

**CANADA – UNITED STATES SAFE THIRD COUNTRY
AGREEMENT IN THE TRUMP ERA**

By

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A Thesis submitted to the Faculty of Graduate and Postdoctoral Affairs
in partial fulfillment of the requirements for the degree of

Masters of Arts

in

Law and Legal Studies

Carleton University

Ottawa, Ontario

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Abstract

The purpose of this thesis is to examine the Canada-United States Safe Third Country Agreement (hereinafter the “STCA”). In the wake of Donald Trump’s election as US president, the executive orders he has issued on matters of immigration, and various policies implemented by the administration, it is worth questioning the STCA and its relevance. The STCA is an agreement between Canada and the United States that outlines how refugee claimants are to be addressed by these two countries. The agreement came into effect in 2004. It requires refugee claimants to request refugee protection in the first safe country in which they arrive in, unless they qualify for an exception to the agreement.¹

Various organizations, including the Canadian Council for Refugees (hereinafter “CCR”), and the Canadian Association of Refugee Lawyers (CARL) have called for the suspension of the STCA, on the grounds that the United States is no longer a safe country, following President Trump’s executive orders and the influx of asylum-seekers crossing the border into Canada. The number of asylum-seekers has dramatically increased since January 2017, with an estimated 32,000 having arrived in Canada in 2017 alone.

The STCA violates both international and domestic law. Specifically, the STCA violates the 1951 *Convention Relating to the Status of Refugees* (hereinafter “the *Refugee Convention*”) and the 1967 *Protocol Relating to the Status of Refugees* (hereinafter “the 1967 *Protocol*”). Domestically, it is in violation of the *Canadian Charter of Rights and Freedoms* (hereinafter “the *Charter*”). This thesis concludes that the cornerstone of the *Convention*, the principle of *non-*

¹ *Agreement between the Government of Canada and the Government of the United States of America for cooperation in the examination of refugee status claims for nationals of third countries*, Canada and the United States of America, 5 December 2002, Treaty Law Division (entered into force 29 December 2004).

refoulement, has achieved the status of *jus cogens*, that is, a norm of international law from which no derogation is permitted.²

² Kamrul Hossain, “The Concept of *Jus cogens* and the Obligation Under the U.N. *Charter*” (2005) 3 Santa Clara J. Int’l L. 72.

Acknowledgements

First and foremost, I would like to extend my sincerest gratitude to my thesis supervisor Professor Umut Ozsu. Thank you for your guidance and the patience you have shown me as I have undertaken the most significant project of my life to date. This thesis is your accomplishment as much as it is mine. I have been extremely fortunate to have had a supervisor as compassionate and caring as you, who has responded to my questions so promptly. Thank you from the bottom of my heart.

To Randy and Richard, thank you for your continuous support throughout my academic journey. This accomplishment would not have been possible without you. I will forever be indebted to you for your encouragement, your patience, and most of all, your unshaken support. Throughout the last few years, you two have been the only constant in my life, and my family away from home. Thank you!

To my best friend, Saranda Shala, who has read every draft of this thesis and offered her invaluable guidance. Thank you for having a genuine interest in everything that is important to me. Your encouragement in times of uncertainty provided me with a renewed sense of purpose. Faleminderit!

Dedicated

To

My father, Fazli Mazreku, for instilling a passion for human rights in me from an early age. You will always be the smartest man I know and I will never stop trying to make you proud. Thank you for showing me that we cannot stand by idly in the face of injustice and the plight of those less fortunate.

My mother, Shpresa Mazreku, for enduring the hardship of refugee camps with four young children, with utmost strength. Thank you for providing us with the foundation we desperately needed while the world was collapsing under your feet.

Ju dua shume.

LIST OF ABBREVIATIONS

ALI	American Law Institute
CARL	Canadian Association of Refugee Lawyers
CATSA	Canadian Border Services Agency
CCR	Canadian Council for Refugees
CBSA	Canadian Border Services Agency
ECRE	European Council on Refugees and Exiles
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTY	International Criminal Tribunal for the Former Yugoslavia
IIRIRA	Illegal Immigration Reform and Immigrant Responsibility Act
ILC	Nations International Law Commission
INA	Immigration and Nationality Act
IRPA	Immigration and Refugee Protection Act
UNHCR	United Nations High Commissioner for Refugees
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East
USCIS	United States Citizenship and Immigration Services
STCA	Safe Third Country Agreement
VCLT	Vienna Convention on the Law of Treaties

Table of Contents

ABSTRACT..... i
ACKNOWLEDGEMENTS..... ii
DEDICATION..... iii
LIST OF ABBREVIATIONS iv
TABLE OF CONTENTS..... v

INTRODUCTION.....1

CHAPTER 1: OVERVIEW OF THE CANADA- US SAFE THIRD COUNTRY

AGREEMENT

1.1. Introduction.....13
1.2. Smart Border Action Plan.....13
1.3. Border Sharing Policies.....18
1.4. Contesting the United States’ Safe Third Country Designation.....21
 1.4.1. One-Year Bar.....21
 1.4.2. Expedited Removal.....23
 1.4.3. Detainment of Asylum-Seekers.....28
1.5. Should the United States’ Safe Third Country Designation be Revoked?.....30
1.6. Overview of the STCA.....35
1.7. Conclusion.....43

CHAPTER 2: CANADA’S INTERNATIONAL AND DOMESTIC OBLIGATIONS

RELATING TO REFUGEES

2.1 Introduction.....	45
2.2 The Refugee Convention.....	46
2.3 The United States’ Violation of the <i>Convention</i> Before Trump.....	49
2.4 The United States’ Violation of the <i>Convention</i> After Trump.....	51
2.5 The Canadian <i>Charter</i> of Rights and Freedoms.....	60
2.6 Section 7 of the <i>Charter</i> – Right to Life, Liberty, and Security of the Person.....	62
2.7 Conclusion.....	69

CHAPTER 3: CHAPTER 3: THE PRINCIPLE OF *NON-REFOULEMENT* AS *JUS COGENS*

3.1 Introduction.....	71
3.2 International Law and the Birth of <i>Jus cogens</i>	72
3.3 <i>Jus cogens</i>	73
3.4 Identifying a <i>Jus cogens</i> Norm.....	77
3.5 The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.....	81
3.6 The Principle of <i>Non-refoulement</i> as <i>Jus cogens</i>	84
3.7 Obligations to <i>Jus cogens</i> Norms.....	89

3.8 Conclusion.....	92
CONCLUSION.....	93
BIBLIOGRAPHY.....	100

Introduction

It is estimated that over 40,000 people are expected to cross the border into Canada this year alone, for the purpose of seeking asylum.³ Following President Trump's inauguration, and multiple legislative measures undertaken by the Trump administration, thousands of asylum-seekers have crossed the Canada-US border and sought asylum in Canada. Among the legislative measures undertaken by the administration is the executive order of January 2017, specifically Order 13769 signed on January 27, 2017. This executive order, titled "Protecting the Nation from Foreign Terrorist Entry into the United States" is commonly known as the "Muslim ban" or "travel ban". The purpose of this executive order is to halt refugee admissions and temporarily bar people from seven Muslim-majority countries from entering the United States.⁴ Terminating the Temporary Protection Status (TPS) for tens of thousands of Haitian immigrants,⁵ and ending protection for Salvadorian migrants⁶ has also contributed to the surge in asylum-seekers crossing the border into Canada. Asylum-seekers are subject to the STCA, which outlines how refugee claimants are to be addressed by Canada and the United States. The STCA requires refugee claimants to request refugee protection in the first safe country in which they arrive in, unless they qualify for an exception to the agreement.⁷

³ Charles Krupa, "Number of people seeking asylum in Canada at levels not seen since 2009", *The Globe and Mail* (7 August 2017), online: <<https://www.theglobeandmail.com/news/national/number-of-people-seeking-asylum-in-canada-at-levels-not-seen-since-2009/article36300393/>>.

⁴ Exec. Order No.13769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

⁵ Tal Kopan, "DHS decision to end Haitian immigration protections questioned", *CCN* (17 April 2018), online: <<https://www.cnn.com/2018/04/17/politics/haiti-tps-documents-questions/index.html>>.

⁶ Zeke Miller & Elliot Spagat, "200K Salvadorian immigrants face deportation from U.S. as Trump ends special protection", *Global News* (8 January 2018), online: <<https://globalnews.ca/news/3951691/trump-el-salvador-temporary-protected-status>>.

⁷ STCA, *supra* note 1.

Canada's elected representatives and their respective parties share different opinions on this matter. The governing party, the Liberal Party of Canada, has stated that suspending the STCA is unnecessary as "the asylum system in the United States is still functioning and the country remains open to granting people refuge".⁸ The Conservative Party of Canada, however, wants to augment the STCA further, by "closing the loopholes" in the agreement, which currently prevent refugees who cross the Canada-US border without authorization from being turned away.⁹ This thesis will examine Canada's international and domestic legal obligations in relation to refugees, while arguing that the principle of *non-refoulement* has achieved the status of *jus cogens*.

Over the last year, thousands of asylum-seekers have walked across the US-Canada border to seek asylum in Canada. As a result, the STCA has now come to the forefront of public attention. Refugee advocates have called for the suspension of the STCA, as they fear that the United States should no longer be considered safe for refugees. According to the STCA, "third country" refers to a state through which an asylum-seeker passes en route to their destination state.¹⁰ A country is designated "safe" when it has been determined that the country will provide refugee protection in accordance with the *Refugee Convention* and its *1967 Protocol*.¹¹ Specifically, the Governor in Council is required to review the country's human rights record, so as to ensure that the necessary conditions are met. Additionally, a "safe" country will examine refugee applications fairly.

⁸ Stephanie Levitz, "NDP MP says Trudeau Liberals misleading asylum-seekers over border crossings", *The Canadian Press* (23 August 2017), online: <<https://globalnews.ca/news/3690015/ndp-mp-says-trudeau-liberals-misleading-asylum-seekers-over-border-crossings/>>.

⁹ Daniel Leblanc, "Conservative Leadership camps ratchet up plans to stop asylum-seekers", *The Globe and Mail* (28 March 2017), online: <<https://www.theglobeandmail.com/news/politics/conservative-leadership-camps-ratchet-up-plans-to-stop-asylum-seekers/article34438990/>>.

¹⁰ STCA, *supra* note 1.

¹¹ *Ibid.*

According to the *Refugee Convention*, as amended by the *1967 Protocol*, a refugee is a person who:

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country.¹²

Both Canada and the United States are parties to the *1967 Protocol*. Canada is also a party to the *Refugee Convention*. Both countries have incorporated the refugee definition into their domestic law. Article 33(1) of the *Refugee Convention* maintains that no state shall expel or return a refugee “in any manner whatsoever” to a country where a refugee’s life or freedom would be threatened.¹³

According to Amnesty International Canada and the CCR, by continuing to uphold the STCA, Canada “currently violates both international and domestic norms”.¹⁴ As already mentioned, by becoming a party to the *Refugee Convention* and the *1967 Protocol*, Canada is under an international legal obligation not to return asylum-seekers to a third country “where there are systemic deficiencies in the asylum system or in reception conditions”.¹⁵ By returning asylum-seekers to the United States, Canada is failing to satisfy its international legal obligations, according to these international organizations.

In accordance with the Immigration and Refugee Protection Act (IRPA), for a country to maintain its “safe country” designation by Canada, the Governor in Council is required to review

¹² *Convention relating to the Status of Refugees* (adopted 28 July 1951, entered into force 22 April 1954), 189 U.N.T.S. 150.

¹³ *Ibid.*

¹⁴ Amnesty International Canada and Canadian Council for Refugees, *Contesting the Designation of the US as a Safe Third Country* (19 May 2017), online: <<http://ccrweb.ca/sites/ccrweb.ca/files/stca-submission-2017.pdf>>.

¹⁵ *Ibid.*

the country’s human rights records in order to ensure “that the conditions that led to the designation as a safe third country continue to be met”.¹⁶ However, despite this requirement, the Federal Court found in 2007 that the federal cabinet failed to comply with its obligation to ensure continuous review of the US as a safe third country.¹⁷ However, a year later the Federal Court of Appeal overturned the ruling.¹⁸ Amnesty International and the CCR have urged the Canadian government to rescind the designation of the United States as “safe” in light of “documentary evidence on systemic failings of the asylum system and widespread human rights abuses against asylum-seekers”.¹⁹

In their submission to the Honourable Ahmed Hussen, Minister of Immigration, Refugees and Citizenship Canada (IRCC), and the Honourable Ralph Goodale, Minister of Public Safety and Emergency Preparedness, Amnesty International and the CCR argue that the United States asylum system has suffered from deficiencies since the implementation of the STCA.²⁰ These deficiencies have been further exacerbated since Trump’s inauguration. This submission highlights some of the gravest failings of the US refugee protection system. They include:

1. The one-year bar

The one-year bar requires asylum-seekers to apply for refugee protection within one year of entering the United States. This bar prevents asylum-seekers from receiving protection if they have not met the application deadline. According to Physicians for Human Rights, this bar “adds an arbitrary, ineffective, and unnecessary roadblock to

¹⁶ STCA, *supra* note 1.

¹⁷ Library of Parliament General Distribution Paper, *Agreement Between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims From Nationals of Third Countries* (Ottawa, 2017).

¹⁸ *Ibid.*

¹⁹ Amnesty International, *supra* note 14.

²⁰ *Ibid.*

the already complicated asylum process and prevents people with legitimate asylum claims from receiving protection”.²¹ This policy affects certain categories of refugees, including women and refugees suffering from post-traumatic stress disorder.²²

2. Expedited removal

Expedited removal is a process by which low-level immigration officers have the authority to deport noncitizens who are undocumented or have committed fraud of misrepresentation.²³ Since the inception of the STCA, immigration officers have used expedited removal to deport individuals who arrive at the US border, as well as those who enter without authorization if they are apprehended within two weeks of arrival and within 100 miles of the Canadian border. The Trump administration has significantly expanded this immigration enforcement process, and as a result, more asylum-seekers will be at risk of *refoulement* (deportation to countries where they may be at risk of persecution).²⁴

3. Detaining asylum-seekers

Amnesty International and CCR argue that the United States’ “punitive and excessive approach to detaining asylum-seekers already falls well short of international norms”.²⁵

The Trump administration has significantly expanded the detention of asylum-seekers.

Amnesty International and CCR predict that these changes will “significantly aggravate

²¹ Physicians for Human Rights, “The *One Year Bar to Asylum*”, online: <https://s3.amazonaws.com/PHR_other/factsheets/One-Year-Bar.pdf>.

²² Amnesty International, *supra* note 14.

²³ American Immigration Council, “A Primer on Expedited Removal” (2017), online: <https://www.americanimmigrationcouncil.org/sites/default/files/research/a_primer_on_expedited_removal.pdf>.

²⁴ Amnesty International, *supra* note 14.

²⁵ *Ibid.*

an already dire situation for asylum-seekers who are often separated from their families and detained in inappropriate penal conditions”.²⁶

Among other grave failings of the US refugee protection system are the Operation Streamline and the prosecution of asylum-seekers. Operation Streamline requires the federal criminal prosecution and imprisonment of all unauthorized border crossings, and adopts a “zero tolerance” approach.²⁷ Moreover, turning back asylum-seekers at the Mexico border and extraterritorial processing of applications further undermines the *Refugee Convention*. President Trump’s Border Enforcement Order instructs the Department of Homeland Security to return asylum-seekers to Mexico to be detained, pending a formal removal proceeding.²⁸

In addition to the failings of the US immigration system listed above, inconsistent recognition of gender-based asylum claims, and inconsistent adjudication of claims and “asylum-free zones” are listed in the submission by Amnesty International and CCR.²⁹ This submission argues that judicial precedents have not given clear guidance to immigration judges on gender-based claims. As a result, the treatment of these claims continues to be a barrier for asylum-seekers.³⁰ The inconsistent adjudication of claims has allowed certain parts of the United States to be labelled “asylum free” zones, due to the unlikely chance that an application for asylum will succeed. In light of the alleged failure of the US refugee protection system and the country’s inability to fulfill obligations under the *Refugee Convention*, the submission urges the Canadian government to rescind the STCA, and to immediately suspend it.³¹

²⁶ *Ibid.*

²⁷ Johanna Lydgate, “Assembly- Line Justice: A Review of Operation Streamline” (2010) 98:2 California L Rev.

²⁸ Amnesty International, *supra* note 14.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

However, the Canadian government, despite the harsh criticism, maintains that it is important for the STCA to remain in force, since it is considered an “important tool for Canada and the United States to work together on the orderly handling of refugee claims made in our countries”.³² Moreover, according to the Honourable Mr. Hussen, “there is absolutely no need to tinker with the Safe Third Country Agreement”.³³ The minister maintains that the US domestic asylum system provides due process.³⁴ IRCC has further stated that “[s]imilar agreements are used by countries around the world to control pressures on asylum systems” and that the government is committed to protecting its border with the United States.³⁵

By upholding the STCA, Canada is in breach of domestic and international legal obligations. Under international law, Canada is in breach of the *Refugee Convention* as article 33 highlights the principle of *non-refoulement*. According to the principle of *non-refoulement*, no state shall expel or return a refugee in any manner whatsoever to a country where their life or freedom would be threatened on account of race, religion, nationality, membership or particular group or public opinion.³⁶

Moreover, the principle of *non-refoulement* also falls under Canada’s domestic legal obligations under section 7 of the *Charter*, which guarantees the right to life, liberty, and security

³² Immigration, Refugees and Citizenship Canada, *Claiming Asylum in Canada – What happens?* (2018), online: <https://www.canada.ca/en/immigration-refugees-citizenship/news/2017/03/claiming_asylum_incanadawhathappens.html?wbdisable=true>.

³³ Brenna Rose, “Safe Third Country Agreement to Stay, pledged immigration minister”, *CBC News* (29 March 2017), online : <<http://www.cbc.ca/news/canada/british-columbia/safe-third-country-agreement-to-stay-pledges-immigration-minister-1.4046998>>.

³⁴ *Ibid.*

³⁵ Canadian Council for Refugees, *Safe Third Country*, online: <<http://ccrweb.ca/en/safe-third-country>>.

³⁶ *Ibid.*

of the person.³⁷ According to a report conducted by law students across Canada,³⁸ Canada may have committed indirect *refoulement* on some occasions by denying entry to asylum-seekers arriving at a port of entry through the United States, thus breaching domestic law”.³⁹

Canada’s ongoing participation in the STCA violates its international legal obligation to protect refugees coming from displaced countries and passing through the United States.⁴⁰ States cannot simply “contract out” of their *jus cogens* legal obligations.⁴¹ *Jus cogens* refers to certain fundamental principles of international law, from which no derogation is permitted.⁴² According to Jean Allain, the principle of *non-refoulement* has acquired the status of *jus cogens*, and not maintaining this status may have detrimental effects for asylum-seekers.⁴³ *Jus cogens* norms permit no derogation, and as such, by maintaining *jus cogens* status, the principle of *non-refoulement* affords asylum-seekers protection they will otherwise not have.

Furthermore, there have been numerous legal challenges to the STCA on the grounds that the United States’ refugee policies are not safe for all refugee claimants. A case brought by the CCR, Amnesty International, and the Canadian Council of Churches on behalf of a Colombian national, known only as “John Doe”, resulted in a Federal Court ruling that the STCA violated the right to life, liberty, and security of the person under section 7, and the right to equality under section 15 of the *Charter*.⁴⁴ Additionally, the United Nations High Commissioner for Refugees

³⁷ *Ibid.*

³⁸ Sissi Wang, “Canadian Law Students Call for the STCA to be Suspended Immediately”, *PrecedentJD* (14 March 2017), online: <<http://precedentjd.com/news/law-students-call-for-the-stca-to-be-suspended-immediately/>>.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² Jean Allain, “The Jus Cogen nature of *non-refoulement*” (2001) 13:1 *Int’l J Refugee L*.

⁴³ *Ibid.*

⁴⁴ *John Doe et al. v. Canada*, 2004 FCC.

(UNHCR), the UN agency responsible for managing refugee resettlement, has expressed concerns over the STCA, arguing that such agreements may directly or indirectly violate the principle of *non-refoulement*.⁴⁵

Since its implementation, the STCA has restricted the grounds upon which refugees may enter Canada. According to Canadian Border Services Agency (hereinafter “CBSA”) statistics, several hundred refugee claimants have been rejected under the STCA every year since its implementation. However, according to Efrat Arbel, the STCA not only rejects refugee claimants at the border, but also discourages claimants from presenting at the border.⁴⁶ The STCA applies only at land points of entry, and does not apply to claimants who present “in land” claims. Arbel argues that as a result, the STCA “creates incentives for human smuggling [and] has also prompted a rise in unauthorized border crossings into Canada”.⁴⁷ An evaluation study of the CBSA suggests that the STCA has increased the number of unauthorized border crossings into Canada, thereby failing to meet its key objective.⁴⁸

Under article 3 of the STCA, a refugee claimant may not be removed to a country outside of Canada or the United States until their refugee claim has been assessed by one of these countries.⁴⁹ This is in line with the principle of *non-refoulement* outlined in the *Refugee Convention* and *1967 Protocol*. Due to President Trump’s executive orders, Canada is in violation of its international law obligations, specifically relating to the principle of *non-refoulement*. Additionally, Sonia Akibo-Betts argues that it is possible for a country to be safe for claimants of

⁴⁵ *Ibid.*

⁴⁶ Efrat Arbel, “Shifting borders and the boundaries of rights: examining the Safe Third Country Agreement between Canada and the United States” (2013) 25:1 Int’l J Refugee L.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

a particular origin, and unsafe for others due to the “unfounded association between refugees and terrorism and the differential treatment of refugees in the US”.⁵⁰

There are many reasons why a refugee may seek protection in a country other than the one of arrival. As Rachel Gonzalez Settlage argues, “asylum-seekers are not required by the *Refugee Convention* to apply for asylum in the first safe country to which they are able to travel”.⁵¹ By preventing refugees to choose their new home, the STCA has merely increased the number of unauthorized crossings into Canada. To illustrate, a report prepared for the Harvard Immigration and Refugee Law Clinical Program entitled *Bordering on Failure* has found that claimants resorted to smugglers to get them into Canada in order to evade the STCA.⁵²

This thesis examines Canada’s international and domestic legal obligations as stipulated in the *Refugee Convention*. The STCA has come to the forefront of legal and ethical discussions in the context of unprecedented numbers of people displaced in 2015 and the immigration executive order adopted by President Trump in 2017. Various non-governmental organizations are opposed to the STCA on principle and urge the Canadian government to rescind it. The reasons put forth by various critics of the STCA range from human rights violations to the violation of domestic and international obligations by Canada. Canada is a party to the *Refugee Convention* and its *1967 Protocol*. Critics argue that by upholding the STCA, Canada is in violation of the *Refugee convention* and the *1967 Protocol*. Additionally, by subjecting asylum-seekers to *refoulement*, Canada is in violation of the *Charter*, specifically section 7 (the right to life, liberty, and security

⁵⁰Sonia Akibo-Betts, “The Canada – U.S. Safe Third Country agreement: Reinforcing Refugee Protection or Putting Refugees at Risk?” (2006) 6:1 JIJS.

⁵¹ Rachel Gonzalez Settlage, “Indirect *Refoulement*: Challenging Canada’s Participation in the Canada–United States Safe Third Country Agreement” (2012) 30:1 Wisconsin Int’l L J.

⁵² Efrat Arbel and Alletta Brenner, “Bordering on Failure: Canada–U.S. Border Policy and the Politics of Refugee Exclusion” (2013) Harvard Immigration and Refugee Law Clinical Program, Harvard Law School.

of the person). The principle of *non-refoulement* has achieved the status of *jus cogens*, which is a norm in international law from which no derogation is permitted.⁵³ This thesis will establish the *jus cogens* status of the principle of *non-refoulement* by examining how to identify a *jus cogens* norm, as well as by drawing parallels between the prohibition against torture, which has achieved *jus cogens* status, and the principle of *non-refoulement*. In doing so, this thesis will conclude that the STCA must be rescinded immediately.

Thesis Structure

The first chapter will begin by giving the historical background of the STCA. It will then examine the agreement in detail. This will include doctrinal analysis of the STCA, examining certain provisions as well as exceptions closely. Furthermore, I will also examine border-sharing policies and draw parallels between the STCA and the Dublin II Regulation, which is an EU law that determines the EU Member States responsible for examining an application for asylum-seekers. This chapter will also contest the US' "safe country" designation, by outlining deficiencies within the US refugee determination system.

The second chapter will focus on the *Refugee Convention* and the *Charter*. Specifically, it will analyze certain provisions of the *Refugee Convention*, particularly article 33, or the *non-refoulement* provision. This will be followed by an examination of the United States' violation of the *Refugee Convention* before and after Trump's inauguration. Greater emphasis will be placed upon the latter, as this thesis will argue that while the agreement violated international law from the outset, the violation has been exacerbated under the Trump Administration. This chapter will discuss policies undertaken by the current administration, such as the "zero-tolerance" policy,

⁵³ Allain, *supra* note 42.

and the suspension of refugee protection for victims of gender-based violence. Moreover, the second chapter will examine section 7 of the *Charter*, and establish that Canada is violating its domestic obligations. This will be achieved by examining the John Doe case in detail.

The third chapter will focus on the principle of *non-refoulement* as a *jus cogens* norm. It will discuss the creation of peremptory norms, as well as how to identify a *jus cogens* norm. It will provide a brief history on the emergence of *jus cogens* norms in the sphere of international law, as well as examine the conditions under which *jus cogens* norms arise from.

In establishing the *jus cogens* status of the principle of *non-refoulement*, this chapter will draw parallels between the prohibition against torture and *non-refoulement*. The prohibition against torture enjoys *jus cogens* status, and since it is very closely linked to the principle of *non-refoulement*, the chapter asserts that *jus cogens* status should be extended to *non-refoulement* as well. This chapter will examine the protection against *refoulement* in the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (hereinafter “CAT”), as well as case law that established the *jus cogens* status of the prohibition against torture.

CHAPTER 1: OVERVIEW OF THE CANADA- US SAFE THIRD COUNTRY AGREEMENT

1.1 Introduction

In this chapter, I will discuss the historical background that led to the creation of the STCA. This will be achieved by examining Canada's response to the attack of September 11, 2001. I will also provide an extensive analysis of the STCA. Moreover, this chapter will draw a parallel between the STCA and the Dublin II Regulation, on which the agreement was modelled.

This chapter will also contest the "safe country" designation of the United States by citing various deficiencies of the US' refugee protection system. By listing and explaining the flaws within the US refugee protection system, this chapter argues that the United States is in violation of its international obligations and, as such, should lose its safe country designation. On the other hand, it will be shown that by upholding the agreement, Canada is also in violation of its international and domestic obligations, and as such, the agreement must be suspended immediately.

1.2 Smart Border Action Plan

Canada and the United States share the longest international border in the world.⁵⁴ The attack on September 11, 2001 spurred the Canadian government to respond to the attack by taking multiple security measures. Among these measures were the creation of the Canadian Air Transport Security Authority (hereinafter "CATSA"), the creation of CBSA, and the creation of Canada Command. CATSA is a federal Crown Corporation responsible for screening passengers

⁵⁴ Statistics Canada, *International Perspective*, 11-402-X (Ottawa: Statistics Canada, 2016) <<https://www.statcan.gc.ca/pub/11-402-x/2012000/chap/geo/geo01-eng.htm>> accessed 24 June 2018.

and baggage.⁵⁵ CBSA was created in order to provide integrated border security services that support national security and public safety priorities.⁵⁶ This is achieved through increased use of advance information on goods and travelers entering Canada, enhanced information sharing and co-operation with national and international partners, automated risk assessment tools, trusted travelers' and trade programs, and the arming of front line CBSA officers.⁵⁷ Canada Command is an operational headquarters responsible with the improvement of military resources available for domestic safety, security and defence, in Canada and in the continent.⁵⁸ Moreover, the Canadian government introduced and enacted the Anti-Terrorism Act – Bill C-36, which “takes aim at terrorist and terrorist groups and protects the safety, security, and fundamental rights of Canadians”.⁵⁹ The *Criminal Code* was also amended to accord with Bill C-36, creating a mechanism to identify groups and individuals associated with terrorism publicly.⁶⁰

In addition, the Canadian government adopted a budget that changed the government's spending priorities.⁶¹ This “Security Budget” allocated \$7.7 billion over five years to security and enforcement initiatives.⁶² Specifically, \$1 billion was allocated to immigration screening and enforcement, \$1.6 billion to intelligence and policing, and \$1.2 billion to border security measures.⁶³

⁵⁵ Public Safety Canada, *The Government of Canada's response to the terrorist attacks of 9/11* (Ottawa: Public Safety Canada, 2015), online: <<https://www.publicsafety.gc.ca/cnt/ntnl-scrt/cntr-trrrsm/sptmbr-11th/gvrnmnt-rspns-en.aspx>>.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ Carpentier, Michel Lawrence. “Canada and 9/11: Border Security in a New Era” (Masters of Arts, University of Saskatchewan, 2007).

⁶² *Ibid.*

⁶³ *Ibid.*

Finally, less than two months after the attack, Deputy Prime Minister John Manley and then Governor Tom Ridge signed the “Smart Border Declaration” and “30 point Action Plan” to enhance the security of the Canada- US border.⁶⁴ The four pillars of the Action Plan were identified as follows: (1) the secure flow of people; (2) the secure flow of goods; (3) secure infrastructure; and (4) the sharing and coordination of information in the enforcement of these objectives.⁶⁵ The first pillar of the Smart Border Declaration was supported by both countries introducing cards for permanent residents that would include a biometric identifier; by developing an alternative inspection system for processing pre-approved travellers; by developing an air-pre clearance program; and by developing compatible immigration databases to promote intelligence coordination.⁶⁶ The second pillar of the Smart Border Declaration committed both countries to develop programs that would ensure the free flow of goods by establishing complementary systems for commercial processing, developing an integrated approach to improve security and facilitate trade through “away-from-the-border” processing for trade related inspections.⁶⁷ The third pillar of secure infrastructure required the two countries to improve the infrastructure that was in place, conducting bi-national threat assessment of trans-border infrastructure, and improving policies related to aviation security. Lastly, the fourth pillar committed both governments to “coordinate and share all relevant information related to the enforcement of all of the above objectives”, by expanding the role of the Integrated Border and Marine Enforcement Teams, ensuring coordination between law enforcement agencies,

⁶⁴ Canadian International Freight Forwarders Association, *Smart Border Action Plan Status Report (2003)*, online :<https://www.ciffa.com/downloads/2003/10/07/English-SBAP_Oct_%2003.pdf>.

⁶⁵ *Ibid.*

⁶⁶ Carpentier, *supra* note 61.

⁶⁷ Public Safety Canada, *supra* note 55.

strengthening anti-terrorism efforts, and producing threat and intelligence assessment, to name a few.⁶⁸

The STCA was created as part of the 30 point Smart Border Action Plan in order to “more efficiently manage the flow of individuals seeking to access the Canada or US refugee/asylum system”.⁶⁹ The STCA was signed on December 5, 2002. Canada and the United States entered a bilateral agreement known as the Canada- US Safe Third Country Agreement on December 29, 2004. According to Audrey Macklin, Canada sought this agreement as it believed that it was carrying a larger burden of the refugee problem than the United States.⁷⁰ Among measures taken by the Canadian government to prevent the influx of refugees prior to the STCA were carrier sanctions that punish private airlines and shipping lines for transporting improperly documented passengers, the imposition of visa requirements on so-called “refugee-producing” countries, to the interception and deflection of ships suspected of carrying migrants to Canada.⁷¹ Therefore, despite its international reputation as a safe haven for refugees, Canada actively sought to curb the number of refugees it accepted prior to the STCA. This is evident in the process that Macklin describes as “placing refugees in an orbit” and bouncing them back and forth between Canada and the United States.⁷²

One such case is that of the Maoude family in Ottawa, who sought refuge in Canada after escaping war in Somalia.⁷³ The family initially arrived in the United States, but chose Canada as

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ Audrey Macklin, “The value(s) of the Canada–U.S. Safe Third Country Agreement” (2003) Caledon Institute of Social Policy.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ Janet M. Haynes, “Safe Third Country Agreement: Closing the Doors on Refugee Women Seeking Protection” (2013) 95:2 Families in Society: the Journal of Contemporary Human Sciences.

their country of resettlement. After arriving in Canada, the family was “bounced back and forth” between Canada and the United States for four years.⁷⁴ The family was returned to the United States every six months for processing as their point of entry was in that country.⁷⁵ During this process, one of the sons was murdered in the United States, and the other was deported back to Somalia.

Attempts to minimize the number of refugees finally gained increased traction for the Canadian government after September 11, 2001. The 9/11 attack provided Canada with an opportunity to achieve its goal of restricting the number of asylum-seekers, while maintaining the free flow of goods into the US market.⁷⁶ The United States is Canada’s most important trading partner, with an estimated \$1.9 billion in trade crossing the border every day.⁷⁷ In 2017, trade between Canada and the United States totalled \$673.8 billion, with an estimated surplus of \$17.5 billion for Canada. As a result, Canada sought an agreement that would not affect trade relations with the United States, but would instead alleviate the burden of processing asylum claims. The principal objective of the STCA is to enhance border security by preventing refugee claimants who are in the United States from lodging claims in Canada, and vice versa.⁷⁸ The STCA is modelled on the *European Union Dublin Convention*, which was signed on June 15, 1990, and came into effect on September 1, 1997. The Convention was replaced by the Dublin II Regulation, which is an EU law that determines the EU Member States responsible for examining an application for asylum-seekers.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ Public Safety Canada, *supra* note 55.

⁷⁷ Canada, Government of Canada, Department of Foreign Affairs and International Trade, “A Strong Partnership, The Canada-US Trade and Investment Partnership”, online: <http://geo.international.gc.ca/can-am/main/trade_and_investment/trade_partnership-en.asp>.

⁷⁸ STCA, *supra* note 1.

1.3 Burden- Sharing Policies

According to Michelle Foster, multilateral migration-related arrangements such as the Dublin II Regulation and bilateral schemes such as the STCA have given rise to serious concerns.⁷⁹ The Dublin II Regulation assigns responsibility for dealing with an asylum application to the state through which the asylum claimant first entered the EU, even if the claim is lodged in another member state. In other words, the first country of arrival is responsible for processing the asylum claim, regardless of where the claim was lodged. However, the Dublin II Regulation does not contain any mechanisms to ensure that this responsibility is shared in an equitable fashion, which brings into question the objective of responsibility sharing. The objective of the Dublin II Regulation is “to ensure quick access to asylum procedures and the examination of an application on the merits by a single, clearly determined Member State”.⁸⁰ Member states signed onto the Dublin II Regulation in order to ensure a fair distribution of asylum application. Instead, the Dublin II Regulation has shifted the responsibility towards border states. To illustrate, net Dublin transfers represented a significant proportion of total asylum applications received in Poland (19.25%), Slovakia (12.06%), and Hungary (9.56%). As the European Parliament noted, “it fails to serve as a burden-sharing mechanism”.⁸¹

Even within a “harmonized” system such as that of the EU, divergence schemes found in responsibility sharing policies will inevitably lead to inequity, which in the case of the Dublin II Regulation has resulted in an “asylum lottery”.⁸² The UNHCR reports that a refugee from

⁷⁹ Michelle Foster, “Responsibility Sharing or Shifting? “Safe” Third Countries and International Law” (2008) 25:2 *Refugee: Canada’s J Refugees*.

⁸⁰ European Commission, *Country Responsible for asylum application (Dublin)* (2018), online: <https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/examination-of-applicants_en>.

⁸¹ Foster, *supra* note 79.

⁸² *Ibid.*

Chechnya who is transferred from Austria to Slovakia has their chance of being granted asylum diminish by eighty percent.⁸³ Similar examples can be noted throughout the EU. For instance, the European Council on Refugees and Exiles (ECRE) estimated that in 2007, approval of asylum status for Iraqis varied from zero percent in Greece and Slovenia to 87.5 percent in Cyprus.

In the 2011 case, *M.S.S. v. Belgium and Greece*,⁸⁴ the Grand Chamber of the European Court of Human Rights held that the transfer of an asylum-seeker from Belgium to Greece violates Article 3 (the prohibition on torture and inhuman or degrading treatment) and Article 13 (the right to an effective remedy) of the *European Convention on Human Rights*.⁸⁵ The Grand Chamber noted that Belgian authorities ought to have known that the asylum application would not have received serious consideration in Greece due to the country's asylum system deficiencies.⁸⁶ The UNHCR noted that Greece has failed to implement minimal standards set out in the EU Reception Directive, which aims to provide minimum standards for the reception of asylum-seekers.⁸⁷ In April 2008, UNHCR published a paper calling for all EU member states to "refrain from returning asylum-seekers to Greece".⁸⁸ Moreover, the Grand Chamber found that the transfer subjected the asylum-seeker to conditions amounting to degrading treatment.⁸⁹ The transfer of asylum-seekers has come under fire in the European context. For instance, in *N.S. v. Secretary of State for the Home Department*, the Court of Justice of the European Union held that member states shall not transfer asylum-seekers to face difficult circumstances under article

⁸³ UNHCR, *2005 Global Refugee Trends* (2006), online: <<http://www.unhcr.org/statistics/>>.

⁸⁴ ECHR App. No. 30696/09, Grand Chamber judgment, 21 January 2011.

⁸⁵ *Convention for the Protection of Human Rights and Fundamental Freedoms* (4 November 1950, entered into force 3 September 1953) 213 UNTS 221, Eur TS 5.

⁸⁶ Amnesty International, *supra* note 14.

⁸⁷ Foster, *supra* note 79.

⁸⁸ UNHCR, *UNHCR Position on the Return of Asylum-Seekers to Greece under the "Dublin Regulation"* (2008), online: <<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4805bde42>>.

⁸⁹ *Ibid.*

3(2) of the Dublin II Regulation, known as the “sovereignty clause”.⁹⁰ Under the sovereignty clause, in the event that it is impossible to transfer an asylum-seeker to the state responsible for determining their claim due to systemic flaws in the asylum procedure and in the reception conditions for claimants, such as the case of Greece, the determining State shall continue to examine the criteria in order to establish whether another State can be designated as responsible.⁹¹

Similar concerns have been raised in the context of the bilateral agreement between Canada and the United States. While both states are parties to the *1967 Protocol*, many organizations argue that the treatment of asylum-seekers between the two states varies greatly. The United States’ track record in upholding Article 33 of the *Refugee Convention* has been questioned by many refugee organizations. Amnesty International and CCR contest the designation of the United States as a safe third country. Despite the fact that the United States is a state party to the *1967 Protocol*, there exist many inconsistencies between handling of asylum claims in the United States and Canada. Amnesty International and CCR argue that while Canada is not a party to the European Union’s human rights instruments, European Union jurisprudence has “persuasive value in interpreting substantially similar protections under other human rights instruments, such as the Canadian *Charter of Rights and Freedoms*”.⁹² Moreover, the Supreme Court of Canada has considered European Court of Human Rights jurisprudence in interpreting domestic rights protections.⁹³

⁹⁰ *Ibid.*

⁹¹ Dublin II Regulation, Reg. No. 604/2003, Feb. 18, 2003, OJ L 50 of 25.2.2003.

⁹² Amnesty International, *supra* note 14.

⁹³ *Ibid.*

1.4 Contesting the United States' Safe Third Country Designation

1.4.1 One-Year Bar

Among the most egregious failings of the United States' refugee protection system is the one-year bar. The one-year bar prevents asylum-seekers from receiving protection if they have not met the filing deadline. In other words, asylum-seekers have one year to file their asylum claim in the United States. Failure to do so renders them ineligible for asylum protection. While the one-year bar can be waived by an asylum officer if the applicant shows "changed circumstances materially affecting the applicant's eligibility for asylum", studies suggest that the asylum officer's power to waive the one-year bar is exercised unfairly.⁹⁴ The discriminatory nature varies not only based on the immigration officer awarding the exceptions, but also on the applicant's country of origin.⁹⁵ For instance, Latin American applicants were rejected 66% more often on the basis of the one-year bar than North African or Middle Eastern applicants.⁹⁶

The one-year bar was added to United States' immigration law as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), adopted in 1996.⁹⁷ This was a result of strong anti-immigrant sentiment in the United States in response to the 1993 World Trade Centre bombing and 1995 Oklahoma City bombing.⁹⁸ Critics of the one-year bar argued that instead of deterring fraud, the one-year bar would merely frustrate legitimate claims.⁹⁹ However, the sponsor of IIRIRA responded to these concerns by claiming that immigration

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ Philip G. Schrag et al., "Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum" (2010) 52 WM. & Mary L. Rev.

⁹⁷ Roy Xiao, "Refugee From Time: How the One year Filing Deadline Unfairly Frustrates Valid Asylum Claims" (2017) 95:2 North Carolina L Rev.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

authorities would provide notice of the one-year deadline to new immigrants. Despite this, two decades later, notice about the one-year bar has yet to be made available as matter of policy.¹⁰⁰

In order to comply with the one-year bar, an applicant must file an asylum application with the proper immigration court within one year of the applicant's arrival in the United States.¹⁰¹ However, there are various immigration system failures that prevent applicants from complying with the one-year deadline. For instance, if United States Citizenship and Immigration Services (USCIS) officers fail to docket a case with the immigration court, the hearing can never be scheduled. Therefore, the applicant does not have the opportunity to present and file the application.¹⁰² However, even in the event that the officers do docket the case and the hearing is scheduled, the applicant may not be aware of the date and location of the hearing due to the failings of the service standards.¹⁰³ Despite the fact that the Immigration and Nationality Act (INA) plainly states that the notice should include a description of the "time and place at which proceedings will be held," it is common practice for this requirement to not be met.¹⁰⁴ These are among the reasons that the one-year bar has been criticized for unfairly penalizing deserving applicants.¹⁰⁵

1.4.2 Expedited Removal

Another cause for concern in the United States' refugee protection system is expedited removal. Expedited removal is a process by which low-level immigration officers have the authority to deport non-citizens who are undocumented or have committed fraud or

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

misrepresentation.¹⁰⁶ Similar to the one-year ban, the expedited removal was enacted as part of the IIRIRA.¹⁰⁷ Expedited removal enables an immigration officer to summarily remove an asylum-seeker without the benefit of procedural safeguards, such as a removal hearing before an independent adjudicator, legal counsel, and cross-examination of the government's evidence.¹⁰⁸ Moreover, the legislation requires the detention of asylum-seekers during the removal process and results in asylum-seekers being taken to detention centres and prisons upon their arrival in the United States.¹⁰⁹

There is an exception to the expedited removal process for individuals who express fear of persecution or torture in the event that they are returned to their home countries. The individual must then be referred to a USCIS asylum officer for a credible fear interview.¹¹⁰ In order to assess the legitimacy of the alleged fear, the USCIS asylum officer applies a credible fear standard that requires a demonstration of "a significant possibility...that the alien could establish eligibility for asylum".¹¹¹ The "significant possibility" standard of proof is not defined by the statute or the relevant immigration regulations, but it is much lower than the "well-founded fear" standard enshrined in the *Refugee Convention* and applied to asylum claims in immigration courts.¹¹² If the asylum-seeker is unable to demonstrate a credible fear of persecution, the USCIS officer enters an unfavourable determination. The individual may then request that an immigration judge review the decision. If the judge agrees with the negative

¹⁰⁶ Amnesty International, *supra* note 14.

¹⁰⁷ Alvaro Peralta, "Bordering Persecution: Why Asylum-seekers Should Not be Subject to Expedited Removal" (2015) 64:5 American Univ. L Rev.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*

decision reached by the officer, the individual must be removed from the United States and has no right to appeal.¹¹³ If the individual is successful in demonstrating credible fear of persecution, the officer issues a notice requiring the individual to present their claim in immigration court for removal proceedings.¹¹⁴

Critics have argued that credible fear interviews have become superficial in nature due to the expedited removal system.¹¹⁵ Due to the US government's increased reliance upon the expedited removal process, mishandling of procedures undermines the government's processing of asylum-seekers, which violates section 235(b) of the US Immigration and Nationality Act.¹¹⁶ Section 235(b) of the Immigration and Nationality Act states that an "officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum . . . or a fear of persecution".¹¹⁷ Human Rights First notes that:

[i]n the 1999 fiscal year, of the 176,990 total removals, 50.3% were expedited. Of those 89,035 people deported under expedited removal during the 1999 fiscal year, 99.3% were returned without a referral for further examination to determine whether a credible fear of persecution existed or whether U.S. citizenship or another lawful basis existed for admission into the United States. INS inspectors make almost all expedited removal decisions on the spot at ports of entry, with no meaningful review.¹¹⁸

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

Moreover, Amnesty International and the CCR report that the Trump administration has “adopted a more restrictive approach to credible fear and reasonable fear determinations which are essential for identifying individuals who may need asylum”.¹¹⁹

The expedited removal process deprives asylum-seekers of the opportunity to have their claim heard by a judicial body independent of the government body responsible for rendering the initial removal order.¹²⁰ The problem with expedited removal begins with the fact that an INS officer—who is not required to have specific expertise in asylum law, country conditions, or specialized interview training appropriate to refugees—can issue a summary order for the deportation of any asylum-seeker he or she considers inadmissible.¹²¹ This order may be reviewed only by his or her supervisor, and this is only a perfunctory review. In the past, only a trained immigration judge was allowed to issue an order of deportation.¹²² Those ordered to be removed under this process have no right to federal judicial review.¹²³ This process lacks key procedural safeguards such as notice prior to secondary inspection of the consequences of the process (i.e. immediate deportation); guarantee of a qualified interpreter to explain the process to an alien who is not fluent in English; and the right to be represented by legal counsel.¹²⁴ Moreover, decisions are made not by independent adjudicators but by border enforcement personnel, and there is no right to have these decisions reviewed on appeal. Anyone removed under this procedure is barred from re-entering the United States for five years.¹²⁵

¹¹⁹ Amnesty International, *supra* note 14.

¹²⁰ *Ibid.*

¹²¹ Human Rights First, “Is this America? The Denial of Due Process to Asylum-seekers in the United States” (2000), online: <[http://www.humanrightsfirst.org/refugees/reports/due process/due process.htm](http://www.humanrightsfirst.org/refugees/reports/due%20process/due%20process.htm)>.

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ Amnesty International, *supra* note 14.

Assessed from the perspective of Canada's duty to deliver fundamental justice, the expedited removal process deprives asylum claimants of procedural justice.¹²⁶ Fundamental justice is the fairness underlying the administration of justice and its operation. It is important to note that Canada has also undertaken measures to undermine fundamental justice for asylum-seekers. This was done through the enactment of Bill C-31¹²⁷ or Protecting Canada's Immigration System Act, and Bill C-24¹²⁸ or Strengthening Canadian Citizenship Act, passed in 2012 and 2014 respectively. Both bills have been criticized by human rights groups for giving the Ministers broad and unprecedented powers.¹²⁹ Bill C-31 gives the immigration minister the power to decide which countries are safe without a committee.¹³⁰ Rejected refugee claimants from the safe countries list would no longer be able to appeal the decision.¹³¹ Moreover, claimants from the safe countries list would have to wait a year before compassionate and humanitarian consideration to become permanent residents, and could still be deported in the meantime.¹³² Bill C-24 makes amendments to the Citizenship Act by updating the eligibility requirements for Canadian citizenship. This is achieved by modifying the period during which a permanent resident must reside in Canada before they may apply for citizenship; requiring an applicant to demonstrate knowledge of Canada and the responsibilities of citizenship; limiting the role of citizenship judges in the decision-making process; and revoking citizenship of dual

¹²⁶ Nicole A Borovan, "The Canada-United States Safe Third Country Agreement: A constitutional analysis" (Masters of Laws, McGill University, 2006).

¹²⁷ Bill C-31, *Protecting Canada's Immigration System Act*, 1st Sess, 41st Parl, 2012 (assented to June 28, 2012).

¹²⁸ Bill C-24, *Strengthening Canadian Citizenship Act*, 2nd Sess, 41st Parl, 2014 (assented to June 19, 2014).

¹²⁹ Human Rights Watch, "Canada: Vote No on Migrant Detention Bill" (16 March 2012), online: <<https://www.hrw.org/news/2012/03/16/canada-vote-no-migrant-detention-bill>>.

¹³⁰ Bill C-31, *supra* note 127.

¹³¹ *Ibid.*

¹³² *Ibid.*

residents who engaged in actions contrary to the national interest of Canada.¹³³ As demonstrated, Canada's commitment to refugee protection has been insufficient and leaves significant room for improvement. Despite that, the erosion of refugee protection rights under the Trump administration is far graver and renders the US unsafe for refugees.

The expedited removal process has attracted criticism from various human rights advocacy groups, such as the UNHCR,¹³⁴ Amnesty International,¹³⁵ and CCR.¹³⁶ The House of Commons Standing Committee on Citizenship and Immigration¹³⁷ expressed its concerns over the expedited removal process in its recommendation and asked that the Canadian government seek assurance that refugees returned to the United States would not be subject to it.¹³⁸ The Committee has oversight of Citizenship and Immigration Canada and the Immigration and Refugee Board of Canada, and monitors federal multiculturalism policy. However, the Committee's role is of an advisory nature, and as such the recommendation was ignored and the STCA was signed and ratified.¹³⁹

Since the inception of the STCA, immigration officers have used expedited removal to deport individuals who arrive at the US border, as well as those who enter without authorization if they are apprehended within two weeks of arrival and within 100 miles of the Canadian

¹³³ *Ibid.*

¹³⁴ UNHCR, *UNHCR Reports on US Expedited Removal Process* (2004), online:

<<http://www.unhcr.ch/cgi-bin/txis/vtx/news/opendoc.pdf?tbl=NEWS&id=405ea67a4>>.

¹³⁵ Amnesty International USA, "Lost in the Labyrinth: Detention of Asylum-seekers", online:

<<http://www.amnestyusa.org/countries/usa/document.do?idK/CA1246D90686CB08025690000693482>>.

¹³⁶ Canadian Council for Refugees, "10 Reasons Why the Safe Third Country Agreement is a Bad Deal", online: <<http://www.web.net/~ccr/10reasons.html>>.

¹³⁷ Canada, Parliament, House of Commons Standing Committee on Citizenship and Immigration, online: <<http://www.ourcommons.ca/Committees/en/CIMM>>.

¹³⁸ Canada, Parliament, House of Commons, Standing Committee on Citizenship and Immigration, *The Safe Third Country Regulations: Report of the Standing Committee on Citizenship and Immigration*, 37th Parl, 2nd Sess, No 1 (3 December 2002) (Chair: Joe Fontana).

¹³⁹ *Ibid.*

border. The Trump administration has significantly expanded this immigration enforcement process, and as a result, more asylum-seekers will be at risk of *refoulement*.

1.4.3 Detainment of Asylum-Seekers

Amnesty International and CCR argue that the United States’ “punitive and excessive approach to detaining asylum-seekers already falls well short of international norms.”¹⁴⁰ The Trump administration has significantly expanded the detention of asylum-seekers. These changes will “significantly aggravate an already dire situation for asylum-seekers who are often separated from their families and detained in inappropriate penal conditions”.¹⁴¹ The United States is in violation of Article 31 of the *Refugee Convention*, which prohibits penalizing illegal entry or presence.¹⁴²

According to UNHCR’s 2012 *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, detention must be used only on a case-by-case basis. Otherwise it may be considered arbitrary.¹⁴³ Detention may be considered arbitrary if government officials have not considered less intrusive or less coercive means to monitor or control the whereabouts of the asylum-seeker. However, despite the guidelines set out by UNHCR, various human rights reports indicate that the United States employs detention widely and often without an individualized assessment of the need in a given case.¹⁴⁴ Asylum-seekers have been detained for extended periods of time without any form of assessment to determine if the detention is justified. Arriving asylum-seekers are subject to

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² *Refugee convention, supra* note 12.

¹⁴³ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012), online:<<http://www.refworld.org/pdfid/503489533b8.pdf>>.

¹⁴⁴ Amnesty International, *supra* note 14.

detention until they pass the credible fear test. Amnesty International cites a 2009 directive that requires Immigration and Customs Enforcement (ICE) officials to grant parole to asylum-seekers who have demonstrated credible fear, who manage to establish their identity and who are not a danger to society or a flight risk.¹⁴⁵ However, in practice this directive is often ignored, even in cases of urgent and humanitarian requests.¹⁴⁶ A report produced by Borderland Immigration Council found that ICE routinely denies parole.¹⁴⁷ One lawyer estimated that in one year, less than ten percent of her organization's parole requests were granted.¹⁴⁸

Detention of asylum-seekers has been described as a deterrence measures by US officials. Months after Trump's inauguration, the Department of Homeland Security considered a proposal to separate women and children who enter the country illegally. The proposal was ultimately never adopted. However, it was recently reported that an asylum-seeker was separated from her seven-year-old daughter for four months.¹⁴⁹ Although the policy of separating mothers from their children has not formally been implemented, the deputy director of the American Civil Liberties Union (ACLU) Immigrants' Rights Project, Lee Gelernt, has stated that this practice is widely being exercised. Although the policy of separating mothers and children has not been formally adopted, a group of six immigration organizations filed a complaint with the Department of Homeland Security in December 2017, after documenting over 175 cases of

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ Borderland Immigration Council, "Discretion to Deny: Family Separation, Prolonged Detention, and Deterrence of Asylum-seekers at the Hands of Immigration Authorities Along the US-Mexico Border", online: <http://media.wix.com/ugd/e07ba9_72743e60ea6d4c3aa796becc71c3b0fe.pdf>.

¹⁴⁸ *Ibid.*

¹⁴⁹ Amanda Holpuch, "US Immigration kept asylum-seeker and daughter apart for months, suit says", *The Guardian* (26 Feb 2018), online : <<https://www.theguardian.com/us-news/2018/feb/26/us-immigration-kept-asylum-seeker-and-daughter-apart-for-months-suit-says>>.

family separation at the border.¹⁵⁰ Gelernt notes that while prior administrations have detained families, the Trump administration has taken matters to a “whole other level”.¹⁵¹

1.5 Should the United States’ Safe Third Country Designation be Revoked?

A “safe country” refers to a state through which an asylum-seeker passes en route to their final destination. A “safe country” is considered to be a country that will provide refugee protection in accordance with the *Refugee Convention* and the *1967 Protocol*. Under section 102 of IRPA, only countries that respect human rights and offer a high degree of protection to asylum-seekers may be designated as safe third countries. Specifically, the legislation requires that the review of a designated country be based on the following factors:

1. whether it is party to the 1951 *Refugee Convention* and the 1984 *Convention Against Torture*;
2. its policies and practices with respect to claims under the 1951 *Refugee Convention*, and its obligations under the 1984 *Convention Against Torture*;
3. its human rights record; and
4. whether it is party to an agreement with the Government of Canada for the purpose of sharing responsibility with respect to claims for refugee protection.

To date, the United States is the only country designated a safe third country by Canada.¹⁵²

In accordance with IRPA, for a country to maintain its “safe country” designation by Canada, the Governor in Council is required to review the country’s human rights record, so as

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² STCA, *Supra* note 1.

to ensure “that the conditions that led to the designation as a safe third country continue to be met”.¹⁵³ Specifically, the Minister of Citizenship and Immigration must continually review the four factors mentioned above, and report to the Governor in Council should circumstances require it.¹⁵⁴ The review of the designation incorporates information obtained from various sources, such as United Nations organizations, international human rights organizations, government agency reports, statistical records and policy announcement, and relevant academic research.¹⁵⁵ However, despite the requirement of continuous review, the Federal Court found in 2007 that the federal cabinet failed to comply with its obligation to ensure continuous review of the United States as a safe third country.¹⁵⁶ Moreover, Justice Michael Phelan argued that the designation of the United States as a safe third country is *ultra vires*, as it is unreasonable to conclude that the United States complies with its obligation to respect the principle of *non-refoulement* under the *Refugee Convention*.¹⁵⁷

As illustrated above, the United States is in violation of Article 33 of the *Refugee Convention*, namely the principle of *non-refoulement*. The principle of *non-refoulement* prohibits states from returning refugees to a country where they may face persecution. The *non-refoulement* principle is the crux of the *Refugee Convention* and its violation is a direct violation of the *Convention* at large. Asylum-seekers in the United States are not afforded the same protection as they would be in Canada. In *N.S. v. Secretary of State for the Home Department*, the Court of Justice of the European Union found that “the presumption that a country is safe is

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ Canadian Council for Refugees v R, [2008] 3 FCR 606, 2007 FC 1262 (CanLII).

¹⁵⁷ *Ibid.*

rebutted when there are systemic deficiencies in asylum procedures and reception conditions for asylum-seekers”.¹⁵⁸ There are important differences between the refugee protection systems in Canada and the United States. While Canada and the United States enjoy a similar level of economic prosperity, they differ greatly in their procedural and substantive treatment of refugees. This has been further exacerbated since the Trump presidency. The deficiencies within the United States protection system for asylum-seekers have been further eroded since President Trump implemented policies with grave implications for asylum-seekers. Among these is the executive order titled “Protecting the Nation from Foreign Terrorist Entry into the United States”. The purpose of this executive order is to halt refugee admissions and temporarily bar people from seven Muslim-majority countries.¹⁵⁹ The Trump administration has also adopted a policy of criminally prosecuting asylum-seekers, which in turn leads to family separation. Under the “zero tolerance” policy, everyone caught crossing the border illegally is prosecuted, including individuals fleeing persecution or those crossing the border with their children. When parents are transferred to criminal custody, their children are treated as “unaccompanied minors”, as if they had crossed the border on their own.¹⁶⁰ They are then separated from their parents, and sent into the care of a different department.¹⁶¹ Moreover, Attorney General Jeff Sessions has recently ended asylum protection for domestic violence and gang violence.¹⁶² This erosion of refugee protection rights is also evident in the influx of asylum-seekers crossing the border into Canada.

¹⁵⁸ Amnesty International, *supra* note 14.

¹⁵⁹ White House Executive Order, *supra* note 4.

¹⁶⁰ Dara Lind, “*Trump’s DHS is using an extremely dubious statistic to justify splitting families at the border*”, *Vox* (8 May 2018), online: <<https://www.vox.com/policy-and-politics/2018/5/8/17327512/sessions-irregular-immigration-border-asylum-families>>.

¹⁶¹ *Ibid.*

¹⁶² Tal Kopan, “*Trump Admin drops asylum protections for domestic violence victims*”, *CNN* (11 June 2018), online: <<https://www.cnn.com/2018/06/11/politics/jeff-sessions-asylum-decision/index.html>>.

The United States' designation as a "safe" third country has been contested for some time, even before the ratification of the STCA in 2004. Concerns over the United States' refugee protection system were brought to light in the recommendations submitted by the Standing Committee on Citizenship and Immigration when it first examined the STCA. The Committee recommended that the government seek assurance that individuals returned to the United States under the agreement would not be subject to expedited removal proceedings.¹⁶³ The Committee also asked that women claiming refugee status on the basis that they are victims of domestic violence be listed as an exempt category.¹⁶⁴ A further recommendation asked that gender-based analysis be part of the ongoing monitoring of the STCA to ensure that victims of domestic violence are not adversely impacted.¹⁶⁵ This recommendation is noteworthy in light of the decision reached by Attorney General Jeff Sessions which ends protection for victims of domestic violence.

The Committee also recommended that as part of the monitoring of the STCA, the issues of "irregular migration" and human smuggling be examined closely.¹⁶⁶ Specifically, it recommended that should the STCA fail to decrease the number of claims being referred to the Immigration and Refugee Board, and should it increase the number of illegal entries to Canada, the government must suspend or terminate the agreement.¹⁶⁷ Studies indicating the increase in unauthorized border crossings emerged prior to the the election of the Trump administration.¹⁶⁸ However, since November 2016, the increase in unauthorized crossings has been significant.

¹⁶³ CIMM report, *Supra* note 134, recommendation 1.

¹⁶⁴ *Ibid*, recommendation 2.

¹⁶⁵ *Ibid*, recommendation 3.

¹⁶⁶ *Ibid*, recommendation 5.

¹⁶⁷ *Ibid*.

¹⁶⁸ Arbel, *supra* note 46.

Unfortunately, the Committee's recommendations were ignored and the STCA has not been suspended despite the increase in unauthorized crossings.

The number of asylum-seekers crossing over into Canada has increased drastically over the course of the last year, and all indications point to this trend continuing in the future. One year after signing the immigration executive orders, the US president ended special protections for Salvadorian and Haitian migrants.¹⁶⁹ This decision forces nearly 300,000 migrants to leave the country or face deportation.¹⁷⁰ As a result, more asylum-seekers are expected to cross over into Canada, in addition to the sixty to seventy crossings that occur each day.¹⁷¹ Therefore, an agreement whose legality has long been questioned, is now affecting the lives of asylum-seekers more than ever before. Since the STCA only applies to land ports of entry, and does not apply to claimants who present "in land" claims, critics such as Erfat Arbel argue that it creates incentives for irregular crossings. Supporters of the STCA consider this a "loophole" in the agreement, and advocate for extending the agreement to in-land claims. President Trump's executive orders have forced thousands of asylum-seekers to cross the border illegally into Canada in order to avoid *refoulement* by the United States. By continuing to uphold the agreement, Canada is guilty of committing indirect *refoulement*. This will be illustrated in the following chapter.

¹⁶⁹ Miller, *supra* note 6.

¹⁷⁰ Jeremy B White, "Trump's decision to end protections for Haiti and El Salvador immigrants is racially motivated, claims lawsuit", *Independent* (22 February 2018), online: <<https://www.independent.co.uk/news/world/americas/us-politics/trump-tps-lawsuit-haiti-el-salvador-racist-shithole-aids-huts-a8224161.html>>.

¹⁷¹ Miller, *supra* note 6.

1.6 Overview of the STCA

The primary objective of the STCA is to promote “the orderly handling of asylum applications by the responsible party and the principle of burden-sharing”.¹⁷² The agreement requires asylum-seekers to submit their refugee claims in their first country of arrival. Therefore, refugees arriving into Canada from the United States are unable to submit their refugee claim in Canada, as the United States is their first country of arrival. There are certain exceptions to this rule, which will be discussed below. The STCA gives Canadian and US authorities the right to return asylum-seekers to their first country of arrival. Additionally, under the STCA, the country of last presence is obligated to accept the individual from the receiving country. The “country of last presence” refers to the country in which the refugee claimant was physically present immediately prior to making a refugee status claim at a land border point of entry.¹⁷³ Under article 3 of the STCA, the refugee claim must be heard by one of the countries before the refugee can be removed to a country outside of Canada or the United States. A “safe country” refers to a state through which an asylum-seeker passes en route to their final destination. A “safe” country is considered to be a country that will provide refugee protection in accordance with the *Refugee Convention*.

The preamble of the agreement begins by reaffirming the two countries’ signatory status to the *1967 protocol* and Canada’s signatory status to the *Refugee Convention* and their commitment to upholding their obligations in accordance with these instruments.¹⁷⁴ One such obligation mentioned in the preamble is the principle of *non-refoulement*, and the parties’

¹⁷² STCA, *supra* note 1.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

commitment to upholding it.¹⁷⁵ The preamble further states that such agreements may “enhance the international protection of refugees by promoting the orderly handling of asylum applications by the responsible party and the principle of burden sharing”.¹⁷⁶ The preamble ends by reaffirming the commitment to the principle of *non-refoulement*, stating that the parties are aware that in sharing this responsibility, the possibility of indirect breaches of this principle must be avoided.

Macklin argues that preambles to Canadian legislation and other legal instruments exert “minimal influence on judicial interpretation of legislation”.¹⁷⁷ Although the preamble to the STCA reaffirms Canada’s commitment to its international legal obligations, does the agreement in fact violate these obligations, specifically the principle of *non-refoulement*? Macklin offers the analogy of tax avoidance, which is legal, and tax evasion, which is illegal, to illustrate Canada’s response to its international legal obligations.¹⁷⁸ Does the STCA represent Canada’s avoidance or evasion of its international obligations? She further questions whether such nuanced distinctions are appropriate where the subject of discussion is not money, but rather “liberty, security, and life itself”¹⁷⁹ Whether Canada is avoiding or evading its international obligations is secondary to the fact that by refouling asylum-seekers, Canada is complicit in subjecting them to persecution.

Article 3 of the agreement prohibits the parties from returning or removing a refugee status claimant to another country “until an adjudication to the person’s refugee status has been

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ Audrey Macklin, “Disappearing Refugees: Reflections on the Canada-U.S. Safe Third Country Agreement” (2005) 36:2 *Colombia Human Rights L Rev.*

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

made”.¹⁸⁰ According to Macklin, this provision is intended to avoid two related phenomena: “chain *refoulement*” and “refugee in orbit” scenario.¹⁸¹ “Chain *refoulement*” is when an asylum-seeker is moved from one country to another, either informally or pursuant to “readmission agreements”, until they are returned to their country of origin without accessing a refugee determination process.¹⁸² “Readmission agreements” facilitate the expulsion of nationals of third-countries, whereby contracting parties readmit to their territory without any formality persons with the nationality of that country who are residing in another country without authorization.¹⁸³ Macklin illustrates the “refugee in orbit” scenario by using the example of country A designating country B as a safe third country, thereby entitling country A to refuse to examine the claim of an asylum-seeker who arrived in country A through country B. However, in the absence of an agreement such as the STCA, country B is further entitled to send the asylum-seeker to country C, which may then send the person to country D, and so on. This scenario may ultimately lead to *refoulement* without a single country ever adjudicating the refugee claim.¹⁸⁴

One good example of the “refugee in orbit” scenario is the case of nineteen Guatemalan refugees who found themselves rejected from numerous countries. Fearing persecution on grounds of political opinion and race, the group arrived at London’s Heathrow Airport, after stopovers in the United States and Spain. The British authorities returned them to Spain, which in turn returned them to the United States. They were ultimately refouled back to Guatemala

¹⁸⁰ STCA, *supra* note 1, article 3.

¹⁸¹ Macklin, *supra* note 177.

¹⁸² *Ibid.*

¹⁸³ EUR-Lex, *Readmission Agreements*, online: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A133105>>.

¹⁸⁴ Macklin, *supra* note 177.

despite pleas from Amnesty International to the three governments.¹⁸⁵ Article 3 of the STCA aims to avoid such scenarios, by prohibiting the return of asylum-seekers to another country until their claim has been adjudicated.

Article 4 of the Agreement sets out the rules which prevent refugee claimants who are in the United States from lodging claims in Canada, and vice versa. Article 4(1) states that:

the Party of the country of last presence shall examine, in accordance with its refugee status determination system, the refugee status claim of any person who arrives at a land border port of entry on or after the effective date of this Agreement and makes a refugee status claim.

Exceptions to the rule are listed under Article 4(2), which states that the receiving country will be responsible for determining the refugee status of any person who has at least one family member in the territory of that country, and who has had a refugee status claim granted or has been granted lawful status; has at least one family member who is at least eighteen years of age and is not ineligible to pursue a refugee status claim in the receiving state's refugee status determination system; is an unaccompanied minor; arrived in the territory of the receiving party with a validly issued visa or admission document; or arrived in the territory of the receiving party not being required to obtain a visa by only the receiving party.¹⁸⁶ Article 6 of the STCA permits the parties to examine a refugee claim "where it determines that it is in its public interest to do so".

The STCA only applies to refugee claims made at a land port-of-entry, thereby excluding refugee claims made within Canada or the United States.¹⁸⁷ In order to submit a refugee claim in

¹⁸⁵ Stephen Legomsky, "Secondary Refugee Movements and the Return of Asylum-seekers to Third Countries: The Meaning of Effective Protection" (2003) 15:4 Int'l J Ref L.

¹⁸⁶ STCA, *supra* note 1.

¹⁸⁷ *Ibid*, article 1.

Canada, asylum-seekers must ensure that their flights do not connect through the United States. Canada and the United States are authorized to refuse protection to refugees who do not travel continuously to their chosen country of asylum.¹⁸⁸ This continuous journey policy requires an individual to declare their attention to seek asylum once they disembark on US soil, prior to boarding the flight to Canada. Failure to disclose this information authorizes Canadian authorities to deny the claim and return the asylum-seeker to the United States for processing.¹⁸⁹

Proponents of the STCA argue that the “loophole” present in the agreement presents a problem for Canada, and as such the agreement should be extended to claims made within the country.¹⁹⁰ According to Judith Kumin, Canada had been trying to persuade the United States to enter a “safe third country” agreement as early as the mid-1990s.¹⁹¹ Specifically, between 1995 and 1997, Canada had failed to persuade the United States to enter into an agreement that would have covered claims made within Canada or the United States.

The United States’ reluctance to enter into a safe third country agreement with Canada came to an end with the 9/11 attack. Resistance to a safe third country agreement with Canada was based upon concerns over its potential impact on the United States. The refugee flow is mainly from south to north, and as such the agreement could decrease the number of asylum-seekers in Canada and increase the number in the United States.¹⁹² In 2001, over fourteen thousand people applied for asylum in Canada at a US-Canada land border. Only about two

¹⁸⁸ Macklin, *supra* note 177.

¹⁸⁹ *Ibid.*

¹⁹⁰ Nicole Bogart, “Maxime Bernier wants to close loophole in Safe Third Country Agreement, send refugees back to US”, *Global News* (14 March 2017), online: <<https://globalnews.ca/news/3308852/maxime-bernier-safe-third-country-agreement-loophole/>>.

¹⁹¹ Judith Kumin, “UNHCR Feature: Proposed US- Canada accord sparks debate”, online: <<http://www.unhcr.org/news/latest/2002/9/3d74ec864/feature-proposed-us-canada-accord-sparks-debate.html>>.

¹⁹² *Ibid.*

hundred people applied for asylum on the US side of the border.¹⁹³ Over half of all of Canada's asylum claims were made by individuals who travelled through the United States.¹⁹⁴ The STCA was intended to curb the number of claims lodged in Canada.

The STCA does not apply to inland refugee claims due to the difficulty in determining whether the claimants arrived via the United States. It is in the interest of the refugee claimant to omit that information and not answer truthfully if their fate relies on it. Those who seek to extend the STCA to land claims suggest that asylum-seekers who do not make a claim in the first country of arrival are not legitimate refugees, but merely economic migrants trying to “jump the queue”.¹⁹⁵ Mark Krikorian analogizes the granting of asylum to “giving a drowning man a berth in your lifeboat, and a genuinely desperate man grabs at the first lifeboat that comes his way”.¹⁹⁶ Furthermore, some critics of Canada's approach to matters of national security have argued that “compared to other countries in the developed world, Canada is soft on illegal immigration”.¹⁹⁷

The vilification of refugees has steadily intensified over the last two decades, particularly following the events of 9/11. Former United Nations Secretary General Kofi Annan acknowledged the tendency to equate refugees “at best with economic migrants, and at worst with cheats, criminals, or even terrorists”.¹⁹⁸ As a result of this phenomenon, refugees are often subjected to inconsistent reception in so-called “safe” countries. As the Canadian Representative

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

¹⁹⁵ Immigration Watch Canada, *Research on Refugees*, online: <<http://immigrationwatchcanada.org/background/research/research-on-refugees/>>.

¹⁹⁶ *Ibid.*

¹⁹⁷ Fraser Institute, “Immigration Policy and the Terrorist Threat in Canada and the United States” (2008), online: <<https://www.fraserinstitute.org/sites/default/files/ImmigrationPolicyTerroristThreatCanadaUS.pdf>>.

¹⁹⁸ Ray Wilkinson, “Refugees and asylum-seekers worldwide feel the effects of the September attacks in the United States” UNHCR (2002), online : <www.unhcr.ch/cgi-bin/texis/vtx/publ/openssl.htm?tbl=PUBL&page=bome&id=3ccd5842d>.

for UNHCR, Mr. Jean-Nicolas Beuze has noted, the IRB is the only competent body in making a determination of whether people are entitled to the protection of Canada as refugees.¹⁹⁹

Therefore, it is dangerous to qualify asylum-seekers as “eventual bogus claims”.²⁰⁰

Critics of the STCA argue that the agreement only applies to land ports-of-entry, and that this presents a moral and legal challenge for Canada, since the United States has a history of *refoulement* of bona fide asylum-seekers.²⁰¹ Refugees are generally aware of which countries have a reputation for accepting more refugees, and they tend to apply for protection to those countries. Millbank states that 70% of asylum-seekers sought protection in just four countries in Europe in 1999.²⁰² Critics of the agreement argue that refugees have the right to apply for protection in the country of their choosing. Asylum-seekers are “not required by the UN *Refugee Convention* to apply for asylum in the first safe country to which they are able to travel”.²⁰³

Asylum-seekers may consider many factors when considering their country of resettlement. These include, but are not limited to, maximizing the likelihood of acceptance, presence of family or friends, language and cultural affinity, and better treatment pending the determination of the asylum claim. Seeking refugee status in a country more likely to grant it is akin to applying for a job from the employer more likely to hire.²⁰⁴ In fact, the agreement does recognize the legitimacy of making a claim in a country other than that of the first arrival. For this reason, a refugee claimant is able to cross into their destination country if they fulfill any of

¹⁹⁹ Canada, Parliament, House of Commons, Standing Committee on Citizenship and Immigration, *Minutes of Proceedings and Evidence*, 42nd Parl, 1st Sess, (24 July 2018).

²⁰⁰ *Ibid.*

²⁰¹ Macklin, *supra* note 70.

²⁰² *Ibid.*

²⁰³ Settlage, *supra* note 51.

²⁰⁴ Macklin, *supra* note 70.

the exceptions listed above, such as having a visa to enter the country, or having a family member in their destination country.

There are many reasons why a refugee may find themselves in a third country. The shortest distance between a persecutor and a safe haven is rarely a straight line.²⁰⁵ A refugee's presence in a "third country" might be legally sanctioned or irregular. The individual may or may not formally request protection in the third country, and if requested, it might or might not be granted.²⁰⁶ If granted, the protection may take several forms, ranging from a temporary protection to formal long-term residence.²⁰⁷ In any of these instances, refugees often decide to leave the third country and seek protection in a more favourable place.

There are many reasons that contribute to the imbalance of asylum claims between Canada and the United States. Asylum-seekers often prefer Canada because of its higher refugee recognition rates, more favourable reception conditions, more liberal access to government assistance, and fewer restrictions on employment.²⁰⁸ For French speaking refugees, Canada is the obvious country of resettlement due to its bilingual status. Asylum-seekers who wish to file their application in Canada often find themselves unable to travel continuously to their final destination. For instance, Central American asylum-seekers can rarely secure direct flight to Canada.²⁰⁹ Most of the flights available to them require transit through the United States. The STCA provides Canadian authorities with the power to return these refugees to the United States, despite their original intention of seeking asylum in Canada.

²⁰⁵ Legomsky, *supra* note 185.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

According to Nicole Borovan, deflection mechanisms such as the STCA serve to exclude individuals from lodging an asylum claim in Canada for reasons that are irrelevant to their need for protection.²¹⁰ Asylum-seekers who are returned to the United States are subjected to the way claimants tend to be treated in that country, which falls short of the standard of treatment afforded to asylum-seekers in Canada.²¹¹ The treatment provided by the United States is inconsistent with Canada's legal and domestic obligations due to its many deficiencies.

1.7 Conclusion

In this chapter, I have provided an extensive review of the STCA and its historical background. I have illustrated that Canada sought this agreement in an attempt to curb the number of asylum-seekers lodging claims in the country. The events of 9/11 ultimately resulted in the two countries entering the bilateral agreement in order to enhance border security. The STCA was created as part of the 30 point Smart Border Action Plan, and its focus relied on efficiently managing the flow of individuals seeking to access the Canada or US refugee/asylum system, while maintaining the free flow of goods into the Canadian and US markets.

The agreement was modelled after the Dublin II Regulation, under the guise of "burden sharing". I have explained that border sharing policies are flawed and often lead to inequalities in the system. This has been highlighted by citing European case law which has found the transfer of asylum-seekers to be in violation of the *European Convention on Human Rights*. Due to its many similarities, I have suggested that Canada should consider European Court of Human Rights jurisprudence in interpreting domestic rights protections.

²¹⁰ Borovan, *supra* note 126.

²¹¹ *Ibid.*

Moreover, in this chapter I have contested the safe country designation of the United States by citing various examples of the inherent deficiencies in its refugee protection system. These include the one-year bar which prevents asylum-seekers from receiving protection if they have not met the filing deadline; expedited removal which allows low-level immigration officers to quickly deport noncitizens who are undocumented or have committed fraud or misrepresentation; and detainment of asylum-seekers which has been practiced far more liberally since the inauguration of President Trump. By listing and explaining the flaws within the United States' refugee protection system, I argued that the United States is in violation of its international obligations and as such should lose its safe country designation.

The inconsistencies between Canada's and United States' refugee protection systems have been evident since the inception of the STCA. However, the Trump Presidency has further eroded refugee protection in the United States. As a result, the STCA, which has been questioned for its legal validity in the past, has now come to the forefront of discussion. In order to uphold its international obligations, Canada must suspend the STCA immediately.

CHAPTER 2: CANADA'S INTERNATIONAL AND DOMESTIC OBLIGATIONS RELATING TO REFUGEES

2.1 Introduction

In this chapter, I will be examining Canada's international and domestic legal obligations. In discussing Canada's international legal obligations, I will be focusing on the *Refugee Convention* and the *1967 Protocol* and the historical background surrounding these international instruments. The chapter will emphasize the fact that under the *Refugee Convention*, state parties are obligated to offer protection to refugees, most importantly by upholding section 33 of the *Convention*, known as the *non-refoulement* principle. Under section 33, state parties cannot return refugees to a country where they are at risk of persecution.

In relation to Canada's domestic legal obligations, I will examine the *Charter*. Under section 7 of the *Charter*, everyone is afforded the right to life, liberty, and security of the person. The Court concluded in *Singh* that these rights are afforded to illegal immigrants as well. This chapter examines the *John Doe* case in detail, where the Federal Court ruled that the STCA was unconstitutional as sending refugees back to the United States violated their section 7 rights under the *Charter*. Unfortunately, this decision was overturned by the Federal Court of Appeal. However, a new challenge to the STCA was launched in 2017.

Most importantly, this chapter will examine the erosion of refugee protection rights under the Trump administration. This is achieved by explaining what the "zero-tolerance" policy entails for refugees, and how the family separation policy is a violation of international obligations. The "zero tolerance" policy authorizes the criminal prosecution of anyone who crosses the United States border without authorization. This is a clear violation of section 31 of the *Refugee Convention*, which prohibits the imposition of penalties on account of illegal entry

or presence. This chapter will also explain the great risks posed as a result of the recent decision made by General Attorney Jeff Sessions to remove asylum protection for those fleeing gang or domestic violence. This erroneous decision will have dire consequences for many female asylum-seekers who are no longer eligible to seek refuge in the United States.

This chapter will conclude by urging the Canadian government to suspend the agreement immediately. While the agreement always put refugees at risk, its suspension is long overdue in light of the grave human and refugee rights violations in the United States. While the Prime Minister has criticized the United States' family separation policy, he has continued to defend the STCA, along with the Minister of Immigration, Citizenship and Refugees. Canada must suspend the agreement immediately.

2.2 The *Refugee Convention*

The 1951 Refugee Convention is a United Nations multilateral treaty that has been ratified by 145 state parties. It defines the term “refugee” and sets out the rights of refugees and the legal obligations of states.²¹² Canada ratified the *Refugee convention* on June 4, 1969, eighteen years after it was approved by the United Nations.²¹³

The *Refugee Convention* consolidates and moves beyond previous international instruments relating to refugees. It is applied without discrimination on the basis of race, religion or country of origin and contains safeguards against the expulsion of refugees. It also provides for refugee documentation, including a refugee travel document in passport form. Most state parties to the *Refugee Convention* issue a refugee travel document.

²¹² *Refugee convention*, *supra* note 12.

²¹³ Canadian Council for Refugees, “40th Anniversary of Canada signing the *Refugee convention*, 1969-2009”, online: <<http://ccrweb.ca/sites/ccrweb.ca/files/static-files/40thanniversary.htm>>.

The atrocities of the Second World War inspired the international community to establish various human rights instruments, including the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), as well as the *Genocide Convention*. The Second World War displaced over fifty million people in Europe, with fourteen million refugees in Germany alone.²¹⁴ The *Refugee Convention* was intended to respond to displacement in Europe by providing certainty to the millions of people affected by the events that had taken place.

The *Refugee Convention* does not apply to those refugees who are monitored under United Nations agencies other than the UNHCR, such as refugees from Palestine who receive protection or assistance from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), or those refugees who have a status equivalent to nationals in their country of resettlement.²¹⁵

While the term “refugee” as outlined in the *Refugee Convention* has been interpreted in various ways, the *Refugee Convention* is limited to persons who became refugees as a result of “events occurring before January 1, 1951”.²¹⁶ Domestic and international courts have adapted the term “refugee” to evolving understandings of human rights law. The High Court of Australia, for instance, has maintained that the *Refugee Convention’s* provisions must not “be determined in a vacuum removed from the context of the treaty or its object or purpose”.²¹⁷ However, the emergence of new refugee crises created a need to extend the application of the *Refugee*

²¹⁴ Jane McAdam, “The Enduring Relevance of the 1951 *Refugee convention*” (2017) 29:1 Int’l J Ref L.

²¹⁵ *Refugee convention*, *supra* note 12.

²¹⁶ *Ibid.*

²¹⁷ *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 253 (McHugh J).

Convention to such situations. As a result, a *Protocol Relating to the Status of Refugees* was prepared and submitted to the United Nations General Assembly in 1966. The *Protocol* entered into force on October 4, 1967,²¹⁸ and it removed both the temporal and geographical restrictions of the *Refugee Convention*. Therefore, upon accession to the *Protocol*, states agree to apply the provisions of the 1951 *Refugee convention* to all refugees covered by the definition, without restrictions of date or place.²¹⁹

The Office of the High Commissioner is tasked with promoting and overseeing the implementation of international instruments for refugee protection.²²⁰ Under the *Refugee Convention* and the *1967 Protocol*, contracting states are required to cooperate with the UNHCR in the exercise of its functions. Specifically, contracting states are to facilitate the UNHCR's duty of supervising the application of the provisions of these instruments.²²¹

Article 33, also known as the principle of *non-refoulement*, is the cornerstone of the *Convention*. Pursuant to this article,

[n]o Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.²²²

There is a limited exception under article 33(2), which states that the benefit of the principle of *non-refoulement* “may not, however, be claimed by a refugee whom there are

²¹⁸ *Refugee convention*, *supra* note 12.

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

²²¹ *Ibid.*

²²² *Ibid.*

reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country”.²²³ However, aside from this exception, the principle of *non-refoulement* is a fundamental principle of international law that has achieved the status of *jus cogens*, that is, a norm of international law from which no derogation is permitted.²²⁴

2.3 The United States’ Violation of the *Refugee Convention* Before Trump

The United States ratified the *1967 Protocol* in 1968.²²⁵ By 1980, it had codified the provisions of the *Convention* in the *Refugee Act* of 1980, which established the process of obtaining asylum in the United States. The *Refugee Act* of 1980 granted the U.S. Attorney General the authorization and discretion to grant asylum.²²⁶ Moreover, the *Refugee Act* of 1980 codified certain provisions of the *Refugee Convention*, including the definition of “refugee”.²²⁷ However, over time, judicial interpretation created a two-tier asylum protection system, asylum, and withholding, which in turn weakened the protection under the principle of *non-refoulement*.²²⁸

An asylum-seeker may either make a claim for asylum or withholding-of-removal in the United States.²²⁹ Asylum is a permanent form of protection that leads to the path of citizenship and allows for family unity. Withholding-of-removal is a temporary form of protection whereby

²²³ *Ibid.*

²²⁴ Allain, *supra* note 42.

²²⁵ UNHCR, *State Parties to the 1951 Convention relating to the Status of Refugees and the 1967 protocol*, online: <<http://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-Convention-its-1967-Protocol.html>>.

²²⁶ Settlage, *supra* note 51.

²²⁷ *Ibid.*

²²⁸ *Ibid.*

²²⁹ *Ibid.*

an asylum-seeker will not be returned to their country so long as they are likely to face persecution. In the event that the conditions improve in the country of origin, the individual may be removed.²³⁰ An individual being granted temporary protection under the withholding-of-removal procedure may also be sent to another non-risk country. Moreover, the withholding-of-removal does not allow for family unity, unless the family members are eligible for withholding-of-removal protection independently.²³¹

The US Supreme Court decided that different standards apply to asylum and withholding. In order for an individual to be granted asylum, they must show a well-founded fear or persecution. In *INS v. Cardoza-Fonseca*, the Supreme Court held that the measure that substantiates a well-founded fear or persecution must be 10 percent. In other words, unless an applicant has at least a one in ten chance of being persecuted, they do not have a well-founded fear of the persecution occurring.²³² However, the granting of asylum is discretionary. This means that an individual may be denied asylum even if they fit the “refugee” definition as defined in the *Refugee Convention*.²³³ Therefore, the refugee protection system in the United States does not meet its obligations as set out under article 33 of the *Convention*.²³⁴ The Court held in *INS v. Cardoza- Fonseca* that the granting of asylum does not correspond to article 33 of the *Refugee Convention*, but rather to article 34. Article 34 holds that contracting states “shall as far as possible facilitate the assimilation and naturalization of refugees ... and ...reduce as far as possible the charges and costs of such proceedings”.²³⁵

²³⁰ *Ibid.*

²³¹ *Ibid.*

²³² *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

²³³ *Settlage*, *supra* note 51.

²³⁴ *Ibid.*

²³⁵ *Refugee convention*, *supra* note 12.

The United States aims to meet its obligations under article 33 of the *Refugee Convention* through the withholding-of-removal as it is not discretionary.²³⁶ However, the standard to demonstrate fear of persecution is higher in withholding-of-removal cases.²³⁷ The Court held in *Cardona-Forseca*, as well as in *Stevic*, that the principle of *non-refoulement* does not apply to everyone who fits the refugee definition as defined in the *Convention*.²³⁸ In *Cardona-Forseca*, the Court stated that those individuals who only show a well-founded fear of persecution “are not entitled anything”.²³⁹ They are merely eligible for the discretionary relief of asylum.²⁴⁰

2.4 The United States’ Violation of the *Refugee Convention* After Trump

As illustrated above, the United States’ refugee protection system is inadequate and does not comply with the obligations set out in the *Refugee convention*. However, the erosion of refugee protection rights has worsened since the inauguration of President Trump. According to Refugees International’s evaluation of the Trump administration in six critical areas,²⁴¹ the Trump administration received an overall failing grade.²⁴² The Trump administration has publicly demonized asylum-seekers. The administration has adopted a policy of persecuting anyone who crosses the US border illegally.²⁴³ This has resulted in the criminal prosecution of

²³⁶ Settlege, *supra* note 51.

²³⁷ *Ibid.*

²³⁸ *Ibid.*

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*

²⁴¹ Refugees International is a global, independent advocacy organization that focuses on important refugee, displacement, humanitarian, and human rights issues. More information can be found at: <<https://www.refugeesinternational.org/currentwork/>>.

²⁴² Refugees International, “Report Card: The Trump Administration’s Performance on Refugee and Humanitarian Protection” (2018), online: <https://www.refugeesinternational.org/reports/2018/6/19/report-card-on-the-trump-administrations-performance-on-refugee-and-humanitarian-protection>.

²⁴³ *Ibid.*

asylum-seekers, which is a clear violation of section 31 of the *Refugee Convention*. Under section 31, state parties “shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened ... enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence”.²⁴⁴ On average, there are as many as 50,000 people behind bars in immigration detention centres across the United States.²⁴⁵ These individuals often include families fleeing persecution and violence and seeking refuge in the United States.²⁴⁶ Last year, arrests of non-criminals by ICE more than doubled.²⁴⁷

However, the detention violates not only international law, specifically the *Refugee Convention*, but also the 2009 ICE policy, which states that asylum-seekers who are not at risk of flight and do not pose a danger to society should be released on parole while their asylum process unfolds.²⁴⁸ The instructions for Detention and Removal Operations (hereinafter DRO) specifically state that:

[w]hen an arriving alien found to have credible fear establishes to the satisfaction of DRO his or her identity and that he or she presents no flight risk nor danger to the community,

²⁴⁴ *Refugee convention*, *supra* note 12.

²⁴⁵ Jeremy Raff, “The American Detention Machine”, *The Atlantic* (2018), online: <<https://www.theatlantic.com/video/index/553913/ice-immigration-detention/>>.

²⁴⁶ *Ibid.*

²⁴⁷ *Ibid.*

²⁴⁸ Ana Campoy, “Nielsen Says it’s the law to detain asylum seekers. It’s not, according to these rules”, *Quartz* (19 June 2018), online: <<https://qz.com/1309188/trumps-family-separation-policy-nielsens-detainment-claim-is-challenged-by-two-rules/>>.

DRO should, absent additional factors, parole the alien on the basis that his or her continued detention is not in the public interest.²⁴⁹

ICE has been denying parole to nearly all asylum-seekers found to have credible fear.²⁵⁰ Credible fear is a concept according to which an individual who demonstrates that he or she has a credible fear of returning home cannot be subject to deportation from the United States until their asylum claim has been determined. In February 2017, US Citizenship and Immigration Services issued a new guidance to immigration officials responsible for making “credible fear” determinations. Under the new guidance, the likelihood of errors that will result in the *refoulement* of *bona fide* refugees increased substantially.²⁵¹ If there is reasonable doubt about the credibility of an asylum-seeker, immigration officials are now authorized to make their own final judgement before an asylum-seeker has had access to legal counsel or a judge.²⁵² In a tweet shared on June 24, 2018, President Trump stated that when individuals enter the United States, the authorities “must immediately, with no Judges or Court Cases, bring them back from where they came”.²⁵³ This tweet is a clear indication that the president has no intention of improving the refugee protection system, but on the contrary has every intention of further eroding refugee protection rights and depriving asylum-seekers of their basic rights.

²⁴⁹ U.S. Immigration and Customs Enforcement, *Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture* (U.S. Immigration and Customs Enforcement, 2009), online: <https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf>.

²⁵⁰ Campoy, *supra* note 244.

²⁵¹ Refugees International, *supra* note 242.

²⁵² Tal Kopan, “Trump admin quietly made asylum more difficult in the US”, *CNN* (8 March 2017), online: <<https://www.cnn.com/2017/03/08/politics/trump-immigration-crackdown-asylum/index.html>>.

²⁵³ Donald Trump, “We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court cases, bring them back from where they came from. Our system is a mockery to good immigration policy and Law and Order. Most children come without parents...” (24 June 2018), online:

<<https://twitter.com/realdonaldtrump/status/1010900865602019329?lang=en>>.

Due to inadequate processing capacities at the US-Mexico border, asylum-seekers are unable to promptly request asylum at ports of entry.²⁵⁴ Asylum-seekers are forced to wait for extended periods of time before they can submit their application.²⁵⁵ Many spend weeks sleeping near crossings on the border, on Mexican soil.²⁵⁶ Human Rights First released a report which states that border agents are illegally turning away people seeking asylum at the border.²⁵⁷ The group stated that it has documented 125 cases of individuals denied access to the United States asylum process.²⁵⁸ It argues that many more cases go unreported.²⁵⁹ These violations of basic refugee protection rights have dire consequences. Human Rights First reports that the family of a youth who was murdered by Mara Salvatrucha, an international criminal gang, was denied asylum by a U.S immigration officer.²⁶⁰ The family sought asylum twice. The first time, a border officer warned them that if they refuse to leave, he would have to use force to remove them. The second time, they were indeed removed forcefully and returned to Mexico.²⁶¹

Such denials do not only put asylum-seekers at risk. They also contribute to unauthorized border crossings, as many asylum-seekers have to resort to crossing the border illegally, rather than risk being turned away by border agents.²⁶² Asylum-seekers have also been subject to difficult circumstances at the border as they wait for days before they are able to claim asylum

²⁵⁴ Refugees international, *supra* note 242.

²⁵⁵ Simon Romero & Miriam Jordan, “On the Border, a Discouraging New Message for Asylum Seekers: Wait”, *New York Times* (12 June 2018), online: <<https://www.nytimes.com/2018/06/12/us/asylum-seekers-mexico-border.html>>.

²⁵⁶ *Ibid.*

²⁵⁷ Suzanne Gamboa, “Border Agents Turning Away, Blocking People Seeking Asylum: Report”, *NBC News* (3 May 2017), online: <<https://www.nbcnews.com/news/latino/border-agents-turning-away-blocking-people-seeking-asylum-report-n754416>>.

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² Lind, *supra* note 160.

protection.²⁶³ In light of these circumstances, asylum-seekers crossing the border illegally must be treated in accordance with article 31 of the *Refugee Convention* and not be prosecuted criminally.²⁶⁴

A recent decision by Attorney General Jeff Sessions has further exacerbated the situation for asylum-seekers in the United States. In his decision, the Attorney General overturned asylum protections for domestic violence and gang violence.²⁶⁵ The precedent set during the Obama administration allowed more women to claim credible fears of domestic abuse. The Attorney General reversed the landmark 2014 decision in which the applicant had applied for asylum on grounds of domestic violence.²⁶⁶ The Department of Homeland Security, under the administration of President Obama, did not dispute the fact that the applicant belong to a “particular social group”. The Attorney General’s decision was based on the reasoning that the “prototypical refugee flees her home country because the government has persecuted her”.²⁶⁷ Therefore, credible fear of domestic abuse or private matters is no longer recognized as legitimate due to the ruling of the Attorney General. In fact, the bar has been set so high for victims of violence, that the government of the home country must not only be unable or unwilling to help, but “the applicant must show that the government condoned the private actions or demonstrated an inability to protect the victims”.²⁶⁸

²⁶³ Refugees international, *supra* note 242.

²⁶⁴ *Ibid.*

²⁶⁵ Tal Kopan, “Trump Admin drops asylum protections for domestic violence victims”, *CNN* (11 June 2018), online: <<https://www.cnn.com/2018/06/11/politics/jeff-sessions-asylum-decision/index.html>>.

²⁶⁶ Matter of A-B-, 27 I&N Dec. 316 (A.G. 2018).

²⁶⁷ Katie Benner & Caitlin Dickerson, “Sessions Says Domestic and Gang Violence are Not Grounds for Asylum”, *New York Times* (11 June 2018), online: <<https://www.nytimes.com/2018/06/11/us/politics/sessions-domestic-violence-asylum.html>>.

²⁶⁸ Kopan, *supra* note 261.

This decision was highly criticized by various human rights and refugee groups. It is of particularly grave concern to women fleeing domestic violence. Gender based violence is a major concern in Central America and parts of Mexico, according to a 2015 United Nations report.²⁶⁹ The report relates domestic violence to the refugee crisis in Europe.²⁷⁰ The decision reached in “*Matter of A.B.*” provided women who are victims of domestic violence in Central America with protection for being members of a “particular social group”, primarily as a result of societal norms that make it difficult to escape abusive relationships.²⁷¹ However, as a result of the Attorney General’s decision, domestic violence no longer amounts to credible fear under the United States law.

The Attorney General has the authority to overturn decisions, as immigration courts are under the authority of the Department of Justice.²⁷² This has been considered by some immigration judges as an infringement of their ability to decide cases.²⁷³ The veto power of the Attorney General in the decision making of immigration judges is another cause for concern.

To make matters worse, through the criminal prosecution of asylum-seekers, the Trump administration has adopted a policy of separating children from their parents, as a deterrent measure. This policy is likely to cause traumatic psychological consequences for the children and their families.²⁷⁴ According to the UN Human Rights Council, this separation policy amounts to

²⁶⁹ UNHCR, *Women on the Run* (2015), online: <<http://www.unhcr.org/enus/publications/operations/5630f24c6/women-run.html>>.

²⁷⁰ *Ibid.*

²⁷¹ Kopan, *supra* note 265.

²⁷² Benner & Dickerson, *supra* note 267.

²⁷³ *Ibid.*

²⁷⁴ Jamie Ducharme, “‘What This Amounts to Is Child Abuse’ Psychologists Warn Against Separating Kids from Their Parents”, *Time* (19 June 2018), online: <<http://time.com/5316030/kids-separation-parents-psychological-harm/>>.

torture.²⁷⁵ Amnesty International has also echoed the United Nations, calling the separation policy “nothing short of torture”.²⁷⁶ While the Trump administration has argued that the separation policy was in place during the Bush and Obama presidencies,²⁷⁷ this is in fact misleading. Some separation did occur under the previous administrations; however, there was no blanket policy to prosecute parents prior to Trump.²⁷⁸ It has been estimated that over two thousand children were separated from their parents between April and May 2018, after the Trump administration adopted the “zero-tolerance” policy.²⁷⁹ The administration argues that this policy is a deterrent to illegal migration. However, the separation of children from their families was rejected by the US Supreme Court in 1982 case of *Plyler v. Doe*.²⁸⁰ In this decision, the Court held that a state government cannot withhold primary education to an undocumented person because it punishes the child for the actions of the parents.²⁸¹ The Trump administration is blatantly punishing the children for the actions of their parents.

²⁷⁵ Clark Mindock, “U.N Says Trump Separation of Migrant Children with Parents ‘May Amount to Torture’, in Damning Condemnation”, *Independent* (22 June 2018), online: <<https://www.independent.co.uk/news/world/americas/us-politics/un-trump-children-family-torture-separation-border-mexico-border-ice-detention-a8411676.html>>.

²⁷⁶ Amnesty International, “USA: Policy of separating children is nothing short of torture” (2018), online: <<https://www.amnesty.org/en/latest/news/2018/06/usa-family-separation-torture/>>.

²⁷⁷ Lori Robertson, “Fact Check: Did Obama administration separate families?”, *USA Today* (23 June 2018), online: <<https://www.usatoday.com/story/news/politics/2018/06/23/trump-obama-administration-separate-families-immigration/728060002/>>.

²⁷⁸ *Ibid.*

²⁷⁹ Cameron MacLean, Rignam Wangkhang, and Kathleen Harris, “Canada should suspend refugee agreement with U.S. in wake of crackdown: Winnipeg immigration lawyer”, *CBC News* (20 June 2018), online: <<https://www.cbc.ca/news/canada/manitoba/suspend-safe-third-country-agreement-1.4715374>>.

²⁸⁰ Laura S Yates, “Plyer v. Doe and the Rights of Undocumented Immigrants to Higher Education: Should Undocumented Students Be Eligible for In-State College Tuition Rates?” (2004) 82:2 *Washington Univ L Rev.*

²⁸¹ *Ibid.*

There is no official policy dictating that every family entering the United States without authorization must be separated.²⁸² However, the United States has officially adopted a “zero tolerance” policy towards anyone caught crossing the border illegally. This leads to family separation, as anyone crossing the border is referred to the Department of Justice, and anyone referred is open to prosecution for the misdemeanour of illegal entry.²⁸³ According to the “zero tolerance” policy, everyone is prosecuted, including asylum-seekers fleeing persecution as well as those crossing the border with their children. When parents are transferred to criminal custody, their children are treated as “unaccompanied minors”, as if they had crossed the border on their own.²⁸⁴ They are then separated from their parents, sent into the care of a different department, and put in the foster care system.²⁸⁵ The separation of children from their parents is a violation of international human rights law, which protects the integrity of the family. Specifically, article 12 of the *Universal Declaration of Human Rights* states: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks”.²⁸⁶ It also violates international law relating to children, which requires that the best interest of the children be considered when applying government

²⁸² Dara Lind, “The Trump administration’s separation of families at the border, explained”, *Vox* (15 June 2018), online: <<https://www.vox.com/2018/6/11/17443198/children-immigrant-families-separated-parents>>.

²⁸³ *Ibid.*

²⁸⁴ *Ibid.*

²⁸⁵ *Ibid.*

²⁸⁶ *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71.

policy and that children only be detained as a last resort.²⁸⁷ Article 9 of the *Convention on the Rights of the Child* states:

State Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.²⁸⁸

Since the implementation of the *Refugee Act* of 1980, the US President, in consultation with Congress, determines each year the number of refugees that the United States will resettle from different countries around the world. The Trump administration has continuously portrayed refugees, especially those fleeing Muslim countries, as a threat to national security.²⁸⁹ These claims are unfounded, as nearly one million refugees have been resettled in the United States since 9/11. Of those, not a single refugee has been responsible for an act of violence resulting in the death of an American.²⁹⁰ Nevertheless, the Trump administration set the cap of 45,000 refugees for the fiscal year of 2017.²⁹¹ Despite the global refugee crisis, with an estimated 65

²⁸⁷ Sean Rehaag, "U.S.-Canada agreement on refugees is now unconstitutional", *The Conversation* (20 June 2018), online: <<https://theconversation.com/u-s-canada-agreement-on-refugees-is-now-unconstitutional-98227>>.

²⁸⁸ *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3 (entered into force 2 September 1990, accession by Canada 13 December 1991).

²⁸⁹ Refugees International, *supra* note 242.

²⁹⁰ Alex Nowraseth, "Terrorism and Immigration: A Risk Analysis" (2016) *Cato Institute*, online: <<https://www.cato.org/publications/policy-analysis/terrorism-immigration-risk-analysis>>.

²⁹¹ Alan Gomez, "Refugee Admission to US plummet in 2017", *USA Today* (3 January 2018), online: <<https://www.usatoday.com/story/news/world/2018/01/03/refugee-admissions-u-s-plummet-2017/999903001/>>.

million refugees in the world²⁹², the United States has only admitted eleven Syrian refugees in 2018.²⁹³

The United States is in clear violation of the *Refugee Convention*, specifically the principle of *non-refoulement*. By upholding the STCA, Canada is complicit in the *refoulement* of refugees, albeit indirectly. By accession to the *Convention* and the *Protocol*, Canada has an obligation to uphold refugee protection rights. However, Canada's obligations do not end there. They extend to domestic obligations under the *Charter*.

2.5 The Canadian *Charter of Rights and Freedoms*

The Canadian Charter of Rights and Freedoms protects rights and freedoms of anyone in Canada. Prior to the *Charter*, rights and freedoms were protected by a variety of laws, including the 1960 Bill of Rights.²⁹⁴ The Constitution is the supreme law of the land, and as such has the power to trump any other law. Therefore, being part of the Constitution, the *Charter* enjoys the same supremacy. The *Charter* protects individuals against the state, and minorities against parliamentary majorities.

The first legal challenge to the STCA came on December 29, 2005, when a Colombian asylum-seeker launched a legal challenge to the agreement.²⁹⁵ The applicant, John Doe, was refused his refugee claim in the United States for having failed to comply with the one-year bar. Since he had already made a refugee claim in the United States, he was barred from seeking

²⁹² Diana Diaz, "On World Refugee Day, UN urges support, solidarity for record number of displaced people", *UN News* (20 June 2017), online: <<https://news.un.org/en/story/2017/06/559872-world-refugee-day-un-urges-support-solidarity-record-number-displaced-people>>.

²⁹³ Chris Geraldi, "Here's How Many Refugees the US Has Accepted in 2018", *Global Citizen* (26 April 2018), online: <<https://www.globalcitizen.org/en/content/us-accepted-refugees-2018/>>.

²⁹⁴ *Canadian Bill of Rights*, 1st Sess, 24th Parl, 10 August 1960, S.C. 1960, c.

²⁹⁵ John Doe, *supra* note 44.

asylum in Canada, which left him at risk of *refoulement* to Colombia where he claimed he would face persecution.²⁹⁶ John Doe did not appear at the Canadian border to make his claim as he was made aware that he would be turned away.²⁹⁷ Due to the serious human rights implications of the STCA, Amnesty International, CCR, the Canadian Council of Churches, and John Doe launched a legal challenge to the STCA and the designation of the United States as a safe country.²⁹⁸

The applicant argued that by upholding the STCA, Canada was violating his section 7 rights under the *Charter*, which guaranteed him the right to life, liberty, and security of the person. By rendering him ineligible for asylum protection, John Doe would be subject to *refoulement* back to his native country where he would face persecution. This is not only a violation of the principle of *non-refoulement* under the *Refugee Convention*, but a clear violation of section 7 guarantees of the right of life, liberty, and security of the person.²⁹⁹ The Federal Court of Canada upheld the challenge, finding that in denying access to the refugee determination system and returning the claimant to the United States where laws are inconsistent with Canadian laws, refugee claimants are exposed to serious risks of *refoulement* to torture and persecution.³⁰⁰ The judge found that compliance with Article 33 of the *Refugee convention* and Article 3 of the *Convention Against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment* is a condition precedent to the Governor-in-Council exercise of its designation of the United States as a safe third country.³⁰¹ Under section 102 of the IRPA, only countries that comply with article 33 of the *Refugee Convention* and article 3 of the *Convention*

²⁹⁶ *Ibid.*

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.*

²⁹⁹ *Ibid.*

³⁰⁰ *Ibid.*

³⁰¹ *Ibid.*

Against Torture may be designated “safe”.³⁰² In addition, for a country to maintain its “safe country” designation by Canada, the Governor-in-Council is required to review its human rights records, in order to ensure “that the conditions that led to the designation as a safe third country continue to be met”.³⁰³ The court in *John Doe* found that the federal cabinet failed to comply with its obligation to ensure continuous review of the United States as a safe third country.³⁰⁴

2.6 Section 7 – Right to Life, Liberty, and Security of the Person

Section 7 of the *Charter* affords everyone the right to “life, liberty, and security of the person”.³⁰⁵ By upholding the STCA, Canada is in violation of this fundamental *Charter* right. Sean Rehaag argues that the STCA is unconstitutional, stating that it would not be possible for Canadian Department of Justice lawyers to even argue that the agreement is constitutional “without breaching professional obligations as lawyers and civil servants”.³⁰⁶ He warns that any lawyer asked to do so should look at the experience of others who have defended the indefensible elsewhere, such as lawyers who argued that torture was a lawful response to national security threats, or lawyers who defended the South African apartheid.³⁰⁷

In *John Doe*, the Court found that by subjecting asylum-seekers to indirect *refoulement*, Canada was in breach of section 7 of the *Charter*. In *Singh v. Canada*, Justice Wilson stated that section 7 can be asserted by “every human being who is physically present in Canada and by virtue

³⁰² *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

³⁰³ STCA, *supra* note 1.

³⁰⁴ *John Doe*, *supra* note 44.

³⁰⁵ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11.

³⁰⁶ Rehaag, *supra* note 287.

³⁰⁷ *Ibid.*

of such presence amenable to Canadian law”.³⁰⁸ As such, the word “everyone” in section 7 of the *Charter* applies to irregular immigrants as well. In *Burns*, the Supreme Court of Canada held that extradition to the United States without assurance that the government would not seek the death penalty was contrary to the principles of fundamental justice.³⁰⁹ The Court argued that even though the Canadian government did not have the death penalty, extraditing an individual to a country where they may face the death penalty is enough to engage the *Charter*.³¹⁰ The applicants in *John Doe* argued that the situation of an individual charged with an offence punishable by death is analogous to that of an asylum-seeker who upon approaching the Canadian border is returned to the United States, where they are at risk of *refoulement*.³¹¹ Therefore, the *Charter* applies to a refugee claimant who is prevented from lodging an asylum claim in Canada due to the STCA.

A *Convention* refugee is by definition a person who has a well-founded fear of violence and persecution in their home country. To deprive them of protection due to the STCA is, at minimum, an impairment of the right to life, liberty, and security of the person. The Court in *John Doe* held that the “security of the person” must encompass “freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself”.³¹²

In *Suresh*, the Supreme Court held that:

the guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than our government, if there is a sufficient causal connection

between our government’s participation and the deprivation ultimately effected. We reaffirm

³⁰⁸ *John Doe*, *supra* note 44.

³⁰⁹ *Ibid.*

³¹⁰ *Ibid.*

³¹¹ *Ibid.*

³¹² *Ibid.*

that principle here. At least where Canada's participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada's participation, the government does not avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else's hand.³¹³

Section 7 of the *Charter* applies to torture inflicted abroad if "there is sufficient casual connection with Canadian government acts".³¹⁴ As such, it is evident that the life, liberty and security of asylum-seekers is put at risk when Canada returns them to the United States. Moreover, the Federal Court found that the application of the agreement had discriminatory effects, and that the federal government failed to comply with its legal obligations of monitoring and reviewing the United States designation as a safe third country.³¹⁵

As a result, the Federal Court issued an order revoking the United States' designation as a safe third country as of February 2008. The government appealed the Federal Court's decision and was granted a stay of the order by the Federal Court of Appeal until the appeal was decided.³¹⁶ The Federal Court of Appeal sided with the government, finding that the Federal Court had erred in deciding a case on hypothetical scenarios.³¹⁷ The Court held that an individual who has been adversely affected by the STCA would have to challenge it.³¹⁸ The applicants filed an application to appeal the Federal Court of Appeal's judgement to the Supreme Court, but the application was denied.³¹⁹

³¹³ *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3.

³¹⁴ *Ibid.*

³¹⁵ *John Doe*, *supra* note 44.

³¹⁶ *Ibid.*

³¹⁷ *Ibid.*

³¹⁸ *Ibid.*

³¹⁹ *Ibid.*

On July 5, 2017, Amnesty International, CCR, and the Canadian Council of Churches launched a new challenge to the STCA.³²⁰ The individual litigant at the core of the challenge is a Salvadorian woman who fled her country with her daughters after a decade of being targeted by a gang. The applicant believes that she would not be protected in the United States. Her fear is now more legitimate than ever, in light of the quashing of asylum protections for domestic violence and gang violence by US Attorney General Jeff Sessions.³²¹ The Attorney General's decision extends asylum protection only to those individuals who have been persecuted by their government. As such, credible fear of domestic abuse or private matters is no longer recognized as legitimate. The litigant challenging the agreement would most definitely not be granted asylum and would be sent back to El Salvador, where she would be at great risk of violence and persecution. The failure to provide protection for the litigant in light of the grave human rights violations in the United States would make the Canadian court system complicit in the abuse, bringing it into disrepute.

Section 1 of the *Charter*, also known as the reasonable limits clause, gives the government the authority to limit an individual's *Charter* rights. In other words, although *Charter* rights are guaranteed, they are not absolute. Section 1 states that the *Charter* "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".³²² When the government does enforce section 1 of the *Charter* and limits an individual's rights, the Crown must show that the limitation was prescribed by the law, and that it is justified in a free and democratic society.³²³

³²⁰ *Ibid.*

³²¹ Kopan, *supra* note 265.

³²² *Charter*, *supra* note 305.

³²³ *Ibid.*

According to the *Oakes* test,³²⁴ the objective served by the measures limiting a *Charter* right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The *Oakes* test involves a proportionality test comprised of three important elements:

1. The measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective.
2. The means should impair the right in question as little as possible.
3. Lastly, the effects of the limiting measure must be proportional to the objective - the more severe the deleterious effects of a measure, the more important the objective must be.³²⁵

However, despite the reasonable limits clause, the violation of section 7 rights by the STCA would not be justifiable under section 1 of the *Charter*. While the first element of the *Oakes* test may be fulfilled, the other two would not be. The STCA impairs section 7 of the *Charter* in a serious way, and the objective of the agreement cannot trump the grave violations imposed by the STCA.

Unfortunately, the protection afforded to non-citizens under the Charter is often less than adequate in maximizing protection for non-citizens. In Canada, non-citizens are required to make their rights claims primarily in Charter terms, and only secondarily in international human rights terms.³²⁶ The Supreme Court of Canada has relied exclusively on the Charter, even in cases where international human rights may have provided a greater protection for non-citizens.³²⁷

³²⁴ *R. v. Oakes* [1986] 1 SCR 103.

³²⁵ *Ibid.*

³²⁶ Catharine Dauvergne, "How the *Charter* Has Failed Non-citizens in Canada: Reviewing Thirty Years of Supreme Court of Canada Jurisprudence" (2013) 58:3 McGill.

³²⁷ *Ibid.*

Catherine Dauvergne has labelled this phenomenon “Charter hubris”, whereby jurisprudence has taken the position that the Charter delivers all human rights protections.³²⁸ Dauvergne argues that the requirement that international rights claims must be heard through the Charter puts non-citizens in Canada in a worse position than those in England, Australia, and New Zealand.³²⁹ In cases involving refugees, the *Refugee Convention* has rarely been considered since the *Singh* ruling. Dauvergne argues that the court departed from directly turning to international law and international treaty-interpretation since the *Nemeth* case.³³⁰ Despite this unfavorable engagement with non-citizen issues, the Charter does apply to everyone physically present in Canada.

Canada cannot, in good conscience, return refugees to the United States where they face a great risk of being refouled to countries where they face persecution. The Canadian government is facing mounting pressure to suspend the STCA. Erfat Arbel argues that Canada should never have concluded the agreement, claiming that the evidence has been clear since the creation of the STCA that “the United States is not a safe country for refugees”.³³¹ The United States’ standard for refugee protection falls short of what the agreement requires for designation of a country as safe.³³² Arbel’s sentiments are echoed by Nadia Abu-Zahra, who argues that the assumption that the United States is a safe country is incorrect. It was incorrect in 2002, and it is clearly incorrect now “with babies being taken away from their mothers and children being held in cages”.³³³ The agreement forces asylum-seekers to seek irregular modes of entry, thereby putting their lives and safety at risk. Suspending the agreement is not only beneficial for asylum-seeker, but also for

³²⁸ *Ibid.*

³²⁹ *Ibid.*

³³⁰ *Ibid.*

³³¹ Teresa Wright, “Canada Faces Mounting Pressure to end Safe Third Country Agreement with U.S.”, *Ipolitics* (22 June 2018), online: <<https://ipolitics.ca/2018/06/22/canada-faces-mounting-pressure-to-end-safe-third-country-agreement-with-u-s/>>.

³³² *Ibid.*

³³³ *Ibid.*

Canada. By allowing asylum-seekers to cross at official ports of entry, Canada can better manage the flow of asylum-seekers. The Canadian government is also being criticized for being hypocritical in its approach to the rights of female asylum-seekers. While the Trudeau government has gone to great lengths to position itself as a feminist government and a protector of women's rights, the refusal to suspend the agreement in light of the ruling by Attorney General Jeff Sessions is incompatible with the government's feminist agenda.³³⁴

The criticism of the STCA is not new; it has been voiced since before the agreement was concluded. On World Refugee Day, Canadian citizens piled toys outside the Immigration Minister's constituency office in protest of the STCA. Even the former Conservative immigration minister Chris Alexander has stated that the time has finally come to suspend the agreement.³³⁵ Prime Minister Justin Trudeau has also joined the chorus of international leaders speaking out against the actions of the Trump administration.³³⁶ However, condemning the administration is hardly enough when the Prime Minister has the power to suspend the agreement and alleviate asylum-seekers of the hardships to which they are being subjected.

Canada's Immigration Minister Ahmed Hussen continues to stand behind the agreement despite calls from opposition Members of Parliament and experts to suspend it.³³⁷ He argues that the agreement is still "a good policy for [Canada]".³³⁸ However, due to developments in the United States, the STCA is no longer defensible. Prime Minister Pierre Trudeau gave Canada

³³⁴ *Ibid.*

³³⁵ Amanda Connolly, "'What's going on in the United States is wrong:' Trudeau adds voice to chorus condemning Trump", *Global News* (20 June 2018), online: <<https://globalnews.ca/news/4285443/justin-trudeau-donald-trump-child-detention-cages/>>.

³³⁶ *Ibid.*

³³⁷ Anna Desmarais, "Minister Defends Refugee Deal with U.S. as calls grow for it to be cancelled", *Ipolitics* (18 June 2018), online: <<https://ipolitics.ca/2018/06/19/minister-defends-refugee-deal-with-u-s-as-calls-grow-for-it-to-be-cancelled/>>.

³³⁸ *Ibid.*

the *Charter*. It is up to Prime Minister Justin Trudeau to determine whether his government will protect those rights guaranteed by it. The government's refusal to take proactive measures and end this unconstitutional agreement will inevitably lead the Courts to render the agreement unconstitutional.

2.7 Conclusion

In this chapter, I provided a review of the *Refugee Convention* and the *1967 Protocol* and the historical background surrounding these international instruments. I explained that the creation of the *Refugee Convention* was inspired by the atrocities of the Second World War, and that Canada ratified the *Convention* eighteen years after its inception, in 1968. Under the *Convention*, state parties are obligated to offer protection to refugees, most importantly by upholding section 33 of the *Convention*, known as the *non-refoulement* principle. Under section 33, state parties cannot return refugees to a country where they are at risk of persecution.

Under the STCA, Canada may designate a country as a “safe third country” on the condition that the country protects refugee rights and upholds the *Refugee Convention*. I have shown that the US refugee protection system has been deficient since the creation of the agreement. The United States does not afford the same level of protection to asylum-seekers as Canada. The agreement is ultra vires the *Refugee Convention* as well as the Canadian Constitution.

Moreover, I examined the erosion of refugee protection rights under the Trump administration. I explained what the “zero-tolerance” policy entails for refugees, and how the family separation policy is a violation of international obligations. Through the adoption of this policy, anyone who crosses the United States border illegally is prosecuted criminally, which is a

clear violation of section 31 of the *Refugee Convention*. I also explained that the recent ruling by General Attorney Jeff Sessions further puts refugees at risk. As a result of his decision, the United States no longer offers asylum to those fleeing gang or domestic violence.

In this chapter I also discussed the domestic legal implications of the STCA. Canada is not only violating its international obligations, but its domestic obligations. Under section 7 of the *Charter*, everyone is afforded the right to life, liberty, and security of the person. The Court concluded in *Singh* that these rights are afforded to illegal immigrants as well. I have discussed the John Doe case in detail, where the Federal Court ruled that the STCA was unconstitutional as sending refugees back to the United States violated their section 7 rights under the *Charter*. Unfortunately, this decision was overturned by the Federal Court of Appeal. However, a new challenge to the STCA has been launched in 2017.

I concluded this chapter by urging the Canadian government to suspend the agreement immediately. While the agreement has always put refugees at risk, its suspension is long overdue in light of the grave human and refugee rights violations in the United States. While the Prime Minister has criticized the United States' family separation policy, the Minister of Immigration continues to defend the agreement. Canada must do the right thing and suspend the agreement immediately. If the government refuses to do so, then the Court will inevitably find the STCA unconstitutional.

CHAPTER 3: THE PRINCIPLE OF *NON-REFOULEMENT* AS *JUS COGENS*

3.1 Introduction

This chapter will focus on establishing the *jus cogens* status of the principle of *non-refoulement*. This will be achieved by examining the conditions under which *jus cogens* norms arise from. *Jus cogens* rules are rules that are peremptory in nature, from which no derogation is permitted. Establishing the *jus cogens* status of the principle of *non-refoulement* is imperative in ensuring that the rights of asylum-seekers are upheld internationally. This is due to the fact that *jus cogens* norms allow no derogation. As such, by establishing the *jus cogens* status of the principle of *non-refoulement*, states would be under an obligation to uphold the principle of *non-refoulement*.

The concept of *jus cogens*, though common in various domestic legal traditions, was, as a concept of international law, merely discussed among academic legal circles until the 1969 *Vienna Convention on the Law of Treaties*. This chapter will discuss the challenges of identifying a *jus cogens* norm. However, I will argue that such an ambiguity is essential in giving *jus cogens* norms flexibility in its application. This chapter will focus on the prohibition against torture as an established *jus cogens* norm, and demonstrate that the principle of *non-refoulement* and the prohibition against torture are very closely related.

Finally, this chapter will also discuss border-sharing policies, such as the Dublin II Regulation and the STCA, and show that states are bound by *jus cogens* norms, which permit no derogation under any circumstances.

3.2 The Emergence of *Jus Cogens* as an International Legal Concept

International law is comprised of three important documents: the *Charter of the United Nations*, the *Statute of the International Court of Justice*, and the *Universal Declaration of Human Rights*.³³⁹ Article 38 of the *Statute of the International Court of Justice* serves as a key reference-point for debates about the sources of international law. It provides a list of those sources: international conventions, international customs, “general principles of law recognized by civilized nations”, and “judicial decisions and the teachings of the most highly qualified publicist of the various nations”.³⁴⁰

For the past seventy years, these provisions have served as the “holy grail” for identifying sources of international law.³⁴¹ There is no hierarchy among the sources listed in Article 38. However, “general principles of law” are often understood as “complementing custom and treaty law”.³⁴² Customary international law and international treaty law are typically regarded as the primary sources of international law. Treaties are created through negotiation and are binding only upon those states that sign and ratify them. Customary international law is the body of international legal rules that arise from consistent patterns of state practice that are recognized as legally obligatory. Rules of customary international law are binding upon all states save those that explicitly and persistently object to their application.³⁴³

A customary principle may be “overridden” by a treaty, and a new treaty may be given priority over an older one.³⁴⁴ Treaties may also serve as a basis for identifying legally binding

³³⁹ Kennedy Gastorn, “Defining the Imprecise Contours of *Jus cogens* in International Law” (2017) 16:4 *Chinese J Int’l L*.

³⁴⁰ United Nations, *Statute of International Court of Justice*, 18 April 1946, Article 38.

³⁴¹ Gastorn, *Supra* note 339.

³⁴² Malcolm Shaw, *International Law* (New York: Cambridge University Press, 2003).

³⁴³ Gastorn, *Supra* note 339.

³⁴⁴ *Ibid.*

principles due to the explicit nature of the state consent.³⁴⁵ In 1969, the Vienna *Convention on the Law of Treaties* (VCLT) introduced the concept of peremptory norms as a concept of international law. Since then, the concept of *jus cogens* has been applied to the principle of non-*refoulement* by a variety of jurists and institutions.

3.3 *Jus Cogens*

Jus cogens, which literally means “compelling law”, is a term applied to those rules that are deemed to be of universal importance and scope of application, hierarchically superior to all other rules.³⁴⁶ *Jus cogens* are peremptory in nature, from which no derogation is allowed under any circumstances.³⁴⁷ The concept of *jus cogens* first appeared in Justinian’s Digest, comprised of juristic writings on Roman law compiled under the Roman emperor Justinian I in the 6th century CE.³⁴⁸ The passage pertaining to *jus cogens* in the Digest states that “*jus publicum privatorum pactis mutari non potest*”, meaning “private pacts cannot derogate from public law”.³⁴⁹ *Jus publicum*, or “private law”, has in this case a wider meaning than the modern notion of private law, referring to all rules from which individuals may not depart by a separate agreement. In other words, *jus publicum* refers to rules from which no derogation is allowed, a legal concept we now know as *jus cogens*.

³⁴⁵ *Ibid.*

³⁴⁶ Hossain, *supra* note 2.

³⁴⁷ *Ibid.*

³⁴⁸ Gastorn, *supra* note 339.

³⁴⁹ *Ibid.*

The doctrine of *jus cogens* was developed under the strong influence of the natural law tradition, which holds that states do not enjoy absolute freedom in their international relations.³⁵⁰ David Luban argues that natural law forms “the most obvious justification for criminalizing murder, extermination, enslavement, deportation, and other inhumane acts ... [,]whether or not in violation of domestic law”.³⁵¹ On this account, such crimes against humanity are inconsistent with the common good, and any legal system that permits them must violate natural law.³⁵²

The international community determined that there are two sets of laws that govern their behaviour: *jus cogens* and *jus dispositivum*. In the case of *jus dispositivum*, states may find themselves in situations where they are justified in violating an international obligation, and as such precluded from their wrongfulness.³⁵³ By contrast, rules of *jus cogens* do not allow for such deviation. A state cannot, under any circumstance, violate the norms of *jus cogens*. The violation of *jus cogens* norms places the very existence of the international legal system in question.³⁵⁴

According to Albert Verdross, *jus cogens* is the “ethical minimum recognized by all states of the international community”.³⁵⁵ *Jus cogens* norms are considered peremptory in the sense that they are mandatory, do not permit derogation and can only be modified “by general international norms of equivalent authority”.³⁵⁶ Rules contrary to a given *jus cogens* norm are void, since they oppose “fundamental rules of international public policy”.³⁵⁷ *Jus cogens* norms

³⁵⁰ Hossain, *supra* note 2.

³⁵¹ David Luban et al, “Moral Responsibility in the Age of Bureaucracy”, (1992) 90 Michigan L Rev.

³⁵² *Ibid.*

³⁵³ Allain, *supra* note 42.

³⁵⁴ *Ibid.*

³⁵⁵ Evan J. Criddle & Evan Fox-Decent, “A Fiduciary Theory of *Jus Cogens*” (2009) 34 Yale J. Int'l L.

³⁵⁶ *Ibid.*, page 332.

³⁵⁷ Hossain, *supra* note 2.

are the most authoritative legal principles; no statute, treaty, or government conduct is permitted to conflict with them.³⁵⁸

Peremptory norms were brought to the forefront of international law in 1969, through the VCLT. Article 53 of the VCLT gives *jus cogens* its recognition, stating that:

[a] treaty is void, if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole, as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.³⁵⁹

In other words, a treaty is of no legal force and effect if it violates a *jus cogens* norm. Article 53 implicitly offers four criteria for determining whether a given rule has achieved the status of a *jus cogens* norm: (1) whether the rule enjoys the status of a norm of general international law; (2) whether it is accepted by the international community of states as a whole; (3) whether it is immune from derogation; and (4) whether it can be modified only by a new norm having the same status.³⁶⁰

Additionally, Article 64 of the VCLT provides that:

[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

³⁵⁸ Mary Ellen O’Connell, “*Jus Cogens: International Law’s Higher Ethical Norms*” (2012) *The Role of Ethics in International Law*, Cambridge University Press.

³⁵⁹ Vienna Convention on the Law of Treaties, 23 May 1969 (entered into force 27 January 1980, accession by Canada 14 October 1970).

39/ 27, 1155 U.N.T.S. 331. Online: < <http://www.un.org/law/ilc/texts/treaties.htm>.>.

³⁶⁰ Hossain, *supra* note 2.

This provision establishes that a treaty that contradicts a *jus cogens* norm has no legal force or effect. Thus, by virtue of Articles 53 and 64, if the principle of *non-refoulement* can be shown to have attained the status of *jus cogens*, treaties such as the STCA may well be null and void.

Prior to the crystallization of *jus cogens* in the VCLT, states enjoyed a greater degree of power to conclude treaties enshrined in various rules and commitments.³⁶¹ For this reason, the introduction of *jus cogens* into the canon of international law was viewed by some as a limitation of state sovereignty and the requirement of consent.³⁶² By acknowledging the existence of *jus cogens* norms, the international community also acknowledged that there exist some international norms that states cannot “contract out of”.³⁶³ The doctrine of *jus cogens* has been characterized by some as depriving states “of their legal capability of producing valid rules of international law by concluding treaties with other States”.³⁶⁴ This is the case even if all parties consent to objectionable regulations which none of them view of harmful.

The concept of rules of international law that apply independently of the will of states existed before the nineteenth century.³⁶⁵ This is often attributed to writers such as Hugo Grotius and Emer de Vattel who represented natural law thinking. However, prior to the VCLT, this concept was merely a topic of discussion among academics, instead of a practically applied principle.³⁶⁶ The VCLT was drafted by the United Nations International Law Commission (ILC). Over the years, the topic of *jus cogens* was at the heart of many reports of the ILC, conferences,

³⁶¹ Gastorn, *supra* note 339.

³⁶² *Ibid.*

³⁶³ *Ibid.*

³⁶⁴ *Ibid.*

³⁶⁵ *Ibid.*

³⁶⁶ *Ibid.*

and discussions.³⁶⁷ In 1966, during a discussion organized by the Carnegie Endowment for International Peace, the following description of *jus cogens* was provided:

Drawing an analogy from the concept of *ordre public* in municipal law ... *jus cogens* [is] not formulated in precise rule ... [T]he only method of deriving it [is] judicial determination.³⁶⁸

Based on this interpretation of the principle of *jus cogens*, some scholars describe it as a form of international public policy.³⁶⁹ In national legal systems, a judge may strike down contracts between private parties, and even between governments and private parties because the contract violates public policy.³⁷⁰ Therefore, to analogize, an international judge must extract *jus cogens* limitations for the international legal system as a whole “by transforming primordial social values directly into legal imperatives”.³⁷¹

3.4 Identifying a *Jus Cogens* Norm

While there is consensus within the international law community over the existence of *jus cogens* norms, the consensus begins to break down over how to identify a norm as *jus cogens*, and which rules qualify as such. However, governments, courts and scholars have characterized a number of rules as *jus cogens* norms.³⁷² The VCLT does not explain where *jus cogens* norms may be found or how they can be identified. However, the very fact that *jus cogens* norms are not precisely defined or fixed makes their application flexible.

³⁶⁷ O’Connell, *supra* note 358.

³⁶⁸ *Ibid.*

³⁶⁹ *Ibid.*

³⁷⁰ *Ibid.*

³⁷¹ *Ibid.*

³⁷² O’Connell, *supra* note 358.

The list of *jus cogens* norms found in the *1987 Restatement (Third) of the Foreign Relations Law of the United States* (hereinafter *Restatement*), involves ethical or moral norms almost exclusively.³⁷³ Other norms integral to the system of international law belong to the category of general principle. It is the moral character of *jus cogens* norms that justifies providing a separate category for them.³⁷⁴ *Jus cogens* possess a moral superiority other norms do not.³⁷⁵ In the scale of moral normativity in international law, *jus cogens* norms are situated at the top of the scale.

The 1987 Restatement glosses *jus cogens* as follows:

Some rules of international law are recognized by the international community of states as peremptory, permitting no derogation. These rules prevail over and invalidate international agreements and other rules of international law in conflict with them. Such peremptory norm is subject to modification only by a subsequent norm of international law having the same character.³⁷⁶

In American jurisprudence, restatements of the law are secondary sources that seek to restate the legal rules that constitute common law in a particular area.³⁷⁷ They are prepared by the American Law Institute (ALI), a legal organization comprised of academics, judges and lawyers.³⁷⁸ The 1987 Restatement cites two types of *jus cogens* norms: the prohibition on the use of force, and norms associated with human rights.³⁷⁹ Those norms associated with human rights

³⁷³ *Ibid.*

³⁷⁴ *Ibid.*

³⁷⁵ *Ibid.*

³⁷⁶ American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (St. Paul: American Law Institute, 1987).

³⁷⁷ Meg Kribble, "Intro to Restatements" (2017) Harvard Law School, online: <<https://guides.library.harvard.edu/c.php?g=309942&p=2070280>>.

³⁷⁸ *Ibid.*

³⁷⁹ Restatement, *supra* note 376.

include prohibitions on: (a) genocide, (b) slavery and the slave trade, (c) the murder or causing of the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, and (f) systemic racial discrimination.³⁸⁰ The Restatement further notes that not all human rights norms possess *jus cogens* status, but that those in clauses (a) to (f) do so, and that an international agreement that violates them is void.³⁸¹

Jus cogens norms have been recognized by a significant number of courts and tribunals. With the establishment of the International Military Tribunal in Nuremberg, the organizers and the drafters of its *Charter* relied on principles of natural law for the proposition that valid national law could not be used as a defence before the tribunal.³⁸² According to David Luban, the Nuremberg Tribunal “held individual Nazi officials responsible for acts that positive law did not forbid at the time they were committed”.³⁸³ Article 8 of the Nuremberg *Charter* states that “[t]he fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility”.³⁸⁴ While the Nuremberg *Charter* does not mention natural law (or *jus cogens* norms), it is based on natural law principles that assert that domestic law does not enjoy absolute freedom.³⁸⁵

In 1970 the International Court of Justice (ICJ) made reference to *jus cogens* norms in the Barcelona Traction case.³⁸⁶ The Court held that a distinction should be made between the obligations of a state towards the international community and those arising vis-à-vis another

³⁸⁰ *Ibid.*

³⁸¹ *Ibid.*

³⁸² O’Connell, *supra* note 358.

³⁸³ Luban, *supra* note 351.

³⁸⁴ Yale Law School, “Nuremberg Trial Proceedings Vol. 1, *Charter* of the International Military Tribunal”, online: <<http://avalon.law.yale.edu/imt/imtconst.asp>>.

³⁸⁵ O’Connell, *supra* note 358.

³⁸⁶ Barcelona Traction (Belg v. Spain), 1970 ICJ.

state in the field of diplomatic relations.³⁸⁷ By their very nature, the Court argued, the former are the concern of all states, and as such, all states can be held to have an interest in their protection: they are obligations *erga omnes*.³⁸⁸ In other words, the protection of *jus cogens* norms is an obligation owed to all. The Court further stated that these obligations derive from the principles and rules concerning basic human rights, including “protection from slavery and racial discrimination”.³⁸⁹ In this relevant case, the ICJ not only described a special category of norms and provided a list that has achieved consensus as *jus cogens* norms, but it also explained an important substantive aspect of *jus cogens*, that they are obligations *erga omnes*, which is Latin for “towards all”. In short, the ICJ established that *jus cogens* obligations are owed to everyone, without discrimination.

In the case concerning East Timor,³⁹⁰ the ICJ considered whether the right to self-determination is a *jus cogens* norm. The Court described the right to self-determination as one of the “essential principles of contemporary international law”.³⁹¹ Possessing an *erga omnes* character is significant as it amounts to its elevation as a *jus cogens* norm.³⁹² While the notion of rights and obligations *erga-omnes* and the concept of *jus cogens* norms are not identical, they are inextricably linked.³⁹³ To illustrate, *jus cogens* norms are widely accepted norms that all states must comply with. *Erga omnes* obligations are obligations that every state has towards the entire international community. A *jus cogens* rule creates an *erga omnes* obligation for all states to

³⁸⁷ *Ibid.*

³⁸⁸ *Ibid.*

³⁸⁹ *Ibid.*

³⁹⁰ East Timor (*Portugal v. Australia*), [1995] ICJ 86.

³⁹¹ *Ibid.*

³⁹² Gino J Naldi, “The East Timor Case and the Role of International Court of Justice in the Evolution of the Right of Peoples to Self-determination” (1999) 5:1 Australian J H Rights.

³⁹³ *Ibid.*

comply with the rule. The ICJ stated that, “Portugal’s assertion that the right of peoples to self-determination, as it evolved from the *Charter* and from United Nations practice, has an *erga omnes* character, is irreproachable”.³⁹⁴

3.5 The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter “CAT”) was adopted by the United Nations in 1984 and came into force in 1987.³⁹⁵ According to its preamble, its aim is to strengthen the struggle against torture and other cruel, inhuman or degrading treatment or punishment around the world.³⁹⁶ CAT is a universal human rights treaty.

Article 3 of CAT is concerned with the prohibition of *refoulement*, stating that “[n]o State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”.³⁹⁷ Moreover, article 3(2) guides the assessment of the danger described in the first paragraph, stating that:

[f]or the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable,

³⁹⁴ *Ibid.*

³⁹⁵ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984 (entered into force 26 June 1987, accession by Canada 24 June 1987).

³⁹⁶ *Ibid.*

³⁹⁷ *Ibid.*

the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human right.³⁹⁸

The prohibition of *refoulement* in CAT was largely influenced by emerging case law that concerned cases of expulsion and extradition.³⁹⁹ The prohibition is not restricted by factors such as nationality, legal status or location.⁴⁰⁰ There are also no restrictions in the case of stateless persons or those who are in a country illegally. Therefore, the scope of protection from *refoulement* under CAT is afforded to any person.

Article 1 of CAT gives a definition of torture. Specifically, it states that:

For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁴⁰¹

In order to determine the risk factor, the risk of danger must be personal, foreseeable, real, and present.⁴⁰² In order to determine that an individual may be subject to torture upon their return, the

³⁹⁸ *Ibid.*

³⁹⁹ Esa Mykkanen, “Expulsion to Torture- The Principle of Non-*Refoulement* and International Human Rights”, (Masters of Law, University of Helsinki, 2006).

⁴⁰⁰ CAT, *supra* note 395.

⁴⁰¹ *Ibid.*

⁴⁰² *Seid Mortesa Aemei v. Switzerland*, CAT/C/18/D/34/1995, UN Committee Against Torture (CAT), 29 May 1997.

individual's past experiences of human rights violations and political activities are considered significant evidence.⁴⁰³

The CAT supervisory body, the Committee against Torture (hereinafter "ComAT"), is a monitoring body with declaratory powers.⁴⁰⁴ Case law of ComAT has consistently found that there are no exceptions to article 3 of CAT, not even in cases where an individual poses a threat to national security.⁴⁰⁵ As such, the scope of protection from *refoulement* is wider than that afforded by the *Refugee Convention*, so long as the individual faces a danger of torture. In its General Comments Number 2, ComAT emphasized the absolute nature of the prohibition of *refoulement* in the context of CAT.⁴⁰⁶

In the 1998 case *Prosecutor v. Furundzija*, the International Criminal Tribunal for the Former Yugoslavia (ICTY) held that the prohibition of torture is a *jus cogens* norm and domestic law does not serve as defense.⁴⁰⁷ This decision is echoed in the Pinochet case, in which the Court held that torture cannot be justified by any domestic or international rule.⁴⁰⁸ Given that the ICJ in the 2012 case concerning *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v Senegal) acknowledged the *jus cogens* status of the prohibition of torture, Tomas Molar argues that the same status can be applied to the principle of *non-refoulement* as "it is by its logic closely related to the former".⁴⁰⁹ Moreover, the prohibition of *refoulement* follows from Article 3 of the *1950 European Convention on Human Rights* (ECHR), which enshrines the

⁴⁰³ Mykkanen, *supra* note 399.

⁴⁰⁴ Committee Against Torture 1997, paragraph 9.

⁴⁰⁵ Mykkanen, *supra* note 399.

⁴⁰⁶ Committee Against Torture 2008, paragraph 5.

⁴⁰⁷ *Prosecutor v. Anto Furundzija* (Trial Judgement), [1998] IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY).

⁴⁰⁸ *R v Bow St Metropolitan Stipendiary Magistrate, Ex Parte Pinochet* [1998] UKHL 41.

⁴⁰⁹ Tomas Molnar, "The principle of non-*refoulement* under international law: Its inception and evolution in a nutshell" (2016) 1:1 Cojourn.

prohibition of torture.⁴¹⁰ The European Court of Human Rights ruled that extradition and expulsion violate article 3 of CAT, if there are reasonable ground to assume that the person being extradited would be in danger of torture or inhuman or other degrading treatment by the receiving state.⁴¹¹

3.6 The Principle of *Non-Refoulement* as *Jus Cogens*

Article 33 of the *Refugee Convention*, or the *non-refoulement* provision, is the cornerstone of the entire *Convention*. This provision prohibits states from returning individuals to countries where they may face persecution. However, states have often introduced policies that effectively violate this provision either individually or collectively. Any action that falls within the domain of *jus cogens*, be it unilateral, bilateral, or multilateral, is prohibited. In the case of the STCA, Canada and the United States have bilaterally adopted a policy that violates the principle of *non-refoulement*. However, the successful demonstration of the *jus cogens* nature of the principle of *non-refoulement* would preclude states from violating this norm in any way.

According to Jean Allain, in order to determine whether the principle of *non-refoulement* has attained the status of *jus cogens*, one must determine whether it has been recognized as such “by the international community of States as a whole” as a norm “from which no derogation is permitted”.⁴¹² He argues that state practice of not refouling refugees must be shown to be based on the belief that they are legally obligated not to refoule, and that this obligation is binding as a matter of *jus cogens*.⁴¹³

⁴¹⁰ *Ibid.*

⁴¹¹ *Ibid.*

⁴¹² Allain, *supra* note 42.

⁴¹³ *Ibid.*

The conclusions adopted by the Executive Committee of the programme of the United Nations High Commissioner for Refugees (UNHCR) are the most important forum for identifying the value attributed to the principle of *non-refoulement*.⁴¹⁴ These conclusions act in an advisory capacity and reflect the consensus of states, where issues as such as the principle of *non-refoulement* are addressed.⁴¹⁵ The first mention of the principle of *non-refoulement* as *jus cogens* was raised by the Executive Committee in Conclusion No.25 of 1982. The committee stated that the principle of *non-refoulement* “was progressively acquiring the character of a peremptory rule of international law”.⁴¹⁶ By 1989, the Executive Committee stated that states were obligated to refrain from *refoulement* as doing so was “contrary to fundamental prohibitions against these practices”.⁴¹⁷ Seven years later, in 1996, the Executive Committee concluded that the principle of *non-refoulement* had indeed earned the status of *jus cogens*, stating that the principle of *non-refoulement* “is not subject to derogation”.⁴¹⁸

The 1984 *Cartagena Declaration of Refugees* provides further evidence of the *jus cogens* status of the principle of *non-refoulement*.⁴¹⁹ The Declaration stresses the importance of the principle of *non-refoulement* as a “cornerstone of the international protection of refugees”.⁴²⁰ It asserts that the principle of *non-refoulement* “is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*”.⁴²¹ The conclusion of the *Cartagena Declaration* was acknowledged by

⁴¹⁴ *Ibid.*

⁴¹⁵ *Ibid.*

⁴¹⁶ Executive Committee Conclusion No. 25, 'General Conclusion on International Protection', 1982.

⁴¹⁷ Executive Committee Conclusion No. 55, 'General Conclusion on International Protection', 1989.

⁴¹⁸ Executive Committee Conclusion No. 79, 'General Conclusion on International Protection', 1996.

⁴¹⁹ Allain, *supra* note 42.

⁴²⁰ UNHCR, *Collection of International Instruments and Other Legal Texts Concerning Refugees and Displaced Persons: Regional Instruments* (1995).

⁴²¹ *Ibid.*

intergovernmental bodies such as the *Inter-American Commission on Human Rights* and the *OAS General Assembly*.⁴²²

Allain argues that the *jus cogens* nature of the principle of *non-refoulement* should not be questioned as a result of grave violations of the principle of *non-refoulement*. He argues that although the UNHCR itself signed a *refoulement* agreement with Tanzania, this does not weaken the peremptory nature of the principle of *non-refoulement*.⁴²³ His reasoning is based on the Nicaragua case, in which the ICJ held that in order for a rule to be established as a rule of customary international law, the corresponding practice need not be in absolute rigorous conformity with the rule.⁴²⁴ As such, even though states may wish to contract out of their obligations, by committing themselves to the *jus cogens* nature of the principle of *non-refoulement*, they are prohibited from doing so.⁴²⁵

In fact, according to ICJ's decision in the Nicaragua case, violations of a peremptory rule only help strengthen it. The ICJ held that:

[i]f a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.⁴²⁶

⁴²² Allain, *supra* note 42.

⁴²³ *Ibid.*

⁴²⁴ *Ibid.*

⁴²⁵ *Ibid.*

⁴²⁶ *Ibid.*

Thus, based on the logic of the ICJ, the fact that the principle of *non-refoulement* is being violated only serves to further strengthen it.

Under Article 103 of the UN *Charter*, an obligation under the *Charter* prevails over any other obligation arising under other international agreement.⁴²⁷ Specifically, this provision states that “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present *Charter* and their obligations under any other international agreement, their obligations under the present *Charter* shall prevail”.⁴²⁸ The UN Security Council is responsible for the maintenance of international peace and security. Under Chapter VII of the *Charter*, the Security Council may take actions in response to a threat to international peace and security or an act of aggression.⁴²⁹ These actions may include the use of force under Article 42, or other measures under Article 41.⁴³⁰ The Security Council has autonomy under Chapter VII of the *Charter*.⁴³¹ By virtue of Chapter VII, it would appear that the Security Council could sanction *refoulement*, if it determined that doing so would restore international peace and security. However, establishing the *jus cogens* nature of the principle of *non-refoulement* would render such an action unlawful, as the Security Council has “an absolute obligation to respect *jus cogens*”.⁴³²

Furthermore, Bardo Fassbender has argued that “obligations of States arising from decisions of the Security Council only lawfully arise ‘under the present *Charter*’ (Article 103) if those decisions are in accordance with the constitutional law of the international community,

⁴²⁷ Hossain, *supra* note 2.

⁴²⁸ United Nations, *Charter* of the United Nations, 24 October 1945, 1 UNTS XVI.

⁴²⁹ UN *Charter*, Article 39.

⁴³⁰ *Ibid.*

⁴³¹ UN *Charter*, article 25.

⁴³² Allain, *supra* note 42.

including the peremptory norms”.⁴³³ In other words, any decisions undertaken by the Security Council need to be in accordance with *jus cogens*. As such, since the principle of *non-refoulement* has attained *jus cogens* status, the Security Council would not be able to sanction *refoulement* as such a decision would violate the terms of its own mandate.

In response to the Genocide case, brought by Bosnia and Herzegovina against Yugoslavia, Judge Lauterpacht held that:

[t]he concept of *jus cogens* operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the *Charter* may give the Security Council in case of a conflict between one of its decisions and an operative treaty obligation cannot - as a matter simply of hierarchy of norms - extend to a conflict between a Security Council resolution and *jus cogens*. Indeed, one only has to state the opposite proposition thus - that a Security Council resolution may even require participation in genocide - for its unacceptability to be apparent.⁴³⁴

For this reason, the *jus cogens* nature of the principle of *non-refoulement* must be established, as failure to do so would give the Security Council the authority to adopt resolutions that allow or require *refoulement*.⁴³⁵

In 1991, the Security Council nearly allowed *refoulement* with Resolution 688, by expressing its concern over the large number of Iraqi Kurds seeking asylum in Turkey and Iran. The Security Council held that such a great flow of refugees would “threaten international peace

⁴³³ Bardo Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (The Netherlands: Kluwer Law International, 1998).

⁴³⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia), Order, 13 Sept. 1993, 440.

⁴³⁵ Allain, *supra* note 42.

and safety in the region”.⁴³⁶ The resolution sanctioned Turkey’s closed border policy, instead of increasing the pressure put on Turkey to “provide aid and sanctuary for the one million starving and freezing refugees along its border”.⁴³⁷ It is precisely because of this kind of outcome that the *jus cogens* status of the principle of *non-refoulement* is important to establish. Failure to have its *jus cogens* status recognized by the international community risks having it sanctioned.

3.7 Obligations to *Jus Cogens* Norms

All states are obligated under article 33 of the *Convention* not to refoule refugees. However, what states may be unable to achieve on their own, they will attempt to achieve in collaboration with other states. States are legally bound to uphold the principle of *non-refoulement*, be it unilaterally, bilaterally, or multilaterally. As such, intergovernmental organizations such as the European Union are not exempt from the peremptory nature of the principle of *non-refoulement*.⁴³⁸ This is also true of the STCA. However, as Allain argues, it is important to hold inter-governmental organizations to their obligations. States that participate in burden-sharing policies that in turn lead to *refoulement* must be reminded of their agreement to the *jus cogens* nature of the principle of *non-refoulement*.⁴³⁹

Burden-sharing policies, as those adopted by the European Union in the Dublin II Regulation and also by Canada and the United States in the STCA, have institutionalized procedures which effectively refoule individuals who meet the refugee definition. Human Rights Watch argued that asylum “is under serious threat, not least from European States which were

⁴³⁶ United Nations Security Council Resolution 688 (1991) of 5 April 1991.

⁴³⁷ Fernando R. Teson, “Collective Humanitarian Intervention” (1996) 17 Mich. J. Int’l L.

⁴³⁸ Allain, *supra* note 42.

⁴³⁹ *Ibid.*

the primary architects of the international refugee regime fifty years ago”.⁴⁴⁰ This is largely due to the fact that the European Union coordinated “towards the lowest common denominator in terms of human rights and refugee protection standards”.⁴⁴¹

The restrictive nature of such policies was noted by the Executive Committee in its 1999 General Conclusions, where it stated that policies based on “safe third country” lack the necessary safeguards to ensure that asylum-seekers are not refouled.⁴⁴² The STCA requires asylum-seekers to submit their refugee claim in their first country of arrival. Therefore, refugees arriving into Canada from the United States are unable to submit their refugee claim in Canada, as the United States is their first country of arrival, and vice-versa. However, it is important to note that there is no obligation under international law for individuals to claim asylum in the first country of arrival.⁴⁴³ As noted by Elspeth Guild, “unless asylum applications are determined in an equivalent manner across the EU ...the protection against *refoulement* may not be guaranteed”.⁴⁴⁴ The same is true for the STCA. The inconsistencies between the United States’ and Canada’s refugee protection systems put asylum-seekers at risk of *refoulement*. Canada is implicit in the violation of the principle of *non-refoulement*, albeit indirectly.

Despite the fact that Canada may only be guilty of indirect or chain *refoulement*, it is still in violation of international law. In other words, even though Canada may only return an individual to the United States as per the STCA, the United States may return the individual to a

⁴⁴⁰ Human Rights Watch, *UNHCR at 50: What Future for Refugee Protection?*, (2000), online: <www.hrw.org/campaigns/refugees>.

⁴⁴¹ *Ibid.*

⁴⁴² Executive Committee Conclusion No. 87, “General Conclusion on International Protection”, 1999.

⁴⁴³ CIMM, *supra* note 199.

⁴⁴⁴ Elspeth Guild, “The Impetus to Harmonise: Asylum Policy in the European Union”(1999) Frances Nicholson & Patrick Twomey, eds., *Refugee Rights and Realities: Evolving International Concepts and Regimes*, 321.

country where they may face persecution. As such, Canada is guilty of violating its international obligations by failing to protect the asylum-seeker against *refoulement*. Given that *jus cogens* norms are the most powerful legal principles; no statute, treaty, or government conduct is permitted to conflict with them.⁴⁴⁵ As such, establishing the *jus cogens* status of the principle of *non-refoulement* would automatically render the STCA void.

Establishing the *jus cogens* status of the principle of *non-refoulement* is of paramount significance. As illustrated above, failure to do so could potentially lead to the sanction of *refoulement*. The prohibition against torture has been established as a *jus cogens* norm through various case law. The principle of *non-refoulement* and the prohibition against torture are very closely related, as *refoulement* may lead to torture. In fact, CAT makes explicit mention of the principle of *non-refoulement* in article 3, and its scope of protection is wider than that afforded by the *Refugee convention*. Since the prohibition against torture has attained its *jus cogens* status, it logically follows that the principle of *non-refoulement* must also attain its indisputable *jus cogens* status.

3.8 Conclusion

This chapter focused on establishing the *jus cogens* status of the principle of *non-refoulement*. This was achieved by examining the conditions under which *jus cogens* norms arise from. *Jus cogens* rules are rules that are peremptory in nature, from which no derogation is permitted. The concept of *jus cogens* came to the forefront of legal discussion through the 1969 *Vienna Convention on the Law of Treaties*.

⁴⁴⁵ O'Connell, *supra* note 358.

This chapter also focused on the right to be free from torture as an established *jus cogens* norms, and conclude that the principle of non-*refoulement* and the prohibition against torture are very closely related. It also discussed the principle of non-*refoulement* under CAT, and concluded that since the prohibition against torture is a recognized *jus cogens* norm, the principle of non-*refoulement* should attain the same status. This chapter also discussed burden-sharing policies, such as the Dublin II Regulation and the STCA, and asserted that despite the fact that state parties ratify treaties, they are nonetheless bound to *jus cogens* norms, which permit no derogation under any circumstance. For this reason, establishing the *jus cogens* status of non-*refoulement* is of utmost importance.

CONCLUSION

This thesis examined the Canada- US STCA in light of the surge of asylum-seekers crossing the border into Canada since the Trump inauguration. This was caused by the various policies implemented by the Trump administration. Among those are the immigration executive order titled “Protecting the Nation from Foreign Terrorist Entry into the United States”. The purpose of this executive order is to halt refugee admissions and temporarily bar people from seven Muslim-majority countries.⁴⁴⁶ The administration has also ended protection for Salvadorian and Haitian refugees. As a result, asylum-seekers who fear expulsion from the United States have made their way into Canada in order to avoid being sent to a country where they may face persecution.

Under the agreement, refugee claimants must request refugee protection in the first safe country in which they arrive in, unless they qualify for an exception to the agreement.⁴⁴⁷ However, the agreement only applies to land-ports-of-entry, which places asylum-seekers at risk by forcing them to cross the border irregularly. Canada has designated the United States as a “safe third country”. Such a designation is warranted when it has been determined that the country will provide refugee protection in accordance with the *Convention* and the *1967 protocol*.⁴⁴⁸ Additionally, a “safe” country will examine refugee applications fairly. This thesis has shown that the United States is not safe for refugees, and as such, its “safe” designation should be revoked.

In accordance with the Immigration and Refugee Protection Act (IRPA), for a country to maintain its “safe country” designation by Canada, the Governor in Council is required to review the country’s human rights records, to ensure “that the conditions that led to the designation as a

⁴⁴⁶ White House, *supra* note 4.

⁴⁴⁷ STCA, *supra* note 1.

⁴⁴⁸ *Ibid.*

safe third country continue to be met”.⁴⁴⁹ In 2007, the Federal Court found that the federal cabinet failed to comply with its obligation to ensure continuous review of the United States as a safe third country.⁴⁵⁰ However, a year later the Federal Court of Appeal overturned the ruling.⁴⁵¹

This thesis has examined some of the greatest failings of the United States’ refugee determination system. Among them are the one year bar, which requires asylum-seekers to apply within one year of entering the United States. This bar prevents asylum-seekers from receiving protection if they have not met the filing deadline; expedited removal, which provides low level immigration officers with the authority to quickly deport certain noncitizens who are undocumented or have committed fraud or misrepresentation; and the detainment of asylum-seekers, which has been expanded significantly under the Trump administration, and is a violation of international norms.

Both Canada and the United States are parties to the *1967 Protocol*. Canada is also a party to the *Refugee Convention*. Both countries have incorporated the refugee definition into their domestic law. Article 33(1) of the *Refugee Convention* states that no state party to the *Convention* shall expel or return a refugee “in any manner whatsoever” to a country where a refugee’s life or freedom would be threatened. This thesis has argued that the principle of *non-refoulement* has attained *jus cogens* status. As such, no derogation is permitted. By upholding the agreement, Canada is in violation of its international and domestic obligations. The seriousness of these violations is exacerbated by the fact that Canada is violating a *jus cogens* norm, which is prohibited under any circumstance.

⁴⁴⁹ *Ibid.*

⁴⁵⁰ Library of Parliament, *supra* note 17.

⁴⁵¹ *Ibid.*

This thesis has also determined that the recent decision by Attorney General Jeff Sessions further erodes refugee protection rights. His decision ends protection for victims of domestic violence and gang violence. As such, women fleeing domestic violence are no longer protected under the United States' refugee protection system. This decision will have dire consequences for the vulnerable population fleeing domestic violence. The UN reported in 2015 that gender based violence is a major concern in Central America and parts of Mexico.

However, the Canadian Government, despite the harsh criticism, maintains that it is important for the STCA to remain in force, since it is considered an "important tool for Canada and the United States to work together on the orderly handling of refugee claims made in our countries".⁴⁵² By upholding the STCA, Canada is in breach of domestic and international obligations. Under International Law, Canada is in breach of the 1951 *Refugee Convention* as Article 33 of the *Convention* highlights the principle of *non-refoulement*. According to the principle of *non-refoulement*, no contracting state shall expel or return a refugee in any manner whatsoever to a country where their life or freedom would be threatened on accounts of race, religion, nationality, membership or particular group or public opinion.⁴⁵³

Moreover, the right to *non-refoulement* also falls under Canada's domestic obligations under section 7 of the *Charter*, which guarantees the right to life, liberty, and security of person.⁴⁵⁴ This thesis maintains that Canada cannot simply "contract out" of its *jus cogens* legal obligations".⁴⁵⁵ The principle of *non-refoulement* has acquired the status of *jus cogens*, and not maintaining this status may have detrimental effects for asylum-seekers.⁴⁵⁶

⁴⁵² IRCC, *supra* note 32.

⁴⁵³ *Ibid.*

⁴⁵⁴ *Ibid.*

⁴⁵⁵ *Ibid.*

⁴⁵⁶ *Ibid.*

Since its implementation, the STCA has significantly reduced refugee eligibility to enter Canada. CBSA reports that several hundred refugee claimants have been rejected under the STCA every year since its implementation. The agreement also discourages claimants from presenting at the border.⁴⁵⁷ The STCA applies only at land points of entry, and does not apply to claimants who present “inland” claims. This has created “incentives for human smuggling [and] has also prompted a rise in unauthorized border crossings into Canada”.⁴⁵⁸ An evaluation study of the CBSA suggests that the STCA has increased the number of unauthorized border crossings into Canada.⁴⁵⁹

Under Article 3 of the STCA, a refugee claimant may not be removed to a country outside of Canada or the United States until their refugee claim has been assessed by one of the countries.⁴⁶⁰ This is in line with the principle of *non-refoulement* outlined in the *Convention and Protocol*. Due to President Trump’s executive orders, Canada is in violation of its international law obligations, specifically relating to the principle of *refoulement*.

This thesis examines Canada’s international and legal obligations. The STCA has come to the forefront of legal and ethical discussions in the context of unprecedented numbers of people displaced in 2015 and the immigration executive orders adopted by President Trump in 2017. Various non-governmental organizations are opposed to the STCA on principle and urge the Canadian government to rescind it. The reasons put forth by various critics of the STCA range from human rights violations to the violation of domestic and international obligations by Canada. By upholding the STCA, Canada is in violation of the *Convention* and the *Protocol*. Additionally,

⁴⁵⁷ Arbel, *supra* note 46.

⁴⁵⁸ *Ibid.*

⁴⁵⁹ *Ibid.*

⁴⁶⁰ *Ibid.*

by subjecting asylum-seekers to *refoulement*, Canada is in violation of the *Charter*, specifically section 7, the right to life, liberty, and security of the person. The principle of *non-refoulement* has achieved the status of *jus cogens*, which is a norm in international law from which no derogation is permitted.⁴⁶¹

This thesis has attempted to establish the *jus cogens* status of the principle of *non-refoulement*. Doing so is of utmost importance, as failure to do so could potentially lead to the sanction of *refoulement*. The argument largely rests on parallels drawn between the prohibition against torture, which has attained the status of *jus cogens*, and the principle of *non-refoulement*. The two are very closely related, as *refoulement* may lead to torture. The thesis has established this by examining CAT, and its protection against *refoulement* under article 3. This thesis has concluded that since the prohibition against torture has attained its *jus cogens* status, it logically follows that the principle of *non-refoulement* must also attain its indisputable *jus cogens* status.

Despite the public fear in regards to the surge of asylum-seekers crossing the border into Canada, and the Official Opposition's position on the STCA⁴⁶², Canada has accepted 0.002% of the 29.5 million population of refugees worldwide.⁴⁶³ The UNHCR Representative in Canada, Jean Nicolas Beuze, in his testimony to the Standing Committee on Citizenship and Immigration during an emergency committee meeting addressing the STCA, noted that a significant number of asylum-seekers are economically self-reliant.⁴⁶⁴ For instance, in Quebec, 50 percent have gained employment and do not rely on social subsidies of the state.⁴⁶⁵ Mr. Beuze also clarified that the

⁴⁶¹ Hossain, *supra* note 2.

⁴⁶² The Official Opposition has called for an extension of the STCA to in-land claims.

⁴⁶³ CIMM, *supra* note 199.

⁴⁶⁴ *Ibid.*

⁴⁶⁵ *Ibid.*

capacity of shelter to accommodate asylum-seekers has not been overwhelmed by their arrival.⁴⁶⁶ He warns against scapegoating asylum-seekers for “issues which predate and are related to other factors than their arrival in the country”.⁴⁶⁷

Secretary General of Amnesty International Canada, Mr. Alex Neve, in his testimony to the Standing Committee on Immigration clarified that the situation along the Canada-US border does not constitute a crisis by any measure.⁴⁶⁸ The numbers are well within Canada’s capacity and responsibility to respond to, and do not come close to approaching a crisis when considered in a global context.⁴⁶⁹

This thesis has predicted that the STCA will ultimately be found unconstitutional by the Court. The full hearings of the legal challenge to the STCA are scheduled for January 2018. However, suspending the STCA would send a strong message that Canada is concerned about the deterioration of refugee rights in the United States. Moreover, in light of the decision by the Attorney General that ended protection for victims of gender-based violence, suspending the STCA would be consistent with the Liberal government’s feminist agenda.

In suspending the STCA, this thesis recommends that the government fund the IRB appropriately so that asylum-claims are processed efficiently and expeditiously. The former Chair of the IRB has stated that suspending the agreement would not necessarily lead to significant increase in asylum-claims.⁴⁷⁰ It would, however, allow people to present themselves in a regular fashion at an official border crossing, rather than make dangerous journeys into Canada, including

⁴⁶⁶ *Ibid.*

⁴⁶⁷ *Ibid.*

⁴⁶⁸ *Ibid.*

⁴⁶⁹ *Ibid.*

⁴⁷⁰ Mark Gollom, “Would scrapping Safe Third Country Agreement lead to influx of asylum seekers? Not necessarily”, CBC News (26 June 2018), online: <<https://www.cbc.ca/news/canada/safe-third-country-agreement-trump-canada-asylum-refugee-1.4721151>>.

in harsh winter conditions. However, since a backlog of applications already exists, with 55,000 pending cases as of April 30, 2018,⁴⁷¹ the IRB must be funded adequately to allow for an efficient processing of asylum-claims. In addition, funding to local communities and provinces should also be increased in order to provide necessities for asylum-seekers.

The Government should also issue temporary work permits for asylum-seekers who wish to find employment. Currently, asylum-seekers cannot be issued work permits until they meet with Immigration Canada to determine if they are eligible for a refugee claim. If they are, then they can apply for a permit as they wait to have their hearing with the IRB.⁴⁷² Issuing temporary work permits would help offset the cost of housing and other services provided to the asylum-seekers.

This thesis has concluded that the United States is not safe for refugees. Procedural barriers to making asylum claims, restrictive interpretations of the refugee definition, limits on women advancing gender-based claims, bars on making claims after one year, and extensive arbitrary, lengthy, and abusive immigration detention make the United States an unsafe country for asylum-seekers. In addition, the Muslim ban and the refugee ban, toxic rhetoric associated with President Trump's position on asylum-seekers, and cruel measures targeting children and families for mandatory detention further exacerbate the dire situation of the refugee protection system in the United States. As such, this thesis calls on the Canadian government to uphold its international and legal obligations and immediately suspend the STCA.

⁴⁷¹ *Ibid.*

⁴⁷² Matt D'Amours & Verity Stevenson, "'We want to work': Asylum seekers, groups call on Ottawa to issue work permits", CBC News (18 Aug 2018), online: <<https://www.cbc.ca/news/canada/montreal/quebec-asylum-seekers-work-permits-1.4251960>>.

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