

Ensuring the protection of unaccompanied and separated children in the context of return or transfer to “safe third countries”

Introduction

In recent years, several countries have either entered or are seeking to enter into bilateral agreements to transfer asylum seekers to third countries for the purpose of adjudicating their claims for international protection. These agreements, which are often referred to as “Asylum Cooperative Agreements” or “Safe Third Country Agreements,” pose critical implications for the safety, well-being, and best interests of unaccompanied and separated children as well as countries’ compliance with international, regional, and domestic law.

What Are Asylum Cooperative Agreements?

Asylum Cooperative Agreements (ACAs) are bilateral or multilateral agreements through which countries agree to transfer asylum seekers to another designated country to process for the processing of their protection claims. These agreements, which differ significantly from standard asylum procedures, are part of a broader range of so-called “safe third country” mechanisms, through which States assert that they may lawfully discharge their protection obligations if the transferred person can access “effective protection” in the receiving State.

As a concept, ACAs date back to the late 1980s, when governments in Europe and North America began experimenting with “protection elsewhere” models in response to rising asylum applications and political pressure to control irregular arrivals.¹ The European “safe third country” and “first country of asylum” clauses were incorporated into national and EU law beginning in this period, with the 1990 Dublin Convention and subsequent Dublin Regulations formalizing inter-State transfers within the EU on the premise that protection could be sought in another participating State.²

In more recent decades, States beyond Europe have adopted offshore processing or “outsourcing” models comparable to ACAs. A notable example is Australia’s “Pacific Solution,” initiated in 2001. Under that policy, Australia entered arrangements with the island States of Nauru and Papua New Guinea (Manus Island) to hold and process asylum seekers arriving by boat offshore rather than on the Australian mainland.³ In the Americas, the United States and Canada concluded the first bilateral Safe Third Country Agreement in 2002,⁴ followed by the United States’ ACAs with Guatemala,⁵ El Salvador,⁶ and Honduras⁷ in 2019. At the EU level, the “safe third country” concept was codified in Article 38 of the Asylum Procedures Directive, and further revised in the 2024 Asylum Procedure Regulation, set to take effect in mid-2026.⁸ These provisions allow applications to be declared inadmissible if a safe third country is identified.

ACAs have been justified by States as efforts to “end asylum abuse,”⁹ to “break the business model” of smugglers and traffickers,¹⁰ to deter “dangerous and illegal journeys,”¹¹ to provide refugee protection “as close to home as possible,”¹² or as part of broader “strategic partnerships.”¹³ However, in practice, there is little evidence that they achieve these aims and ACAs have been criticized for leading to human rights violations, providing limited oversight, and presenting significant challenges in ensuring children’s best interests are respected.¹⁴ They have also faced persistent legal challenges for restricting access to asylum and exposing applicants, including children, to risks of refoulement.¹⁵

As a result, the ACA concept has become increasingly controversial, and its compliance with international law is highly contested. Ultimately, ACAs may represent the latest iteration of a decades-long policy trend toward externalization of asylum and migration control. While often framed in the language of international cooperation, they have too often operated as instruments of responsibility shifting to States that are neither “safe” nor adequately equipped to provide effective protection.

International and Regional Law Frameworks

Refugee Law

The 1951 Refugee Convention and its 1967 Protocol¹⁶ set forth State parties’ legal obligations regarding the rights, treatment, and protection of refugees and asylum seekers. Together, they are the cornerstone of international refugee law, establishing that individuals may not be expelled or returned to a place where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group, or political opinion.¹⁷ Regional refugee law instruments such as the 1969 OAU Convention¹⁸ and 1984 Cartagena Declaration¹⁹ provide more expansive protection than the 1951 Refugee Convention, extending eligibility to people fleeing generalized violence, conflict (including civil wars), foreign aggression, massive violations of human rights, or other events seriously disturbing public order.²⁰

While international and regional refugee law do not explicitly prohibit ACAs or transfers to “safe third countries,” they also provide no basis for them, and impose binding legal obligations that strictly constrain such practices. Foremost among these is the principle of non-refoulement, which prohibits States from returning a refugee “in any manner whatsoever” to territories where their life or freedom would be threatened on Convention grounds.²¹ This principle has attained the status of customary international law and applies to all refugees and asylum seekers regardless of formal recognition status.²² Legal scholars and numerous international courts have also underscored that non-refoulement obligations extend to indirect transfers—so-called “chain refoulement” or “constructive refoulement”—where an individual is sent to a country that, in turn, sends them onward to a place of persecution.²³ Additionally, refugee law prohibits asylum-seekers from being punished for irregular entry²⁴ and requires access to fair procedures for determining their need for international protection.²⁵

UNHCR has stressed that, while ACAs are not per se unlawful, they are permissible only if certain minimum standards are met. Among these are: (i) prior to any transfer, an individualized assessment of the asylum seeker’s circumstances and the appropriateness of the transfer; (ii) procedural safeguards, including an effective opportunity to rebut any general presumption that a third country is “safe;” ; assurances that the person will (iii) be admitted to the proposed receiving State; (iv) be protected from refoulement; (v) have access to a fair and efficient procedure for determining refugee status or other forms of protection in the receiving State; (vi) be treated in accordance with accepted international standards, including adequate reception conditions and safeguards against arbitrary detention; and (vii) if recognized as in need of protection, be able to enjoy asylum and access to a durable solution.²⁶ UNHCR has also stressed that in all ACA cases, the removing State bears responsibility for ensuring that the third country will treat the person in line with these international standards.²⁷

Several UNHCR Executive Committee (ExCom) Conclusions have reaffirmed these duties. For example, ExCom Conclusion No. 15 (XXX) (1979) urges States to consider an asylum seeker’s intentions and not to refuse asylum solely because it could be sought elsewhere. ExCom Conclusions No. 8 (XXVIII) (1977), No. 58 (XL) (1989), and No. 85 (XLIX) (1998) further emphasize that any third country transfer must comply with international refugee protection standards, including effective access to asylum procedures and protection from refoulement.

Collectively, international and regional refugee law standards confirm that while States may cooperate to share responsibility for processing asylum claims, they remain individually responsible for ensuring that every transfer upholds refugee rights. ACAs which deny access to these minimum standards or that transfer persons to States lacking functional asylum systems are inconsistent with international refugee law obligations.

Human Rights Law

While refugee law applies only to those individuals meeting a specific refugee definition, human rights law applies to all individuals without discrimination, regardless of their claims for protection, mode of entry, or any other status. Therefore, human rights law provides heightened protections in the context of return, transfer, or removal of persons according to ACAs, and each State's actions must be consistent with their obligations under binding international and regional human rights instruments.²⁸

To begin with, the scope of the principle of non-refoulement under human rights law is broader than that found in refugee law. While refugee law prohibits return to a real risk of persecution, the prohibition of refoulement under human rights law applies to all forms of removal or transfer where substantial grounds exist for believing that the individual would face a real risk of torture, ill-treatment, or other irreparable harm, even where there are no concerns of persecution. For example, courts have interpreted the real risk of torture, ill-treatment, or other irreparable harm to include: flagrant denial of the right to a fair trial; violations to the rights to life, integrity, and/or freedom of the person; serious forms of sexual and gender-based violence; death penalty or death row; female genital mutilation; prolonged solitary confinement; and severe violations of economic, social, and cultural rights, such as degrading living conditions, lack of medical treatment, or mental illness, among others.²⁹

Additionally, while refugee law permits certain exclusions to the non-refoulement principle,³⁰ as an inherent element of the prohibition of torture and other forms of cruel, inhuman, or degrading treatment or punishment, the principle of non-refoulement under human rights law is non-derogable, permitting no exceptions or exclusions, even during states of emergency or on grounds of national security or public order.³¹ Accordingly, human rights law also requires heightened procedural safeguards. Whereas refugee law primarily focuses on whether the third country may be considered "safe" for the transferred asylum-seeker and whether persons will have access to fair and effective asylum procedures in the third country,³² human rights law requires additional procedural safeguards that must be respected prior to any decision to return or transfer an individual, including returns according to ACAs.

Several human rights treaty bodies, including the Human Rights Committee, the Committee against Torture, and the Committee on the Rights of the Child have affirmed that States must conduct an individualized assessment before any transfer or removal and that collective or automatic procedures will amount to collective expulsions.³³ Such individualized assessments must not only assess risks of persecution, but must also consider the full range of individual circumstances that may weight against an individual's return, including any broader risks of irreparable harm, potential violations of the right to family life and unity (such as family separation), and the best interests of the child.³⁴ Additionally, individuals have a right to a written decision, provided in a language they can understand,; to be able to challenge the legality or appropriateness of the decision,; to have any decision to return or transfer them examined impartially and independently by a competent administrative or judicial authority,; and to have access to legal assistance, representation, translation, and interpretation.³⁵

Heightened consideration must also be given to children in the context of return or transfer decisions, where every decision concerning a child's transfer or return must be guided by the best interests of the child as a primary consideration.³⁶ The Committee on the Rights of the Child (CRC Committee) has clarified that the best interests of the child is not merely one of several considerations, but instead a "high priority" that must be given larger weight than other considerations.³⁷ The CRC and Migrant Workers Committee have also clarified that "non-rights-based arguments such as those relating to general migration control, cannot override best interests considerations."³⁸ Under human rights law, States therefore cannot justify the removal or transfer of a child according to an ACA unless such removal has been found to be in the child's best interests and where appropriate care, guardianship, and sustainable reintegration arrangements are in place prior to any transfer.³⁹

Children are also entitled to heightened procedural safeguards under human rights law, including a right to: access the territory regardless of documentation and be referred to protection authorities; be notified of proceedings, decisions, and appeal options; have immigration proceedings conducted by specialized, child-trained officials; be provided with child-friendly information on their rights and the procedures that may affect them; be heard and participate in all stages with free interpretation; communicate with and receive consular assistance; be represented by a qualified attorney with free legal aid; have their cases prioritized while ensuring sufficient preparation time and due process; appeal decisions with suspensive effect; have a competent guardian appointed promptly for unaccompanied or separated children; and to be fully informed throughout the process together with their guardian and legal adviser.⁴⁰

Regional Law

European Union (EU) law requires that transfers occur only where effective protection can be guaranteed, and the European Court of Human Rights (ECtHR) has repeatedly found violations where asylum seekers were exposed to inhuman or degrading treatment following a return or transfer to a third country. For example, in *M.S.S. v. Belgium and Greece*, the ECtHR held that Belgium violated Article 3 of the European Convention on Human Rights (prohibition of torture, inhuman or degrading treatment, or punishment) by transferring an asylum seeker to Greece under the Dublin system despite well-documented deficiencies.⁴¹ Similarly, in *Tarakhel v. Switzerland*, the Court held that States must obtain individualized assurances of adequate reception conditions before transferring families with children.⁴² Article 24 of the EU Charter of Fundamental Rights (The rights of the child) reinforces this obligation to consider children’s rights in all Dublin or safe-third-country transfers.⁴³

Within the Americas, regional human rights and refugee-protection standards provide robust safeguards against transfers that would endanger children or other vulnerable persons. The American Declaration of the Rights and Duties of Man (Art. VII) recognizes every child’s “right to special protection, care and aid.”⁴⁴ The Inter-American Court of Human Rights (IACtHR), in Advisory Opinion OC-21/14, has affirmed that States are prohibited from returning, expelling, deporting, repatriating, rejecting at the border, or otherwise transferring a child to any State where the child’s life, security, or liberty would be at risk, or to a third State that might in turn send them to such danger.⁴⁵ The Court emphasized that all return or transfer decisions must be based exclusively on the best interests of the child and accompanied by individualized refugee-status determination procedures consistent with due process guarantees.⁴⁶ More recently, the OAS General Assembly Declaration on Migrant and Refugee Children and Adolescents (2023) urged Member States to adopt preventive measures tofor identifying and protecting unaccompanied or separated children, to facilitate family reunification, and to guarantee that all actions concerning them respect their best interests and human rights.⁴⁷

The Inter-American Commission on Human Rights (IACHR) has also applied these principles in its jurisprudence. In *John Doe et al. v. Canada* (Report No. 78/11), the Commission held that Canada violated Articles XVIII and XXVII of the American Declaration by directing refugee claimants back to the United States without individualized assessment or assurance that they would be protected from refoulement.⁴⁸ The IACHR reaffirmed that States remain responsible under inter-American human rights law for transfers that expose asylum seekers to risk, even when undertaken pursuant to bilateral “safe third country” arrangements.⁴⁹ At the African level, the African Charter on the Rights and Welfare of the Child provides similar protections, obliging States not to subject any child to refoulement and to ensure that the child’s best interests are the primary consideration in all actions concerning them.⁵⁰ Read together with the 1969 OAU Convention, African regional law has been interpreted to impose responsibilities on African Union Member States to prevent transfers to danger and to guarantee humane treatment and durable solutions for refugee and asylum-seeking children.⁵¹

Key Considerations for Protecting Unaccompanied and Separated Children in ACAs

When determining whether to subject unaccompanied and separated children to ACAs or other “safe third country” agreements, States must ensure that all actions are guided by their international and regional law obligations. The following section outlines several key considerations for upholding children’s rights and ensuring their protection from harm in the context of third country transfer or return agreements:

1. Individual Assessment

Every unaccompanied or separated child has the right to an individualized assessment of their protection needs, and States implementing ACAs must ensure that children have effective access to the territory in order to assess their best interests, regardless of documentation or entry status. Denial of entry, pushbacks, or summary transfers without individualized assessment violate these obligations and will amount to collective expulsion. Individual assessments must be child-sensitive and adapted to the age, maturity, and vulnerability of the child. The prohibition of refoulement under both refugee and human rights law applies absolutely to all children, regardless of status. Before returning or transferring a child under an ACA, the sending

State must verify that the receiving State offers effective protection from persecution, torture, ill-treatment, or other irreparable harm and that there is no risk of chain refoulement. This requires a forward-looking, individualized risk assessment rather than reliance on general presumptions of safety. Non-refoulement obligations must supersede any bilateral arrangement or policy objectives under ACAs.

2. Right to Life, Survival and Development

Every child has the inherent right to life and States are obliged to ensure their survival and development “to the maximum extent possible.” This requires States to evaluate the practical consequences of return or transfer agreements, including potential exposure to conditions that could endanger physical safety, health, or psychosocial well-being of the child. Transferring children to States lacking adequate living conditions, health care, education or other basic services would violate the obligation to ensure the child’s development and dignity. Transfers may also not be pursued if the receiving State lacks capacity to provide children protection from violence, including exposure to trafficking, gender-based violence, or other forms of exploitation or abuse. For example, transfer to a country where trafficking networks operate with impunity or where victim identification systems are weak would breach these obligations, as would policies in the receiving country that subject children to immigration detention or other child rights violations.

3. Best Interests

The best interests of the child must be a primary consideration in all actions affecting unaccompanied or separated children, including any decision to return or transfer the child under an ACA. This requires an individualized and documented best-interests determination (BID) before any decision is made to transfer or return a child to another State.⁵² Non-rights-based arguments such as those relating to general migration control cannot override best interests considerations. Accordingly, a transfer decision may only proceed if it demonstrably secures the child’s long-term protection, safety, and development, taking into account the conditions in the receiving State, the child’s right to family life and family unity, the availability of guardianship and care arrangements, and the child’s expressed views.

4. Family Unity

States must avoid any separation of children from their parents or primary caregivers unless an individualized assessment and objective criteria indicate that such separation is necessary to protect the child’s best interests. Before considering any transfer of a child or their parents, guardians or family members under an ACA, authorities must assess whether maintaining family unity is possible or whether relocation would disrupt established family or kinship care arrangements. General considerations of migration control cannot justify the separation of families or the transfer of a child without ensuring continued contact, communication, and care. In the case of unaccompanied and separated children, family reunification is the starting point and preferred durable solution. Family reunification should be facilitated in the location that upholds the best interests of the child, as well as the child’s rights to life, survival, and development. Family reunification in the country of origin should not be pursued where there is a reasonable risk that such a return would lead to the violation of the human rights of the child. Where family reunification is not possible, for example on child protection grounds, other sustainable solutions may include further integration and settlement in the country of current residence, repatriation to the country of origin, or resettlement in a third country.

5. Guardianship

All unaccompanied or separated children must be provided promptly with a competent guardian who acts in their best interests and is empowered to represent the child’s best interests in all administrative and judicial proceedings. Guardianship must be established as soon as the child is identified and must continue until a sustainable and durable solution—such as family reunification, local integration, or resettlement in a third country—is achieved. Guardians must be independent of immigration authorities and adequately trained in child protection, asylum, and trauma-informed practice. Transfer of an unaccompanied or separated child under an ACA in the absence of effective guardianship would be inconsistent with international and regional law obligations.

6. Access to Counsel and Due Process

All unaccompanied and or separated children must enjoy access to free, qualified legal assistance in return proceedings.

The appointment of trained legal representatives is essential to ensure that children's claims are properly presented and that their express wishes and legal interests are represented in all stages of ACA-related decision-making. Additionally, due process requires that unaccompanied and separated children are informed of their rights in a language they understand, have access to interpretation, and are able to appeal adverse decisions before an independent authority. Collective or expedited transfers under ACAs without access to counsel or the ability to challenge the legality of a return or transfer decision violate binding due process guarantees recognized under international and regional law.

7. Respect for the Views of the Child

Children have the right to express their views freely in all matters affecting them, and those views must be given due weight in accordance with the child's age and maturity.

Prior to any transfer under an ACA, authorities must ensure that the child is provided with child-friendly information on their rights and relevant procedures, heard personally or through a representative, and that their opinion is genuinely considered in the final decision. This includes explaining the implications of transfer in a child-friendly manner and documenting how the child's views influenced the outcome. Failure to obtain or consider the child's perspective constitutes both a procedural and substantive violation of international and regional law obligations.

8. Sustainable Solutions

In all cases, States are required to identify and implement comprehensive, secure, and sustainable solutions for unaccompanied and or separated children.

Such solutions are those that ensure the child's long-term best interests and welfare, and ensure that the child is able to develop into adulthood, in an environment that will meet his or her needs and fulfil his or her rights as defined by the UN Convention on the Rights of the Child.⁵³ When evaluating a child's potential transfer under an ACA, States must therefore not only assess immediate safety but also whether the arrangement provides a durable and sustainable solution. This requires the preparation of an individualized reintegration or long-term care plan developed with the participation of the child, their guardian, and their legal counsel and coordinated with competent child-protection and social-services authorities in both sending and receiving States. The plan should outline the child's access to education, health care, psychosocial support, livelihood opportunities, and legal status, ensuring continuity of care after return or transfer. Without such a plan and the resources to implement it, transfer of an unaccompanied or separated child would be inconsistent with international and regional law obligations.

Recommendations

- **Explicitly exempt unaccompanied and separated children from any Asylum Cooperative Agreements.** Unaccompanied and separated children should never be subject to ACAs or other "safe third country" transfers. Instead, States must ensure prompt admission to their territory, access to asylum or complementary protection pathways, and child-appropriate care while the best interests of the child are being determined. Independent guardians should be appointed promptly to safeguard children's rights.
- **Prioritize children's rights, safety, and well-being in all bi-lateral or multi-lateral cooperation.** In diplomatic engagements around ACAs, countries should make clear their commitment to non-refoulement and ensure specific safeguards for unaccompanied and/or separated children. This includes seeking provisions, clarifications, and amendments in policies and agreements as necessary to ensure compliance with binding human rights and refugee law obligations. Countries should request review of and input on any implementing policies to ensure they appropriately uphold children's rights, provide for children's unique needs, and prevent refoulement.
- **Respect the best interests of the child as a primary consideration.** Receiving authorities should provide for robust identification and registration of any unaccompanied and separated children at reception centers, borders, and during encounters inside the country, carrying out individualized screenings and initial best-interests assessments (BIA) to identify protection needs, family links, and any risk factors. Procedures should be gender- and age-sensitive and ensure

the child's participation. States should also incorporate formal best interests determination (BID) procedures into all ACA-related decision-making, ensuring multidisciplinary participation of child-protection authorities, guardians, and legal representatives, as well as respect for the views of the child.

- **Safeguard family unity and avoid family separation.** Refrain from transferring children or their family members under ACAs when doing so would result in separation from parents, siblings, or guardians. Establish mechanisms for family tracing and reunification when in the child's best interests and cooperate with other States to facilitate family reunification in a timely manner.
- **Ensure access to qualified, professional legal representation and child-sensitive services.** Facilitate access to free independent legal aid, psychosocial support, and other essential services for all unaccompanied and separated children in migration and asylum-related procedures. Children should have immediate and non-discriminatory access to health care, education, housing, and other social services throughout the duration of these procedures.
- **Strengthen capacity and inter-agency coordination.** Provide systematic training for border, immigration, and asylum officials on unaccompanied and separated children's unique rights and needs, risk indicators, child-rights standards, best-interests procedures, and trauma-informed practices. Engage and collaborate with civil society organizations in the creation and delivery of capacity strengthening resources, as well as in the provision of information to children and families, including about their rights. Develop clear inter-agency protocols between asylum, migration, and child-protection authorities to ensure accountability and continuity of care.
- **Facilitate comprehensive return and reintegration services and support.** Where return or transfer is determined to be in the child's best interests, receiving countries—together with sending States and civil -society partners—should develop and implement individual sustainable reintegration plans in consultation with the child. These plans should ensure continuity of care, education, psychosocial support, livelihood opportunities, and other considerations consistent with the rights, welfare, and needs of the child. Comprehensive return and reintegration services should be provided for any child for whom repatriation is determined to be safe and in the child's best interests and should include pre-departure screening, planning, and counseling, child-sensitive return procedures and accompaniment, case management, and access to local, community-based services.
- **Monitor implementation and ensure accountability.** Develop independent oversight, monitoring, and complaint mechanisms—preferably involving national human -rights institutions and civil -society partners—to ensure that ACA implementation aligns with international standards and that corrective measures are taken promptly where deficiencies are identified. Conduct regular audits and public reporting, with data disaggregated by age, gender, and nationality, to assist in identifying any violations of children's rights and assess compliance with child -protection standards, while preserving confidentiality.

Endnotes

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- 20 OAU Convention, Article I(2); Cartagena Declaration, Section III, para. 3.
- 21 Article 33(1).
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