involved and the continuation of such responsibilities until such time as an appropriate durable solution is achieved or, in the case of those found not to be in need of international protection, return to the country of origin."[61]

The UNHCR judges as inadequate those agreements that provide for readmission without ensuring sufficient procedural safeguards for the asylum seeker.[62]

Specifically, the UNHCR states that transfer arrangements must guarantee that each asylum seeker:

- will be individually assessed as to the appropriateness of the transfer, subject to procedural safeguards, prior to transfer. Pre-transfer assessments are particularly important for vulnerable groups, including unaccompanied and separated children. The best interest of the child must be a primary consideration;
- will be admitted to the proposed receiving State;
- will be protected against *refoulement*;
- will have access to fair and efficient procedures for the determination of refugee status and/or other forms of international protection;
- will be treated in accordance with accepted international standards (for example, appropriate reception arrangements; access to health, education, and basic services; safeguards against arbitrary detention; persons with specific needs are identified and assisted); and
- if recognized as being in need of international protection, will be able to enjoy asylum and/or access a durable solution.[63]

The sending state continues to bear the responsibility to monitor the receiving state's factual compliance with the agreement and respect for refugee rights generally.[64] Absent inclusion of these terms, the UNHCR regards transfer agreements as invalid.[65] Although state practice may support the view that these substantive conditions should be met for transfer to be valid, it is not clear

61. U.N. Doc. FORUM/CG/SM/03, *supra* note 54, ¶ 23.

62. *See* U.N. High Comm'r for Refugees, *Convention Plus Core Group on Addressing Irregular Secondary Movements of Refugees and Asylum-Seekers: Joint Statement by the Co-Chairs*, at 5, U.N. Doc. FORUM/2005/7 (Nov. 8, 2005).

63. U.N. High Comm'r for Refugees, Guidance Note on Bilateral and/or Multilateral Transfer Arrangements of Asylum-Seekers ¶ 3(vi) (2013) [hereinafter UNHCR, Guidance Note].

64. *See id.* ¶ 3(viii).

65. *See id.* ¶ 3(vii).

whether state practice supports the view that agreements must specifically include these requirements.[66]

B. *The Applicant Has No Well-Founded Fear of Being Persecuted in the Third Country on Any of the 1951 Convention Grounds, or of Being Refouled to a Territory Where He or She Would Face Persecution*

This requirement, known as the *non-refoulement* principle, arises from Convention Article 33 and covers both direct *refoulement* (the return to the frontiers of a territory where the individual has a well-founded fear of facing persecution) and indirect *refoulement* (the removal of an individual to a state that may, in turn, transfer the individual to a territory where he or she has a well-founded fear of facing persecution).[67] The principle of *non-refoulement* is widely recognized as the core of the Convention, as reflected in Legomsky, the Michigan Guidelines,[68] UNHCR documents, and the practice of states. In addition to protection against *refoulement* under Article 33, individuals are entitled to protection against removal to states where other rights, such as rights under the Convention Against Torture or the ECHR, would likely not be respected. For this reason, this Article discusses here both *non-refoulement* under Article 33 of the Convention, as well as the application of the *non-refoulement* principle more broadly to other human rights.

The UNHCR lists *non-refoulement* as a core requirement that prohibits both direct and indirect *refoulement.*[69] Ultimately, responsibility rests with the sending country to secure sufficient guarantees that the receiving state will respect the individual's right against *refoulement.*[70] The prohibition on *refoulement* applies equally to indirect *refoulement*, requiring the sending state to determine that "there is no real risk that the person would be sent by the third State to another State in which he or she would not receive effec-

66. *See Plaintiff M70/2011 v Minister for Immigration & Citizenship* [2011] HCA 32, ¶ 135 (Austl.) (finding that nonbinding Australia-Malaysia arrangement was insufficient because Malaysia does not recognize refugees in its domestic law, does not undertake any role in the reception of asylum seekers or in the processing of their claims, is not a party to the Convention, and has undertaken no form of legal obligation requiring it to provide the same substantive Convention rights).

67. *See* Hathaway, *supra* note 22, at 213.

68. *See generally id.*

69. *See* UNHCR, Background Paper No. 2, *supra* note 12, at 2; Lisbon Expert Roundtable, *supra* note 4, ¶ 15(a); Global Consultations, Asylum Processes, *supra* note 12, ¶ 50(c); U.N. Doc. FORUM/CG/SM/03, *supra* note 54, ¶ 31(ii); UNHCR, Guidance Note, *supra* note 63, ¶ 3(vi).

70. *See* UNHCR, Background Paper No. 2, *supra* note 12, at 2.

tive protection or would be at risk of being sent from there on to any other State where such protection would not be available."[71]

State practice fully supports the view that *non-refoulement* is a core requirement that the sending state must ensure is not violated, either directly or indirectly. *Non-refoulement* is included within the Dublin scheme that governs removals to third countries within the European Union.[72] New Zealand, although it does not currently transfer asylum seekers to third countries, acknowledges *non-refoulement* as a core principle that would have to be respected in any safe third country.[73] The United Kingdom regards *non-refoulement* as a binding principle that applies not only to Britain's obligations under the Convention, but also under Articles 3 and 8 of the ECHR.[74] Likewise, Australian case law supports the view that *non-refoulement* is a core requirement that must be respected in any safe third country practice.[75] In practice, states are not always scrupulous in respecting the principle of *non-refoulement.* For instance, Spain, the E.U. state with the largest number of migration-related agreements with non-E.U. states, increasingly deflects asylum seekers from the Spanish frontier before processing their claims for protection, placing individuals at risk of *refoulement.*[76] Certain states, such as South Africa, reportedly make use of the safe third

71. Lisbon Expert Roundtable, *supra* note 4, ¶ 15(c).

72. *See* Council Directive 2013/32/EU, art. 38, 2013 O.J. (L 180) 60, 63 (EU).

73. *See* N.Z. Human Rights Comm'n, New Zealand's Sixth Periodic Review Under the Convention Against Torture ¶¶ 116–18 (2015), http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/NZL/INT_CAT_CSS_NZL_20017_E.pdf [https://perma.cc/C78U-P485].

74. *See* R v. Sec'y of State for the Home Dep't, ex parte Razgar (FC) [2004] UKHL 27 (HL) ¶¶ 1, 6, 8 (discussing in length the appropriate circumstances to apply each); Sec'y of State for the Home Dep't v. Nasseri (FC) [2009] UKHL 2 (HL) ¶¶ 14, 24, 34.

75. *See Plaintiff M70/2011 v Minister for Immigration & Citizenship* [2011] HCA 32, ¶ 119 (Austl.) ("Thus when s 198A(3)(a)(iii) speaks of a country that 'provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country' it refers to provision of protections of all of the kinds which parties to the Refugees Convention and the Refugees Protocol are bound to provide to such persons. Those protections include, but are not limited to, protection against refoulement. And because the protections contained in the Refugees Convention and the Refugees Protocol include according certain rights to those who are found to be refugees, the protections must be provided pursuant to a legal obligation to provide them."); *CPCF v Minister for Immigration & Border Prot.* [2015] 255 CLR 514, 561, 604 ("[A]ssessing the risk of refoulement requires consideration of state practice as well as the domestic law of that state . . . . A country will only be a safe third country if there is no danger that a refugee might be sent from there to a country where he or she will be at risk of harm.").

76. *See* Gil-Bazo, *supra* note 1, at 55–58.

country concept in the absence of any governing legal provisions, placing asylum seekers at risk of *refoulement*.[77]

British and Canadian case law consider that an individual may not be removed to a receiving state that applies the Convention in good faith but nonetheless fails to comply with its true and autonomous meaning.[78] In the Canadian context, a trial court found that the United States was not a safe third country in part because its interpretation of the Convention excluded gender-based claims for protection.[79] Likewise, the British judiciary has considered that an apparent gap between its construction of the Convention on the one hand and Germany's on the other was a basis for barring removal of an asylum seeker to Germany where the asylum seeker's claim was based on non-state persecution in his country of origin and would not have been recognized in Germany.[80] Such a gap between the states in the application of the Convention results in a situation where an individual properly classified as a refugee under the Convention (and recognized as such in the sending state) would not be so recognized in the receiving state, and would thereby be at risk of *refoulement*.[81]

C. *Assurance That the Third Country Will Respect 1951 Convention Rights*

Beyond the principle of *non-refoulement*, it is widely recognized that the sending state is obligated to ensure that the receiving state will respect the rights outlined in Articles 2–34 of the Convention. This criterion is based on the application of the complicity principle to the state's obligations under the Convention. Under this reasoning, the sending state may not indirectly violate its obligations under the Convention by transferring an individual to another state that will not afford the individual the same protections required by the Convention.

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77. *See id.* at 49–55.

78. *See* Foster, *supra* note 2, at 71.

79. *See* The Queen v. Canadian Council for Refugees, [2009] 3 F.C.R. 229, ¶ 105 (Can.) (reversing the trial court holding on the basis that the question of whether the United States was a safe third country was not an issue properly before the trial court).

80. *See* R v. Sec'y of State for the Home Dep't, ex parte Adan, R v. Sec'y of State for the Home Dep't, ex parte Aitseguer [2001] 2 WLR 143 (HL) (appeal taken from Eng.) (requiring that the United Kingdom assure itself that Germany, as a proposed third country for removal, would interpret and apply the Convention in a manner that respected the "true autonomous and international meaning" of Article 1 of the Convention, defining "refugee").

81. *See id.*

Generally, it is considered relevant but not required that the receiving state has ratified the Convention (and the 1967 Protocol).[82] Where a potential receiving state has not ratified the Convention, but as a matter of fact and law affords identical protections to asylum seekers and refugees, there are strong grounds for considering that transfer is permitted.[83] In light of the fact that various rights under the Convention vest only after the asylum seeker or refugee has established a presence in the territory, as the asylum seeker or refugee develops a stronger connection to the territory, he or she is entitled to additional rights under the Convention. For this reason, a sending country must assure itself that each transferred individual will enjoy the same rights to which he or she had become entitled in the sending country.

The UNHCR literature supports the view that the receiving state must respect those rights provided in the Convention.[84] The UNHCR notes that while accession to the Convention is a useful indicator of compliance, it is neither sufficient nor necessary.[85] The core requirement is that the receiving state actually provides the protections as required under the Convention.[86]

State practice supports the view that the sending state must ensure that the receiving state will afford asylum seekers and refugees the rights provided under the Convention. It is recognized that this does not require that the receiving state necessarily be party to the Convention and Protocol, though this may be a relevant fact. What is essential is that the state, in practice, respects these rights. In addition to this factual compliance, UNHCR gui-

82. *See* GLOBAL CONSULTATIONS, ASYLUM PROCESSES, *supra* note 12, ¶ 14 ("[T]he general question of 'safety' . . . cannot be answered solely on the basis of formal criteria, such as whether or not the third State is a party to the 1951 Convention and 1967 Protocol and/or relevant international human rights treaties."); UNHCR, *Considerations on the 'Safe Third Country' Concept: EU Seminar on the Associated States and Safe Third Countries in Asylum Legislation*, July 8-11, 1996, at 2.

83. *See* LISBON EXPERT ROUNDTABLE, *supra* note 4, ¶ 15(e); UNHCR, GUIDANCE NOTE, *supra* note 63, ¶ 3(iii).

84. *See* LISBON EXPERT ROUNDTABLE, *supra* note 4, ¶ 15(e); UNHCR, GUIDANCE NOTE, *supra* note 63, ¶ 3(iii); UNHCR, CONSIDERATIONS, *supra* note 48, at 2.

85. *See* LISBON EXPERT ROUNDTABLE, *supra* note 4, ¶ 15(e); UNHCR, GUIDANCE NOTE, *supra* note 63, ¶ 3(iii); UNHCR, CONSIDERATIONS, *supra* note 48, at 2; GLOBAL CONSULTATIONS, ASYLUM PROCESSES, *supra* note 12, ¶ 14 ("[T]he general question of 'safety' . . . cannot be answered solely on the basis of formal criteria, such as whether or not the third State is a party to the 1951 Convention and 1967 Protocol and/or relevant international human rights treaties.").

86. *See* LISBON EXPERT ROUNDTABLE, *supra* note 4, ¶ 15(e); UNHCR, GUIDANCE NOTE, *supra* note 63, ¶ 3(iii); UNHCR, CONSIDERATIONS, *supra* note 48, at 2; GLOBAL CONSULTATIONS, ASYLUM PROCESSES, *supra* note 12, ¶ 14 ("The third State needs actually to implement appropriate asylum procedures and systems fairly.").

dance and at least some state practice as seen, for example, in the Australian case law, require that compliance be pursuant to a binding legal obligation.[87] This is to ensure that it is not mere temporary circumstance, happenstance, or administrative benevolence that affords *ad hoc* or *de facto* protection to asylum seekers and refugees. Instead, protection must be provided both in fact and in law. The legal obligation may be either domestic or international but must be binding. A mere political understanding, arrangement, or undertaking does not suffice.

D. *Respect for International and Regional Human Rights Standards*

In addition to complying with the requirements of the Convention, the receiving state must respect international and regional human rights standards. As with Section C above, this requirement arises from the complicity principle. A state may not avoid its human rights obligations by transferring an individual to a state that does not itself fulfill the same obligations.[88] This requirement is supported by Legomsky and the Michigan Guidelines, as well as by the UNHCR and state practice.

To determine whether a state satisfies this requirement, it is relevant whether the state has ratified major human rights conventions and whether it has registered any reservations.[89] Any reservations of the state in this regard would also be relevant. Beyond accession to relevant human rights instruments, the state must as a matter of fact fulfill its human rights obligations. Formal accession to international conventions is persuasive but is neither necessary nor sufficient. As with respect to the Convention, the core of the analysis is whether the receiving state in fact affords rights to asylum seekers and refugees. The extent to which *de facto* compliance alone

87. *See Plaintiff M70/2011 v Minister for Immigration & Citizenship* [2011] HCA 32, ¶ 135 (Austl.) (finding that the nonbinding Australia-Malaysia arrangement was insufficient because Malaysia does not recognize refugees in its domestic law, does not undertake any role in the reception of asylum seekers or in the processing of their claims, is not a party to the Convention, and has undertaken no form of legal obligation requiring it to provide the same substantive Convention rights); GLOBAL CONSULTATIONS, ASYLUM PROCESSES, *supra* note 12, ¶ 50(c) ("Any mechanisms under which responsibility for assessing the asylum claim is transferred should be clearly defined in law."). *But see* UNHCR, GUIDANCE NOTE, *supra* note 63, ¶ 3(v) (stating merely that agreements to transfer asylum seekers should be legally binding).

88. *See* Legomsky, *supra* note 4, at 677.

89. U.N. HIGH COMM'R FOR REFUGEES, CONSIDERATIONS ON THE 'SAFE THIRD COUNTRY' CONCEPT: EU SEMINAR ON THE ASSOCIATED STATES AND SAFE THIRD COUNTRIES IN ASYLUM LEGISLATION 2 (1996), http://www.refworld.org/docid/3ae6b3268.html [hereinafter UNHCR, CONSIDERATION ON THE 'SAFE THIRD COUNTRY' CONCEPT] [https://perma.cc/RC7T-8X7B].

suffices absent an accompanying legal obligation, is an open question.

The UNHCR states that it is the sending state's responsibility to ensure that the transferred individual will "be treated in accordance with accepted international standards" in the receiving state.[90] In a European regional meeting, the UNHCR stated that these standards included respect for the rights provided in the Convention Against Torture and the ECHR.[91] The European Court of Human Rights (ECtHR) has found removal unlawful where it would place the transferred individual at risk of having his or her ECHR Article 2 (right to life) or Article 3 (right to protection against torture or inhuman and degrading treatment) rights violated, even where the risk is based on generalized violence rather than specific risks relating to the individual.[92] Elsewhere, the UNHCR stated that the sending state is responsible to ensure, inter alia, that:

- there is no real risk that the person would be subjected to torture or to cruel, inhuman or degrading treatment or punishment in the third State;
- there is no real risk to the life of the person in the third state;
- there is no real risk that the person would be deprived of his or her liberty in the third State without due process.[93]

State practice is inconsistent as to which human rights standards a receiving state must respect. Based on the complicity principle, the receiving state should respect all the rights that the sending state is obligated to respect. Understanding that certain rights are more important than others, Legomsky proposes a sliding scale of certainty based on the severity of the potential harm that would result from a violation of the right. For example, where the right at stake is the right to be free from cruel or inhuman treatment, a sending state should use a lower standard of proof in deciding that the transfer should be blocked. Where a lesser right or less severe harm is at stake, the state could use a higher standard of proof, requiring that there be clear evidence that there is a substantial likelihood that the right would be violated in the proposed third

90. UNHCR, Background Paper No. 2, *supra* note 12, at 3.

91. *See* Global Consultations, Regional Meeting: Budapest, *supra* note 14, ¶ 13 ("The returned persons should be treated by the receiving State in accordance with human rights principles in general, and the standards set forth in the [ECHR] and [CAT], in particular.").

92. *See* L.M. and Others v. Russia, App. Nos. 40081/14, 40088/14 and 40127/14, Eur. Ct. H.R., ¶¶ 119–20 (2015), https://hudoc.echr.coe.int/eng#{"itemid":["001-157709"]} [https://perma.cc/6RJ9-A9SD].

93. Lisbon Expert Roundtable, *supra* note 4, ¶ 15(b).

country, rather than merely evidence that there was a real risk that such a violation would occur.

European practice requires that receiving states ratify the ECHR.[94] The ECtHR has found removal unlawful where the transfer would place the individual at risk of having his or her rights under Articles 2 and 3 violated.[95] Article 38 of Directive 2013/32/EU further sets out the following requirements that a sending country must ensure the third country meets to qualify as safe:

a. life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
b. there is no risk of serious harm, as defined in Directive 2011/95/EU;
c. the principle of non-refoulement in accordance with the Geneva Convention is respected;
d. the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and
e. the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.[96]

Article 15 of Directive 2011/95/EU defines serious harm as:

a. the death penalty or execution;
b. torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
c. serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.[97]

Australian practice requires, by statute, that the government certify that a proposed third state respects international human rights standards.[98] The Australian High Court has held that this includes rights of religious freedom, equal access to education, access to courts, the right to work, and freedom of movement in the receiving state.[99] Likewise, Canadian practice requires that the government consider the human rights record of the receiving state.[100] British practice has barred removal to third states based on Articles

94. *See* Council Directive 2013/32/EU, art. 39, 2013 O.J. (L 180) 60, 81 (EU).
95. *See* L.M. and Others, Eur. Ct. H.R., ¶ 126.
96. Council Directive 2013/32/EU, art. 38, 2013 O.J. (L 180) 60, 80–81 (EU).
97. Council Directive 2011/95/EU, art. 15, 2011 O.J. (L 337/9) 9, 18.
98. *See Plaintiff M70/2011 v Minister for Immigration & Citizenship* [2011] HCA 32, ¶ 11 (Austl.) (citing Migration Act § 198A).
99. *See id.* ¶¶ 135, 223–24 (not reaching whether these protections apply to those who have not yet had an opportunity to establish refugee status).
100. *See* Immigration and Refugee Protection Act, S.C. 2001, c 27, art. 102(2)(c) (Can.).

3 and 8 of the ECHR, protecting against cruel, inhuman or degrading treatment, and violations of the right to private life, respectively.[101] In Canadian practice, the Court of Appeals has held, on domestic statutory grounds, that the government is required merely to *consider* the receiving state's human rights record, and that the Court is not granted the power of substantive judicial review as to whether the receiving state in fact is in compliance with human rights standards.[102]

E. *Assurance That the Third Country Will Provide a Fair Refugee Status Determination (or Effective Protection Absent Such a Determination)*

The provision of a fair refugee status determination is a criterion of vital importance. Without a fair refugee status determination process, there is a substantial risk that a state that affords protection to those determined to be refugees would nonetheless fail to comply with the Convention because individuals entitled to protection under international law would go unrecognized. Thus, a fair refugee status determination process is necessary to ensure that refugees are protected from *refoulement* and the violation of any other of those rights granted under Articles 2–34 of the Convention.

To assure itself that the receiving state will provide a fair refugee status determination, the sending state must assure itself that the receiving state's refugee status determination process satisfies the following requirements:

a. The refugee must have access to UNHCR;
b. Preservation of the asylum seeker's privacy in making a claim (to ensure full testimony);
c. The determination process must take account of the special vulnerabilities of the individual refugee (e.g., women who are survivors of rape or other sexual violence, who are pregnant, or who are single heads of households; children, especially where unaccompanied; and stateless persons); and
d. Asylum seekers should be provided state-funded representation at all stages of the refugee status determination pro-

101. *See* R v. Sec'y of State for the Home Dep't, ex parte Razgar (FC) [2004] UKHL 27 (HL) ¶¶ 8, 71 (showing how the court considers the above-mentioned elements in regard to the respective articles); Sec'y of State for the Home Dep't v. Nasseri (FC) [2009] UKHL 2 (HL) ¶ 4 (discussing inhumane treatment under Article 3 and respect for family life under Article 8).

102. *See* The Queen v. Canadian Council for Refugees, [2009] 3 F.C.R. 229, ¶¶ 77–78 (Can.) (describing the condition precedent under the statutory scheme as requiring that the government *consider* the receiving state's compliance with human rights standards, rather than requiring that the receiving state in fact respect human rights).

cess, although this is not strictly required under international law.[103]

e. An asylum seeker should not be barred from receiving protection based solely on the fact that he or she failed to submit an application within a certain period of time.[104]

The UNHCR states that it is the sending state's responsibility to ensure that any transferred individual will "have the possibility to seek . . . asylum" in the receiving state.[105] It notes that it is "best practice" that individuals seeking protection will be returned "only if the individual will be readmitted to the country, will be able to access fair asylum procedures, and, if recognized, will be able to enjoy effective protection there."[106] To fulfill its obligation to ensure that the transferred individual is afforded a fair refugee status determination in the receiving country, the sending state should "provide clear information (in the language of the third State and one understood by the applicant) that the individual is an asylum-seeker and that his/her application has not been substantively examined."[107] A fair refugee status determination in the receiving country should grant protection based on any grounds that are recognized in the sending country.[108] Procedurally, a fair refugee status determination must take account of the refugee's privacy interests and special vulnerabilities.[109]

Comparative case law provides broad support that individuals must have access to a fair and effective refugee status determination.[110] State practice further supports the view that components (c) and (e) above are mandatory requirements for a fair refugee

103. Although this requirement is absent from Legomsky's list of criteria, it was considered relevant in a Canadian trial court's consideration of the issue. *See id.* ¶ 22. It is unlikely that this can be considered a formal requirement, as public representation is not ensured under Canadian law, although it may be available under provincial legal aid programs. *See Legal Aid Program*, CAN. DEP'T JUST., http://www.justice.gc.ca/eng/fund-fina/gov-gouv/aid-aide.html (last modified Mar. 22, 2017) (discussing immigration and refugee aid services available through the Department of Justice Legal Aid Program for economically disadvantaged persons) [https://perma.cc/VTP8-LSDY].

104. *See id.*; GLOBAL CONSULTATIONS, ASYLUM PROCESSES, *supra* note 12, ¶ 20; *Canadian Council for Refugees*, [2009] 3 F.C.R. 229, ¶ 22 (noting the arbitrary one-year time bar applied to asylum claims in the United States).

105. UNHCR, BACKGROUND PAPER NO. 2, *supra* note 12, at 3.

106. GLOBAL CONSULTATIONS, ASYLUM PROCESSES, *supra* note 12, ¶ 15; UNHCR, CONSIDERATION ON THE 'SAFE THIRD COUNTRY' CONCEPT, *supra* note 89, at 2.

107. GLOBAL CONSULTATIONS, ASYLUM PROCESSES, *supra* note 12, ¶ 15.

108. Transfer would not, however, be barred where the receiving state grants protection based on a broader set of grounds than the sending state. *See* LISBON EXPERT ROUNDTABLE, *supra* note 4, ¶ 15(f).

109. *See id.* ¶ 15(h).

110. *See Plaintiff M70/2011 v Minister for Immigration & Citizenship* [2011] HCA 32, ¶ 11 (Austl.) (citing Migration Act § 198A(i)).

status determination process. Component (d) is supported as a best practice. However, neither (a) nor (b) find explicit support in the case law of the surveyed states. The support, or lack thereof, for each of these sub-criterion is laid out below.

1. The Refugee Must Have Access to UNHCR

Although favorable reference is made to UNHCR access, there is little explicit support for the view that it is mandatory. The UNHCR mandate "requires that it have prompt and unhindered access to asylum-seekers and refugees wherever they are."[111] In the Australian context, the courts considered access to the UNHCR to be insufficient, without more, to ensure that individuals would have access to a fair refugee status determination process in Malaysia.[112] Elsewhere, in the Canada-U.S. Safe Third Country Agreement, a provision is made for the UNHCR to attend meetings to review implementation of the agreement.[113] It may be that access to UNHCR is such a basic requirement that it is rarely denied, and therefore, rarely the subject of specific discussion by official organs. Denial of access to the UNHCR should therefore be viewed as a red flag for inadequate refugee status determination procedures, even if it may not be legally required.

2. Preservation of the Asylum Seeker's Privacy in Making a Claim (to Ensure Full Testimony)

The UNHCR views it as the sending state's responsibility to ensure that any receiving state respects the privacy interests of any transferred individual and of any members of his or her family.[114] The case law from the surveyed states does not directly address this criterion. It does, however, appear to be state practice to caption cases and to refer to applicants throughout by the use of pseudonyms to protect the privacy of the applicants.[115] As with (a) above, this criterion may be so widely observed that it is rarely the subject of specific discussion. In addition to its importance in providing for a fair and effective refugee status determination, protec-

111. Global Consultations, Asylum Processes, *supra* note 12, ¶ 50(g).

112. *See Plaintiff M70/2011*, [2011] HCA 32, ¶ 135.

113. Agreement for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, Can.-U.S., art. 8(3), Dec. 5, 2002, T.I.A.S. No. 04-1229 (providing for the parties to review the agreement together, along with UNHCR).

114. *See* Lisbon Expert Roundtable, *supra* note 4, ¶ 15(h).

115. *See, e.g.*, R v. Sec'y of State for the Home Dep't [2014] UKSC 12 (appeal taken from Gr. Brit.); *Plaintiff M70/2011*, [2011] HCA 32.

tion of privacy is likely of great importance in ensuring the safety of any asylum seeker or refugee.

3. The Determination Process Must Take Account of the Special Vulnerabilities of the Individual Refugee (e.g., Women Who are Survivors of Rape or Other Sexual Violence, Who are Pregnant, or Who Are Single Heads of Households; Children, Especially Where Unaccompanied; and Stateless Persons)

This requirement is supported by UNHCR documents, as well as by state practice. The UNHCR views taking account of special vulnerabilities as an essential element of effective protection.[116] This is supported by state practice. For instance, the British judiciary, pursuant to the ECHR framework, takes account of the special vulnerabilities of the individual asylum seeker with respect to access to mental health treatment.[117] Special vulnerabilities would additionally include age and physical health.

4. Asylum Seekers Should Be Provided State-Funded Representation at All Stages of the Refugee Status Determination Process, Although This Is Not Strictly Required Under International Law[118]

This is not articulated by the UNHCR as a requirement. Nevertheless, there is some evidence of states considering it as a relevant, although not mandatory, criterion in determining whether a third state provides a fair and effective refugee status determination procedure. Specifically, a Canadian trial court decision, subsequently overturned on domestic procedural grounds (without addressing the substantive findings), found that the United States was not a safe third country to which Canada could send asylum seekers or refugees.[119] The trial court found that the United States did not comply with its obligations under the Convention or the Convention Against Torture based in part on findings that asylum seekers

116. *Id.* at ¶ 15(h).

117. *See* R v. Sec'y of State for the Home Dep't, ex parte Razgar (FC) [2004] UKHL 27 (HL) ¶ 70 (expressing concern that sending an asylum seeker back may have a potentially fatal effect on their mental health).

118. Although this requirement is absent from Legomsky's list of criteria, it was considered relevant in a Canadian trial court's consideration of the issue. *See* The Queen v. Canadian Council for Refugees, [2009] 3 F.C.R. 229, ¶ 22 (Can.). It is unlikely that this can be considered a formal requirement, as public representation is not ensured under Canadian law, although it may be available under provincial legal aid programs. *See Legal Aid Program, supra* note 103.

119. *See Canadian Council for Refugees*, [2009] 3 F.C.R. 229, ¶ 22.

were not provided with state-funded representation at all stages of the refugee determination process (despite the fact that this is not guaranteed under Canadian law, although assistance is available through provincial legal assistance programs).[120]

This decision provides support for the view that asylum seekers should be provided with state-funded representation at all stages of the refugee status determination process, although this cannot be understood to be a formal requirement, as it is not ensured under Canadian law.[121] A French administrative decision shares the view that access to free representation is relevant to determining whether the third country is safe.[122]

5. An Asylum Seeker Should Not Be Barred from Receiving Protection Based Solely on the Fact That He or She Failed to Submit an Application Within a Certain Period of Time[123]

The UNHCR views arbitrary time bars as contrary to the Convention.[124] As such, a sending state is responsible to ensure that a receiving state does not implement arbitrary time bars that would negatively impact a transferred asylum seeker. This finds support in state practice. In the Canadian trial court decision mentioned above, the court found that the United States was not a safe third country to which Canada could send asylum seekers or refugees based in part on findings that persons who failed to make a claim

120. *See id.* The decision also considered that the United States was in breach of the Convention for failing to consider gender-based asylum claims, for detaining asylum seekers with prior convictions and processing their claims in an expedited review process, and for excluding from protection those found to have offered support to terrorists (without providing any exemption based on coercion or duress). *See id.* (noting the lack of access to representation). Under Canadian law, an individual is not entitled to public representation; representation may be available for indigent claimants through provincial legal aid programs. *See Legal Aid Program*, *supra* note 103; *see also* R v. Sec'y of State for the Home Dep't, ex parte Adan, R v. Sec'y of State for the Home Dep't, ex parte Aitseguer [2001] 2 WLR 143 (HL) (appeal taken from Eng.) (requiring that the United Kingdom assure itself that Germany, as a proposed third country for removal, would interpret and apply the Convention in a manner that respected the "true autonomous and international meaning" of Article 1 of the Convention, defining "refugee").

121. *See Legal Aid Program*, *supra* note 103.

122. Tribunal administratif de Paris, No. 0912495-3/3 (3d section, 3d chambre) (2009) (considering, among other factors, the lack of access to public counsel and interpreters as relevant to a finding that Greece was not a safe third country to which France could remove an asylum seeker).

123. *See id.*; Global Consultations, Asylum Processes, *supra* note 12, ¶ 20; *Canadian Council for Refugees*, [2009] 3 F.C.R. 229, ¶ 22 (noting the arbitrary one-year time bar applied to asylum claims in the United States).

124. *See* Global Consultations, Asylum Processes, *supra* note 12, ¶ 20.

for protection within one year of arriving in the United States were improperly barred from later making an application.[125]

6. Additional Requirements for a Fair and Effective Refugee Status Determination?

Beyond the criteria described above for ensuring that the refugee status determination procedure is fair and effective, there is some precedent to support the view that the refugee status determination should be judicially reviewable. In *M.S.S. v. Belgium*, the ECtHR viewed a lack of access in Greece to judicial review of refugee status determinations as an important factor in finding that Belgium had violated its *non-refoulment* obligations by transferring asylum seekers to Greece.[126] Likewise, the Australian High Court has required that Australia's offshore refugee status determinations be subject to judicial review to ensure the availability of effective procedures.[127] In a 1996 case, the German Federal Constitutional Court held that the legislator properly exercised its power to designate Ghana as a presumptively safe third country where there was not a risk of political persecution, focusing on the existence of an independent judiciary as an important factor.[128]

F. *The Third Country Is a Party to the 1951 Refugee Convention and 1967 Protocol (or Provides Comparable Protection)*

As discussed under factor (3) above[129] (that the sending state ensure that the receiving state will respect the Convention and Protocol), ratification of the Convention and Protocol is relevant to

125. The decision also considered that the United States was in breach of the Convention for failing to consider gender-based asylum claims, for detaining asylum seekers with prior convictions and processing their claims in an expedited review process, and for excluding from protection those found to have offered support to terrorists (without providing any exemption based on coercion or duress). *See Canadian Council for Refugees*, [2009] 3 F.C.R. 229, ¶ 22 (noting the lack of access to representation). Under Canadian law, an individual is not entitled to public representation; representation may be available for indigent claimants through provincial legal aid programs. *See Legal Aid Program*, *supra* note 103; *see also* R v. Sec'y of State for the Home Dep't, ex parte Adan, R v. Sec'y of State for the Home Dep't, ex parte Aitseguer [2001] 2 WLR 143 (HL) (appeal taken from Eng.) (requiring that the United Kingdom assure itself that Germany, as a proposed third country for removal, would interpret and apply the Convention in a manner that respected the "true autonomous and international meaning" of Article 1 of the Convention, defining "refugee").

126. *See* M.S.S. v. Belgium & Greece, App. No. 30696/09, Eur. Ct. of H.R., ¶¶ 316–20 (2011).

127. *See Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, ¶¶ 77, 105 (Austl.).

128. Bundesverfassungsgericht [Federal Constitutional Court] May 14, 1996-2 BvR 1507/93.

129. *See supra* Section III(E)(3).

determining whether a third state is safe. Additionally, it is relevant whether the third state has registered any reservations in ratifying these instruments.[130] Unlike the other criteria included in this Article, it is not, however, strictly required under international law. The core requirement is that the receiving state affords refugees the rights provided in the Convention. Following British case law, this factual inquiry alone may suffice. In contrast, the Australian High Court has required that in addition to factually affording the same substantive rights as are provided in the Convention, the receiving state must do so pursuant to some legal obligation, either international or domestic.

While the UNHCR takes the view that compliance with the Convention should be specifically incorporated into agreements regarding the transfer of refugees and asylum seekers, comparative case law does not support the view that agreements must incorporate these provisions. In general, in light of the fact that such agreements, though encouraged, are not strictly required, it is hard to see why it would be required that states incorporate substantive protections in their terms where some other binding legal obligation, domestic or international, requires that the receiving state provide the same substantive rights. In this respect, the Australian High Court view may be the most sensible: that binding international agreements incorporating the Convention rights can provide the type of binding legal obligation that a receiving state is required to undertake (and in fact, comply with); agreements containing such provisions are not strictly mandatory so long as the receiving state is bound by some legal obligation, either domestic or international, to provide the same substantive rights to refugees and asylum seekers.

G. *A Durable Solution Is Available in the Third Country*

Legomsky, supported by the UNHCR, states that it is the responsibility of the sending state to ensure that any transferred individual will "have the possibility to seek and enjoy asylum" in the receiving state.[131] At a minimum, this requires that the receiving state provide effective protection until a durable solution is

130. *See* Legomsky, *supra* note 4, at 644–45 (considering and rejecting the view that a safe third country need not respect reservable Convention rights).

131. UNHCR, BACKGROUND PAPER NO. 2, *supra* note 12, at 3; *see* UNHCR, BACKGROUND PAPER NO. 3, *supra* note 48, ¶ 17 ("[T]he responsibility for examining an asylum application lies primarily with the State to which this [protection] application has been submitted.").

found.[132] In state practice, courts have rarely had the opportunity to separately consider this requirement. At a minimum, this requirement demands that the receiving state afford the transferred individual non-temporary protection. At a maximum, this requirement could demand that the sending state ensure that the receiving state and its asylum system are sufficiently stable to provide lasting protection. This is not the type of analysis that lends itself well to judicial consideration. Where, however, the receiving country lacks stable traditions of rule of law and judicial review, or a long history of compliance with the Convention, there may be reason to question an otherwise sufficient protection regime.

H. *Material Subsistence and an Adequate Standard of Living*

Although Legomsky does not include this criterion as a standalone requirement under the Convention, he states that "knowingly sending the applicant to a third country where he or she will lack either physical security or basic subsistence can be 'cruel, inhuman or degrading treatment' for purposes of the various [other] human rights agreements that use that term."[133] It can be conceptualized as constituting a substantive and material counterpart to the procedural requirements for a fair and effective refugee status determination process. As set forth below, there is some support for the view that the sending state is obligated to ensure that the transferred individual will have access to necessary means of subsistence and an adequate standard of living in the receiving country. What precisely these standards require is not entirely clear. The UNHCR states that this requires that "[t]he person has access to means of subsistence sufficient to maintain an adequate standard of living."[134] Once the individual is recognized as a refugee, the receiving state must undertake steps to "enable the progressive achievement of self-reliance, pending the realisation of durable solutions."[135]

The United Kingdom considered the material conditions facing asylum seekers and refugees in Italy. Initially finding conditions in Italy systemically deficient, the court revisited the situation in Italy, finding that it had improved to the point where it was no longer

132. *See* Lisbon Expert Roundtable, *supra* note 4, ¶ 15(i).

133. Legomsky, *supra* note 4, at 674.

134. Lisbon Expert Roundtable, *supra* note 4, ¶ 15(g).

135. *Id.*

systemically deficient.[136] This finding was based largely on reports of the UNHCR, despite conflicting personal experiences on the part of some of the asylum seekers and refugees before the court. The court found that although asylum seekers and refugees had, in recent years, faced homelessness or overcrowded and inadequate housing conditions and were forced to rely on charitable handouts for food once food vouchers ran out, the UNHCR report indicated that conditions had improved, specifically with regard to the availability of housing. In light of this, the court held that Italy was now a safe third country to which individuals could be transferred under the Dublin scheme.[137]

Switzerland's case law regarding safe third country determinations is limited. Where Swiss courts have considered the issue, they have emphasized the material conditions that the asylum seeker would face in the third state, and have not articulated a doctrinal list of generally applicable criteria. Notably, the Swiss Tribunal Administratif Fédéral (the Tribunal) considered whether Israel was a safe state to which an Eritrean asylum seeker could be removed.[138] The Tribunal found that Israel was not a safe third state with respect to the petitioner, based upon its consideration of the following factors:

1. precarious situation relating to shelter;
2. precarious situation relating to work;
3. real danger of being imprisoned or of being held in a so-called open facility for an undetermined time;
4. remoteness of the open detention facility; and
5. lack of a temporary residence permit (only a one-month renewable permit would be available).[139]

While the Tribunal indicated that factors (1) and (2) may be insufficient to support a finding that Israel is not a safe third state with respect to the petitioner, it considered that these factors taken together amounted to a separation and expulsion order.[140] The Tribunal further considered the risk that Israel could deport the petitioner to a third state such as Uganda.[141] The Tribunal expressed concern regarding the unknown fate that a petitioner could face in Uganda or in some other country. The Tribunal's set

136. *See* R v. Sec'y of State for the Home Dep't [2014] UKSC 12, ¶¶ 1, 26 (appeal taken from Gr. Brit.).

137. *See id.*

138. *See* Bundesverwaltunggericht [BVGE] [Federal Administrative Court] June 6, 2014, D-1938/2014 (Switz.).

139. *See id.*

140. *See id.*

141. *See id.*

of criteria does not line up cleanly against the Legomsky criteria. The Tribunal's focus appeared to be the practical life that would be available to the petitioner in Israel and the intent behind the restrictions that he would encounter. Taken as a whole, the Tribunal believed the policies were intended to compel self-deportation contrary to the provision of effective protection.[142]

Conclusion

International law with respect to safe third state determinations has, in recent years, been thought of principally in terms of criteria set out by international organizations and academics. The result has been admirably lofty standards. But many states routinely disregard these standards. Rules of international law rest not only on treaties and advisory opinions of international organizations; they rest as well on the force of *opinio juris* as reflected in the practice of states. Reliance on state practice has its limitations. The resulting articulation of the law is often less lofty. It may, however, represent a more workable minimum standard to which states can be made to comply. On that basis, it is the author's hope that future studies in the area of international refugee law will focus somewhat less on international institutions and academic literature and somewhat more on the practice of states and how domestic judicial systems have regarded that practice.

142. *See id.* ("The Federal Administrative Court arrived at the conclusion, based on the evidence in the file, that the petitioner could possibly have serious difficulties with the authorities in his home country. The examination of the reasonableness of remaining in Israel produced the following: The precarious situation relating to shelter and work, taken alone, might not be regarded as sufficient in themselves as grounds for the unreasonableness of a claim of protection at his current location; on the other hand, the facts of the case lead to the conclusion that the appellant is in real danger of being imprisoned or of being held in a so-called open facility for an undetermined time and to be forced to depart, as the Israeli authorities have the intention of imprisoning thousands of Eritrean nationals, and the appellant submitted a copy of a detention order for Holot Detention Centre to the case file and presented the original for view by the Swiss consulate in Tel Aviv (cf. Human Rights Watch [HRW], Israel: Detained Asylum seekers Pressured to Leave, dated 13 March 2013). Therefore, it must be assumed in this case that he will be held for an indefinite period in Holot and who – in contrast to the FOCM's description – will not long have a temporary residence permit, which would only be renewable for one month at a time, as the copy of the detention order shows that he is regarded as an infiltrator or intruder and will not receive a visa any more. In addition, it must be assumed that any opportunity for integration and assimilation in Israel is cancelled by [the] detention order. Rather, by detaining the appellant in a facility that he can only leave with permission, in the middle of the Negev desert, 65 km from the next city and without the possibility of work, must be regarded as a separation and expulsion measure. Furthermore, there is the risk that he will be deported to a third state such as Uganda, where it is unclear what fate will threaten the appellant in that country. Under these circumstances, it is not reasonable for the appellant to be expected to remain in Israel and seek protection there.").