

The Safe Third Country Agreement: An Analysis Thirteen  
Years Later

by

Deepa Nagari

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## Abstract

Over the past few years, there have been several changes in the US and Canadian refugee policies, as well as changes in international refugee law and global sentiments towards refugees. In this thesis, I will be analyzing the Safe Third Country Agreement (STCA) between the US and Canada, which came into force in 2004. I will look at the debates and arguments that surrounded the STCA during its early stages and how those debates have evolved since its implementation. I will be exploring whether these changes are extensive enough to render the STCA ineffective. I will also unpack the meaning of major concepts and terms within the 1951 Refugee Convention and the 1967 Protocol. I hope to determine to what extent these new developments have affected the status of the STCA, whether it should be suspended or eliminated, and what that would mean for security and border management strategies.

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## Introduction

### Background and Argument

Immigration and refugee issues have been at the forefront of contemporary law, policies, media, and popular culture. With the 2016 United States election, the refugee and migrant crisis due to conflicts in Syria, Ukraine, and the Middle East, and the continued existence of the “War on Terrorism” rhetoric, it is very pertinent and useful to analyze the effects of immigration and refugees as it relates to international conventions and laws. These are highly contested and debated issues that have a strong impact on law, politics, criminology, and sociology. This thesis project is interested in how past and current laws and policies on immigration, refugee, citizenship, and human rights have shaped people’s ideologies and views towards migrants in Canada and by extension how it has shaped people’s views on migration globally. Refugees, immigrants, and other migrants encompass several aspects of the Canadian population, and it is important to see how migration management mechanisms, recent developments in the US (such as the election and the recession of positive migration policies), and international and domestic refugee law intersect in these “unstable” times in the Canadian context.

Specifically, I will be analyzing the *Agreement between the Government of Canada and the Government of the United States of America (US) for cooperation in the examination of refugee status claims from nationals of third countries* or the Safe Third Country Agreement (STCA) between the US and Canada. The STCA came about shortly after the events of September 11, 2001 (“9/11”), during which the war on terror rhetoric was at its peak and increased security measures were being taken by both the US and Canada. The STCA was created partly to combat any threats to Canada and the US, and

also to share the burden of refugee and asylum seekers at the border (“Canada-US Safe Third Country Agreement”, 2004). When the STCA came into force in 2004, the refugee determination systems of Canada and the US were fairly similar, and their sentiments towards refugees and asylum seekers were also similar. Since its inception, however, Canada and the US have evolved, and their refugee policies have changed.

After the election of Donald Trump, the Trump administration has been ending policies and programs which have benefitted refugees and migrants in the past. For example, the Deferred Action for Childhood Arrivals (DACA) allowed people who were brought into the US as undocumented children to legally work and live in the US. Another program, Temporary Protection Status (TPS) gave temporary protection to people who are fleeing not only conflict situations but environmental disasters and economic turmoil. These are only some of the programs ending under the Trump era. Furthermore, since the election, the Trump administration has been clamping down on migration. During the first few months of his term, President Trump established several Executive Orders (EOs) that negatively affected refugees, including an order banning refugees from seven Muslim-majority countries, and this EO was informally known as the “Muslim travel ban” (Executive Order No. 13769, 2017). Parallel to this, there has been an increase in anti-migrant and anti-foreigner sentiments in the US, and 2017 saw protests against refugees and asylum seekers, most notoriously in Charlottesville, Virginia. These developments have caused a rise in irregular asylum seekers at the US-Canada border who are crossing into Canada using dangerous routes to circumvent the STCA.

Canada has also experienced some anti-migrant sentiments evident with policies such as the face covering ban in Quebec. However, after the Liberal Party came into power, Canada's migration policies have largely been positive. For example, the Liberal Party repealed a provision in the Citizenship Act that would strip dual citizens of their citizenship if convicted of treason, espionage, or terrorism (Crawford, 2017). This means that the Minister of Immigration, Refugees, and Citizenship will no longer have the power to revoke an individual's citizenship on their own or without a hearing (Crawford, 2017). Furthermore, in 2016, Canada brought in 46,700 Syrian refugees to be resettled and are looking to bring in more refugees in the future. The international realm has also changed over the last thirteen years. We are currently grappling with mass migration, the increased relevance of the war on terror rhetoric, and instances of anti-refugee sentiments globally. These global events shape Canadian and US policies, and the way Canada and the US view refugees and asylum seekers.

I want to look at the debates and arguments that surrounded the STCA during its nascent stages and how those debates have evolved and changed since its implementation in 2004. This thesis will be framed around the question of whether the STCA allows for Canada and the US to provide protection to refugees and asylum seekers in a way that is consistent with international law. To accomplish this, I will examine and explore how policies and laws in Canada and the US have changed since the STCA came into effect, and whether these changes are extensive enough to render the STCA ineffective. Since 2004, there have been many changes and events that have occurred in the US, Canada, and around the world, that have seriously undermined the necessity of the STCA. These include changes in US policies such as the ending of certain countries' TPS, the

elimination of DACA, the anti-refugee/migration EOs, and anti-foreigner sentiments, all which call the status of the US as a safe third country into question. Furthermore, the influx in irregular arrivals in Canada at the beginning of 2017 also questions the validity and necessity of the agreement. Analyzing the STCA in the current context allows us to unpack the meaning of major concepts and terms within the 1951 Convention Relating to the Status of Refugees (“1951 Refugee Convention”) and the 1967 Protocol Relating to the Status of Refugees (“1967 Protocol”). In this thesis I seek to examine what it means to be a refugee and an asylum seeker, as well as the concepts of well-founded fear and persecution, and showcase the limitations of the 1951 Refugee Convention and the 1967 Protocol. Through this, I hope to determine to what extent these developments have affected the status of the STCA, whether it should be suspended or eliminated, and what that would mean for “security” and “border management” strategies relating to refugees and asylum seekers.

In order to ensure consistency and keeping in mind the constantly progressing nature of refugee and migration policies and developments, this thesis has been confined to the events that have occurred up until 2017.

*i. Why is an Analysis of the STCA needed?*

Critics of the STCA argue that now, more than ever, the US is not a safe third country. Especially considering the heightened anti-refugee and anti-migrant measures, the “Muslim travel bans”, and other immigration enforcement policies. Moreover, although the refugee determination systems of the US and Canada were similar when the STCA came into effect, over the past few years the differences between the two systems have been increasing. This brings up the issue of whether the STCA has been rendered

ineffective due to the increasing variances between the two countries. Determining the necessity and the effectiveness of the STCA is even more relevant now as many lawyers, organizations, and advocacy groups are constantly calling for its suspension or elimination. A spike in irregular asylum seekers at the beginning of 2017 revealed that asylum seekers were willing to cross into Canada in harsh conditions through unofficial borders in order to apply for refugee status. This undermines the security of the border, as well as the security of the asylum seekers who are already fleeing persecution. The differences in the situations between 2004 and 2017 raises the question of whether the STCA was designed inadequately in the first place and not in the best interests of refugees and asylum seekers. Moreover, as a result of the European Union refugee crisis and large-scale migration, several civil wars and other political conflicts across the globe, as well as environmental disasters and issues such as widespread famine, the number of people fleeing their countries of origin has increased worldwide (Batchelor, 2017). There has also been a shift in the nature of conflict, and several refugees and asylum seekers today are not only fleeing persecution due to political actors, but also due to non-state actors such as gangs, domestic violence, environmental disasters, and economic degradation. Thus, it is very important to seriously analyze the effectiveness and the necessity of the STCA in the current national and international context.

### Theoretical Framework

I will be intersecting critical legal studies and legal positivism to tackle the subjects and concepts within this thesis. I will engage in legal positivism when attending closely to the relevant international treaties, domestic statutes, and case law. This is to understand how international refugee laws and domestic refugee laws have come about,

through what contexts, and from what authority. Through critical legal studies, I will analyze the mechanisms of the STCA, refugee determination systems of the US and Canada, and the recent developments in US and Canada in order to show that law and politics are not neutral and objective. Roberto Unger, a notable critical legal scholar, denaturalizes the concept of law and its presentation in particular institutions (Collins, 1987). He argues that liberal legal order emerged because of unknown relations between the monarchy, the aristocracy, and the bourgeoisie, or in other words the upper class and those who hold power in society (Collins, 1987). He envisioned a future where divides between people are broken down to create a more harmonious society (Collins, 1987). This thesis borrows from Unger's ideas, wherein it criticizes and unpacks the formal and prevailing systems and doctrines of refugee law and politics, such as the 1951 Refugee Convention, the 1967 Protocol, and the US and Canadian refugee determination systems, to understand who produces these mechanisms and who they are meant to protect. Tools such as the STCA are supposed to protect refugees and asylum seekers, however I argue that rather they are in place to limit refugee and asylum protection. The STCA and other border management mechanisms are tools Canada and the US utilize to manage refugee and asylum flows, and to exercise their sovereign right to protect their borders. Currently with an increase in global migration and with new developments in the US, it is pertinent to examine how law and politics can be used to free refugees and asylum seekers from structures of power that limit them.

I will accomplish this by analyzing in depth the growing differences between the US and Canadian refugee determination systems, emphasizing aspects such as gender-based claims, expedited removals, and terrorism and serious criminality bars.

Furthermore, I will be looking at current news articles as well as scholarly articles surrounding the STCA, irregular border crossings, anti-migration and anti-foreigner rhetoric in the US, and the recession in refugee policies to analyze and compare the status of the US as a safe third country now as opposed to when the legislation was first implemented.

*i. Literature Review*

The literature on immigration and refugee policies and laws is vast and interdisciplinary. For the purposes of this thesis, I will focus primarily on the works of Guy S. Goodwin-Gill and James C. Hathaway because they examine refugee law at the international level and at the domestic level (in terms of Canada and the United States). In *The Refugee in International Law*, Guy S. Goodwin-Gill and Jane McAdam state that the status of refugees in the international law has always been precarious and in flux (2007). Their book examines international refugee law and details the status refugees have, as well as the fundamental interests that must be protected in regard to refugees. Goodwin-Gill and McAdam provide a robust overview of refugee international law, the concepts within the 1951 Refugee Convention and the 1967 Protocol, the relationship between customary international law and refugee law, and some of the domestic processes connected to international refugee law. James C. Hathaway's book *The Law of Refugee Status* explores refugee status as defined by the 1951 Refugee Convention and the 1967 Protocol. Hathaway largely focuses on issues of international refugee law, and argues that terms such as "persecution" and "well-founded fear" are dated and limited, as most refugees from "Third World" countries flee due to natural disaster, war, and economic and political turmoil in a broad sense rather than just "persecution" as

understood in the Western and Eurocentric context (1991). Hathaway and Goodwin-Gill have also written several other articles related to the outdated nature of the 1951 Refugee Convention and the 1967 Protocol, and have argued extensively that these definitions must be expanded.

In addition to Hathaway and Goodwin-Gill, I will be using the works of other scholars such as Audrey Macklin, Amy Arnett, Efrat Arbel, Michelle Foster, and Andrew Moore, who have written extensively on domestic refugee laws and policies in Canada and the United States. In her article “Disappearing Refugees: Reflections on the Canada-US Safe Third Country Agreement”, Macklin examines the legal consequences of the STCA on refugee and asylum seekers mainly through a Canadian lens (2005). Arnett, in her article “One Step Forward, Two Steps Back: Women Asylum-Seekers in the United States and Canada Stand to Lose Human Rights under the Safe Third Country Agreement”, examines the agreement in relation to female asylum seekers and refugees. She explores the American approach to gender-based claims in order to show the extent of the differences between the Canadian and US refugee determination systems, and argues that the United States should not be considered a safe third country (Arnett, 2005). Arbel analyzes the Canadian Federal Court and Federal Court of Appeal decisions relating to the STCA in her article, “Shifting Borders and the Boundaries of Rights: Examining the Safe Third Country Agreement between Canada and the United States” (2013). Arbel also examines the context surrounding the STCA and how and why it came into effect. Foster, in her article “Responsibility Sharing or Shifting? “Safe” Third Countries and International Law”, extends safe third country mechanisms to international law, and she analyzes whether these tools are used to share responsibility and burden of

asylum seekers and refugees, or shift responsibility (2008). Moore examines the US refugee determination system and argues that the US should not be considered a safe third country in his article, “Unsafe in America: A Review of the US-Canada Safe Third Country Agreement” (2007). He also considers how the STCA fits into this argument. These scholars will form the basis of my argument and will assist my analysis of how the STCA limits refugee protection. Additionally, in order to examine international law, I will draw upon Susan Kneebone’s book *The Refugee Convention 50 Years On: Globalisation and International Law*, which contains a series of essays from various scholars who critique different aspects of the 1951 Refugee Convention, the 1967 Protocol, and international refugee law in general (2003). Rather than focusing on the broader issues of international refugee law, Kneebone and the other authors in this book provide specific examples of the outdated nature of the 1951 Refugee Convention and the issues that surround the Convention.

Other information about the STCA comes from news articles, political opinion pieces, and advocacy groups. The most prominent source of information for debates against STCA is the Canadian Council for Refugees (CCR), which has published several articles and reports about the STCA that outline why they support the elimination of the agreement. When the STCA was first put forward, the CCR released several reports challenging the designation of the United States as a safe third country. More recently, the CCR released a report titled “Contesting the Designation of the US as a Safe Third Country” that outlines a number of issues with the continued designation of the United States as a “safe country”, including expedited removals and increased detention of asylum seekers (2017). Additionally, Audrey Macklin published an article in 2003 titled

“The Value(s) of the Canada-US Safe Third Country Agreement”, in which she put forth the “values” in relation to the STCA and stated that even though the agreement contains elements consistent with some of those values, many provisions are inconsistent and undermine them. Another report, this one from Harvard Law School and titled “Bordering on Failure: The US-Canada Safe Third Country Agreement Fifteen Months After Implementation”, analyzed the STCA fifteen months after its implementation. Using statistics, it argued that the STCA failed to accomplish its stated goals and actually makes the border less secure (“Bordering on Failure”, 2006). For the other side of the debate, most of my arguments draw upon news articles, government spokespersons, the Canadian Border Services Agency (CBSA), and the Immigration, Refugees, Citizenship Canada (IRCC) website. Several of these arguments include the fact that Canada has already reviewed US refugee protection policies in lieu of the “travel bans” and has determined that it remains a safe third country (Harris, 2017a). The current Minister of Immigration, Citizenship, and Refugees Ahmed Hussen maintains that it remains an important tool for border management and security (Harris, 2017a).

The literature on which I focus furthers my argument against the STCA. My analysis of the STCA breaks down the various aspects of the agreement, situates it within the current context, and ultimately examines it within the international legal realm in order to show that it is not operating in the way it was designed. Moreover, I argue that the 1951 Refugee Convention and the 1967 Protocol themselves are outdated, and because the STCA is operating within an archaic system it is also inherently flawed. The articles and scholars that I will be using for this thesis examine domestic laws and policies as well as international law in a critical manner, and unpack border management

tools and policies such as the STCA. For example, Moore and Arnett provide arguments against the US refugee determination system and argue that several features within the US refugee determination system and US refugee policies violate international refugee law (2007; 2005). Arbel and Macklin argue that the STCA is exclusionary and does not focus on refugee protection but rather border management and security (2013; 2005). Hathaway, Goodwin-Gill and McAdams, and Kneebone assist in furthering my arguments to the international legal context and to current global migration movements such as the situation in Central America. Although these arguments provide the groundwork for this thesis, all of these articles focus on different issues and aspects of the STCA. In other words, they focus on one or more factors relating to the STCA (such as gender based claims, the expedited removal process, or the CCR legal challenge) to argue that the agreement hinders refugee protection. I bring these issues together to critique the STCA, and show that all these factors simultaneously render the agreement ineffective and are harmful to refugees and asylum seekers. Furthermore, these articles and scholars examined the STCA and refugee protection during the first few years after the STCA was implemented, and some before the STCA was concluded. I will bring the examination of the STCA to the current context, and argue that many of the factors and issues that these scholars cite is still relevant today. Ultimately, this thesis seeks to build upon the arguments of these scholars in order to examine and explore why the STCA has become redundant and what this means for domestic and international refugee laws and policies.

### Structure of Thesis

The first chapter will go through the basic parameters of the debate, and will set out the agreement, and will lay the foundations of the STCA in international and

domestic refugee law. This chapter will explain the refugee systems and laws in Canada and the US and define various concepts such as asylum seeker, refugee, well-founded fear of persecution, and the principle of *non-refoulement*. This chapter will also explore the history and nascent stages of the STCA, examine the contexts surrounding the agreement, and go through both sides of the debate after its implementation. Finally, this chapter will conclude by providing an overview of current developments, such as the irregular arrivals, the EOs implemented by the Trump administration, the elimination of DACA and TPS, and the prevalence of anti-migration sentiments in the US.

The second chapter will focus on contemporary events mentioned in the first chapter and will begin to unpack what it means to be a safe third country, and why these events would arguably undermine that status. I will also bring forth some counter arguments in favor of the STCA and why the Canadian government refuses to suspend the agreement. I will first closely examine the preamble of the STCA and go through the review mechanisms as well as the exceptions provided in the STCA. The majority of this chapter will be dedicated to examining emerging differences between the US refugee determination system and the Canadian refugee determination system and will relate these differences to current developments and how they bolster the divide between the two countries.

The third chapter will extend my argument against the STCA to the international context and focus largely on the limits of the 1951 Refugee Convention and the 1967 Protocol in relation to the contemporary events within North America and globally. This chapter will go through the major criticisms of the 1951 Refugee Convention provided by states and refugee advocacy groups, how state practice compares to convention

guidelines, and unpacks the limitations of definitions of concepts such as refugee and well-founded fear of persecution. I will also provide examples of the outdated nature of the 1951 Refugee Convention and the 1967 Protocol by examining new situations that cause people to flee. Through this, I hope to show that the STCA operates within a flawed international legal system and thus the agreement is also inherently flawed.

The conclusion will summarize the thesis and gesture in the direction of further possible work. Refugee and migrant issues are at the forefront of almost every political and legal debate in the past few years, therefore the STCA and its implications for the 1951 Refugee Convention become extremely pertinent.

## Chapter One

### International and Domestic Refugee Law

#### *i. International Law*

The 1951 Refugee Convention is the main treaty that codifies the rights of refugees at the global level. The 1951 Refugee Convention also lays out the responsibilities of states in terms of refugees and outlines the basic minimum standards for the treatment of refugees and other persons of concern (UNHCR, 1951). The 1951 Refugee Convention was modified by the 1967 Protocol, which was drafted and entered into force with the understanding that new refugee situations have arisen since 1951 (UNHCR, 1967). The 1967 Protocol removes the geographical and temporal limitations inherent in the 1951 Refugee Convention, and includes those who became refugees after 1 January 1951 and those located outside of Europe. This was required due to refugee flows resulting from decolonization and because people were starting to flee from and to countries outside of Europe (Goodwin-Gill & McAdam, 2007). Despite this expansion, only people who are fleeing due to a “well-founded fear of persecution” or on the grounds of political and civil status, which includes race, religion, nationality, membership of a particular group, or political opinion, fall within the scope of the 1967 Protocol (Hathaway, 1951). Canada is a contracting party to both the 1951 Refugee Convention and the 1967 Protocol, while the US is party to only the 1967 Protocol.

An “asylum seeker”, as defined by the United Nations High Commissioner for Refugees (UNHCR) and the Immigration and Refugee Protection Act (IRPA) of Canada, is someone who has fled their country of origin and is seeking protection in another country, and whose sanctuary request has yet to be processed (IRPA, 2001). A “refugee”,

according to the 1951 Refugee Convention, is someone who has a well-founded fear of persecution due to one or more of the following five grounds: “race, religion, nationality, membership of a particular social group, or political opinion” (UNHCR, 1951, pg.3). A “refugee claimant” is someone whose claim for refugee status has been made, but is yet to be determined (IRPA, 2001). In Canada, a refugee claimant must show that at the time that their claim is being assessed they have grounds for fearing persecution in the future (IRPA, 2001). The term “persecution” does not have a clear definition. However, several factors for persecution have been recognized by the courts. Persecution should entail serious harm, the anticipated mistreatment or suffering must be serious, and the harm should occur with repetition, persistence, or in a systematic manner (IRPA, 2001). Persecution must also differ from common crimes, as well as random and arbitrary violence, and the agent of persecution can include several people from individuals tied to the government to other “regular” people (IRPA, 2001). Although, there are several other factors that contribute to what constitutes as persecution, ultimately the refugee claimant must prove that they have considerable fear of persecution in their country of origin. A “well-founded” fear of persecution is justified in an objective sense. Subjective fear is the existence of a fear of persecution in the claimant’s mind; the objective basis of such a fear requires that there be a valid base for it (IRPA, 2001). The basic test used during a hearing is whether there is a “reasonable chance that persecution would take place were the applicant returned to his/her country of origin” (IRPA, 2001, chapter 5). Courts have used “good grounds” or “reasonable chance” to determine this test (IRPA, 2001). What constitutes “good grounds” is again based on case law.

Another central element of the 1951 Refugee Convention is the principle of *non-refoulement*, derived from customary international law and codified in Article 33 of the Convention. It stipulates that “no refugee should be returned to any country where he or she is likely to face persecution, other ill-treatment, or torture” (Goodwin-Gill & McAdam, 2007, pg. 201). The principle of *non-refoulement* brings into question the issues of admission and return of refugees and asylum seekers in each country. It first came about after the Second World War (WWII) due to the failure of many states to provide safe haven to Jewish refugees fleeing genocide (Goodwin-Gill & McAdam, 2007). The principle is so fundamental that according to the 1951 Refugee Convention “no reservations or derogations may be made to it” (UNHCR, 1951, pg. 3). In order to prevent violations of the principle, the UNHCR has encouraged states to jointly monitor refugees and to engage in alternatives to deportation and removals (Goodwin-Gill & McAdam, 2007). Furthermore, provisions relating to *non-refoulement* can also be found in other international treaties that protect basic human rights. Both the US and Canada have *non-refoulement* provisions in their domestic immigration and refugee laws. In Canada, section 115 of IRPA outlines the principle of *non-refoulement*, providing the relevant exceptions and regulations. The section states that a protected person or a person who has been found to be a Convention refugee in another country may not be removed from Canada to their country of origin or habitual residence if there is a risk of persecution for reasons of religion, nationality, race, membership in a particular social group, or political opinion, or if there is risk of torture, death, or cruel and unusual punishment (IRPA, 2001, s.115). In the US, the *non-refoulement* clause is under the “restrictions on removal”, where the Attorney General has the power to stop the removal

if it is determined that the person's life or freedom would be threatened based on the five grounds of persecution (INA, 1965a, s. (a)3(a)). There are exceptions to the principle as outlined in Article 33(2) of the 1951 Refugee Convention, which states that the principle does not apply to any refugee who was found on reasonable grounds to be a danger to security in the country of asylum or has been convicted of a serious crime constituting in danger to the country of asylum (UNHCR, 1951). This exception is also outlined in US and Canada's refugee laws.

*ii. The Limitations of International Laws and Conventions*

The 1951 Refugee Convention was originally designed as a response to displacements in Europe (Hathaway, 1991). It was an attempt to facilitate and equally distribute high volumes of human displacement resulting from WWII, and it dealt largely with the influx of refugees from the war and the Soviet bloc (Hathaway, 1991). As previously stated, the 1967 Protocol was introduced with the aim of expanding the scope of the 1951 Refugee Convention to refugees around the world (Hathaway, 1991). Despite this expansion and the elimination of geographic and temporal limitations, the 1951 Refugee Convention and the 1967 Protocol have Eurocentric, Western roots and ideas that constrain the very persons they are meant to protect (Hathaway, 1991). Hathaway argues that terms such as "persecution" and "well-founded fear" are dated and limited, and restrict the scope of protection to those who can appropriately demonstrate a present or future risk of persecution, which may not always be the case as risk and persecution are not straightforward and evidence is sometimes not available (Hathaway, 1991). For example, a large number of refugees from Haiti, Somalia, and elsewhere have fled due to conflict, famine, state collapse, and a variety of environmental disasters. There are also

large numbers of asylum seekers coming into the US, Mexico, and Canada from the northern parts of Central America and Venezuela. This is due to gang-related violence, the activities of other organized criminal groups, and other domestic issues (“Operational Update”, 2017). These factors are not included specifically in the 1951 Refugee Convention as grounds of persecution, and the grounds provided are those that deal with persecution stemming from a narrow definition of civil war and political conflict. Asylum seekers who make a claim based upon factors that do not fall under one of the five grounds have a higher difficulty of proving their protection needs.

As the world’s population increases and resources are depleted, it is important to take into consideration other factors that could lead to people becoming refugees. Under the Guidelines on International Protection No. 12, direct and indirect consequences of armed conflict and violence may constitute as persecution, this includes long-term consequences of these situations (UNHCR, 2016). Furthermore, if situations of armed conflict and violence negatively affect the rule of law, state, and societal structures, this can also constitute as persecution (UNHCR, 2016). For example, people displaced by famine are not considered refugees under the 1951 Refugee Convention, but if famine is linked to situations of armed conflict and violent, then they may fall under the refugee criteria (UNHCR, 2016). However, trying to prove this link within the Canadian and US legal systems requires more specificity and clarifications on the part of the claimant; and in situations where the link is not so evident it can be very difficult. Another limitation of these international conventions is that there is no “right to freedom of movement between states” (Hathaway, 1991, pg. 231). Some countries try to broaden the scope of the right to asylum and refugee status and many states like Canada and the US have altered their own

laws and policies to extend the scope of well-founded fear of persecution (Hathaway, 1991). At the same time they also seek to constrain the extent of migration (Hathaway, 1991). The 1951 Refugee Convention was largely created by self-interested states, and this poses a problem for defining access to asylum (Hathaway, 1991). Perhaps a critical analysis of the root causes of human displacement, and what “persecution” and “well-founded fear” means to different groups of refugees, could help to expand that definition. This idea will be further explored in chapter three.

*iii. Domestic Immigration Processes*

Canada recognizes two types of refugees: a “Convention refugee”, as already explained, is someone with a well-founded fear of persecution based on religion, race, nationality, membership, or political opinion; a “person in need of protection” is someone whose removal from Canada may result in their torture, cruel and unusual punishment, or death (IRPA, 2001). Claims in Canada can be made at an official port-of-entry (POE), which includes either land, air, or sea, and handled by the CBSA, or inside Canada at an inland office and handled by IRCC (IRPA, 2001). If a claim is made with the CBSA, the agents determine whether the asylum seeker is “eligible” to make a refugee claim in Canada, and eligibility is based on whether the asylum seeker is a Convention refugee or a person in need of protection (IRPA, 2001). The CBSA officer will also determine whether the asylum seeker falls under the “Designated Countries of Origin” policy (DCO). DCOs include countries that “do not normally produce refugees and respect human rights and offer protection”, and refugee claimants who are from a DCO will have their claims processed faster (“Designated Countries of Origin”, 2017, para 3). The Minister of Immigration, Refugees, and Citizenship has the authority over the list and

makes the final decision on whether a country is designated as a DCO (“Designated Countries of Origin”, 2017) If found eligible, the asylum seeker is referred to the Immigration and Refugee Board (IRB) for a hearing, where they will supply evidence, facts, and an explanation for seeking refugee status (IRPA, 2001). An IRB member may give their decision at the end of the hearing or through mail, and if the claim is successful the refugee can apply for permanent resident status (IRPA, 2001). If the claim is unsuccessful, the refugee claimant can either apply for a Pre-Removal Risk Assessment (PRRA), to the Refugee Appeal Division (RAD) where the claimant can file a Notice of Appeal for re-consideration of their negative decision, to the Federal Court of Canada for a judicial review, or to the IRCC for stay under humanitarian and compassionate grounds (H&C) (IRPA, 2001). Refugee claims can be made outside of Canada as well, and those who are sponsored by the government or a private group to come to Canada are called “resettled refugees” (IRPA, 2001). Resettled refugees are granted permanent residence status when they land in Canada, and they usually fall under two refugee classes: “convention refugee abroad class” and “country of asylum class”. “Convention refugee abroad class” has the same requirements as a regular convention refugee (IRPA, 2001). Refugees who fall in the “country of asylum class” are either outside their home country or country in which they normally live, have been seriously affected by civil war or armed conflict, or have been denied basic human rights on an ongoing basis (IRPA, 2001). Resettled refugees must be referred, either through the UNHCR or through a private sponsorship group.

The US has two main systems through which people can claim refugee status: the Affirmative Asylum Process and the Defensive Asylum Process. Those who come to the

US through the affirmative asylum process enter the country with a valid US visa, and proceed with the asylum application once in the country (“The Affirmative Asylum Process”, n.d.). Those who enter through the Defensive Asylum Process are in the US without a valid status. These are usually persons who entered the US on a valid visa but have overstayed their visas and thus have no status. They could also be people who have been found to have entered the country “illegally” (“Obtaining Asylum in the US”, n.d.). These persons can be detained, as well as subjected to other Immigration and Customs Enforcement (ICE) action; however, they can still proceed with an asylum application (“Obtaining Asylum in the US”, n.d.). If a person requests asylum at the border without a valid visa, they are placed in immigration detention before having their credible fear interview (“Obtaining Asylum in the US”, n.d.). According to the Immigration and Nationality Act (INA), a credible fear interview is conducted by an asylum officer, and the asylum seeker must express fear of return to their country of origin (INA, 1965b). If credible fear is established, then the applicant is referred to an asylum hearing with an immigration judge; if not, then they will go through the expedited removal process (INA, 1965b).

### Laying the Foundation

#### *i. What are Safe Third Countries?*

A safe third country mechanism maintains that an asylum seeker’s life will not be threatened for any reason outlined in the 1951 Refugee Convention if they enter a designated “safe third country”, and that they will be allowed the full procedure of an asylum or refugee claim or the equivalent temporary protection (Goodwin-Gill & McAdam, 2007). Safe third country mechanisms allow for accelerated procedures,

usually in the name of border management. These mechanisms prevent asylum seekers and refugees from “asylum shopping”, so that an individual fleeing persecution will seek asylum in the first “safe” country and any secondary movement is considered for purposes of migration rather than protection (Goodwin-Gill & McAdam, 2007). Safe third country mechanisms were originally concluded between countries in the European Union (EU), especially between 1985 and 2000 when many people were fleeing from persecution entered Western Europe (Moore, 2007). In order to deal with this influx, several EU countries established the Schengen Convention, and this limited processing asylum claims to a single country (Moore, 2007). Following this Convention, the Dublin Convention was concluded. This Convention stated that any application for protection should be made in the “first EU country in which an asylum seeker arrives”, and further established safe third country mechanisms (Moore, 2007, pg. 206). Changes in domestic refugee laws and policies within specific European countries also limited refugee flow into the countries.

Outside Europe, Australia has a unilateral transfer scheme in its Migration Act that denies protection to people who have “not taken all the possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently, any country apart from Australia” (1958, section 36(3)). Another more recent agreement is the one between the EU and Turkey, concluded in 2016. In exchange for visa-free travel for Turkish citizens to EU countries, financial assistance, and a revival of negotiations for Turkey’s accession into the EU, Greece would return people to Turkey who arrived on its shores “irregularly” (this term referring to the movement of migrants outside regular legal channels) after 20 March 2016 (Leghtas, 2017). This includes all

asylum seekers and other migrants for whom Turkey is considered a safe third country. Another aspect of this agreement is that for every Syrian refugee or asylum seeker who travelled irregularly from Turkey to a Greece, a Syrian national would be resettled in the EU (Leghtas, 2017). A year after this instrument was established, it was found that thousands of people were left stranded on Greek islands in overcrowded, unsafe, and unsanitary conditions (Gogou, 2017). Additionally, it has been argued by Greek asylum committees that Turkey was not a safe country for returnees, due to its human rights violations and the view that it cannot provide effective protection as required by international law (Gogou, 2017). Turkey was also not satisfied with the deal as the EU has yet to deliver on its promises to provide financial aid, to reduce the number of Syrian refugees, make visa-free travel available to Turkish nationals, and accelerate the EU accession process (Herszenhorn & Barigazzi, 2017). The controversial agreement is now being called into question, and recently Turkey's EU affairs minister has stated that it will be reviewed (Gogou, 2017).

The fact that asylum seekers can be barred from gaining asylum in countries and could be forced to retrace their steps back to their country of origin or another country raises several criticisms of safe third country agreements. For example, it neglects the individual circumstances and needs of asylum seekers (Goodwin-Gill & McAdam, 2007). Asylum seekers flee their country of origin for several reasons and may also specifically choose their country of asylum for various reasons such as having family members or differences in perception of safety (Goodwin-Gill & McAdam, 2007). Canada's refugee determination system is perceived to be more robust, generous, and accessible than many other countries, leading potential asylum seekers to believe that Canada has a higher

approval rating for refugee status than the US (Moore, 2007). Even though the approval rating between the US and Canada remains fairly similar, the numerous obstacles and requirements in the US asylum process, such as broader grounds of exclusion and high rates of detention, deter many people from seeking asylum in the US (Moore, 2007). Moreover, certain countries may be more or less safe for certain groups of asylum seekers than they are for others. In some situations, like in the EU, this could result in an “asylum lottery”, meaning that the chances of receiving protection in one country for specific groups of refugees could be low compared to the chances of receiving refugee protection in another country (Foster, 2008, pg. 65). Furthermore, international law does not require an asylum seeker or refugee to seek protection in the first country of entry, and recognizes the limited choice in where people can seek asylum, especially when they have family members residing in another state (Goodwin-Gill & McAdam, 2007). For these and other reasons, the safe third country mechanism is already flawed. Considering these contemporary factors that cause asylum seekers to flee their country of origin, safe third country mechanisms do not always provide for effective protection. This is an idea that will be further explored in chapter two.

*ii. The Safe Third Country Agreement Between Canada and the US*

The US and Canada entered into the bilateral agreement in 2004 as part of the “US-Canada Smart Border Action Plan” (“STCA”, 2004). According to the text of the STCA, it is meant to “better manage the flow of refugee claimants at the shared land border” between the two countries (“STCA”, 2004, introduction). Persons who seek refugee protection must make a claim in the first country they enter (either the US or Canada) and at a designated POE. If a claimant is found to be a refugee in the US, they

can be deported from Canada, and the reverse also being the case (“STCA”, 2004). There are four types of exceptions to this agreement: if asylum seekers have family members in Canada who have some sort of legal status; if they are unaccompanied minors (under eighteen years of age); if they have another form of legal document such as a valid Canadian visa; and public interest exceptions, such as if they have been convicted of an offence which could result in the death penalty in the US (“STCA”, 2004). Despite these exceptions, the STCA significantly affected refugee flows between Canada and the US. For example, in 2005 approximately three hundred refugee claimants were returned to the US, and the total number of refugee applications decreased dramatically in Canada during the same year (Moore, 2005). Furthermore, even if refugee claimants and asylum seekers meet these exceptions, they must still meet the other eligibility requirements of Canada’s immigration legislation (“STCA”, 2004). Claiming refugee protection at the Canada-US border entails proper documentation, a screening process, and an interview (“STCA”, 2004). If the asylum seeker is successful at this preliminary stage, then they are found to be “eligible” to be referred to the IRB, where they will undergo the relevant processes detailed in the IRPA. The US has a similar process under the agreement for asylum seekers before the refugee claimant can officially start the determination process.

Under the IRPA, countries that offer a high degree of protection to asylum seekers and refugee claimants and those who respect human rights are designated as safe third countries (IRPA, 2001 s. 102). Currently, only the US is designated as a safe third country under the STCA. The IRPA necessitates continual assessment of all states designated as safe third countries in order to ensure that these states continue to offer a high degree of protection to refugees and asylum seekers and continue to respect human

rights (“STCA”, 2004). Safe third countries are reviewed under four categories: whether the country is a party to the 1951 Refugee Convention and the 1984 Convention Against Torture (CAT); whether the country’s policies and practices are in line with the protocols outlined in the 1951 Refugee Convention and the CAT; the country’s own human rights record; whether the country is a party to an agreement with the Government of Canada for the protection of refugees (“STCA”, 2004). In this review of safe third countries, several sources are considered, such as international human rights organizations and United Nations organizations (“STCA”, 2004).

The IRPA does not specify exactly how these four factors are reviewed. For example, how is the US’s human rights record assessed? Does it take into account the high rates of deportation and detention of immigrants, most of which are conducted without fair access to judicial review? Does it consider the various and often unfair exclusionary clauses in US immigration laws, most of which disproportionately target certain minority groups? The most recent review of the STCA determined that “the United States meets a high standard with respect to the protection of human rights”, citing independent courts, the separation of powers, and an open democracy as the reasons why (“STCA”, 2004, factor 3). However, in lieu of the recent terminations of several positive refugee and migration policies in the US, can this assessment still stand? Furthermore, with respect to the second factor, which relates to whether the country’s policies and practices are in line with CAT and the 1951 Refugee Convention, it has been determined that the US has an “extensive administrative system subject to judicial checks and balances”, and that the refugee determination system within the US offers a high degree of protection to potential refugees (“STCA”, 2004, factor 2). There is no specific

information as to how this was determined, and critics have long argued that US migration laws and policies institute a number of procedural bars that exclude large groups of refugees (Arbel, 2013). The US also has one of the most arduous refugee and immigration determination systems. Refugees who seek asylum in the US have to bear with longer waiting times, and a higher risk of detention while waiting for their claims to be processed (Moore, 2007). They also face higher risk of *refoulement*, which is the forcible return of refugees or asylum seekers to their country of origin or another country where they may be persecuted (Moore, 2007). This would be in direct violation of the 1951 Refugee Convention and customary international law (Moore, 2007). These and other questions will be explored further in chapter two.

*iii. The Contexts Surrounding the STCA*

The 9/11 terrorist attacks in New York played an important role in shaping the STCA. The post-9/11 era saw an increase in migration control mechanisms and a heightened need for “national security”. Coupled with the “war on terror” rhetoric, the association of the asylum seeker with criminality or terrorism became prominent during this period (Macklin, 2005). Specifically, after 9/11, US migration policies became more restrictive in the name of security, and governments throughout the Western world found new ways to address the threat of terrorism, thus legitimizing the security measures taken towards refugees and asylum seekers. For example, the US government detained hundreds of people of Muslim or Arab descent even though they had never been found guilty or even suspected of an offence (Macklin, 2005). Some of these people were undocumented migrants. Others, however, had entered the country legally. In truth, the mode of entry of the migrants was not the main point of concern for the government, but

the pretext of being an “undocumented” or “illegal” person justified their detention (Macklin, 2005). This heightened need for security led to an increase in robust immigration policies, with the introduction of systems such as the “Special Registration” system that registered non-citizens in the US, and disproportionately targeted men from Muslim and Arab majority countries (Macklin, 2005, pg. 389). This meant that a lot of refugees were excluded from receiving protection due to terrorism provisions. For example, refugees who have been deemed a security threat are barred from the protection of *non-refoulement* in the US, and the 1951 Refugee Convention does not contain any specific provisions on terrorism that would prevent this exclusion (Moore, 2007). It merely states that any person found to be a security threat to the country of asylum could be barred from receiving protection, and it does not specify exactly what it meant by a security threat (UNHCR, 1951). Furthermore, the definition of “terrorism” and “terrorist activity” in US migration law is very broad and encompasses factors that arguably do not involve real considerations of national security (Moore, 2007). This also means that refugees who may be seeking protection from systematic discrimination and crimes against humanity could fall into this large “net” of terrorism, and thus may be unable to receive any protection (Moore, 2007).

This heightened need for security applies to Canada as well, and the STCA was another mechanism that came into effect a few years after 9/11. The STCA allows Canada to return asylum seekers who have made their claims at the US-Canada border unless they fall under limited exceptions (Arbel, 2013). Under the STCA, the US and Canada are considered safe countries with fair, functioning refugee policies, and the STCA is supposed to better manage the flow of refugee and asylum claims between the

two states (Thomson, 2007). This is done through an increase in border security between the two states allowing the governments of the two countries to share responsibility of claims, and reducing abuse of their respective systems (“STCA”, 2004). This was the main function and purpose of the STCA, and it is a way to affirm Canada’s and the US’s international legal obligation to protect refugees (Arbel, 2013). However, it is noteworthy that there is no mention of the actual safety of the *refugee* in the intentions and text of the STCA. This is because the STCA was meant to protect the borders of US and Canada from potentially harmful people. The main reason why Canada implemented the STCA was because it sought to regulate migrant flows, and Canada specifically wanted to reduce the number of refugees and irregular asylum seekers entering the country (Arbel, 2013). When the STCA was first introduced, CBSA stated that “Canada sought to limit the significant irregular northbound movement of people from the US” (“United States-Canada Joint Border”, 2010, pg. 12). Since its entry into force, Canada has been successful in reducing the number of refugees entering into Canada, and it has also been successful in discouraging potential refugees from accessing protection in Canada (Arbel, 2013). In other words, the STCA has narrowed the legal parameters of migration of people coming into Canada. According to statistics from the CBSA the number of claims made at the Canadian border declined by over fifty percent after the STCA was implemented (Arbel, 2013). Although Canada’s reasons for supporting the STCA differ from those of the US, Canada can do subtly what it cannot do overtly with this agreement, namely to limit the rights of refugees to protection through international and domestic law (Arbel, 2013).

## Debates Surrounding the STCA

### *i. Domestic and International Debates*

Concerns about security, the need for effective border management, and the need to maintain good relations with the US are the main reasons why the Canadian government refuses to suspend the STCA despite protests from legal and advocacy groups. Minister Hussen rejected demands to suspend the STCA in the beginning of 2017, stating that, “all the parameters of that agreement are in place and there is no change at this time” (Harris, 2017a, para 6). A spokesperson for the IRCC, Nancy Chan, stated that after a close analysis of recent developments in the US, Canada has “determined that the US remains a safe country for asylum claimants to seek protection there”, and Minister Hussen has continued to state that “there is no need to tinker with the STCA” (Thomson, 2017, para 13). This is Canada’s position as of July 2017.

There are also debates in international law surrounding safe third countries in general. Goodwin-Gill and McAdam argue that the status of refugees in international law has always been unstable (2007). An important concept in the debate about safe third countries is “effective protection” (Goodwin-Gill & McAdams, 2007). The principal question here is whether “effective protection” is available in the countries that are designated as safe third countries. Goodwin-Gill and McAdam argue that states must determine whether they can provide every refugee with “effective protection” (Goodwin-Gill & McAdams, 2007). “Effective protection” usually entails that the refugee “enjoys” human rights protection akin to the citizens and other migrants of the state (Goodwin-Gill & McAdams, 2007, pg. 394). Nevertheless, there is no standard definition of “effective protection” in international law. The UNHCR, for example, focuses on the “legal

limitations on the transfer of asylum seekers to third States” (Goodwin-Gill & McAdam, 2007, pg. 394). However, this approach does not consider aspects such as *non-refoulement*, which is an important aspect of “effective protection” (Goodwin-Gill & McAdam, 2007). Taking this into account, the recent developments in the US raise questions about “effective protection”, specifically whether the US *can* provide refugees with “effective protection”. If the US’ current immigration system is unable to provide “effective protection” to refugee and asylum seekers, this undermines the STCA and its operations. If the US is not providing “effective protection” in accord with international laws and policies, then it also undermines Canada’s STCA revision policies and whether they are efficient in evaluating safe third countries.

*ii. Legal Challenges*

The CCR was, and continues to be, strongly opposed to the STCA. The CCR, along with Amnesty International Canada (AIC) and the Canadian Council of Churches (CCC), launched a legal challenge against the designation of the US as a safe third country in *Canadian Council for Refugees v. Canada* (2007 FC 1262). They argued that the designation of the US as a safe country was invalid due to the fact that it failed to discharge its obligations for refugee protection under international law and CAT (Arbel, 2013). They argued further that the fact that Canada was sending refugees back to the US under the STCA was an indirect violation of *non-refoulement* (Arbel, 2013). The challenge was made by reference to a claimant “John Doe”, an asylum seeker from Colombia who had sought refuge in the US but who had been unsuccessful due to the one-year filing deadlines, according to which an asylum seeker who does not file a claim within one year of their arrival is prohibited from seeking asylum in the US (Arbel,

2013). John Doe attempted to apply for asylum in Canada but was denied due to the STCA. Justice Michael Phelan of the Federal Court of Canada found the STCA to be invalid, stating that the agreement may be non-compliant with the 1951 Refugee Convention, and declared it of no force and effect (*Canadian Council for Refugees v. Canada*, 2007). On June 2008, the Federal Court of Appeal overturned Justice Phelan's decision on the basis that it was a matter of statutory interpretation (Arbel, 2013). The Supreme Court declined to hear the case in 2009. Since that time, the CCR along with several other organizations, have been strong advocates against the STCA, maintaining that the US is not a safe third country due to its austere refugee and immigration policies and human rights violations.

*iii. Other Players*

Another prominent player in the debate on the STCA and the conditions of refugees is the UNHCR, who published several reports and pieces about the STCA when it was first introduced. The UNHCR also released a "Monitoring Report" on the STCA based on a review of the agreement conducted within the first twelve months of its implementation. The UNHCR assessed whether the STCA was consistent with the terms of the agreement itself, and whether it aligned with international refugee law ("Monitoring Report", 2006). The report reviews Canada's and the US's first year of implementing the STCA (between 29 December 2004 and 28 December 2005). The monitoring consisted of missions to the US-Canada land border POE, visits to detention centers where applicants under the STCA could be held, observations of eligibility determination interviews, meetings with government officials, NGOs, refugee claimants, their family members, and lawyers, individual case file reviews, reviews of government

policy guidance, and a statistical analysis (“Monitoring Report”, 2006). Their overall conclusion was that the agreement has “generally been implemented by the Parties according to its terms, and, with regard to those terms, international refugee law” (“Monitoring Report”, 2006, pg. 6). Some of the concerns brought forth by the UNHCR were the lack of communication between the governments of Canada and the US, the inadequacy of existing reconsideration procedures, delayed decisions of eligibility under the STCA in the US, the lack of training in interviewing techniques, inadequacy of detention conditions in the US, insufficient and inaccessible public information about the STCA, and the inadequate number of staff dealing with refugee claimants in Canada (“Monitoring Report”, 2006). The UNHCR then made specific recommendations to the US and to Canada based on the monitoring report. The main recommendation made by the UNHCR was to ensure that all the possible avenues were explored before the removal of an asylum seeker or refugee, to ensure that Department of Homeland Security (DHS) and CBSA officers have proper and consistent training, and to ensure that any detention of asylum seekers and refugees is minimal and used only as a last resort (“Monitoring Report”, 2006). This was the initial review of the STCA in its first year, and since then there have been no formal examinations of the STCA by the UNHCR.

#### Overview of Current Events

Advocates against the STCA argue that the US is not a safe third country, especially considering the election of US President Donald Trump, the heightened anti-refugee and anti-migrant measures, the “Muslim travel ban”, and other immigration enforcement policies. Furthermore, a spike in irregular asylum seekers at the beginning of 2017 revealed that irregular refugees can cross the border at “unofficial border crossings”

and still apply for refugee status legally (Wherry, 2017). This undermines the initial reasons provided by the government of Canada as to why it was implementing the STCA. Many of these asylum seekers are from the US, who left the country due to reasons such as Trump's "Muslim travel ban", the ending of TPS designations, and the perceived idea that Canada is "safer" than the US (Cochrane & Laventure, 2017). These irregular asylum seekers were a mix of single men and families, and in Quebec particularly there were a number of young children (Cochrane & Laventure, 2017). The fact that these asylum seekers were making their trip during the winter in severe conditions with their children and families weakens the security of the border, as well as the security of the asylum seekers who are already fleeing persecution. Thus, it is important to seriously analyze the effectiveness and necessity of the STCA. I now provide an overview of some of the changes that have occurred in the US and Canada since the implementation of the STCA.

*i. Irregular Arrivals*

There was an increase in the number of asylum seekers entering Canada during December 2016 and through the first few months of 2017. Asylum seekers were irregularly crossing into Manitoba and Quebec in order to circumvent the STCA and apply for refugee status in Canada. More than 6000 asylum seekers have crossed the border in the first six months of 2017 (Cochrane & Laventure, 2017). This surge of asylum seekers consists of many Haitians, mostly due to threat of deportation in the US because their TPS designation is ending. Most asylum seekers are being held in detachments of the Royal Canadian Mounted Police (RCMP), and are initially questioned, processed, and searched before going through the CBSA (Cochrane & Laventure, 2017). Most will move on to a CBSA temporary detention center, where they

will be held until CBSA agents can ensure identities and make sure they are eligible to make a claim (Cochrane & Laventure, 2017). According to the CBSA, more than 1,200 asylum seekers were waiting at a processing center in Saint-Bernard-de-Lacolle, Quebec alone, and approximately 2,400 people were being housed in Montreal as of August 2017 (Laframboise, 2017). In comparison to past numbers of asylum seekers crossing irregularly into Canada, 2017's numbers show a clear increase in irregular arrivals. Several interviews with asylum seekers and refugees show that the "Muslim travel ban", threats of deportation, and anti-immigration rhetoric play a large part in the decision of people to cross the border (Laframboise, 2017). This is an important phenomenon that relates closely to the STCA, and one that did not exist to the same extent during the initial stages of the agreement.

*ii. The US Executive Orders*

During the first few months of his presidency, President Donald Trump signed numerous EOs. Many relate to immigration, and several seriously undermine the US' human rights and refugee protection agreements. The "Enhancing Public Safety in the Interior of the United States" order cuts in federal funding to "sanctuary cities", and requires Homeland Security to hire 10,000 additional immigration officers and specifically target undocumented immigrants (Executive Order No. 13768, 2017). This EO focuses on crimes committed by undocumented immigrants and allocates additional resources to support victims of crime committed by undocumented immigrants (Executive Order No. 13768, 2017). The "Border Security and Immigration Enforcement Improvements" order is aimed at increasing border security between US and Mexico, partly through the construction of a "wall" between the two countries (Executive Order

No. 13767, 2017). This EO also calls for hiring 5,000 additional Border Patrol agents to detain undocumented immigrants near the Mexican border and ends “catch-and-release” protocols (Executive Order No. 13767, 2017). Under these “catch-and-release” protocols, illegal immigrants and refugees detained by Border Patrol agents would be released while they await their hearing (Vaughan, 2014). Although these protocols officially ended in 2006, there are still various policies and practices that resemble “catch-and-release” policies. The “Protecting the Nation from Foreign Terrorist Entry into the United States” order, more generally known as the “Muslim travel ban”, suspends entry of immigrants from seven Muslim-Majority countries (Syria, Iran, Iraq, Libya, Sudan, Yemen, and Somalia) for 90 days and stops all refugees from entering the country for 120 days (Executive Order No. 13769, 2017). Additionally, refugees from Syria have also been banned indefinitely under this order. The first two EOs remain standing and no revisions have been made to them yet. The “travel ban” has been blocked multiple times by several courts, most prominently on March 15, 2017, when US district courts in Hawaii and Maryland issued temporary orders against the EO to prevent it from going into effect.

Several asylum seekers who have recently crossed the border have stated that fear of deportation and discrimination in the US was their primary motivation for seeking protection in Canada (Ring, 2017). Many expressed that they “are not comfortable in America”, and hope they will have a “better life” in Canada (Ring, 2017, para 19). Furthermore, there has been an increase in “Alt-Right” movements and increasingly racist ideologies in the US, as exemplified by the Charlottesville white supremacist rally. These groups have gained supporters over the past few months, and it can be argued that they have been operating with few repercussions from the US government. For example,

President Trump's response to the Charlottesville rally was delayed, and he later insisted that left- and right-wing extremists were both to blame for the violence at the rally ("Trump Again Blames Both Sides", 2017). These sentiments are not limited to the US as Canada has also had a surge in anti-immigration and refugee policies. Specifically, with the increase in irregular border crossings and the availability of little information on who these asylum seekers are and why they are coming into Canada, many Canadians are concerned about border security and public safety. For example, then-Saskatchewan Premier Brad Wall wrote an open letter urging the Canadian federal government to suspend its plan to resettle 25,000 Syrian refugees to Canada. He stated that bringing in these refugees would undermine the screening process and claimed that "even if a small number of individuals who wish to do harm to our country are able to enter Canada as a result of a rushed refugee resettlement process, the results could be devastating" ("Sask.Premier", 2016, para 3). Wall stated that he would like to see a "redoubling" of security checks before the refugees were brought into Canada to ensure the safety of Canada's citizens ("Sask.Premier", 2016, para 3). Moreover, anti-refugee and anti-migration rhetoric is increasing all over the world, especially with the "refugee/migrant crisis". In lieu of these new developments in the US and around the world, it is important to analyze immigration enforcement tools such as the STCA, as well as refugee law in general.

*iii. Deferred Action for Childhood Arrivals (DACA)*

DACA refers to certain people who came to the US as children, usually without any status, and who meet certain guidelines for protection under US immigration law. According to the latest statistics approximately 690,000 young adults are currently

receiving protection under DACA (Shoichet, Cullinane, & Kopan, 2017). If they receive this protection, they are eligible to work, they can obtain valid driver's licenses, pay income taxes, and enroll in college (Shoichet, Cullinane, & Kopan, 2017). DACA does not provide these people with legal status and does not provide them with a path to becoming lawful US citizens or permanent residents, but it is a humanitarian action that defers an individual from deportation or removal for a certain period of time, with prospects of renewal ("Consideration of Deferred Action for Childhood Arrivals", 2017). Those who are eligible for DACA must be under the age of thirty-one as of June 15, 2012 ("DACA", 2017). They must have come into the US before the age of sixteen and have resided continuously in the country since their arrival ("DACA", 2017). They should not have any previous lawful status in the US, must currently be in school or must have completed high school or its equivalent, and must not have committed any felonies or be considered a threat to national and public safety ("DACA", 2017). The vast majority of the DACA recipients seem to be of Mexican nationals, with Salvadorians, Hondurans, and South Koreans rounding out the top four nationalities (Shoichet, Cullinane, & Kopan, 2017). In September 2017, the US administration announced a recession of the program with a six-month grace period for review ("DACA", 2017). Officials are no longer accepting new applications, though exceptions are made for some more serious cases. This means that beginning in 2018, several undocumented people will lose their status every day without the ability to renew or apply for any other legal status (Shoichet, Cullinane, & Kopan, 2017). This will also mean that these people have a higher risk of deportation once they lose their status in the US.

iv. *Temporary Protected Status (TPS)*

TPS is a humanitarian protection available to certain eligible nationals of designated countries chosen by the Secretary of Homeland Security (“Temporary Protected Status”, 2017). The Secretary of State may grant designation to countries due to ongoing armed conflict, environmental disasters, or other extraordinary and temporary circumstances (“Temporary Protected Status”, 2017). Those who are granted TPS cannot be removed from the US, are able to obtain employment authorization document, and may be granted travel authorization (“Temporary Protected Status”, 2017). They may also not be detained by the DHS. Currently ten countries have TPS designations: El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, Sudan, South Sudan, Syria, and Yemen (“Temporary Protected Status”, 2017). Recently DHS has stated that it would be ending TPS designations for Sudan and Nicaragua as of 2018. Furthermore, the Trump administration is looking to end the granting of TPS to Central Americans and Haitians in general (Miroff & DeYoung, 2017). This would mean that when the TPS ends and visas expire, people who had TPS designations may be forced to return to their country of origin where there is still conflict (Miroff & DeYoung, 2017). Furthermore, this could lead to people coming to Canada due to the fact that many of these individuals would not want to return to their country of origin.

### Conclusion

This is not a comprehensive list of all the changes that have occurred in the US and Canada since the implementation of the STCA, but it showcases some of the major changes in legislation and in attitudes towards refugees and asylum seekers since 2004. Moreover, those who oppose the STCA have argued that the US should have *never* been considered a safe third country. They contend that the bars and restrictions found in the

US refugee determination system, coupled with high rates of deportation and detention, create a discriminatory and unfair system for people seeking asylum. The problem with the STCA is not solely specific to the US. Higher levels of irregular asylum seekers in Canada, and asylum seekers crossing the US-Canada border in harsh conditions undermines the operations of the STCA and it shows that asylum seekers can circumvent the STCA by crossing into Canada at an unofficial POE. The mechanism itself is outdated and effectively undermines refugee protection, despite its promises of greater security and border-sharing. The second chapter will begin to unpack what it means to be a “safe third country”, and deconstruct the various parts of the agreement. The second chapter will also refer to the current events mentioned in this chapter and explore why they would undermine the US’ status as a “safe third country”. Lastly, it will also bring forth some counter-arguments in favor of the STCA and why the Canadian government refuses to suspend the agreement.

## Chapter Two

## Mechanisms of the STCA

The preamble of the STCA states that the US and Canada have generous systems of refugee protection that reflect long traditions of assistance with respect to refugees and displaced persons, compliance with international law and principles, and a commitment to cooperation and burden-sharing on refugee matters (“STCA”, 2004). Furthermore, it states that Canada and the US should uphold asylum as an “indispensable instrument of international protection” for refugees and should resolve to strengthen their systems if necessary (“STCA”, 2004, preamble). Lastly, it states that Canada and the US are aware that responsibility sharing should ensure that refugee protection is always in line with international law and both countries should guarantee that there are no indirect breaches of *non-refoulement* (“STCA”, 2004). The importance of these sections in the preamble is that they express the basic principles underlying the agreement as a whole. The STCA emphasizes the fairness and generosity of the legal systems of the US and Canada, which along with refugee protection, responsibility sharing, and compliance with international law, make up the most important elements of the STCA (“STCA”, 2004). At the time it was signed some of these elements may have been satisfied, but fifteen years later there have been several changes to the US and Canadian refugee systems that bring some of these elements into question. This chapter will examine problems with the operation of the STCA, as well as the current situation in the US and Canada, and determine whether the agreement is living up to its preamble. Through the analysis of the operational mechanisms, the review process, the exceptions, the growing difference between the US and Canadian refugee determination systems, and the current changes and events relating to refugees and asylum seekers, this chapter argues that the STCA, as a legal instrument

governing migration, is inherently flawed (especially in the contemporary context) and should either be suspended or eliminated.

*i. Operational Mechanisms*

An important factor influencing the operation of the STCA is the increase in “irregular arrivals” to Canada that occurred during the first half of 2017. The concept of “irregular arrivals” is controversial, but according to the IRB, the term refers to individuals who cross into Canada between official POEs (“Irregular border crosser statistics”, 2017). A core feature of the STCA is that it applies to persons who make asylum claims at “Canada-US land border crossings, by train, or at airports”, or in other words at official POEs (“STCA”, 2004, para 1). If someone crosses the border irregularly, the STCA would not apply to their situation; some lawyers and government officials have called this a “loophole” in the agreement. According to statistics on the IRB website, there were approximately 3,257 refugee claims made by irregular border crossers between February 2017 and October 2017 (“Irregular border crosser statistics”, 2017). The projected number of claims in 2017 is estimated to be around 36,610, which is a significant increase from 2016 where the numbers were around 24,000 (Forrest, 2017). Most of the asylum seekers who made irregular claims in 2017 were from Haiti, with Nigeria, Turkey, Syria, Eritrea, Yemen, USA, Sudan, Djibouti, and Pakistan rounding out the top ten (“Refugee Protection Claims”, 2018). The fact that there was an increase in claims of asylum seekers whose country of alleged persecution was the US is interesting, as it is not usually a country that is viewed as a producer of refugees and asylum seekers. Between February 2017 and December 2017 there were 408 claims made by people from the US (“Refugee Protection Claims”, 2018). Interestingly, none of those claims have

been accepted, and thirty-one have been rejected thus far (“Refugee Protection Claims”, 2018). This increase in irregular arrivals during the first six months of 2017 is different from irregular arrivals that have occurred in previous years, as it involved a large number of asylum seekers during a short period of time who had similar reasons for travel.

Canada’s refugee system is robust enough to handle the intake of these new asylum seekers. The problem is that these new cases plus any additional ones add to the already significant backlog that exists currently. By the end of September 2017, the IRB had a backlog of approximately 34,000 asylum claims, and in addition to this the IRB also has to process legacy claims (Connolly, 2017). Legacy claimants are asylum seekers who have applied for asylum but whose claims have yet to be heard and determined, some of these refugee claimants have been living in limbo for up to four years (“Legacy Claims”, 2017). On June 2017, the IRB announced that they have created a task force to clear all claims made prior to December 15, 2012, which means that there are around 5,600 legacy claims that need to be heard (“Legacy Claims”, 2017). This means that unless the IRB increases its resources, this rise in irregular arrivals will lead to longer decision-making times, more backlog, and more asylum seekers living in limbo due to the precarious nature of their claims. The aforementioned “loophole” in the STCA, where asylum seekers who cross irregularly do not fall under the agreement, is also problematic because it gives desperate asylum seekers the idea that they can at the very least apply for refugee status if they enter Canada irregularly. The Canadian government maintains that there is no advantage if asylum seekers enter Canada irregularly. However, in a letter to Minister Hussen, Member of Parliament Jenny Kwan stated that the liberal government is “misleading people when it says there is no advantage” (Levitz, 2017, para 1). She claims

that if asylum seekers from the US enter Canada at an official POE, there is the possibility their claim could be rejected outright under the SCTA; but if they cross over between POEs, then under international law Canada must process their refugee claim (Levitz, 2017). Kwan and the NDP stated that this influx in asylum seekers makes it clear that people no longer feel safe in the US due to Trump's "discriminatory edicts, fueled by his anti-refugee and Islamophobic rhetoric" (Kwan, 2017, para 1). The fact that asylum seekers are entering Canada irregularly to ensure that they do not fall under the STCA brings into question the operations of the STCA as well as the distribution of border sharing between the two countries, and it threatens the security and safety of asylum seekers and refugees.

This rise in asylum claims is also in tension with the reason why Canada implemented the STCA in the first place. As stated in Chapter One, Canada's aim in entering into the STCA was to reduce the number of irregular border crossings. It implemented the STCA as a tool to accomplish this task. Although it is true that the overall numbers of asylum seekers coming into Canada is not unprecedented,<sup>1</sup> it is significant that the vast numbers of asylum seekers who irregularly crossed into Canada have cited the STCA as one of the reasons they did so. In interviews conducted at the border, several asylum seekers have cited the recession of some US immigration programs as the cause for them leave the US. Around eighty-five percent of the asylum seekers intercepted in Quebec were from Haiti (Park, 2017). This recent surge in Haitians has been attributed to the fact that their protected status in the US is set to expire by the end of 2017, which would mean they

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<sup>1</sup> In 2008, four years after the STCA came into effect, there was a total of 36,920 asylum claimants across Canada ("Social Policy Trends", 2017). The projected numbers for 2017 are around 37,000 asylum claimants across Canada, which is only slightly higher than the numbers in 2008 ("Social Policy Trends", 2017).

would be forced to leave the country (“Temporary Protected Status”, 2017). President Trump’s EO banning citizens from six Muslim-majority countries was also cited as one of the reasons for the spike, as it affects those from Iran, Syria, Somalia, Yemen, and Libya, who make up five of the top ten countries of origin of asylum seekers entering Canada. This undermines the border sharing commitment made by the US and Canada since these asylum seekers are crossing the border at high numbers. The increase in irregular arrivals also revealed the dangers posed to asylum seekers and refugees. To date, there has been one reported death of an asylum seeker attempting to irregularly cross the border. A 57 year old Ghanaian woman, Mavis Otuteye, was found dead near Emerson, Manitoba late May 2017, while trying to cross the border into Canada to see her daughter (Helgren, 2017). Additionally, a Ghanaian man lost all his fingers to frostbite after entering Canada early 2017 (Lynch, 2017). He stated that he feared deportation from the US after the election of President Trump, and also feared for his life if sent back to Ghana (Lynch, 2017). If the numbers of irregular arrivals continue to increase in 2018, there may be further risk of harm to asylum seekers due to harsh weather conditions and other factors.

The last time Canada had a surge of asylum seekers and refugees of this magnitude was in 2001, and this surge was largely attributed to the events of 9/11 involving people who were fleeing being marked as security threats as a result of terrorism and anti-Muslim sentiments. Since then the number of people entering Canada as refugees has been fairly stable with figures for landed refugees remaining consistent at around 8,000 people a year (Schwartz, 2015). The STCA was relatively easy to monitor because asylum seeking rates remained relatively consistent at the time, and the CBSA, RCMP,

and DHS agents did not have to deal with high levels of asylum seekers. The operation was also able to run smoothly because there were enough resources to deal with the claims. During this spike in irregular arrivals in 2017, the RCMP, CBSA, and several NGOs stated that they did not have enough resources to deal with the number of people coming into Canada. In August 2017, Quebec Premier Phillippe Couillard asked the Trudeau government to increase processing times for asylum claims in order to decrease the bureaucratic pressure on the province (Hinkson, 2017). The number of irregular arrivals was so high that the government had to open ten new shelters including space in Montreal's Olympic Stadium in order to temporarily house asylum seekers as they awaited more permanent quarters (Hinkson, 2017). Although it is not clear if the Canadian government agreed to Couillard's request, CBSA and the RCMP have made "internal adjustments" to make sure enough personnel and resources are in place (Harris, 2017a, para 12). CBSA and the RCMP have also stated that they will advise the government if more resources are required (Harris, 2017a). Similarly, Manitoba opened fourteen emergency housing units for asylum seekers to reduce the strain on resettlement agencies (Hoye, 2017). Several NGOs and resettlement agencies requested additional financial support for housing, as well as for paralegal services and transportation costs (Dangerfield, 2017). In 2001, before the STCA was implemented, there were approximately 45,000 asylum claimants across Canada ("Social Policy Trends", 2017).<sup>2</sup> The current increase in claims during 2017 has shown that the STCA is not successfully reducing the number of irregular arrivals much less asylum seekers in general.

*ii. Exceptions to the STCA and the Review Mechanisms*

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<sup>2</sup> Previously numbers of asylum claims were around 30,000 per year between 1980 and 1999 ("Asylum Applications in Industrialized Countries", 2001).

The STCA provides for four exceptions, which include compliance with the 1951 Refugee Convention, CAT, and the countries' own human rights accords. The Conventions and human rights accords themselves encompass a wide variety of requirements, so the issue remains whether the US or Canada does in fact respect those policies and practices. While Canada maintains that the US continues to uphold its commitments, it can be argued that some policies and laws that the US has recently enacted violate its responsibilities under the 1951 Refugee Convention and other human rights treaties to which the US is party. For example, when assessing factors to consider whether *refoulement* is possible, the sending state must be satisfied that the adjudication procedure is in place to determine refugee status in the receiving state (Foster, 2008). If Canada is the sending state, would it be satisfied with the US refugee determination procedures? A second factor considered when assessing *refoulement* is that the sending state must ensure that the asylum seeker is not barred from the refugee determination system by any procedural or other impediments (Foster, 2008). In this case, does the one-year bar in US refugee law, which states that asylum applicants have to show "by clear and convincing evidence that the application has been filed within one year after the date of the applicant's arrival in the US" not restrict asylum seekers from receiving proper refugee determination, especially considering the one-year bar does not consider the individual circumstances of asylum seekers? (UCIS, 1997, sec.208.4). All of these issues relate to whether or not the refugee determination systems in the US and Canada are currently similar enough for the agreement to still work effectively.

Specifically, the four exceptions include family member exceptions, unaccompanied minors exceptions, document holder exceptions, and public interest exceptions. A

detailed explanation of these exceptions was provided in the previous chapter. Although the exceptions benefit certain groups of refugees and asylum seekers, there are no concrete statistics on how often they are applied or how many people actually qualify for these exceptions. For example, applicants with family members who are citizens or who have been granted some lawful status in Canada are exempt from the STCA (“STCA”, 2004). However, the term “family member” is very narrow as the relationship between the applicant and the relative must be a “closer familial relationship than cousins” (Moore, 2007, pg. 211). This includes siblings, children, parents, grandchildren, grandparents, nieces, nephews, aunts, and uncles. However, if someone has a relative with whom they are still close, but this person does not fall under one of these categories, they may not qualify for an exemption under the STCA. The other exceptions are also fairly narrow. The unaccompanied minor exception is based on the best interests of the child, and the document holder exceptions apply to those who have a valid Canadian visa, work or study permit, travel document, or to those who are exempt from temporary resident visas (“STCA”, 2004). The last exception is public interest exception which is only based on the death penalty (“STCA”, 2004). In the text of the STCA, there are no other factors included, and if they are inadmissible based on grounds of security, violating human or international rights, or criminality then their claim is ineligible anyway (“STCA”, 2004). It is also not stated whether this exception can be broadened to include other public interests, or whether it is just limited to those asylum seekers facing the death penalty (“STCA”, 2004). With the recent cancellation of DACA and TPS for certain groups of migrants, it is important to specify whether these exceptions to the STCA can be expanded. For example, can asylum seekers legally apply for refugee status

at an official POE in Canada if they face deportation in the US due to the fact that their TPS has come to an end? If so, would this qualify as an exception, or would it be based on another mechanism of the STCA? The Canadian government wants asylum seekers to stop crossing the borders irregularly, and if the parameters of these exceptions were to be expanded then perhaps it would deter asylum seekers from crossing irregularly.

The STCA also allows for a review of all the countries designated as safe third countries under the IRPA. The four factors include whether the country is party to and whether its policies and practices respect the 1951 Refugee Convention and the CAT, the country's human rights records, and whether the country is a party to an agreement with Canada ("STCA", 2004). The purpose is to ensure that all conditions of a safe third country designation are being met. In addition to the four factors upon which the review is based, new directives were introduced in 2015 that provide greater clarity on the review process. These directives state that the Minister of Citizenship, Immigration, and Refugees "will monitor, on a continual basis, the four factors of review and report to the Governor in Council" if necessary and continue the review for any other country designated as a safe third country in the future ("STCA", 2004, para 5). Other than these clauses within the STCA and the IRPA, there is no further information as to how these reviews are conducted. Both the agreement and the review of factors require it to take place on a "continual" basis, but there is no explanation of what this entails. Reviews of the US as a safe third country are not publicly available, so there is no way to tell how many times it has been reviewed, how it was reviewed, and what the results were beyond the fact US remains a safe third country. With the recent election of President Trump and the subsequent spike in irregular arrivals, the designation of the US was reviewed again,

but its conclusions were not made public. Another issue with the vague wording of the review process is that it does not explicitly state if the review considers or fails to consider *future* violations of refugee rights and possible changes in immigration and refugee law. The Trump administration has been clamping down on migration, vowing to increase DHS vetting powers and imposing stronger restrictions on travel to the US in general (Aiello, 2017). This is the case during Trump's first year of presidency, and if this is his stance on migration throughout his term it is possible that his administration may eliminate more refugee and migrant policies. If future violations of refugee rights and laws are not a factor considered in the review process of safe third countries it is problematic because refugee and migration matters involve issues of displacement and violence. When addressing the movement of people, especially in times when global migration levels has been increasing, it is important to consider the possibility that there may be further recession of the US refugee system based on the current government's stance on immigration.

### The US as a Safe Third Country

#### *i. The US Refugee Determination System*

At the core of the argument against the STCA is the fact that the US is not a safe third country and most critics of the STCA today claim that the conditions in the US have changed so significantly that it should no longer be considered a safe third country. Canada has a more extensive and generous determination and support system for refugees and asylum seekers. For example, Canada has the PRRA under which failed asylum claimants are entitled to an assessment of risk of persecution if sent back to their country of origin; there is also a separate humanitarian and compassionate consideration in

Canada which provides an alternate way of attaining legal status, and refugee claimants and asylum seekers receive critical support mechanisms such as free legal representation, social assistance, and in some cases employment (Moore, 2007). Even though these exist to some extent in the US, Canada has more formal systems of support for asylum seekers, refugee claimants, and refugees. The US refugee determination system was called into question at the time the STCA was signed<sup>3</sup>, and several times since then.<sup>4</sup> This was further emphasized when the CCR, Amnesty International Canada, and other organizations submitted a letter to the Government of Canada laying out the reasons why the US should not be considered a safe third country.<sup>5</sup> These organizations published more material explaining their position on the STCA in July 2017 in order to inform the public and pressure Parliament to change its own position.

One of the ways the US system is different from the Canadian system is that the US has an expedited removal process. Pursuant to the expedited removal program, when a person arrives in the US without proper travel documents or fraudulently, they can be deported without a hearing unless they genuinely face fear of persecution or apply for asylum (Macklin, 2005). The STCA permits asylum seekers or refugees returned to the US from Canada to a refugee status claim examined in accordance with US and

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<sup>3</sup> CCR was the primary organization that called the US refugee determination system into question. Additionally, AIC and the CCC were also against the US's designation as a safe third country.

<sup>4</sup> Since 2004, refugee advocacy groups such as the CCR, AIC, and the CCC have continued to call for the elimination of the STCA and US's designation as a safe third country. Prominently, in 2008 and 2009 after the Federal Court of Appeal overturned the earlier Federal Court's ruling that the US does not comply with the 1951 Refugee Convention and CAT and also most recently in 2017 after the election of Donald Trump ("Rights Groups", 2008).

<sup>5</sup> Some of the reasons include the one-year bar in the US, the expedited removal process, arbitrary detention in substandard conditions, varying rates of acceptance between regions, and inconsistent record with gender-based persecution ("Why we are challenging", 2017). CCR also alluded to new anti-refugee and anti-Muslim measures adopted recently in the US, and the rise in irregular crossings into Canada as reasons why the US should not be considered a safe third country ("Why we are challenging", 2017).

international law (Macklin, 2005). Furthermore, according to US immigration law, those who are sent back to the US from Canada without a successful claim are considered by the DHS as never having left US soil, and thus should not be subjected to the expedited removal process unless under rare exceptions (Macklin, 2005). This means that any individual returned to the US should receive a full hearing before an immigration judge. However, reports show that this is often not the case, and several refugee applicants have been subjected to expedited removal processes over the last few years without a full hearing (Macklin, 2005; Musalo, Anker, Taylor, & Knight, 2000). Furthermore, these reports have showcased that the US may be applying the expedited removal process to individuals who fall under the STCA (Macklin, 2005; Musalo et. al, 2000). Scholars have criticized the process by stating that even though this program follows the refugee determination process, there are deficiencies and shortcomings of this procedure that increase the likelihood of errors (Macklin, 2005). This is problematic because an unsuccessful claim could mean the individual is sent back to a place where they may be at risk of torture, cruel and unusual punishment, or death. The expedited removal process involves a secondary inspection, in which the immigration officer informs the applicant that they can apply for refugee status and assesses the refugee applicant's eligibility for refugee protection (Moore, 2007). This aspect is critical, but there is no judicial review of the officer's decision. Thus, if there are inadequate interpreters, hostile inspectors, restrained situations, or other inadequate physical conditions, the case may not be successful (Moore, 2007).

Other studies have also determined that the expedited removal process has shortcomings. For example, a study by the US Commission for International Religious

Freedom (USCIRF) revealed that not all the procedures are followed during the secondary inspection stage (Keller, Rasmussen, Reeves, & Rosenfeld, 2005). The study states that over half of the applicants were not informed they could apply for refugee status, and fifteen percent of them expressed fear of returning home but were not given credible fear interviews (Keller et. al, 2005). An earlier study by Musalo et al. showed that although those who were granted a credible fear interview received a full hearing before an immigration judge, many of their applications were denied due to the judge finding discrepancies between the applicant's credible fear interviews and the testimony given before the judge, which could mean that the interviews were inaccurate or incomplete (2001). Canada does not have an expedited removal process or a comparable program, and this is one reason why a refugee may regard Canada's determination system as fairer. The Standing Committee on Citizenship and Immigration has requested guarantees from the US that none of the individuals returned to the US under the STCA would be subjected to the expedited removal process, but no such formal assurances have been provided (Arnett, 2005). Thus, it is still possible that genuine asylum seekers could be deported under this program.

Another example of the disconnect between the two systems stems from gender-based claims. In the American legal system, some factors more specific to female refugees, such as domestic violence, are not taken into account. Only recently in the *Matter of A-R-C-G et al.* did the US grant asylum to a woman fleeing from domestic abuse which could signal an expansion in US refugee law (BIA, 2014). However, women who face gender-based persecution still must fit their claims into one of the five grounds of protection as outlined in the 1951 Refugee Convention. Domestic violence is not

considered a ground for asylum in the US even though the UNHCR recognizes that it is a human rights violation requiring of state intervention. The UNHCR has established guidelines on gender related claims, which explain that domestic violence can cause women and girls to become refugees (2002). These guidelines further state that non-state actors, such as abusive spouses, can engage in persecution (UNHCR, 2002). Lastly, the guidelines recognize that sex is a characteristic that could fall under a particular social group (UNHCR, 2002). Canada adheres to these guidelines, and Canadian refugee law recognizes domestic violence as a viable ground for asylum. In *Narvaez v. Canada (Minister of Citizenship and Immigration)*, the Federal Court of Canada drew distinction between someone experiencing violence and abuse privately and someone who experiences violence and abuse due to a common characteristic, in this case gender (Arnett, 2005). Moreover, battered women are considered a particular social group under Canadian refugee law (Arnett, 2005). When implementing the STCA, the Canadian government commissioned a study to look into gender-based claims in the US, and it was determined that the US has a high rate of success, meaning that most gender-based claims were successful, and that claimants received protection based on the available data (Arnett, 2005). However, there have been several disagreements with these findings. For example, some scholars suggest that the study is not reliable as the results are skewed towards successful cases and unsuccessful cases are often unreported (Arnett, 2005). Nevertheless, Canada declared that the two countries have similar laws on gender-based claims, and thus sending an asylum seeker or a refugee back to the US would not be considered a violation of international law (Arnett, 2005).

The US also bars refugee applicants from seeking asylum in the US if they are found to be convicted of a particularly serious crime or if they present a significant danger to the US (Moore, 2007). While this exclusion is in line with the 1951 Refugee Convention, US practice is different in the scope of the exception when compared to other countries. Upon conviction of a crime, if the migrant faces imprisonment of five or more years it is considered a “particularly serious crime” in the US (Moore, 2007, pg. 228). Nevertheless, the US has determined some crimes to be particularly serious even if the imprisonment is less than five years. Furthermore, aggravated felonies in the US also cover a series of crimes which are non-violent, and the list of aggravated felonies has increased over the past years (Moore, 2007). Linking the term aggravated felony to a refugee or an asylum seeker creates the presumption that they could be a danger to the public, and because there is no independent assessment of whether the refugee or asylum seeker is actually dangerous, the refugee claim could be denied or withheld regardless of their situation (Moore, 2007). This is also not assessed by taking into account the mitigating factors and other circumstances, which is an extremely important aspect for refugees and asylum seekers who face risks of persecution (Moore, 2007).

Similarly, the US also has a lower threshold for determining terrorist activities when deciding on asylum and refugee claims. As previously stated, the 1951 Refugee Convention does not specifically contain terrorism provisions, but there are exceptions to those found to be a security threat. Under article 9 of the 1951 Refugee Convention, contracting states can take provincial measures essential to national security in the case of particular persons (UNHCR, 1951). This exception is also applicable to the issuance of travel documents, which contracting states do not have to provide in cases of national

security, and for expulsion or return of a refugee from the contracting party to their country of origin (UNHCR, 1951, art. 28, 32, 33). US immigration law's approach to terrorism goes beyond what the 1951 Refugee Convention would have considered a "threat to security", and it goes beyond what the Convention would deem a danger to society (UNHCR, 1951). Under US immigration law, terrorist activity involves a wide range of conduct, including factors such as the use of a dangerous device with the *intent* to endanger (Moore, 2007). Furthermore, it casts a wide net on people who may be defending themselves from systematic discrimination, crimes against humanity, or genocide (Moore, 2007). A concrete definition of "aiding" and what constitutes "knowledge" in terms of terrorist activities is not provided, and the list that encompasses assisting a terrorist organization is exhaustive (Moore, 2007, pg. 233). An important aspect of this provision is that there are no mitigating factors considered when determining whether an applicant was involved in terrorist activities or in terrorist organizations. For instance, factors such as how much time has passed since the support, what were the circumstances around the support, how much knowledge did the individual have of the support, or was it the intention of the refugee claimant to provide support, are not considered during the assessment (Moore, 2007). The "war on terror" rhetoric has also created practices that have increased the probability that the refugee claimant may be sent back to their country of origin or arbitrarily detained without proper consideration of their claim (Moore, 2007). For example, the US policy of rendition sends back an individual to their country without due process simply by using "terrorism" and "threat to security" as the reasons (Moore, 2007). The war on terror rhetoric post-9/11 significantly changed legal grounds for seizing, transferring, and detaining people suspected of

terrorism. One of the biggest changes is that detention, interrogation, expulsion, or deportation are usually done without charge or trial (Fitzpatrick, 2003). Irregular rendition, taking the form of expulsion or abduction, deprives the asylum seeker or refugee from the opportunity to gain protection from persecution and it also violates the asylum seeker or refugee's right to *non-refoulement* (Fitzpatrick, 2003). Rendition policies and other war on terror mechanisms demonstrate the willingness of the US to circumvent international and domestic law and showcases that the US may be willing to ignore international law when it comes to cases of terrorism and security threats.

*ii. Relation to Current Events*

In addition to the fact that the US and Canadian determination systems are becoming less similar, recent events in the US have shown that the situation regarding asylum seekers and refugees are very different when compared to 2002-2005. Differences between the US and Canadian refugee systems are becoming increasingly prominent and, as such, it can be argued that the STCA has become ineffective. Minister Hussen has stated that he has no doubt that the US remains a safe third country based on the four factors under the review mechanism. However, since the election of President Trump, the US government has had a very different stance on immigration and refugees compared to the Obama administration. The Trump administration has clamped down on immigration, and has increased austere measures to deal with all migrants coming into the country. In Canada, the Liberal Party was elected in 2015, and they have a very different stance on immigration and refugees than Harper's Conservative government, which was in power for nine years. For example, the Harper government scaled back the interim federal health program for refugees in an effort to save money annually ("Liberal government

fully restores”, 2016). The Liberal government fully restored refugee health care benefits and also added additional coverage (“Liberal government fully restores”, 2016).

Furthermore, the Liberal government has invested more funding to decrease refugee processing times, and to reduce family reunification wait times (Zilio, 2017). These changes in policies have an effect on the way refugees and asylum seekers view different countries. In the US, due to the cancellation of programs such as DACA and TPS, the increase in border control, and the blatant exclusion of certain groups of people, refugees and asylum seekers are at an increased risk of deportation and indefinite detention.

DACA provides children of undocumented immigrants with the ability to work and live in the US and it was introduced during the Obama administration (Shear & Davis, 2017). Repealing DACA would be unfair to young immigrants most of whom were brought into the US as children, and who do not pose any real security or economic threats to the country. Repealing DACA would also mean that many of these young immigrants would face deportation to countries they have no memory of, and it shows a clear distinction between US’s immigration policies currently and its policies before the Trump administration.

Similarly, the ending of TPS designations for certain countries in the US also showcases a recession in US immigration laws and policies. When TPS designation ended for Haitians, Canada saw an influx of Haitian asylum seekers at the border, who were afraid that the ending of their TPS designation would mean that they would now be deported. Additionally, the Trump administration announced that it was ending TPS for approximately 200,000 Salvadorians who have lived in the US since 2001 (Miroff & Nakamura, 2018). These Salvadorians have until late 2019 to leave the US or find a way

to obtain a green card (Miroff & Nakamura, 2018). DHS officials have stated that this move was not part of a broad anti-immigration agenda but because the conditions in El Salvador, after the earthquake in 2001, have improved and thus Salvadorians no longer require protected status (Miroff & Nakamura, 2018). However, immigration advocates have argued against this stating that there is still prevalent gang violence, and El Salvador's homicide rates remain the highest for a country not at war (Miroff & Nakamura, 2018). Another issue with ending the TPS designation for Salvadorians is that there are now US-born children of Salvadorians with protected status, and parents have to decide whether to break up families or face deportation (Miroff & Nakamura, 2018). These are people who have been living and working in the US for the past seventeen years, and who consider the US their home. Forcing them to leave the country to possibly go back to one where it is not safe is extremely harmful. Moreover, if any Salvadorians decide to come to Canada, this would raise the question of whether they would qualify for an exception under the STCA due to the risk of deportation if they were returned to the US.

Another example of the differences between 2004 and the present is the increased power given to DHS agents, the increase in border control and security, and the increase in arrests and detentions by these agents under the new EOs. The travel ban is also in effect, as of 2017, and because of the ban many people (refugees and non-refugees alike) are being denied entry into the US. Applicants from Yemen, for example, are fleeing a major cholera outbreak and civil war – partly due to Saudi armed forces backed by government authorized arms shipments from the US – and have been continuously denied entry to the US due to the travel ban (Al-Maghafi, 2017; Levin, 2017). Other individuals

from other countries included in the ban are also being denied entry, denied a visa without a waiver, and put on administrative hold. Many who are in the US cannot leave due to the fear that they will not be allowed back (Levin, 2017). This is to say that currently the US's stance on refugees and asylum seekers is questionable. If the country does not want to offer effective protection to potential refugees, then why would refugees want to seek asylum in the US? These events should be taken into account when processing applications for asylum seekers and refugees who are looking to come to Canada from the US.

It should be stated that although the US refugee determination system and overall climate towards refugees is controversial, Canada is not perfect either. Before the recent parliamentary election, when the Liberal Party came to form a majority government, Canada's stance on refugee protection was ambiguous, and several austere immigration laws and policies were introduced during the Harper government's tenure. Bills such as the *Faster Removal of Foreign Criminals Act* (Bill C-43) allowed for the mandatory deportation of foreign criminals to their country of origin, and the bill would strip refugee status of those deemed to be a danger to society (Humphreys, 2015). These persons include those who would serve a sentence with a prison term of six months or more under Canadian law ("Faster Removal of Foreign Criminals Act", 2013). The bill limited review mechanisms in place for certain foreign nationals, and also banned family members of those found guilty from entering the country ("Faster Removal of Foreign Criminals Act", 2013). Another change that was made by the Conservative Party was the *Strengthening the Canadian Citizenship Act* (Bill C-24), which allowed for the government to revoke Canadian citizenship from dual citizens who are convicted of

“terrorism, high treason, and several other serious offences” (“What dual citizens need to know”, 2015, para 1). These bills undermined Canada’s reputation as a champion of refugee and migrant protection. Although on a smaller scale, Canada has also experienced anti-refugee and anti-Muslim sentiment, with white supremacist rallies occurring across the country and Quebec’s recent face-covering ban disproportionately targeting Muslims. Canada has always valued migration, but they have mostly valued economical immigration. Canada’s contemporary immigration system is suited to attract skilled immigrants who will benefit the Canadian economy and Canada prefers high skilled, labor-oriented, highly educated individuals who will fill gaps in the labor market (Anwar, 2014). This was done to control the flow of immigrants in a way that would be beneficial to the Canadian state, and potential immigrants who fit into these categories will gain faster and easier admission and eventually citizenship (Anwar, 2014). Currently, Canada’s main immigration tool is the points-based system, which is used to assess and select potential immigrants.

It was recently announced that Canada seeks to admit one million immigrants by the year 2020; approximately sixty percent of these newcomers will be economic migrants and thirty-one percent will be sponsored family members and refugees (“Supplementary Information”, 2017). Most immigrants will come from the economic class in order to help boost the economy and replace those retiring within the next three years (Harris, 2017b). Economic immigrants have some form of higher education, are usually fluent in English, and can contribute to the economy. Asylum seekers are a “wild card”. They sometimes come into the country without proper documentation, may pose a security threat, may not be fluent in English, and may not meet the country’s educational

standards. The dual nature of Canada's migration stance further complicates matters in that while comparatively speaking, Canada remains a pioneer in refugee assistance and immigration and boasts a welcoming environment, but it is still committed to border security and wants to maintain a strong physical border through the STCA and other border management tools. This could potentially be harmful for asylum seekers who want to come to Canada from the US and feel like they have no other option than to risk crossing the border between POEs. For example, Prime Minister Trudeau tweeted, "to those fleeing persecution, terror & war, Canadians will welcome you, regardless of your faith. Diversity is our strength #welcometoCanada", shortly after Trump's travel ban (Trudeau, 2017, 12.28PM). Faced with criticism that this message gives "false hope" to asylum seekers looking to enter Canada, Trudeau was forced to retract the statement, stating that there are still many rules and laws all refugees have to follow, regardless of their entry point (Kassem, 2017). MP Jenny Kwan also stated that these messages send the wrong signal to "desperate asylum seekers who have few options", and she stated that if the Prime Minister was really serious about assisting asylum seekers and refugees "he would have already suspended the STCA" (Kassem, 2017, para 12). Canada's stance on migration remains generally positive, with Trudeau and the Canadian government as a whole encouraging asylum seekers and refugees to come to Canada, but at the same time the existence of tools such as the STCA is a direct contrast to this sentiment.

Why is the STCA still in Effect?

There are several reasons why the Canadian government insists on keeping the STCA. For example, a common misconception among the Canadian public is that people are circumventing the refugee and immigration system (Scotti, 2017). In other words, the public is afraid that refugees are jumping the queue, and that Canada is allowing for potentially harmful individuals to enter the country. The STCA provides a sense of assurance with respect to border security and management. Furthermore, the public also assumes that Canada cannot handle the refugee intake, especially with a spike in irregular arrivals, which once again feeds into the idea that asylum seekers are jumping the queue (Scotti, 2017). Any individual who enters Canada regardless of their mode of entry is still subjected to the full process of the refugee determination system, but the STCA is utilized by the government to assure the public that they are taking a stance on controlling migration.

Furthermore, despite recent policies, the US is still considered a forerunner in immigration globally. In 1980, the US moved from an ad hoc approach to refugee determination, to a more permanent, standardized system for identifying and resettling potential refugees, and compared to other countries it still has an effective refugee determination system (Felter & McBride, 2017). For example, there have been reports of unlawful practices at detention centers housing irregular migrants in Turkey. Local lawyers have reported that their clients' applications are being denied without proper examination, and that they are being arbitrarily blocked (Ulusoy, 2016). There have also been reports of minors being kept away from their family members, as well as ill treatment and torture of asylum seekers (Ulusoy, 2016). Additionally, after the EU-Turkey Joint Action Plan 2015, Turkey established the Directorate General of Migration

Management (DGMM), which lacked experience and capacity, and the personnel hired to manage migration and asylum have no relevant background or any prior experience with these issues specific to migrants (Ulusoy, 2016). The department also lacked the capacity to implement a new status determination procedure for migrants which is the main aspect of a safe third country (Ulusoy, 2016). There is also not enough juridical capacity in Turkey other than the establishment of the Law on Foreigners and International Protection (LFIP), which is the first instance of law on international protection and asylum (Ulusoy, 2016). This means that before the enactment of the LFIP, asylum applications were carried out by the “foreigners’ department of the national police” and the UNHCR (Ulusoy, 2016, para 10).

Reviews of cases were conducted by administrative courts but only to ensure compliance with proceedings, and these cases and procedures followed limited case law on migration and asylum (Ulusoy, 2016). Migration and asylum laws were also not taught in Turkish law facilities and so judges, lawyers, and other legal professionals were still receiving training (Ulusoy, 2016). According to the 2015 Migrant Integration Policy Index, even after the new laws were implemented, Turkey’s legal framework for migrants ranks below other EU countries because migrants have little to no state support, Turkey also has the weakest protections against discrimination towards migrants, and its family reunion and long-term residence status policies are weak (Huddleston, Bigili, Joki, & Vankova). Furthermore, the majority of Turkish citizens have negative views of migrants, especially those linked to a refugee crisis, due to perceived effects on rent and employment (Huddleston et al., 2015). Due to these factors, it is clear that Turkey’s designation as a safe third country may be erroneous and harmful to refugees and asylum

seekers. This designation is further called into question with the recent Turkey-EU “re-admission agreement” for Syrian refugees, which is the transfer and admission of people who “have been found illegally entering, being present or residing in” Turkey or one of the Member States (“Readmission Agreement”, 2014, article 1(n)). This means that Turkish authorities must take back their own nationals and also illegal migrants who have transited through Turkey, and these illegal migrants will be returned to their country of origin (Rais, 2016). The US refugee determination system and immigration laws have a long history and are embedded in its culture; however, merely having these systems and laws in place is not enough. The fact that asylum seekers and refugees have specifically stated that Trump’s new policies and the overall sentiments in the US were the reasons why they came to Canada, shows that they take into account more factors than just having an effective refugee determination system.

All this begs the question of what the STCA is actually about and why Canada is insisting on upholding it. Canada insists on retaining the STCA not because of concerns about refugee protection but because of concerns about maintaining diplomatic relations with the US. Suspending or eliminating the agreement would mean accepting that the US does not have an effective refugee determination system, which would also spark considerable media attention and would not be suitable in terms of diplomatic relations. Canada’s economy and its border security and counter-terrorism strategies are bound to the US. Eliminating this agreement entirely would be a diplomatic challenge for Canada (Proctor, 2017). There is also the fear that suspending the STCA could lead to an even larger increase in asylum claims to Canada; it would send a message to potential refugees that the US is indeed not safe. Resources are already stretched thin at the border, and

another influx of irregular asylum seekers would require Canada to increase personnel, resources, and funds. On the other hand, doing nothing is also extremely harmful. The problem with the operations, its mechanisms, and the agreement itself is clear after thirteen years of observation. Not suspending the STCA allows Canada to hide behind border sharing and security, while minimizing Canadian responsibilities towards refugees and asylum seekers. The US and Canada need to foster a dialogue in terms of the STCA and how they are going to ensure border sharing and security. At the moment, while the situation is so turbulent, Canada should seriously consider at least suspending the agreement in order to conduct a thorough evaluation of the US refugee determination system, focusing on whether changes to US refugee and immigration law is truly a violation of international law, and, as such, whether these factors make it potentially harmful to return asylum seekers and refugees to the US.

### Conclusion

The STCA states that when asylum seekers arrive at the US-Canada border, they should receive effective protection; however, when the number of people fleeing persecution is increasing and there is a global migration movement due to an increase in political, economic, and environmental turmoil, is effective protection doing the bare minimum? Michelle Foster argues that “at the very least, a state is prohibited from removing a person where there is a real risk that their right to life, or the right not to be subjected to torture, or cruel, inhumane, or degrading treatment, will be violated” (2008, pg. 68). This means that human rights treaties and customary international laws prohibit states from expelling, deporting, or transferring a person to other states under safe third country mechanisms (Foster, 2007). As long as the US and Canada comply with the

principle of *non-refoulement* in international law, they are doing the very least to protect refugees. Thus, the STCA is a tool that US and Canada have agreed to within their right as sovereign states (Foster, 2008). The question in need of asking is whether this is enough. Should states be under a legal obligation to do more than what they are already legally doing in order to ensure protection for refugees and asylum seekers?

Perhaps the agreement worked as intended during its early years. The STCA reduced the number of asylum claims into Canada and allowed the US to implement more austere screenings of refugees coming into their country. It also allowed the two states to share responsibility of asylum seekers and refugees especially because the refugee determination systems were fairly similar. Thirteen years later however, things have drastically changed. The war on terror rhetoric is more pertinent than ever, there is an increase in migration flows, people can move across the world more freely, and in desperation will do anything to get to a safer place. The US and Canadian refugee systems have changed, and both countries have had an election within the last three years wherein the rhetoric towards refugees has also changed. Canada has resettled more than 25,000 refugees between 2015 and 2016 and has agreed to bring in more in the coming years (“#WelcomeRefugees”, 2017). Although Canada’s refugee system still has issues, its refugee determination system and resettlement mechanisms are one-of-a-kind and provide more benefits for asylum seekers and refugees than most other countries. On the other hand, changes to US immigration policy clearly showcases that refugee protection is not a priority for the current administration. This is evident in the cancellation of several accommodating policies and the introduction of EOs that increase the risk of deportation and detention. Moreover, sentiments in the US such as anti-Muslim rhetoric

and the resurgence of the white supremacist movements further discourage potential refugees from seeking asylum in the US.

Looking at the current events in terms of the STCA helped in understanding the different situations and circumstances between 2004 and 2017. Similarly, the 1951 Refugee Convention was implemented almost sixty-seven years ago, and a lot of factors have changed since then. Motivation, mobility, and the situations of refugees and asylum seekers around the world has drastically changed, and these factors must be taken into account when assessing a bilateral agreement such as the STCA. The third chapter will extend the arguments from the second chapter to the international context and focus on the limitations of the 1951 Refugee Convention and the 1967 Protocol. If the larger international legal context is flawed then it should stand that the bilateral agreement stemming from this context is flawed as well. The STCA operates within international refugee law, thus the limitations of the Convention and its Protocol will further the argument against the agreement.

## Chapter Three

## Background

The 1951 Refugee Convention and the 1967 Protocol remain the cornerstone of refugee protection and the main codified texts that protect refugee and asylum seekers at an international level. However, during its sixty-seven years the 1951 Refugee Convention and the 1967 Protocol have come into criticism from states, refugee advocates, and lawyers who question whether these texts are still relevant in the current context of global migration (Kneebone, 2003). The 1951 Convention is also criticized for being too narrow in scope and some critics claim that it fails to recognize many of the contemporary reasons and categories of people who require protection (Gonzaga, 2003). On the other hand, the UNHCR maintains that the convention remains the foundation of protection for refugees fleeing persecution (Feller, 2001). Furthermore, Volker Türk, the Assistant High Commissioner for Protection, stated that the definition of refugee today “is as relevant as it was when it was crafted in the wake of the Second World War” (“Q&A”, 2016, para 3). This chapter will consider some of the major criticisms of the 1951 Refugee Convention and will also outline some of its major limitations and challenges in the current global context. As the agreement operates within the context of international law, this chapter seeks to understand how and why a re-evaluation of the STCA is needed by analyzing international law and unpacking the issues within the global refugee context.

## The Limitations of International Laws and Conventions

*i. Major Criticisms by States and Refugee Advocacy Groups*

One of the major criticisms against the 1951 Refugee Convention and the 1967 Protocol stems from globalization. Increased irregular migration and human smuggling, mixed refugee related issues such as prolonged refugee producing conditions, high costs of refugee determination systems and of hosting and assisting refugees, and real and perceived abuses of the system puts an increased strain on states (Gonzaga, 2003). Canada's Syrian refugee program cost the Liberal government approximately \$678 million for refugee resettlement for nearly 25,000 Syrian refugees between 2015 and 2016 ("5 things to know", 2016). Ontario spends nearly \$100 million per year on newcomer supports, which are services such as language training and interpretation, community-based settlement supports, and employment services (Pauls, 2017). In cases such as the irregular arrivals early 2017, the unexpected number of refugees and asylum seekers put increased strain on provinces, as evident in Manitoba and Quebec (Pauls, 2017). Furthermore, modern migration is extremely complex, as refugees now are not just fleeing solely due to persecution but also due to other reasons, such as economic degradation and environmental disasters (Quinn, 2011). This places increased pressure on governments, suggesting that the 1951 Refugee Convention in its current form is no longer suitable as a legislative framework and fails to adequately address the complexities of contemporary refugee protection (Gonzaga, 2003). In other words, its conceptualization of refugee is too narrow. States have introduced more restrictions on the application of the 1951 Refugee Convention and the 1967 Protocol, including mechanisms such as safe third countries found in Europe, in North America, and Australia. Additionally, states have adopted harsher measures in response to the examples

mentioned above aimed at curbing or refusing admission (Gonzaga, 2003). These measures are reminiscent of what is occurring in the US right now. The harsh response to increased migration and the recession of immigration and refugee programs is justified because of illegal immigration, human smuggling, terrorism, and other security threats.

Several of these issues stem from the outdated character of the 1951 Refugee Convention. For example, Guy Goodwin-Gill argues that the drafters of the 1951 Refugee Convention did not foresee that determining refugee status would become so institutional and that refugee claimants would need legal counsel for advice and representation (“The refugee convention”, 2005). He also argues that the drafters of the Convention did not anticipate how well-versed current decision makers need to be on the situation of the claimant’s country of origin and other conflicts around the world in order to make a fair determination of the credibility of a claim (“The refugee convention”, 2005). This is further complicated by migration now consisting of “mixed movements”, which means that different persons with different reasons and objectives travel alongside each other, and use the same modes of travel, same routes, and the same smugglers even though they have different causes for fleeing (Quinn, 2011, pg. 21). This is a problem for states due to the various complexities and challenges that come with different groups of refugees, especially when there are vulnerable populations among these groups such as women and unaccompanied minors (Quinn, 2011). Determining credibility in these types of situations is extremely important and complex, and it places a huge burden on decision-makers both financially and in terms of responsibility to the 1951 Refugee Convention. This is because there are currently asylum seekers and refugees who do not have valid travel or identification documents, there are asylum seekers and refugees with

solid, well-substantiated stories and experiences, and those with grey areas and untruths (Quinn, 2011). Nevertheless, these are all people fleeing some sort of persecution and their claims need to be assessed on an individual basis as per the 1951 Refugee Convention.

This individualized requirement of refugee protection strains the determination systems of states when there are increased migrant flows. Refugee advocacy groups are also worried that if states circumvent the 1951 Refugee Convention and the 1967 Protocol refugees and asylum seekers who are in genuine need of protection will not be recognized as refugees, may be given minimal protection, or could be sent back to their country of origin where they may face persecution or death.<sup>6</sup> These groups largely want to expand the 1951 Refugee Convention definitions as well as the UNHCR's mandate, as they feel it does not currently reflect contemporary refugee issues (Gonzaga, 2003). For example, UNHCR provides assistance to Internally Displaced Persons (IDPs) on an ad hoc basis. IDPs are persons or groups of persons who flee due to armed conflict, situations of generalized violence, violence of human rights, or human-made disasters, but who have not crossed internationally recognized state borders (Deng, 1998). Due to the fact that they do not cross an international border, they do not fall under the standard refugee definition in the 1951 Refugee Convention, even if they are facing similar situations of persecution to Convention refugees (Gonzaga, 2003). A lot of people fleeing violence at the moment, especially in places such as Iraq, Syria, Ukraine, and a few countries in Africa such as South Sudan, Somalia, and the Democratic Republic of Congo, are IDPs because they do not have the money, the resources, or the ability to

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<sup>6</sup> Examples of these refugee advocacy groups include: Amnesty International, Refugees International, Refugee Council of Australia, and the Canadian Council for Refugees.

cross their borders and claim refugee protection. If the refugee definition or the 1951 Refugee Convention was expanded, then IDPs and other persons of concern to the UNHCR, such as stateless people and returnees, can also be covered for protection on a regular basis.

The 1967 Protocol was the only amendment to the 1951 Refugee Convention, and it removed the geographical and temporal limitations of the Convention. According to the UNHCR, the removal of these limitations was meant to give the 1951 Refugee Convention universal coverage (UNHCR, 1967). Removing these limitations definitely assisted in expanding the definition so that all persons are entitled to protection against persecution under Article 1; however, it does not add anything further. Moreover, the 1967 Protocol and the 1951 Refugee Convention are independent instruments meaning that states can be a party to one, both, or neither. This creates certain problems when states only agree to be a party to the 1951 Refugee Convention and not the 1967 Protocol. For instance, Turkey is only party to the 1951 Refugee Convention, opting to lift the 1951 Refugee Convention's temporal limit without lifting the geographical limit (Brambilla, Laine, Scott, & Bocchi, 2015). In 1994, Turkey adopted a Regulation on Asylum which allowed non-European asylum seekers and refugees to receive asylum, but only as a temporary measure (Brambilla et al., 2015). Turkey's reluctance to lift the geographical limit of the 1951 Refugee Convention stems from the fear that they might face a huge influx of legitimate asylum seekers not only from other refugee producing countries but also those rejected in Europe under the grounds that they first arrived in Turkey (Brambilla et al., 2015). However, choosing not to remove the limitations is equally as harmful to asylum seekers and refugees fleeing persecution from neighbouring

countries, especially due to the fact that Turkey is on the border of the Middle East and close to Africa, meaning that many refugees and asylum seekers would have to transit through Turkey.

*ii. State Practice vs. Convention Guidelines*

Several countries, including Canada and the US, have tried to broaden the scope of rights to asylum and refugee status. Examples include the US's Temporary Protection Status (TPS) designation for countries ravaged not only by political conflict but also natural disasters. However, at the same time, these countries also constrain the extent of migration into their borders (Hathaway, 1991). The 1951 Refugee Convention was largely created by self-interested states rather than as a humanitarian approach, and this poses a problem for defining access to asylum (Hathaway, 1991). State practice in terms of providing protection to refugee and asylum seekers can sometimes depart from actual Convention guidelines. At different points of time, various countries' political priorities may be different. For example, after the events of 9/11, migration to the US greatly declined and became more austere because the US wanted to prevent another attack. As stated in chapter two, when new governments and leaders get elected the views and policies of US and Canadian authorities also change, as well as the sentiments among the population. Acceptance rates of countries, attitude towards migration, the numbers of refugees, and diplomatic relations between sending and receiving states are usually more important than genuine claims (Millbank, 2000). The guidelines within the 1951 Refugee Convention may evolve by way of the UNHCR or the domestic government implementing new parameters for refugees and asylum seekers, but as a whole the 1951

Refugee Convention and the 1967 Protocol are not malleable and cannot completely change to reflect evolving circumstances.

The 1951 Refugee Convention and the 1967 Protocol are also not policed by the UNHCR or any global security force. The UNHCR has a supervisory role pursuant to Article 35 of the 1951 Refugee Convention and Article II of the 1967 Protocol (UNHCR, 1951). However, there are several issues with supervision as the 1951 Refugee Convention is not applied uniformly and thus attempting to find evidence of a breach of the 1951 Refugee Convention and the 1967 Protocol would be difficult (Kälin, 2001). Furthermore, states such as the US and Canada have their own immigration laws and policies and see UNHCR's role as a "source of assistance and information" but not as the force of law itself (Kälin, 2001, pg. 9). This applies to other staff as well because the UNHCR only generates and implements policy on the basis of international refugee law and other areas of international law (Kälin, 2001). The UNHCR, as an international organization, must also remain "deferential to states' domestic laws and policies unless there is a serious breach of international law" (Kälin, 2001, pg. 9). That said, countries that have become parties to the 1951 Refugee Convention and the 1967 Protocol cannot deny refugees and asylum seekers from their countries outright. They can impose laws and policies that prevent asylum seekers from entering the country in the first place; however, whether this practice is in fact legal is debatable. For example, the travel ban imposed by the Trump administration prohibits people from seven countries from reaching US soil and thus they cannot claim asylum (Thornton, 2017). Even if this constitutes a breach in international law, the UNHCR cannot outright punish the US; it can only attempt to "embarrass" or place pressure on the US (Thornton, 2017). However,

with a country as powerful as the US this may not be effective. Significant international outrage expressed by other states can put pressure on the US to change its policies (Thornton, 2017). Given the negative sentiments towards refugees and asylum seekers in Europe, Australia, and other parts of the world, this would also seem unlikely.

*iii. Burden Sharing?*

The 1951 Refugee Convention and the 1967 Protocol does not lend itself to burden-sharing, especially in terms of financial burdens and other obligations such as accommodation, and providing assistance to refugees. This is a debatable point, as the 1951 Refugee Convention was designed with refugees and migrants from WWII in mind and thus, the underlying logic was to ensure that people were repatriated or resettled in a coordinated way that did not impose enormous burdens on one country (Goodwin-Gill & McAdam, 2007). However, due to the mass flows of migration, poorer countries in the Middle East, Asia, Africa, and Eastern Europe are now carrying the bulk of refugee burden (Millbank, 2000). Today, most asylum seekers are also from the Middle East, Africa, and Asia rather than from Central and Eastern Europe as was the case when the 1951 Refugee Convention was established (Millbank, 2000). In 2008 the majority of countries who hosted eighty percent of the world's refugees were developing countries, and forty-five percent of these refugees at that time were from Iraq and Afghanistan (Sharma, 2015). In 2016, Syrians were the largest number of refugees worldwide, making up approximately thirty-two percent, and Turkey sheltered the largest number of refugees that same year ("Poorer countries", 2017). The majority of the countries who are hosting refugees in 2016 are part of the developing world (similar to the early 2000s). Five out of ten of the top refugee hosting countries were in Africa, and the remaining were in the

Middle East or Eastern Europe (“Poorer countries”, 2017). When the 1951 Refugee Convention was drafted after WWII, there was strong international concern about human displacement and persecution due to the war, and thus there was higher support for displaced Europeans (Sharma, 2015). Furthermore, during the signing of the 1951 Refugee Convention, countries from Africa and Asia were not represented because the 1951 Refugee Convention was designed to address refugee concerns in Europe (Sharma, 2015). This was also due to the fact that much of Asia and Africa were still under the formal colonial regimes of various states, and there were actually only very few independent sovereign states in Africa during the time the 1951 Refugee Convention was signed (Mayblin, 2014). Today’s refugees are largely from outside Europe. They are not the product of only one war or major conflict as there are several civil wars and several political conflicts occurring simultaneously in different parts of the world. What this means is that wealthier nations in the Global North who were predominately responsible for laying the groundwork for the 1951 Refugee Convention rely heavily upon developing countries, or the “poorer” countries, to take the burden of supporting refugees (Sharma, 2015). Although asylum seekers and refugees would like to come to wealthier nations, as they have more sophisticated refugee determination systems and better services for refugees, they are unable to and consequently have to stay in developing countries that are becoming increasingly overwhelmed.

### Limitations with Definitions

#### *i. The Refugee Definition*

One of the biggest problems with the 1951 Refugee Convention is the narrowness of its definition of “refugee”. The Refugee Convention defines refugees and provides the

framework for their treatment and protection, but it allows states to devise and implement procedures that determine refugee status at a national level (Goodwin-Gill & McAdam, 2007). Refugees and asylum seekers not only have a mixture of motives as to why they are fleeing, but they also encounter a variety of experiences and problems (Goodwin-Gill & McAdam, 2007). This stems from the fact that the 1951 Refugee Convention and its definitions were a response to the WWII displacements in Europe. It reflects the European experience of Nazi-war time persecution and post-war displacements of Germans and others and limits the persons it protects (Millbank, 2000). In that sense, the refugee definition was left deliberately narrow. Furthermore, the outdated nature of the 1951 Refugee Convention means that it has patriarchal consequences: able-bodied men have the ability and the means to move, travel, and seek asylum while women with children, and other less-mobile groups may not be able do so (Millbank, 2000). An important expression of the dated quality of the Convention's definition of "refugee" is the fact that new causes of refugee flows have emerged. Refugees today flee situations of war and conflict, but also other reasons such as gender related persecution, fear of persecution by non-state agents, gangs and other domestic violence, environmental disasters, and economic turmoil (Quinn, 2011). Some academics have termed these types of refugees as "survival migrants" (Valcarel, 2011, para 6; Quinn, 2011, pg. 20). These are refugees who are fleeing their countries due to an "existential threat to which they have no domestic remedy" (Quinn, 2011, pg. 20). For example, the exodus of Zimbabweans to other countries in the South African region between 2005 and 2009 was because of a combination of reasons including state failure, repression, environmental

disasters, and mass livelihood collapse (Valcarel, 2011). There are several other situations such as this occurring all over the world today.

Narrow definitions of “refugee” also undermine the requirement to examine the status of each person on an individual basis. The 1951 Refugee Convention requires that each asylum seeker or refugee claimant receive the full, specific refugee determination process in which all factors are considered. Some states, such as the US and Canada, have sophisticated refugee determination systems that allows for this individualistic approach. However, due to high numbers of asylum seekers, some states argue that their protection systems are inadequate (Gonzaga, 2003). Moreover, during a sudden or massive influx of refugees and asylum seekers, determining refugee status on an individual basis becomes impractical as receiving countries also try to ensure protection is provided. For example, Canada spent around \$31 million for refugee protection in 2017 (“IRCC Departmental Plan”, 2017). Poorer countries spend even more (approximately hundreds of millions) on camps and other services (Sharma, 2015). Pakistan for example faces large scale poverty, high illiteracy, poor health care facilities, and a continuously growing population of refugees (Sharma, 2015).<sup>7</sup> The economic costs of hosting refugees and asylum seekers are different in different states, depending on the extent of their commitment to refugee protection and how many refugees they receive annually. One of the ways that states have tried to reduce pressures on their systems is by providing refugees and asylum seekers temporary protection. However, advocacy groups criticize these procedures because they place asylum seekers in limbo and thus in vulnerable situations as they await a verdict on their claim (Gonzaga, 2003). Temporary protection also puts the

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<sup>7</sup> As of 2013, Pakistan hosted approximately 1,600,000 refugees according to the UNHCR Mid-Year Trends 2013 (“UNHCR-Mid Year Trends”, 2013; Sharma, 2015)

UNHCR in a dilemma because this kind of protection is less satisfactory than Convention-based protection and results in varying standards of treatment (Gonzaga, 2003). These are issues stemming from the current changes in refugee movement. Re-examining the definition of refugee to ensure it is in keeping with the current international migration context could engender consistent forms of protection ensuring that refugees and asylum seekers receive the full protection they need.

*ii. Well-Founded Fear of Persecution*

Persecution is not defined in the 1951 Refugee Convention or any other international document (Goodwin-Gill & McAdam, 2007). When drafting the 1951 Refugee Convention, the definition of refugee was predicated on an individualistic concept of persons fleeing the borders of hostile governments (Millbank, 2001). Persecution was linked to the refugee's country of nationality, and the reasons for persecution to the person's civil or political status (Kneebone, 2003). In other words, the state was the main persecutor. Moreover, "persecution" involved the persecution of an individual, and the individual who was seeking refuge is the victim or the target (McFadyen, 2012). It did not encompass large groups of people who fled war and other conflicts or persecution in a more general sense (McFadyen, 2012). Today the agents of persecution are no longer just states, but may also be non-state actors, sub-state actors, rebels, militia, gangs, and other groups (McFadyen, 2012). In most cases, domestic refugee law recognizes persecution by non-state actors, especially in situations where the government or state is unable or unwilling to provide protection to refugees. However, some states refuse to extend refugee status stressing that it is the "responsibility of the state of origin to provide for the acts inflicted on the victim" and consider this aspect as an essential element of

persecution as reflected in Article 1A of the 1951 Refugee Convention (Kälin, 2001, pg. 417; UNHCR, 1951, article 1A). This is an issue because there is no clear link between the agents of persecution and the state in the 1951 Refugee Convention, and the wording of the 1951 Refugee Convention does not require any direct responsibility on the part of the state (Kälin, 2001). In Article 1 of the 1951 Refugee Convention, only the motives of persecution (one of the five grounds) is explicitly stated and not the source of persecution (Kälin, 2001). The 1951 Refugee Convention also does not detail the role of the state of origin in protecting refugees from persecution (Kälin, 2001).

Deciding whether a refugee is facing persecution under the five convention grounds may or may not be straightforward, depending upon the experiences of claimants. Hathaway argues that the concept of “well-founded fear” is “inherently objective” and was intended to restrict the scope of protection to persons who can demonstrate a present or prospective risk of persecution (1991, pg. 65). This is irrespective of the extent or nature of the mistreatment that they have suffered in the past (Hathaway, 1991). As with persecution, those who are affected by environmental disasters or other conflicts, such as gang violence, are not provided the refugee status on that basis alone but have to show some connection to one of the five grounds (Hathaway, 1991). Fear in the case of the 1951 Refugee Convention was not designed to protect people in large groups whose fear of persecution is generalized (Hathaway, 1991). Once again, the concept of well-founded fear came from the horrors of WWII and fear of obvious agents of persecution such as fascists and Nazis. Although determining the experiences of an asylum seeker or refugee is difficult and not straightforward, currently “good reasons” or well-founded fear for fleeing situations is even less clear. Moreover, political refugees are seen as genuine

while economic refugees are often seen as illegitimate, abusive, and undeserving; international refugee law prioritizes “political” persecution, and ignores “economic” situations (Millbank, 2000). This is problematic because in reality “political” and “economic” factors intersect and are mixed, and there is no reason as to why people displaced due to economic forces should not be considered refugees (Millbank, 2000). This hierarchy of persecution once again stems from the outdated, Eurocentric language and context of the 1951 Refugee Convention. Due to years of political turmoil and civil conflict, refugee-producing countries have seen their economies collapse, their poverty and unemployment rates increase, and have faced environmental disasters such as famine (Millbank, 2000). Due to the prolonged conflict, or the fact that the main conflict has ended, refugees from these places may not fall into the definition of persecution under the 1951 Refugee Convention.

*iii. New Situations that Cause Forcible Displacement*

The situation in Central America clearly showcases the limitations of standard definitions of “refugee”, “persecution”, and “well-founded fear” in international refugee law. Currently, Central Americans, mostly from El Salvador, Guatemala, and Honduras, are fleeing to the US due to corruption, drug trafficking, gang violence, and poverty. The majority of these asylum seekers are unaccompanied minors, and the number of asylum seekers originating from this region reached 110,000 in 2015 and have been increasing since then (Labrador & Renwick, 2018). The three aforementioned countries rank among the most violent countries in the world, but this is not directly related to war. In fact, in 2015 El Salvador became “the world’s most violent country not at war” due to the homicide rate associated with gang-related violence (Labrador & Renwick, 2018, para 4).

Corruption is also a huge problem in these countries. In 2015 a Honduran newspaper revealed that Salvadorians and Hondurans pay approximately between \$61 million and \$390 million to organized crime groups who mainly target small businesses, transportation operators, and residents of poor neighbourhoods (Labrador & Renwick, 2018). Organized crime and gang violence have a long history in this region, due to decades of war. However, most of these civil wars had ended by the 1980s, and some countries such as Honduras never had civil war but have nevertheless experienced the effects of conflicts nearby (Labrador & Renwick, 2018). Violence has persisted due to underfunded institutions and corruption, as well as increasing inequality among the population and straining public services (Labrador & Renwick, 2018). The public is also suspicious of police and security forces and thus most crimes go unpunished, and efforts by the region's respective governments to combat violence have been slightly successful (Labrador & Renwick, 2018). Nonetheless, acceptance rates for asylum seekers from this region remain very low (around 3% of Central Americans were refugees or asylum seekers in the US during 2015), and this in large part due to their not falling into the typical definition of a refugee (Batalova & Zong, 2017).

Most of the Central American migrants who have become lawful permanent residents of the US have been able to do so because they have qualified for family-sponsored preferences (Batalova & Zong, 2017). This is a problem because of 11 million unauthorized immigrants in the US, Central Americans represent nearly fifteen percent, and irregular crossings at the US-Mexico border between 2011 and 2013 averaged around 366,300 per year (Batalova & Zong, 2017; Frelick, 2017). Several of these unauthorized migrants were eligible for DACA, and many of these countries still have TPS designation

in the US (Batalova & Zong, 2017). Since those programs could be ending, new asylum seekers from the Central American region may not qualify. Despite having roots in civil wars and conflicts, the violence in Central America is connected to economic degradation and violence by non-state actors, and these issues have been further exacerbated by several devastating natural disasters. Therefore, asylum seekers from this region do not fit neatly into one of the five Convention grounds of persecution. Many aid groups, such as Doctors Without Borders, argue that asylum seekers from these countries are comparable to refugees from war zones (Laventure, 2017). However, these asylum seekers have largely been painted as economic migrants by countries of refuge, including Canada and the US, and these asylum seekers are also largely vilified due to the fact that a lot of “illegal migrants” in the US are those from Central America and Mexico (Laventure, 2017). Consequently, more aggressive measures are taken against migrants from these regions, such as expedited removals and detention. The US has also been keen to prevent asylum seekers from reaching the US border. This was the case during the Obama administration when the US made a deal with Mexico to restrict the flow of migrants (Frelick, 2017). It is also the case during the Trump administration with the increase in border security, increased patrol along the US-Mexico border, and Trump’s insistence on building a “wall” between the two countries (Frelick, 2017). Other measures have also been taken, such as the ending of TPS designation for Salvadorans.

Due to an increase in migration flows from Central America, the UNHCR has called for urgent action to ensure that these asylum seekers receive protection (Sturm, 2016). In 2016, the UNHCR released eligibility guidelines for assessing the protection needs of asylum-seekers from El Salvador, Guatemala, and Honduras. The guidelines set out

refugee protection mechanisms pursuant to the 1951 Convention and provide ways in which an asylum seeker from these three countries could be considered a refugee. The guidelines state that asylum seekers from this region could potentially fall under the Convention ground of political opinion because objection to gang activities, declining to pay extortion money, or resisting gang recruitment could constitute a political opinion (UNHCR, 2010). The new guidelines also explore the link between gang-related violence and a Convention ground. They state that “where the risk of persecution derives from a non-state actor, the causal link may be satisfied” and ultimately it is up to the examiner to ascertain the link based on the reasons provided by the asylum seeker or refugee claimant (UNHCR, 2010, pg. 13). Although there is considerable effort on the part of the UNHCR to provide a link between persecution and a Convention ground in order to ensure protection for refugees, under US and Canadian law it is the onus of the asylum seeker or refugee claimant to provide, properly and concisely, any persecution they have or may face, and why they fear returning to their country of origin. This can be extremely difficult for asylum seekers, especially those who have gone through traumatic experiences, do not speak English, are afraid or are untrusting of people in authority, or cannot fully explain or provide evidence of persecution and well-founded fear (Campos & Friedland, 2014). It also depends on the officer or the judge who hears the case and how they interpret the law and the definitions within the 1951 Refugee Convention when there is no clear link. For example, a study of credible fear interviews conducted in the US with asylum seekers from Central America and Mexico showed that the results were inconsistent (Campos & Friedland, 2014). Some people passed the threshold for credible fear and some did not (Campos & Friedland, 2014). There was also a general hostility

towards claims from Central America and Mexico, and claims from this region continue to be rejected despite instances of horrific violence on the part of the claimant (Campos & Friedland, 2014). Claims made by Central Americans are usually based on gang violence, and claims from Mexico on violence in general, and these claims once again do not fit neatly within the definitions found in the Board of Immigration Appeals (BIA) of political opinion or membership in a particular social group (Campos & Friedland, 2014). The number of claims made in Canada from Central America is less than those made in the US. In 2016, Hondurans had a 62% acceptance rate, Guatemalans were at 34%, and Salvadorians had a 71% acceptance rate according to statistics provided by the IRB (Laventure, 2017). However, there has been an overall decrease in the number of people requesting asylum protection from these countries since 2008 due to a number of barriers, such as forced repatriation from Mexico, extreme violence on the migration route, and easier access to the US (Laventure, 2017). Those who make it to Canada may also be prevented from being eligible for refugee status due to the STCA because they would have to go through the US in order to reach Canada.

Another situation that showcases the limitation of definitions of “refugee” and “well-founded fear of persecution” is the drought in Somalia and South Sudan, which has displaced millions of people (“Famine Prevention”, 2017). In Somalia, people are leaving their homes due to the drought, but also because of rising food prices, continued dry weather, and ongoing insecurity (“UNHCR revises funding”, 2017). Most people are traveling to urban areas such as Mogadishu and Baidoa, and most are making this dangerous trip by foot in search of assistance (“UNHCR revises funding”, 2017). In March 2017 the Somali Prime Minister Hassan Ali Khaire announced that nearly 110

people had died from starvation and drought-related illness (McKenzie & Swails, 2017). Similarly, refugees are currently fleeing South Sudan due to worsening violence and looming famine, and it is sometimes presented as one of the largest and fastest growing refugee crises in Africa (Court, 2017). On February 20, 2017, the United Nations officially declared a state of famine in two counties of Unity State<sup>8</sup> and food insecurity has worsened to unparalleled levels in these areas (Court, 2017). People displaced solely by famine in many cases are not considered refugees under the 1951 Refugee Convention, however, direct and indirect consequences of situations of armed conflict and violence may constitute persecution (“Protecting Refugees”, 2002). Food insecurity, malnourishment, and famine are all consequences of such situations, and may be sufficiently serious to establish persecution or to create a well-founded fear of persecution (“Protecting Refugees”, 2002). Nevertheless, it is the onus of the claimant to provide evidence of this fact, and in many cases, they may not be able to do so. Famine affects a large number of people, and thus may not fit within the narrow definition of the refugee and may not constitute persecution pursuant to the Refugee Convention (Hathaway, 1991). Requiring claimants to link famine to one of the five grounds is problematic, not least because famine, though often caused, is often prolonged by environmental degradation (Hathaway, 1991). There are several situations where refugees can be denied protection because they do not neatly fit into the refugee definition and what counts as persecution. Perhaps extending the definition or clarifying the parameters by which refugee claimants and asylum seekers could qualify for

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<sup>8</sup> This refers to one of the ten states in South Sudan; the Unity State has now been divided into several new states (“Situation Overview”, 2017).

protection, would prevent them from being sent back to a country where they may face further violence or death.

### What Has Been Done?

States, international organizations, and the UNHCR have recognized the narrow definitions of “refugee” and “persecution”, and have acknowledged that aspects of the 1951 Refugee Convention and the 1967 Protocol do not comprehensively encompass current refugee situations. Some states are now examining the root causes of refugee flows, and what “persecution” and “well-founded fear” mean to different groups of refugees in order to expand the definitions. For example, there have been a series of other definitions of what constitutes a refugee. The Organization for African Unity’s Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention) came into force in June 1974 and extends the definition of “refugee” found in the 1951 Refugee Convention. In the OAU Convention, the term “refugee” is also applied to “every person who, owing to external aggression, occupation, foreign domination or events disturbing public order” (“OAU Convention”, 1974, article 1.2). This means that persons fleeing such situations can claim refugee status in states party to the OAU Convention irrespective of whether they can establish a well-founded fear of persecution (Gonzaga, 2003). The OAU Convention came about as a response to increasing numbers of refugees in Africa and the need to find concrete ways to alleviate their misery (“OAU Convention”, 1974). The OAU also recognized that the problems of Africa should be solved in the Charter of the OAU and within the African context (“OAU Convention”, 1974).

Similarly, the Cartagena Declaration is the regional instrument of protection for refugees adopted in 1984 by Latin American countries and also extends the definition of “refugee” to those who have “fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order” (“Cartagena Deceleration” 1984, article 3.3). The Cartagena Declaration was drafted with the recognition that due to the massive flows of refugees in Central America it was necessary to broaden the concept of refugee to include those who may not be covered under the 1951 Refugee Convention or the 1967 Protocol (“Cartagena Deceleration” 1984). Other regional instruments include the 1966 Bangkok Principles on the Status and Treatment of Refugees (“Bangkok Principles”), which was adopted by the Asian-African Legal Consultative Organization and also expands the definition of “refugee”. The UNHCR views these regional instruments as complementary and they do fill in some of the gaps that exist in the 1951 Refugee Convention and the 1967 Protocol. Issues could arise if these regional instruments eventually make the 1951 Refugee Convention redundant in some parts of the world, putting the universality of refugee protection in jeopardy (Gonzaga, 2003). There could also be issues of conflict of authority or legal incompatibility between the 1951 Refugee Convention and these regional instruments on grounds of protection (Gonzaga, 2003). Although there have not yet been any significant regime conflicts, there could possibly be inconsistencies and conflicts if there continues to be a rise in global migration.

Another way that the international protection of refugees is being expanded is through the drafting of new guidelines with respect to determination proceedings for

certain types of refugees. For example, as previously stated, after the increase in asylum seekers from Central America, the UNHCR published several guidelines for processing claims from El Salvador, Honduras, Guatemala, and claims by unaccompanied children and women. These documents provide guidance on asylum seekers from these countries who may qualify for refugee protection based on risk profiles and certain situations. The UNHCR has also provided an analysis of why these people are fleeing and the situation they face as they flee Central America and enter Mexico. An important aspect of these guidelines is that they also provide legal guidance on the determination of claims caused by organized gangs and gang related violence (UNHCR, 2010). Of course, these are references developed by the UNHCR largely for states to refer to and utilize, and this does not mean that Canada, the US, or other states are obliged to use these guidelines and resources.

#### Conclusion: Connecting to the STCA

In principle, under the 1951 Refugee Convention and the 1967 Protocol all refugees should be equal. However, this is not the case primarily due to the way the 1951 Refugee Convention and the 1967 Protocol are designed. Refugees who are recognized as such by a state receive the highest form of protection, but the majority of the world's refugees live in camps and refugee camps receive the least amount of funding and support (Millbank, 2000). Countries signatory to the 1951 Refugee Convention and the 1967 Protocol provide funds to the UNHCR who are in charge of assisting refugees residing in camps; however, the amount of funding a country provides is again based on the self-interest of the countries themselves, and their budgets. The Convention-based system prioritizes those who can and are able to flee persecution and cross international

borders over those who have the greatest need (Millbank, 2000). Budget restrictions of the UNHCR reflect the inconsistencies within the mechanism of the 1951 Refugee Convention, and similarly this is reflected within the STCA and with other bilateral or regional burden sharing mechanisms as well. The STCA was created in part to share the burden of asylum seekers and refugees at the border. However, the instruments it is based on, namely the 1951 Refugee Convention and the 1967 Protocol, are not designed to neatly share the burden of asylum seekers amongst the countries. Safe third country mechanisms assume that countries who are designated as safe third countries are in fact “safe” countries, and thus the distribution of refugee sharing is also considered equitable and fair (Foster, 2008). As previously discussed, the US and Canada’s refugee determination systems have some similarities but are becoming increasingly different when taking current developments into account. Furthermore, as explored in this chapter, contemporary refugees have different and complex reasons for fleeing countries, and they have different reasons for choosing a certain country over another. Asylum seekers and refugees do consider factors such as family and ethnic networks, employment opportunities and wage levels, generosity in welfare systems, levels of tolerance, and accessibility in determination systems, when fleeing to countries (Millbank, 2000). As examined in the previous chapter, Canada and the US have different environments, systems, and sentiments when it comes to refugees and asylum seekers. Canada has more assistance and services for refugees, and a stronger determination system. Thus, justifying a burden sharing mechanism such as the STCA is challenging when the two countries are not equal. Attempting to ‘shepherd’ people into one country or the other through the STCA will result in situations such as an increase in irregular arrivals.

The issue with the 1951 Refugee Convention and the 1967 Protocol is that it does not offer a comprehensive or flexible response to the complexity and diversity of refugees and asylum seekers fleeing persecution today (Millbank, 2000). Due to factors such as globalization, varying reasons causing people to flee, different definitions and aspects of persecution, and the absence of accountability for signatory states, the 1951 Refugee Convention and the 1967 Protocol have become outdated in the context of contemporary refugees and asylum seekers. The previous chapter examined the problems with the STCA in terms of domestic laws, policies, and events. The STCA is also embedded within an archaic, narrow, and limiting refugee convention, and within an international convention that does not guarantee accountability to countries who seek to minimize their obligations. The 1951 Refugee Convention was never meant for migration issues, but was drafted to provide refugee protection (Quinn, 2011). Thus, the STCA operates within this flawed context, and consequently is also inherently flawed. Analyzing the STCA's role within the larger context would assist in maximizing protection for refugees and asylum seekers globally, and also help states determine the validity and necessity of the agreement.

## Final Conclusions

### Summary

This thesis examined the STCA in the contemporary context, thirteen years after it came into effect. It argued that the differences between the refugee determination systems of the US and Canada combined with differences in sentiment, rhetoric, and policies towards refugees and asylum seekers in the two countries renders the STCA ineffective. In other words, the STCA does not allow the US and Canada to provide protection to asylum seekers and refugees in a way that is consistent with international law. The current differences between the two countries are so vast that the STCA is hindering refugee protection rather than assisting refugees and asylum seekers.

Furthermore, recent developments in the US, such as the elimination of TPS, DACA, the introduction of oppressive EOs, and the rise in anti-migration and anti-foreigner sentiment further establishes that the US should not be considered a safe third country, as it can no longer provide effective protection to refugees and asylum seekers. This was made evident by the increase in irregular arrivals to Canada as several asylum seekers interviewed at the border stated that they do not feel safe in the US under the new administration and its policies. Thus, the STCA should be eliminated or at least suspended, so that Canada can seriously examine the issues within its operations, the mechanisms of the agreement, and the current political, legal and social environment in the US. Canada should re-examine the designation of the US as a safe third country to ensure that the best interests of *refugees* are kept in mind.

By going through international and domestic refugee law, the first chapter laid the foundation upon which the STCA was built, and the surrounding international doctrines and laws it was predicated upon. It also provided the contexts that helped shape the

STCA. As of 2017, the war on terror rhetoric, prominently brought on by the events of 9/11, has become the dominant factor in most immigration and refugee policies around the world. This is aggravated by the refugee and migrant crisis that has been taking place over the past few years. Due to internal conflicts, genocide, and environmental issues, the mass movement of people has and is becoming more prominent. Following 9/11, governments in the Western world found new ways to address the threat of terrorism and this legitimized the security measures taken towards refugees and asylum seekers. In the context of the war of terror, states are also now associating new threats, such as terrorism, international criminality, and unemployment, with migrants. The STCA is one such mechanism, established by the US and Canada to manage the border and its security and to maintain the flow of refugees and asylum seekers.

Chapter two delved into the actual text of the STCA, including the preamble, revision provisions, and exceptions. A spike in irregular arrivals clearly showcases that the environment surrounding refugees and asylum seekers in the US has been changing, and the STCA may not be the right tool when dealing with large intakes of asylum seekers. The importance of this rise in irregular arrivals, was that several people cited the elimination of positive migration programs in the US as the reason why they are fleeing to Canada. The fact that these asylum seekers are willing to cross into Canada during harsh weather conditions is evidence that perhaps recent developments in the US do directly impact the decisions of asylum seekers and refugees. The STCA has recently been in the media, the news, and in political discussion prominently because refugee advocates, lawyers, and parliamentarians have recognized that the situation has changed significantly since 2004. They have recognized that the STCA may not be operating to

ensure refugee protection, and that perhaps the US may no longer be a safe place for refugees and asylum seekers. Furthermore, the STCA was created with the understanding that the refugee determination systems of Canada and the US are fairly similar. However, current differences are so vast and ever-increasing that this aspect of the STCA can be now be considered flawed.

Although tools such as expedited removals, arbitrary detention, inefficient gender-based policies, and bars due to terrorism and serious criminality have always existed within the US refugee determination system, current events have exacerbated their impacts on refugees. Terrorist groups and other non-state actors have legitimized anti-migrant and anti-foreigner rhetoric within the US. As a response, the current US government has clamped down on all aspects of migration, including the refugee determination system. On the other hand, Canada remains committed to refugee protection and although there are issues with the Canadian refugee determination system and the Canadian society at large, Canada continues to be a forerunner in refugee policies and laws. Chapter two also emphasized some of the reasons as to why the STCA is still in effect and why Canada refuses to suspend or eliminate it. One of the most important reasons is that to do so would be an international relations disaster. Suspending the STCA or eliminating it would confirm that the US is indeed not a safe third country. Canada's trade, economy, defense strategies, security, and border sharing is closely tied with the US, and to suspend or eliminate the STCA could result in a serious diplomatic conflict.

Chapter three examined the STCA within the international legal context. Safe third country mechanisms in general have been called into question internationally. Namely through the EU-Turkey deal, which showcased some of the problems in trying to

manage the movement of people through a limiting tool. Turkey has been shown to be an unsafe country for refugees and asylum seekers due to unlawful practices in detention, and overall negative sentiments towards refugees and asylum seekers from citizens as well as officials. International refugee laws and conventions have also shown to be limiting in terms of refugee protection. Furthermore, the 1951 Refugee Convention and its Protocol were designed during a different era, and as a result of globalization, have become increasingly outdated. This is further emphasized with the constrictive definitions of refugee and well-founded fear of persecution. Currently, refugees and asylum seekers do not only flee instances of political and civil conflicts, but there has been an emergence of new reasons that cause forcible displacement. These are situations such as gang violence, as seen in countries in Central America, and environmental disasters such as famine, as evident in South Sudan and Somalia. These new situations highlight that the narrow definition of “refugee” and “well-founded fear of persecution” does not allow for refugee protection for all types of refugees, in the context of international law. Requiring refugees to prove a link between their persecution and one of the five grounds is harmful, as the link may not always be evident or strong enough. Persecution does not always have to be through state actors but is currently occurring due to non-state actors such as terrorist groups, gangs, or abusive spouses. Many states have expanded their own definitions of refugee and what can constitute persecution. However, many states also utilize the limited definitions to constrain their refugee intake and to keep asylum seekers out. The STCA is embedded within the 1951 Refugee Convention and the 1967 Protocol. Consequently, it is also embedded within an outdated and archaic vision of refugee protection. Thus, the STCA as a border management tool and a treaty

mechanisms is in itself a flawed agreement, and must be eliminated or suspended to reflect the current situation.

### Reflection

A limitation of this thesis is that refugee and migration matters are always changing and evolving. During the time I wrote this thesis, there were several new situations that arose in Canada and the US, and there were several changes to current policies. Keeping up with the evolving nature of refugee and migration policies, especially now because the situation is so volatile and unpredictable, is impossible and thus this thesis has been confined to the events leading up to the end of 2017. As these changes occur, there is the likely possibility that the efficacy of the STCA will be questioned again, and Canada will have to seriously face the difficult decision of whether to suspend or eliminate the STCA. This will also bring up the question of whether or not Canada wants to remain a pioneer for refugee protection. Mass migration is increasing and will continue to increase in the future because modes of travel have gotten easier and levels of conflicts have increased. Thus, it remains increasingly pertinent to examine and watch closely how international and domestic laws and conventions, domestic refugee systems, and sentiments towards refugees change and evolve. The question remains whether these systems can evolve to reflect rapid changes in migration flows. As of now, the increase in differences between Canada and the US regarding refugees and asylum seekers is too vast to ignore. If Canada wants to remain a forerunner in immigration and refugee protection, then it must examine whether or not the STCA currently operates with the best interests of refugees and asylum seekers in mind. If not, then Canada must

seriously consider eliminating or at least suspending the agreement. As civil wars, political strife, environmental disasters, and economic turmoil continue to occur, it is Canada's responsibility, as a country with an advanced refugee determination system and as a signatory to the 1951 Refugee Convention and the 1967 Protocol, to step up and provide protection for those fleeing persecution.

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