

HUMAN RIGHTS IN ASYLUM SHARING AND OTHER HUMAN TRANSFER AGREEMENTS

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Abstract

The article sets out the concept of a State-to-State human transfer agreement of which extradition and deportation are specialised forms. Asylum sharing agreements are other variations which the article explores in more detail. Human transfer agreements always affect at least the right to liberty and the freedom of movement, but other rights will also be at issue to some extent. The article shows how human rights obligations limit State discretion in asylum sharing agreements and considers how past and present asylum sharing arrangements in Europe and North America deal with these limits, if at all. The article suggests changes in the way asylum sharing agreements are drafted: for example, providing for a treaty committee would allow existing agreements to better conform to international human rights instruments and would facilitate State compliance to their human rights obligations.

1. INTRODUCTION

The human rights of an individual can clearly be violated when forcibly transferred by one State to another. Although forms of transfer arrangements or return agreements between States are commonplace, there has been little thorough examination of the human rights obligations involved.

This article explores arrangements for State-to-State transfer of persons with a particular emphasis on transfer agreements for the purpose of asylum sharing. There have been studies of extradition and expulsion, but these have not been conceptualised as falling within a broader category of human transfer agreements. This article makes a contribution to this broader concept before turning to another specific agreement – the asylum sharing agreement.

Human transfer agreements affect the human rights of those transferred and it is argued that these agreements must be designed to include human

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rights guarantees, since the International Human Rights regime has become, in international law as it is often also in domestic law, the legitimacy and legality test for State action that most States have now accepted. Human rights treaties provide for exceptional situations where the guarantees they provide for may be limited, such as national emergency, but such is generally not the context for most human transfer agreements, even in the midst of the 'war against terror'.

Several asylum sharing agreements have been proposed between Canada and the US, one in 1991, another in 1995 and the most recent in 2002, which was agreed upon in 2003 and is pending implementation.¹ There were antecedents in Europe such as the 1990 Dublin Convention,² leading to the recent 2003 EU Council Regulation.³

International human rights jurisprudence shows how a human transfer by one State to another can impact on the human rights of the individual involved. While the needs to protect persons from *refoulement* and torture and to protect their family life have been recognised, the full sweep of human rights obligations has not yet. This article gathers such human rights obligations and shows that they require protections within a transfer agreement. The elements required by human rights obligations coincide with and reinforce earlier proposed elements derived principally from refugee law.

The article shows that the various types of agreement between States to transfer persons cannot stand in isolation of human rights obligations. Human beings, including asylum seekers and refugees,⁴ are guaranteed human rights. Most developed States are parties to regional and international treaties under which they have accepted obligations. The UN Covenant on Civil and Political Rights (CCPR) is the most relevant international treaty and it has been widely ratified. The text of the treaty provides for a Human Rights Committee that can examine States Parties, issue General Comments and offer 'views' on complaints of a violation of a right from individuals for those States that have additionally agreed to Protocol I. During the 1990s, international jurisprudence from bodies like

¹ 'Agreement for Cooperation in the Examination for Refugee Status Claims from Nationals of Third Countries', as circulated by the Canadian Council for Refugees, October 2002, hereafter called the '2003 Canada-US Agreement'.

² Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, 15 June 1990, *International Law Magazine*, Vol. 30, 1991, p. 425, ('Dublin Convention').

³ Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, *Official Journal of the European Union*, L050, 25 February 2003, pp. 1-10.

⁴ We use both terms as they would be used in refugee affairs. 'Asylum seeker' describes a person by his or her action. A refugee is a defined term. An asylum seeker is a refugee until determined not to be one. The determination can be made by a signatory State applying Article 1 of the 1951 Convention Relating to the Status of Refugees or by the UH High Commissioner for Refugees applying the mandate given by the UN.

the Human Rights Committee or the European Court of Human Rights (the 'European Court') began to clarify how the treaties should be interpreted with respect to situations involving asylum seekers: the rulings on *Ng* by the Human Rights Committee⁵ and *Chahal* by the European Court⁶ are good examples.

The effect of a human transfer agreement on the person is expulsion from the territory. The concept of a human transfer agreement for some particular purpose has existed for some time in extradition treaties. International case law on deportation and extradition is directly relevant to any form of transfer agreement. Human rights obligations set limits on such transfer treaties. The proposed deportation of *Chahal* to India on grounds of national security would have violated his right to protection from torture or cruel, inhuman or degrading treatment or punishment. The case involved a rudimentary agreement, as the UK, the sending State, had obtained the agreement of India, the receiving State, concerning the safety of *Chahal* if returned. In some extradition cases, the US will agree not to apply the death penalty to the accused being extradited.

The provisions of a transfer or expulsion agreement may or may not transform a real risk of the violation of a right into protection for that right. It is this transformation that this article explores.

How international human rights impact on expulsion has by now been explored in some detail.⁷ This article reviews current jurisprudence, shows that it reinforces the earlier conclusions and shows how the jurisprudence imposes constraints on a human transfer agreement. Such agreements could be adjusted to honour human rights treaty obligations. While looking at international jurisprudence, this article makes particular reference to the Americas.

The first part of the article shows that a range of human rights obligations are involved. It sets out a core of human rights obligations that international jurisprudence has shown will typically apply to a State contemplating a State-to-State human transfer –, and then explores the limitations that a State may

⁵ On 26 September 1991, Canada extradited Mr. Ng to the US so that he could be tried there for murder. The extradition was determined to have violated his right to protection from cruel and inhuman treatment in the form of the death penalty known to be practiced in the US. *Charles Chitat Ng vs Canada*, UN Human Rights Committee, Communication No. 469/1991, Views, UN Doc. CCPR/C/49/D/469/1991, 7 January 1994.

⁶ On 25 October 1996, the European Court of Human Rights ruled that if the UK proceeded to deport Mr. Chahal to India, there was a real risk of torture or cruel or inhuman or degrading treatment or punishment in violation of the *European Convention on Human Rights*. There had been a violation of Mr. Chahal's right to have the lawfulness of his detention for expulsion determined by a court and a violation of his right to an effective remedy. *Chahal vs the UK*, European Court of Human Rights, 70/1995/576/662, Judgment, 25 October 1996, (1996) 23 EHRR 413.

⁷ See Clark, Tom and Aiken, Sharryn with Jackman, Barbara and Matas, David, 'International Human Rights Law and Legal Remedies in Expulsion: Progress and Some Remaining Problems with Special Reference to Canada', *Netherlands Quarterly of Human Rights*, Vol. 15, No. 4, 1997, p. 429.

set on this core of relevant individual rights. The article shows how transfers for the purpose of asylum sharing can be carried out so that human rights of asylum seekers are unlikely to be violated. In the second part, the article proposes elements for a model asylum sharing treaty and shows how some actual or proposed asylum sharing agreements incorporate several, if not all, of the elements proposed. The article concludes that it is in the interests of advancing the implementation of human rights treaties to encourage States to include all of the elements by modifying their existing or proposed human transfer arrangements.

2. HUMAN RIGHTS AND TRANSFERS

All involuntary transfers of persons between States have some effect on the human rights of those transferred.⁸ The question is whether the impairing of the rights amounts to a violation. In the first section of this part, the human rights obligations that a State has assumed by taking jurisdiction over a person are examined. The jurisdiction is evidenced by the very fact that the State is applying a human transfer agreement to that person. The person is lawfully present if only for the purpose of the application of the transfer agreement and the adjudication of any rights arising from that. The second section explores when a limit on the rights of such a person may not amount to a violation of the person's rights, and the measures a State is required to take to avoid violations.

2.1. Defining a Core of Obligations

The central obligation accepted by a State ratifying the CCPR such as Canada or the US, is to ensure the rights provided for in the treaty for those under its jurisdiction.⁹ This is a sweeping obligation and it is tantamount to saying the State must take measures to avoid a violation of these CCPR rights. A State that transfers a person when there is a real consequential risk of the violation of a right by the receiving country is itself accountable for violating the right. The obligation is well put in *Ng vs Canada*:

'... the Committee observes that what is at issue is not whether Mr. Ng's rights (...) are likely to be violated by the United States (...) but whether by extraditing Mr. Ng to the United States, Canada exposed him to a

⁸ The restriction of rights to liberty and freedom of movement is recognised in early case law of the Inter-American Commission on Human Rights. See *ibidem*, p. 435.

⁹ Under the CCPR, the State Party undertakes 'to respect and to ensure to all individuals (...) the rights (...) in the present Covenant without distinctions of any kind...' (Article 2(1)); 'to take the necessary steps (...) to adopt such legislative measures or other measures as may be necessary to give effect to the rights recognized in the present Covenant' (Article 2(2)); 'to ensure that any person whose [CCPR] rights (...) are violated shall have an effective remedy (...) and to develop the possibility of judicial remedy' (Article 2(3)).

real risk of a violation of his rights under the Covenant. States parties to the Covenant will also frequently be parties to bilateral treaty obligations, including those under extradition treaties. A State party to the Covenant must ensure that it carries out all its other legal commitments in a manner consistent with the Covenant. The starting point for consideration of this issue must be the State party's obligation, under article 2, paragraph 1, of the Covenant, namely, to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant (...) If a State party extradites a person within its jurisdiction in such circumstances that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.'¹⁰

Note that, in this ruling, the Human Rights Committee situates extradition alongside other bilateral treaties that a State may enter into with another State. Other human transfer agreements qualify.

Extradition is a form of expulsion. Expulsion is any form of forced and involuntary departure of a person from the territory of a State exercising jurisdiction over that person. In deportation, the deporting State generally does not rely on a specific agreement but rather on the general application of international law that allows States to determine that foreigners must leave their territory.

Two rights are central to arrangements involving the transfer of asylum seekers. The first is the right to seek and obtain asylum that is promised by States parties to some regional human rights treaties.¹¹ The other is the right to apply for refugee status offered by States parties to the 1951 Geneva Convention Relating to the Status of Refugees (the '1951 Refugee Convention'). When such rights are available, they immediately link to the CCPR. The non-discrimination provision of the CCPR extends to any right or benefit offered: the obligation to ensure non-discrimination, according to CCPR Article 26, applies to the right to seek and obtain asylum when some form of this right is available. To sum up, the State must at least:

- 1) respect and ensure CCPR rights without discrimination (CCPR Article 2(1));
- 2) give effect to CCPR rights (CCPR Article 2(2));
- 3) provide an effective remedy for a violation (CCPR Article 2(3)).

If the violation is, as set out above in the *Ngvs Canada* case, by expulsion to a foreseeable 'real risk' of a violation by another State, the effective remedy must be compatible with 'ensuring' the rights, that is, it must be capable of

¹⁰ *Ngvs Canada* (1994), *op.cit.* (note 5), para. 14(1) and (2).

¹¹ We refer here to the American Convention on Human Rights, Article 22(7), and the African Convention on Human and Peoples' Rights, s. 12.3.

preventing this violation by the sending State, here preventing the expulsion. It must be a preventive remedy.¹²

Under Article 2 CCPR, the State's effective remedy must 'develop the potential for a judicial remedy'. In the Americas, there must be more than a potential judicial remedy. There is an obligation to provide access to a simple court process to protect a person from acts of authority that may violate fundamental rights. This has been confirmed in jurisprudence by the Inter-American Commission on Human Rights ('Inter-American Commission').¹³ The Inter-American Commission's interpretation is based on considerable jurisprudence and relevant case law of the Inter-American Court of Human Rights.¹⁴ The Human Rights Committee and European Court case law would be relevant for the EU. The Human Rights Committee and Inter-American Commission and Court case law would be relevant for Canada and the US.

From work on extradition,¹⁵ on expulsion in general¹⁶ and from subsequent additional case law, there is an established collection of rights that a State must anticipate can be impaired or violated when it transfers asylum seekers.

2.1.1. Rights to Liberty and Freedom of Movement

Expulsion invariably limits the rights to liberty and freedom of movement.¹⁷ If the choice of country of asylum is restricted by an asylum sharing-agreement, these rights will be impaired. The issue is whether such a limitation of the rights will amount to a violation. That we will discuss below. The transfer of special categories of non-citizen, for example a Stateless person, would almost invariably amount to the violation of the right to freedom of movement.¹⁸

¹² See *Chahal vs the UK, op.cit.* (note 6), paras 140-155.

¹³ Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, OEA/Ser.L/V/II.106, Doc. 40 rev., 28 February 2000, paras 95-98.

¹⁴ See generally, IACHR, Resolutions No. 3/84, 4/84 and 5/85, Cases No. 4563, 7848 and 8027, Paraguay, published in Annual Report of the IACHR 1983-84, OEA/Ser.L/V/II.63, doc. 10, 24 September 1984, at pp. 57, 62 and 67 (addressing lack of access to judicial protection in proceedings involving expulsion of nationals; linking right to freely enter and remain in one's own country under Article VIII of the Declaration to the rights to a fair trial and due process under Articles XVIII and XXVI). See also, Report No. 47/96, Case 11.436, Cuba, in Annual Report of the IACHR 1996, OEA/Ser.L/V/II.95, Doc. 7 rev., 14 March 1997, at para. 91 (citing Annual Report of the IACHR 1994, 'Cuba', at p. 162, and addressing failure of State to observe freedom of movement of nationals under Article II via denial of exit permits from which no appeal is allowed).

¹⁵ Gilbert, Geoff, *Aspects of Extradition Law*, Martinus Nijhoff, Dordrecht/Boston/London, 1991, pp. 79-91.

¹⁶ Clark and Aiken *et al., loc.cit.* (note 7).

¹⁷ *Ibidem*, p. 435.

¹⁸ *Charles E. Stewart vs Canada*, HRC, Communication No. 539/1993, Views, UN Doc. CCPR/C/56/D/538/1993, 16 December 1996, para. 12(3)-(4).

2.1.2. Discrimination in the Right to Seek and Obtain Asylum from Persecution

If a sending or receiving State offers a right or benefit of 'asylum', for example by the application of the 1951 Convention, the transfer could 'discriminate' against the person transferred as compared with another person not transferred. Even though such a right to asylum is not a formal enumerated CCPR right, Article 26 CCPR on non-discrimination extends to any such right or benefit offered.¹⁹ It obliges the State transferring to ensure non-discrimination with respect to this right or benefit. This non-discrimination obligation is fundamental in a myriad of contexts. For example, this CCPR provision would govern the application of a right promised by a party to the European Convention on Human Rights. It would apply to a right such as the right to work under the Covenant on Economic, Social and Cultural Rights.

This non-discrimination right is central to processes that select persons for transfer to another State where the range of rights and benefits may be substantially different. It will be taken up in a test for setting limits on rights discussed below. It would take into account the consequence of the distinction being made by transfer. In broad terms, transfer that results in minor variations in asylum procedure in another State would be unlikely to amount to 'discrimination'. However, transfer that results in a significant difference in the nature of the asylum available would constitute discrimination: in effect, the consequences for that asylum seeker would be very different from those for a person sent to a State that offers the same social benefits. That difference could stem from, for example, combinations of missing rights such as the rights to work and to social assistance being available to asylum seekers in one State and not in another.²⁰

Evidently, the obligation to ensure rights without discrimination can best be met for asylum sharing when the States involved have organised a

¹⁹ Clark, Tom in collaboration with Niessen, Jan, 'Equality Rights and Non-Citizens in Europe and America: The Promise, the Practice and Some Remaining Issues', *Netherlands Quarterly of Human Rights*, Vol. 14, No. 3, 1996, p. 245, at pp. 249-251. See also HRC, General Comment 18[37], UN Doc. CCPR/C/21/Rev.1/Add.1, 21 November 1989; Nowak, Manfred, *UN Covenant on Civil and Political Rights: CCPR Commentary*, NP Engel, Kiel/Strasbourg/Arlington, 1993, p. 473, at p. 479.

²⁰ The Human Rights Committee General Comment 18[37], UN Doc. CCPR/C/21/Rev.1/Add.1, 21 November 1989, paras 3 and 12 includes the concept of equal treatment before the law as an aspect of discrimination. The right to equal treatment is in Article 2 of the American Declaration of Rights and Duties of Man. One person who seeks asylum but is referred to another State to apply for asylum there is evidently treated differently from the next person who, with similar circumstances, is not so referred. If the procedure in the other State is substantially different or if work opportunities are available in one State but not in the other so that the nature of the asylum and the related processing is substantially different, there is not equal treatment of asylum claims. The issue is whether the differentiation will amount to discrimination.

common framework of rights and benefits. In other words, transfer agreements have a chance of honouring rights when they are among members of treaty systems like the European Union. The more disparate the rights and benefits offered by States parties to a transfer agreement, the more difficult it would be to ensure rights without discrimination.

2.1.3. Right to Life

As noted above, any transferring State that knowingly thereby exposes a person to a real risk of the violation of an important right is itself held accountable for violating that right.²¹ Transfer to a State posing a real risk to aspects of the right to life (Article 6(2) CCPR), such as due process, or a cruel treatment, such as execution of the death penalty can amount to a violation of this right. Transfer to a real risk of the death penalty from a State that has abolished the death penalty can violate the right to life.²² A sending State can accept an undertaking not to apply the death penalty from the receiving State.²³ Ensuring the right to life may well preclude the transfer of a fugitive to a State with a death penalty.

2.1.4. Right to Protection from Torture and Cruel, Inhuman or Degrading Treatment or Punishment

Article 3 of the UN Convention against Torture (CAT) and CCPR are explicit and clear. There can be no transfer of any person, in any circumstances, for any reason, if there is a consequential real risk of torture or cruel, inhuman or degrading treatment or punishment. There is now considerable European and UN Committee against Torture case law.²⁴ Jurisprudence confirms that nothing justifies a limitation on the prohibition of torture, not even national security. An undertaking from the receiving

²¹ 'If a State party extradites a person within its jurisdiction in such circumstances, and if, as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.' *Ng vs Canada*, *op.cit.* (note 5), para. 14(2).

²² See Human Rights Committee, *Judge vs Canada*, Communication No. 829/1998, Views 20 October 2003, UN Doc. CCPR/C/78/D/829/1998.

²³ While States must be mindful of their obligation to protect the right to life when exercising their discretion in the application of extradition treaties, the Committee does not find that the terms of article 6 of the Covenant necessarily require Canada to refuse to extradite or to seek assurances. The Committee notes that the extradition of Mr. Ng would have violated Canada's obligations under article 6 of the Covenant if the decision to extradite without assurances had been taken summarily or arbitrarily.' *Ng vs Canada*, *op.cit.* (note 5), para. 15(6).

²⁴ Gorlick, Brian, 'The Convention and the Committee against Torture: A Complementary Protection Regime for Refugees', *IJRL*, Vol. 11, 1999, p. 479, at pp. 486-492.

State that it will not torture is not good enough.²⁵ The sending State must verify that in fact the receiving State is willing and able to carry out such an undertaking.²⁶

In refugee law, there is a related obligation of *non-refoulement*.²⁷ Transfer of a refugee to a country where there is a real risk of mandatory detention could amount to *refoulement*.

2.1.5. Family Rights and Children's Rights

Jurisprudence of the European Court,²⁸ Human Rights Committee²⁹ and Inter-American Commission and Court³⁰ has shown that the deportation of resident non-citizens with consequential disruption of family life must be expressly justified. Family rights and children's rights are thus to be treated as important rights in transferring persons. An asylum sharing transfer agreement alone would not be expected to justify limiting family rights and children's rights within a core family.³¹ On the other hand, limiting these rights has not arisen as an obstacle to extradition. The test for limitation will be discussed in more detail below.

2.1.6. Effective Remedy and/or Access to a Court Process

An effective remedy must allow access to the highest courts if necessary.³² Forms of judicial review that have some elements of an appeal have been

²⁵ See *Chahal vs the UK*, *op.cit.* (note 6), paras 92 and 105.

²⁶ *Ibidem*, paras 96-106.

²⁷ '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.' 1951 Refugee Convention, Article 33(1).

²⁸ See, for example, *Moustaquim vs Belgium*, European Court of Human Rights, Series A. 193, 18 November 1991, 13 EHRR, Vol. 13, 1991, p. 458.

²⁹ 'The Committee notes that there may indeed be cases in which a State party's refusal to allow one member of a family to remain in its territory would involve interference in that person's family life. However, the mere fact that one member of a family is entitled to remain in the territory of a State party does not necessarily mean that requiring other members of the family to leave involves such interference.' *Winata vs Australia*, HRC, Communication No. 930/2000, Views, UN Doc. CCPR/C/72D/930/2000, 16 August 2001, para. 7(1).

³⁰ '...Given the nature of Articles V, VI and VII of the American Declaration, interpreted in relation to Canada's obligations under the Convention on the Rights of the Child, where decision-making involves the potential separation of a family, the resulting interference with family life may only be justified where necessary to meet a pressing need to protect public order, and where the means are proportional to that end. The application of these criteria by various human rights supervisory bodies indicates that this balancing must be made on a case by case basis, and that the reasons justifying interference with family life must be very serious indeed.' IACHR, *op.cit.* (note 13), para. 166.

³¹ *Idem*.

³² Clark and Aiken *et al.*, *loc.cit.* (note 7), pp. 438-454.

accepted by the European Court³³ and then by the Human Rights Committee, first implicitly³⁴ and then explicitly.³⁵ There are advisory opinions of the Inter-American Court emphasising the role of courts and due process. There has been recent jurisprudence of the Inter-American Commission that emphasised a need for access to the courts even during interdiction on the high sea.³⁶ The nature of the court review includes the right to know the whole of the case against one so as to be able to respond to it – even for asylum seekers in a national security context.³⁷ The Inter-American Commission has questioned limits on access to judicial review: it noted the need to be able to introduce new information prior to expulsion and suggested an appeal on the merits for asylum seekers in this situation.³⁸ The authors acknowledge that the case law of the European Court has so far failed to establish that the full requirements of Article 6 of the European Convention on Human Rights (due process) apply when a treaty right is adjudicated in an expulsion context.³⁹

The concept of ‘effective remedy’ must be interpreted alongside the obligation to ‘ensure’ rights of the person under a State’s jurisdiction so that

³³ *Ibidem*, p. 444.

³⁴ For example the domestic court review is accepted in *Ng vs Canada*, *op.cit.* (note 5).

³⁵ ‘...In the instant case, the Committee finds that, by preventing the author from exercising an appeal available to him under domestic law, the State party failed to demonstrate that the author’s contention that his deportation to a country where he faces execution would violate his right to life, was sufficiently considered. The State party makes available an appellate system designed to safeguard any petitioner’s, including the author’s, rights and in particular the most fundamental of rights – the right to life. Bearing in mind that the State party has abolished capital punishment, the decision to deport the author to a state where he is under sentence of death without affording him the opportunity to avail himself of an available appeal, was taken arbitrarily and in violation of article 6, together with article 2, paragraph 3, of the Covenant.’ Human Rights Committee, *Judge vs Canada*, *op.cit.* (note 22), para. 10(9).

³⁶ ‘...the unnamed Haitian nationals were unable to resort to the courts in the US to vindicate their rights because they were summarily interdicted and repatriated to Haiti without being given an opportunity to exercise their rights...’, *Haitian Centers vs US*, Case 10675, Report No. 51/96, OEA/Ser.L/Vii.95, Doc. 7 rev. 14 March 1997, para. 180.

³⁷ ‘...Although the certificate review process is not criminal in nature, the non-disclosure of such information may well prejudice the rights of the person concerned, giving rise to serious consequences. Once a certificate is upheld by a judge, it constitutes conclusive evidence that the person named falls within an inadmissible class, and mandates that he or she be detained until removed from Canada. While the IACHR recognizes that the State is necessarily concerned with the need to protect its ability to collect sensitive information, it is a fundamental principal of due process that the parties engaged in the judicial determination of rights and duties must enjoy equality of arms. A person named in a certificate who is the subject of secret evidence will not enjoy a full opportunity to be heard with minimum guarantees, the essence of the right to due process. Both citizens and non-citizens must be accorded due process in the determination of basic rights, in this instance, the right to seek asylum and the right to personal liberty, in particular.’ IACHR, *op.cit.* (note 13), para. 157.

³⁸ *Ibidem*, para. 115.

³⁹ For example, the European Court of Human Rights judgment in *Maouia vs France*, 5 October 2000, (2001) 33 EHRR 1037.

international case law, such as the *Ng* ruling, has rightly taken a preventive approach. One cannot ensure a person's rights in expulsion without some form of suspensive provision or practice around access to courts for appeals or reviews. Thus, it is a human rights issue that there is no provision for suspension of transfer pending an appeal in the 2003 EU Council Regulation.

The obligations for an effective remedy and for ensuring rights may together require more than access to a national court when interpreted in the context of a bilateral treaty. In the treaty context, to be truly effective, a remedy must be able to arbitrate the application of the transfer treaty. Only some treaty committee provided for such purpose could do that.

This list of rights that can be violated by a State transferring a person to another State is not meant to be exhaustive. As noted, other rights may arise, like the right to work that may be available in a sending State but not in a receiving State. This would be part of the context of the 2003 Canada-US Asylum Sharing Agreement. In particular circumstances, such other rights may be violated by transfer. Any process must be capable of identifying such rights as at issue and ensuring they are not violated by the transfer. The main point of the listing exercise here is to identify for States some of the more commonly recurring rights known to have been violated by expulsion, that is, by State to State transfer, with or without agreements.

2.2. Ensuring that Limitation of Rights will not Amount to a Violation of Rights

As noted above, for all transfers, at least the rights to liberty and freedom of movement will be affected. For many transfers, other rights relating to the right to security of the person and family rights will be at issue. When any plausible asylum seekers are transferred, the rights to security of the person and non-discrimination will be affected. But are these violations?

Most rights guaranteed by States under human rights treaties are not absolute, and may be limited. However, the human rights treaties restrict the State on the form and extent of the limitations. A limitation may be specific, when it is set out in the text of the treaty as relating to a particular right. The right to freedom of movement is a highly relevant case in point. This article argues however that there is always a more general restriction on any State limiting any right, which comes from the obligation of Article 26 CCPR that requires non-discrimination with respect to any right or benefit. The conditions for limiting the right to non-discrimination itself then become a general condition for limiting the application of any other right or benefit that a State may offer. The right to seek and obtain asylum under an asylum-sharing agreement is a relevant case.

The form of the test for specific and general limitations is similar and can be made to converge for simplicity of application. A general test for limiting

non-discrimination was deduced in an earlier article.⁴⁰ In broad terms, any limit distinguishing the allocation of a right or benefit must be:

- in law;
- for a legitimate purpose;
- necessary; and
- reasonable or proportionate in the context of a human rights treaty.

Since rights to liberty and freedom of movement are always limited by a human transfer agreement, the agreement must at the very least be ‘in law’ and ‘for a legitimate purpose’. The specific test for the right to freedom of movement is largely equivalent to the general test if ‘a legitimate purpose’ in the general test is defined as:

- to protect national security,
- to protect public order,
- to protect public health or morals, or
- to protect the rights and freedom of others.

Case law indicates that there are other legitimate purposes:

- extradition is legitimate in that it allows the person to be tried in equality with others in the place where the crime was committed. It also advances international efforts to prosecute for crime;
- deportation of criminals has been accepted as legitimate by human rights treaty bodies.⁴¹

In principle, an asylum-sharing or responsibility-sharing transfer agreement could be for a legitimate purpose if it aimed to ensure the ‘right to seek and obtain asylum’, provided for in international law.⁴² Even if asylum remains theoretically a discretionary grant by a State,⁴³ as the 1951 Convention provides only for a limited *non-refoulement* principle,⁴⁴ we know that States

⁴⁰ Clark with Niessen, *loc.cit.* (note 19), p. 251. Some consider the ‘necessary’ element as embedded in the ‘reasonable or proportionate’ element of the test. A distinction that is unnecessary would be unreasonable. Thus, although Nowak reaches a similar conclusion for Article 26 CCPR, and refers to the need for the proportionality principle in the European system, he does not list ‘necessary’ as a distinct element for the test. Nowak, *op.cit.* (note 19), p. 473.

⁴¹ See, for example, *Moustaquim vs Belgium*, *op.cit.* (note 28). We think the issue of legitimacy of State-to-State transfer has not been fully examined as an issue between the States involved under wider international law. For example, is it legitimate under international law for Canada to deport to Jamaica a Jamaican citizen with few ties to Jamaica who became criminalised over the majority of a lifetime spent in Canada when the Canadian legal system has failed to rehabilitate that person? Jamaica could have some claim to compensation against Canada under international law.

⁴² See Universal Declaration, Article 14; American Declaration, Article 27; American Convention, Article 22; African Charter, Article 12.

⁴³ Goodwin-Gill, Guy, *The Refugee in International Law*, 2nd ed., Clarendon Press, Oxford, 1996, p. 202.

⁴⁴ 1951 Refugee Convention, Article 33.

have now undertaken human rights obligations that have much strengthened a 'right to asylum'. If an asylum-sharing agreement guaranteed a right of asylum for qualifying individuals in one of the participating States, creating this new right would be a legitimate purpose. Another purpose may be to increase the amount of asylum that can be granted by allowing additional States to assume some responsibility for granting asylum. Increasing the scope of a right would be legitimate. Cooperation among States for responsibility sharing would fit in with the purposes of the UN Charter and so would likely be legitimate. Asylum sharing could be a legitimate precaution for emergency situations of a large influx of asylum seekers, such that there was a threat to national security, public health or public order. Large numbers of Kosovar asylum seekers arrived suddenly in the tiny country of Macedonia in 1999. To have asylum-sharing agreements in place for such emergencies would likely be a legitimate purpose.

Asylum seekers may have mercenary reasons as well as historic and kinship reasons to choose some States for asylum and not others. It is likely a legitimate purpose for States that are disproportionately attractive to asylum seekers to seek to limit this choice. It may even be necessary and proportionate to limit the corresponding liberty and freedom of movement by an asylum-sharing agreement.

The limit of a right must be necessary, as well as for a legitimate purpose. Necessity has been defined as responding to a pressing public and social need, pursuant to a legitimate aim and proportionate to the aim.⁴⁵ Presumably, a measure would not be 'necessary' if there was an evident alternative measure that would address the same aim and impair the right less. Thus, for example, the legitimate purpose of extradition of *Soering* by the UK to the US could be viewed as not necessary because the same purpose could have been accomplished by extradition to Germany – an alternative noted by the European Court.⁴⁶ An extradition treaty might make provision for possible alternative extradition possibilities to an international tribunal or court. A transfer arrangement intent on honouring human rights might deliberately introduce alternatives. For example, the agreement might provide for the free choice of the asylum seeker to be resettled in a State not party to the transfer agreement as arranged under the auspices of the UN High Commissioner for Refugees. This will be explored further below.

For most formal agreements, the first elements of the test are likely to be met. Transferring asylum seekers under an asylum sharing agreement will often be legitimate and necessary. The 'proportionate' or 'reasonable' part of the test is where problems have arisen in expulsion case law. If important rights like family rights are also engaged, even though there is a legitimate

⁴⁵ For Article 12 CCPR, see Nowak, *op.cit.* (note 19), p. 211. For this article, we do not consider necessity as it applies to other less relevant rights limitations such as that for freedom of speech.

⁴⁶ *Soering vs the UK*, European Court of Human Rights, Series A 161, 7 July 1989, [1989] 11 EHRR 439.

purpose and some measure of necessity, the transfer may no longer be proportionate when considering the loss of rights for the individual. Ultimately, the test for whether a transfer amounts to a violation involves balancing the impact on the rights at issue against the legitimacy and necessity of the State transfer, and finding that the impact is either proportionate or disproportionate.

The practical point for States here is that this balancing will involve an examination of the particular circumstances of the case. Even if the initial balancing is made by the authorities, it will be necessary to also allow the person at least normal access to the courts for protection of the rights potentially at risk of violation. Ensuring rights means not transferring the person pending such a court process – a suspensive effect. So far, States appear to have balked at the costs of the required due process. Of course, States must accept that a belief in the importance of rights must be paid for. Yet there may be ways of setting up an asylum-sharing transfer agreement so that it can enhance rights with relatively low cost. That is what the next section will explore.

3. PRACTICAL MATTERS: ELEMENTS FOR A MODEL TRANSFER AGREEMENT

In 1979, refugee law provided some guidance for asylum sharing agreements. States at the Executive Committee of the UN High Commissioner for Refugees agreed on criteria for asylum sharing: objective criteria; the wishes of the asylum seeker; links of the asylum seeker; and consultations together and with UNHCR.⁴⁷

During the 1980s, an *ad hoc* group of experts under the auspices of the Council of Europe produced a 1989 CAHAR Draft Agreement.⁴⁸ The Agreement was based on the objective criterion that the country of first entry should assume responsibility. This group proposed but failed to secure State agreement on a draft provision for responsibility based on family links to a State already examining an asylum request by a spouse or a minor child or dependent child as well as links to a State where such family members enjoyed asylum or a form of residence.⁴⁹ This group provided for oversight by saying (Article 12) that the parties would communicate via specified

⁴⁷ Executive Committee of the UNHCR, Conclusion No. 15 (XXX), 1979, 'Refugees without an Asylum Country', UN Doc. A/AC.96/572, para. 72(2).

⁴⁸ *Draft Agreement on Responsibility for Examining Asylum Requests*, 9 Final 1988, by the Ad Hoc Group of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons, proposed under the Final Activity Report (Strasbourg, 25 January 1989) to the Council of Ministers, CM(89)12, under the auspices of the Council of Europe, E 14.547 02.2. ('CAHAR Draft').

⁴⁹ See *ibidem*, para. 18.

authorities. The 1990 Dublin Convention,⁵⁰ a derivative of the CAHAR Draft Agreement emerged and finally came into force in 1997. It provided for responsibility based on family 'links', but only to family members recognised under the 1951 Refugee Convention. It also provided for a more formal treaty committee (Article 18), but a committee focused on diplomatic interpretation and amendments. The late Arthur Helton argued in favour of these additional elements while examining the 1992 Draft Canada-US MOU. He proposed: protection from *non-refoulement*, protection of family rights and a treaty committee.⁵¹ This article will show how the human rights obligations reinforce and extend each of these earlier elements. But first, human rights considerations make it necessary to provide, as a legal framework, a secure arrangement such as a treaty.

3.1. A Secure Transparent Arrangement – A Treaty Equivalent for 'in Law'

Be it for asylum-sharing, return or extradition, such an agreement is all about transferring persons from State to State. It anticipates the limitation of CCPR or other rights. It envisages making distinctions among asylum seekers that will affect their rights and benefits. The agreement is therefore about human rights. Several strands of reasoning point to a treaty between the States as being the most appropriate vehicle for such purposes.

The obligation of each State to 'ensure' rights requires a joint arrangement that is secure. The need to ensure non-discrimination requires objective criteria. Both these require a transparent and formal arrangement. The obligation on each State to set any limitations on rights 'in law' equally requires formality. Indeed, a formal treaty is the most reasonable international analogue for 'in law' when two States jointly and reciprocally agree to limit rights in accordance with the international standards they have accepted. The obligation to 'ensure' rights would be facilitated by some stated reference to this as an aim of the treaty. The CAHAR draft makes reference to the 1951 Refugee Convention and to Article 3 of the European Convention of Human Rights. The 1990 Dublin Convention makes reference to the 1951 Refugee Convention. The 2003 Canada-US MOU makes reference to 'reaffirming their mutual obligations to promote and protect human rights and fundamental freedoms'.

⁵⁰ Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, 15 June 1990, *Official Journal C* 254, 19 August 1997, pp. 0001-0012, entered into force 1 September 1997 for the twelve original signatories, on 1 October 1997 for Austria and Sweden and on 1 January 1998 for Finland ('1990 Dublin Convention').

⁵¹ Helton, Arthur C., 'Towards Harmonized Asylum Procedures in North America: The Proposed United States – Canada Memorandum of Understanding for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries', *Cornell International Law Journal*, Vol. 26, 1993, p. 737.

Of course, the joint arrangement allowing limitations of rights would not replace the individual State obligations in international law. Insofar as the treaty itself is a measure to limit rights, the treaty itself should be ‘in law’ – that is in the law of each of the participating States. Extradition generally follows this model.⁵² However, asylum-sharing or deportation or return agreements do not always enjoy the status of a formal treaty. The Dublin Convention qualifies. The 1992 Draft Canada-US MOU was a less formal arrangement. The 2003 Canada-US agreement has provisions allowing suspension or termination by either party with short notice. Such arrangements may not be adequate to meet the obligation of ‘ensuring’ rights without discrimination.

3.2. Objective Criteria for Transfer: ‘Ensuring’ Non-Discrimination

To avoid discrimination in who is transferred, the distinctions made among the persons involved in a transfer must not only be in law and for a legitimate purpose, such as asylum sharing, they must be based on objective criteria. That is part of the international non-discrimination test. It applies when any right is at issue and at least rights to liberty and freedom of movement are always at issue.

For asylum-sharing and deportation/return agreements, the dominant criterion used is ‘State of first entry’, that is, the State from among the participating States in the agreement where the asylum seeker was first allowed to enter. This is the basis for the 1990 Dublin Convention and the 2003 Canada-US agreement. For extradition, the objective basis is a request for the transfer of a person under the jurisdiction of one State based on a criminal charge concerning a crime committed on the territory of the other State. However, there are other possibilities such as a criterion that uses the State where immediate close family members are being processed or reside. Almost all the asylum-sharing arrangements include some family criteria and provision for unaccompanied minors including the 2003 EU Council Regulation and the 2003 Canada-US Agreement.

3.3. Respecting the Wishes of the Transferee: Giving Effect to Rights and Freedoms

There is no deprivation of rights if the person gives free informed consent to be transferred. If rights are not impaired, there is no due process requirement to establish the proportionality between the impairing of the rights of the individual and the legitimate purpose and necessity of the State transfer. Thus, a transfer agreement seeking to maximise rights may wish to make provision for a simple consensual alternative.

⁵² Gilbert, *op.cit.* (note 15), pp. 20, 25 and 27.

A mechanism to offer Mr. Soering the option of extradition to Germany for trial instead of the US, would have avoided the court procedures that ultimately ended in the European Court of Human Rights. In fact, the European Court noted the option of transfer to Germany rather than the extradition to the US in its decision. Such a provision would be helped by some form of arbitration committee attached to the transfer treaty.

In asylum sharing, responding to the wishes of the individual should also be factored in. Rights and freedoms are not violated if the individual involved gives free and informed consent to the application of the transfer treaty. Of course, response to the individual's wishes will need to be on the basis of 'in law' objective criteria. The Dublin Convention and the 2003 EU Council Regulation do not make provision for the wishes of the asylum seeker. These arrangements relate to a collective of States where there are substantially similar rights and benefits so that the discriminatory effect of transfer is reduced. On the other hand, the 2003 Canada-US Agreement could allow the wishes of the transferee to be considered. Under Article 6 'either Party may at its own discretion examine any refugee status claim (...) in its public interest to do so.' As it stands, the discretion is not an entirely transparent objective criterion. The discretion would be more transparent if qualified so as to be in response to the wishes of the asylum seeker.

3.4. 'Links' and Ensuring Family Rights

The 'links' criterion of refugee law most commonly arises when there are citizens or resident family members and relatives of the person falling under the jurisdiction of a transfer agreement in one of the States parties. Family rights are important rights. If such important rights arise, the balance between the individual's rights to family life and the State's legitimate interest in the transfer shifts towards the individual. Transferring a person away from a country where core family members like a spouse or a child reside to one where no relatives reside is almost certainly disproportionate. Even the legitimate purpose of deportation of some of the most serious criminals is not generally enough to overcome the obligation to protect family and children's rights. Extradition will generally justify the transfer. However, if there is a real risk of persecution or torture, even extradition does not justify a transfer.

Ensuring such rights must be a stated purpose within the treaty so that this obligation is expressed with a force equivalent to the 'in law' obligation of each individual State. Practical measures must provide for protecting family life and protecting from persecution in any transfer. A measure allowing an asylum seeker to transfer to the State offering the most family ties can be one of the objective criteria for transfer, especially for assigning the responsibility for asylum under a sharing agreement. An exception would occur when the person would face a consequential real risk of family

violence – a form of persecution. Another exception might be a national emergency in one of the States.

As noted above, the 1989 CAHAR Draft, the 1990 Dublin Convention, the 2003 EU Council Regulation and the 2003 Canada US Agreement all provide for some family rights and children's rights. Amnesty International notes that the family link criterion under the otherwise reasonable 2003 EU Council Regulation applies when a family member is being examined 'under a normal procedure'.⁵³ The CAHAR Draft that States could not agree upon at the time comes closest to reflecting the human rights case law obligations. Family rights to live with a spouse and minor children or dependent children are primary. As the time required for processing represents potential family separation, the link should extend to a State where such a family member is being examined for asylum. Depending on the family, other relationships may also be important. The 2003 Canada-US Agreement makes more appropriate allowance for family (Article 4(2) (a) and (b)) in allowing a link to one family member who is 'other than an aunt, uncle, sibling, niece, or nephew' who is 'not ineligible to pursue a refugee status claim and has such a claim pending'.

In making such distinctions between asylum applicants and 1951 Refugee Convention asylum applicants in family rights, States must ensure non-discrimination as provided in Article 26 CCPR. That is, the distinction among applicants on the basis of family must be for a legitimate purpose, objective, necessary and proportionate. The 2003 EU Council Regulation does in broad terms note the importance of family unity in the 'whereas' recitations. However, given the importance of family rights, the limitation made in Article 7 of the 2003 EU Council Regulation could amount to a violation of the right to non-discrimination if spouses or minor dependent children are involuntarily separated into different States for processing.

For adjudicating these important rights, access to the courts becomes an important obligation. Yet whose courts? Does the application of a transfer treaty require something more objective than one national court? It is precisely this reasoning that created the treaty body within most of the international human rights treaties. This same reasoning makes a case for a treaty committee associated with the transfer agreement.

3.5. Ensuring Protection from Persecution: Non-Refoulement

The human rights obligations clearly extend beyond a concern about *refoulement* consequential to transfer of a person. While the right to protection from torture is the most graphic extension of *non-refoulement*, other situations could arise. Earlier, this article suggested that combinations

⁵³ 'Amnesty International's Comments on the Commission's proposal for a Council Regulation...', Brussels, June 2002, downloaded from LARC website (larc.info/acquis/state-resp.htm), 28 August 2003.

of a lack of work and lack of social assistance consequential to transfer might add up for an individual to make transfer a violation of rights – a disproportionate impairing of rights despite the State’s legitimate purpose and necessity. This need to evaluate particular combinations of circumstances makes the access to court review, below, an important element in ensuring rights and providing an effective preventative remedy.

Protection from *refoulement* for a refugee coincides with a general protection from a real risk to any person’s life and liberty consequential to expulsion by transfer. *Refoulement* is likely a form of cruel and inhuman treatment. The issue of liberty could arise in transfers contemplated between States where the receiving State has forms of mandatory imprisonment without adequate court remedy. Objective measures and some mechanism must provide a preventive remedy for these possible forms of consequential persecution. *Refoulement* would almost invariably be disproportionate. Return to a real risk of torture would always be prohibited. Here, as with family situations, there must be mechanisms in law – that is in the text of the agreement – and there must be access to national courts if necessary. The CAHAR Draft did make reference to Article 3 of the European Convention. The 2003 Canada-US Agreement makes explicit reference to the 1984 Convention against Torture obligation in the preamble.

A particular issue from the case law is the transferring of a person out of the jurisdiction of an international treaty body. Thus, for example, a factor in weighing the proportionality of a transfer would be whether both the sending and receiving State had ratified the 1951 Refugee Convention or the 1984 Convention against Torture. Case law, such as *Chahal vs the UK*, indicates that there must also be mechanisms to satisfy the sending State that the receiving State is able in practice to uphold any undertakings given with respect to protecting the individual transferred.⁵⁴ A case in point would be the transfer of a child from Canada that has ratified the 1989 Convention on the Rights of the Child to the US that has not. In fact the 2003 Canada-US Agreement discreetly overcomes this potential problem by making a special provision for an unaccompanied minor in Article 4(2)(c), alongside family link.

The question of some form of a committee for the agreement arises again with the need for a mechanism to protect a transferee from a real risk to life or liberty or real risk of torture upon transfer. Outside the special framework of the European Union, these are delicate matters for States and do not easily lend themselves to the ‘diplomatic channels’ proposed in Article 8(2) of the 2003 Canada-US Agreement. As a practical matter, any agreement can benefit from an objective face saving arbitration mechanism. There is no easy way to resolve differences between States. Complaints mechanisms provided for States in human rights treaties are used only in exceptional circumstances. In contrast, mechanisms allowing individuals to raise

⁵⁴ *Chahal vs the UK, op.cit.* (note 6).

complaints against States have been accepted and have given rise to useful international case law.

3.6. A Treaty Committee and Access to Courts: Providing an Effective Remedy

Almost all human rights treaties found it necessary to provide for forms of interpretation and arbitration by a panel or similar arm's length body provided within the treaty. Unfortunately, human transfer agreements are not yet viewed as a form of human rights agreement. This article has already suggested in several places that some form of treaty committee may be helpful. It may be required. The obligation on individual States to provide an effective remedy may, in a joint treaty context, require the creation of such treaty committee in order to provide a joint remedy with respect to the application of the joint arrangement.

Article 18 of the 1990 Dublin Convention establishes a form of treaty committee. The Committee is made up of representatives of the member States. However, this is not aimed to ensure rights of the individual transferee. It differs significantly from the treaty body for a human rights treaty in that it does not call for particular expertise and experience in human rights from the members. It lacks the mandate to arbitrate for individual cases. It has the mandate to arbitrate different interpretations of the agreement among member States. Indeed, it is set up in the face of the general evidence from other human rights treaties that most useful interpretations of the treaties come from individual complaints, not from State to State arbitration. True, there is power to set up working parties (Article 18(4)) that might be exploited so as to allow the creation of an advisory group of experts closer to a conventional human rights treaty body.

In the 2003 Canada-US Agreement, Article 8 recognises a need to develop 'procedures (...) mechanisms for resolving differences respecting the interpretation and implementation...', but this is not developed beyond a notional possibility in the agreement itself. Again, this could allow the development of an advisory group of experts at arm's length from the Agreement.

Of course, in most developed societies, some form of access to national courts and due process will be required under human rights obligations when important rights are at risk by proposed transfer. As noted above, this access to courts must provide an effective remedy for violation of a right and it must ensure rights – it must be preventive. Thus there is a solid basis for the UNHCR concern that appeals be given suspensive effect in the 2003 EU Council Regulation.⁵⁵ Neither the 1990 Dublin Convention nor the 2003

⁵⁵ 'UNHCR's Observations on the European Commission's Proposal for a Council Regulation...', UNHCR, Geneva, February 2002, downloaded from LARC website, *op.cit.* (note 53), 28 August 2003.

Canada-US Agreement contains any 'measure' to 'ensure' the rights known to arise. Nor do these texts make any reference to a national court 'effective remedy' for an individual being transferred. Indeed, the human person being transferred has no role.

There may be practical wisdom in providing a treaty body that can deal with individual complaints and provide interpretive jurisprudence. Court processes are costly. The case for the treaty committee follows the logic behind the ombudsperson or national human rights institution. Measures to avoid the need for court access through voluntarily accepted alternatives are desirable. A treaty body with powers to arbitrate between the States and an individual and to propose alternatives might be more useful.

Some international agencies have mandates that would allow or require them to play special roles on or for such a transfer treaty committee. For example, the Inter-American Commission has attracted the authority to interpret human rights treaties in the Americas. This stems in part from its mandate under Article 41 of the American Convention to promote progressive human rights among the States of the region and in part from its role in cases before the Inter-American Court of Human Rights that has the authority to interpret human rights treaties.⁵⁶ Not only can the Inter-American Commission advise on the interpretation of relevant international treaties such as the CCPR. The transfer treaty itself can be viewed as a human rights treaty which the Inter-American Commission has the mandate to interpret. If States built into the transfer treaty some role for the Inter-American Commission, it could advance the implementation of international rights in the Americas. Obviously, there would need to be careful provision for staff support to give a typically understaffed human rights agency the resources to participate usefully. Similarly, the specialist advisory group associated with the Council of Europe system that produced the 1989 CAHAR Draft could play a related role linked to a committee for a transfer treaty in Europe.

For asylum seekers, the UNHCR must be included into the transfer agreement supervision in some manner. The 1990 Dublin Convention agrees to cooperate with the UNHCR (Article 2) but fails to give the UNHCR an explicit role in the transfer treaty. The UNHCR has the authority to

⁵⁶ The Inter-American Commission was questioned on the matter of other treaties by Canada in its Report on the Canadian Refugee Determination System (see *op.cit.* (note 13), para. 38). The Commission replied in part quoting the Inter American Court (Advisory Opinion OC-1/82 of 24 September 1982 'Other Treaties...', Series. A, No. 1, para. 43: 'The Commission has properly invoked in some of its reports and resolutions "other treaties concerning the protection of human rights in the American states", regardless of their bilateral character or whether they have been adopted within the framework or under the auspices of the inter-American system'. See also Inter-American Court, Advisory Opinion OC 14/94 of 9 December 1994 '...Laws in Violation of the Convention', Series A, No. 14, paras 25 and 28 making reference to the Commission mandate in American Convention Article 41 'to make recommendations (...) for the adoption of progressive measures in favour of human rights...'

oversee the application of the 1951 Refugee Convention.⁵⁷ The 1951 Refugee Convention is one of the objective means of granting asylum⁵⁸ and its role is recognised in the 1990 Dublin Convention and the 2003 Canada-US Agreement. When asylum sharing involves the 1951 Refugee Convention, the transfer agreement itself is part of a State's application of the 1951 Refugee Convention, so that the UNHCR has the mandate to oversee the application of the transfer agreement. A place on a treaty committee that can offer alternatives, receive individual complaints and arbitrate disagreements among States parties is a logical place for the UHNCR to fit in. The UHNCR has the power to designate an asylum seeker as a refugee under the mandate of the office and to seek a solution for such a refugee.⁵⁹ The UNHCR lacks the power to provide asylum, but can invite other States outside an asylum sharing agreement to resettle a refugee. The UNHCR may also persuade States to offer to process a claim for asylum and may gather a number of prior offers for contingencies arising.

Neither the 2003 EU Council Regulation nor the 2003 Canada-US Agreement make provision for a role of an expert body like CAHAR or the Inter-American Commission on Human Rights. Neither arrangement make provision to allow UNHCR to exercise its mandate insofar as the arrangement is an application of the 1951 Refugee Convention. UNHCR's Observations noted above calls for complementary measures and criteria to those of the 2003 EU Council Regulation.

4. CONCLUSION

Human transfer agreements are performing forms of expulsion and thus always affect human rights such as the right to liberty and freedom of movement. Other important rights will be at issue to a greater or lesser extent, including non-discrimination; family and children's rights; rights to life and freedom; protection from torture (*non-refoulement*). Human rights obligations require a formal agreement that recognises the need to protect these rights in transfer and that will 'ensure' these rights and provide a preventive effective remedy for a violation of them. None of the agreements noted in this article fully met this test.

Bounds on State limitations of individual rights and the jurisprudence on extradition and expulsion support the elements required for an asylum-sharing transfer agreement as proposed previously from refugee law. The elements are: objective criteria; provision for family; provision for protection

⁵⁷ See 1951 Refugee Convention, Article 35.

⁵⁸ See Clark, Tom with Crépeau, François, 'Mainstreaming Refugee Rights. The 1951 Refugee Convention and International Human Rights Law', *Netherlands Quarterly of Human Rights*, Vol. 17, No. 4, 1999, p. 389.

⁵⁹ See Statute of the UNHCR, in: Goodwin-Gill, *op.cit.* (note 53), p. 384.

from *refoulement*; and provision for consultation between parties and with UHNCR.

There is an additional need for a secure transparent formal arrangement such as a treaty rather than some informal memorandum or *ad hoc* arrangement. It is required by the human rights obligations that States must 'ensure' rights and ensure non-discrimination in the limitation of any rights and benefits by objective criteria in law, and by the obligation to provide an effective remedy for potential violations. These all point to a formal treaty. Extradition treaties conform with this. So does the 1990 Dublin Convention. The 2003 EU Council Regulation is relatively secure and transparent. The 2003 Canada-US Agreement has aspects that deviate from security and transparency: it makes reference to external operating procedures with broad powers for resolving differences (Article 8(1)-(2)). It comes into force by an exchange of notes (Article 10(1)) and it can be suspended by either party for three months renewable by notice or terminated by six months notice (Article 10(2)).

In general, to justify the inevitable limitation of some rights and freedoms, human transfer agreements must be for a legitimate purpose, necessary and proportionate for the circumstances of the person to be transferred. Human transfer agreements for the purpose of asylum sharing or for extradition must accomplish that legitimate purpose. However, any particular human transfer may not be necessary, given alternatives, or may not be proportionate, considering the nature of the rights and the real risk of their violation as a consequence of the transfer. A human transfer will ultimately reflect the individual's particular situation and circumstances. The jurisprudence of the various treaty courts, commissions and committees provides authoritative international guidance on what is proportionate. The human transfer treaty ought not only to make reference to the international rights obligations, but also to the relevant corresponding international standards developed by case law so that national courts would draw on this relevant case law for their deliberations on individual court reviews or appeals of transfer decisions. The international advice might become dynamic if some form of link for general advice is established between a human rights treaty body and a specific human transfer treaty committee with power to arbitrate between the individual transferee and the States. Indeed, the obligations to ensure rights and to provide an effective and preventive remedy for potential violations suggest that some form of arbitration and complaints committee associated with the human transfer treaty may be required.

If the transfer agreement is for asylum sharing involving the 1951 Refugee Convention, the UNHCR has a mandate to participate in such a human transfer treaty committee, but so far lacks the formal right to do so. The Inter-American Commission on Human Rights has the mandate to interpret a human transfer treaty because such a treaty intimately involves the rights and freedoms of those being transferred. There would be a special

practical value in having the Commission linked to offer general advice to a human transfer treaty committee. Yet the 2003 Canada-US Agreement makes no such provision.

Adapting existing and proposed human transfer treaties to conform with international human rights obligations could enormously advance the implementation of the international human rights treaties as they apply to vulnerable groups of persons – unwanted non-citizens caught up in State-to-State human transfer arrangements.