A Solution in Search of a Problem:
Implications of the Canada-US Safe Third Country Agreement
Relating to Refugee Claimants
at Land Border Ports of Entry

by

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Abstract

This thesis is an evaluation of the Canada-US Safe Third Country Agreement Relating to Refugee Claimants at Land Border Points of Entry. This Agreement seeks to make refugee claimants apply for asylum in the first of the two countries they enter, rather than allowing them to make the choice themselves.

The paper argues that this specific Agreement goes against Canada's history of refugee protection and that it is also at odds with the international refugee protection regime as embodied by the 1951 Convention relating to the Status of Refugees. By outlining the Canadian government's stated purposes for signing this Agreement, it becomes clear that the application of this treaty will affect more than the specific migrant population that the government is targeting. The paper's conclusion presents alternatives and amendments that can keep the Agreement in line with the domestic and international refugee protection traditions.

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List of Acronyms / Abbreviations

AI	Amnesty International
BCIS.....	Bureau of Citizenship and Immigration Services (formerly INS)
BIA.....	Board of Immigration Appeal (USA)
CBA	Canadian Bar Association
CCR.....	Canadian Council for Refugees
CIC.....	Citizenship and Immigration Canada
CRC.....	Convention on the Rights of the Child
CSIS	Canadian Security and Intelligence Service
CUDA	Canada-US Draft Agreement
ExCom	Executive Committee of the UNHCR
FES.....	Front End Screening
IIRIRA	Illegal Immigration Reform and Immigration Responsibility Act
IJ.....	Immigration Judge (USA)
INA	Immigration and Nationality Act (USA)
INS	Immigration and Naturalization Service (now known as BCIS)
IRB.....	Immigration and Refugee Board (Canada)
IRPA	Immigration and Refugee Protection Act (Canada)
NGO.....	Non-Governmental Organization
PRRA	Pre-Removal Risk Assessment
REA.....	Refugee Escape Act
STA.....	Safe Third Agreement
UDHR	Universal Declaration of Human Rights
UNHCHR.....	United Nations High Commissioner for Human Rights
UNHCR.....	United Nations High Commissioner for Refugees

Introduction

In December 2001 the governments of Canada and the US signed a 30-point plan on their shared border. One of the points was a commitment to sign a safe third country agreement, which would allow either party to return any refugee claimant who arrived at a land border port of entry back to the country she or he had just come from. On 30 August 2002, the two sides initialed the agreement in anticipation of its final implementation. Although this draft included exceptions such as family connections, possession of a valid visa, and unaccompanied minors, the overall intent is to force refugees to make their claim in the first of the two partners in which they arrive. To date the governments have not enforced the treaty, but it could be in place by the end of 2003.

The full text of the agreement is included in Appendix A, but a synopsis is necessary to set the stage for this paper. Article 4 contains the agreement's essence, stating 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 point of entry..." The objective is to make refugees claimants seek asylum in the first of the two countries they enter. There are a several working rules and exceptions that are important to note. The agreement only applies at land border points of entry (so refugees can still make a claim at an airport or an inland immigration office) and the rules do not apply to citizens or "habitual residents" of either country. Exceptions will be made for those making a claim at the border if they have a family member in the receiving country, if they are an unaccompanied minor, if they have an admission visa (other than for transit purposes), and if they are not required to have a visa to enter the receiving country.

This type of agreement is not unique, but it would certainly be a first for Canada. For the first time since including a refugee definition in Canadian legislation in 1976, the federal government would say to a refugee claimant, "Even though you are at our border, you cannot make a claim here. You must go back." Ottawa knows this safe third agreement (STA) will potentially affect the lives of thousands of refugee claimants each year, and it amounts to a significant refugee policy shift for the Canadian government.

The methodological description of this paper can be found in Appendix B, and this introductory section will lay out the structure of this document, which has seven major sections. The first will give a quick synopsis of Canadian immigration and refugee policy, which is important to situate this current proposal. This introductory section will also describe briefly the last attempt by these two countries to sign a similar deal.

The second division will delve into the global picture by first analyzing the international treaties and documents that talk about refugees and their right to choose where to claim asylum versus the right of states to choose who to let past their borders. This section will also look at the history of similar STAs in Europe, and it will also explore Canada's expressed commitment to refugee protection.

The third part will look at the specific history of Canadian jurisprudence and how the courts deal with non-citizens. It will also investigate court decisions on refugee claimants' travel routes as well as the length of time they spent in third countries before making their claim in Canada.

The fourth portion will survey Canada's stated objectives in seeking this deal. Having already explained the international agreements, the goal is to show that Ottawa's plans are out of step with the international refugee tradition on this issue.

The fifth portion will break down the concerns about whether the United States is indeed a 'safe' country for all refugees. Since this agreement treats all refugees who arrive at the land border in the same manner, this question is particularly important, since the goal of the agreement is to keep refugees from telling their individual stories before the Immigration and Refugee Board (IRB), which decides all of the asylum claims in Canada.

The sixth section will point out some of the possible problems of implementation that the Department of Citizenship and Immigration (CIC) will face as it begins to put the treaty into action. There are many questions about the application of the deal that CIC has yet to explain publicly.

Finally, the seventh section will set out alternatives to this specific arrangement which would better align it with the international refugee treaties. The goal is to show some options that will fulfill the stated desire of CIC, which is to work with the Americans to better protect all refugee claimants in our two countries, while also living up to Canada's tradition of refugee protection.

In doing this project I hope to keep in mind Richard Black's point that much of today's writing about refugees is often unpublished because writers fail to consider geographical or historical context and the wider relevance of the topic.¹ While I have no intention of publishing this work, I hope that in looking at the case of Canada's desire for a safe third country agreement I can convey the reasons why such a broad treaty is a bad policy option, no matter the time or place. Furthermore, as Reg Whitaker reminds, in debates about refugee policies, "[l]iberal arguments that fail to take reasonable account of

¹ Richard Black, "Fifty Years of Refugee Studies: From Theory to Policy," *International Migration Review* 35, no. 1 (Spring 2001): 67.

security requirements will not get far, but liberal arguments that seek to balance security requirements with humanitarian objectives will still be heard.”² In the current ‘security environment’ this is particularly prescient. At the same time, the language of *human security* is relevant, for it argues for universal rights that apply to all people everywhere by putting the individual rather than the state at the centre of discussions about security. This concept incorporates physical and social security as well as human rights.³ One of the goals of this paper is to find some equilibrium between these two positions as they relate to refugee protection.

Since the end of the Cold War, states increasingly view today’s asylum seekers as burdens to shun, rather than strategic populations to accept. Unlike the Cold War days, refugees do not carry ideological or geopolitical value, thus today’s refugees face a steeper hill to climb in their search for protection.⁴ As public perception shifts, the plight of refugees can easily get lost, which is why it is necessary to keep in mind some global refugee numbers. In 1951, the year of the United Nations High Commissioner for Refugee’s (UNHCR) establishment, there were 1.5 million refugees worldwide.⁵ This number grew to 8.4 million by 1980, peaked at 17.8 million in 1992 and currently stands at 12 million (as of 1 January 2002). Taking into account the UNHCR’s broader category of ‘persons of concern’ the total number is nearly 20 million.⁶ With such staggering

² Reg Whitaker, “Refugee Policy after September 11: Not Much New,” *Refuge* 20, no. 4 (August 2002): 31.

³ Raquel Freitas, “Human Security and Refugee Protection after September 11: A Reassessment,” *Refuge* 20, no. 4 (August 2002): 35.

⁴ Julie Mertus, “The State and the Post-Cold War Refugee Regime: New Models, New Questions,” *International Journal of Refugee Law* 10, no. 3 (1998): 336.

⁵ Alan Dowty and Gil Loescher, “Refugee Flows as Grounds for International Action,” *International Security* 21, no. 1 (Summer 1996): 45-6.

⁶ UNHCR, “Refugees by Numbers 2002 Edition” [article online] (accessed 12 July 2003), available from <http://www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.htm?tbl=STATISTICS&id=3d075d374&page=statistics>.

numbers Canada's 25,000 to 30,000 protected persons each year is but a drop in the bucket.

In general, countries with asylum policies use the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol⁷ (the Convention) definition of a refugee in their domestic legislation. Article 1(A)(2) states that the term "refugee" applies to any person who:

Owing to well-founded fear of being persecuted for reasons of *race, religion, nationality, membership of a particular social group or political opinion*, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable, or owing to such fear, is unwilling to return to it. [emphasis mine]⁸

The five reasons delineated therein are often referred to as the 'Convention grounds.'

Since states use the Convention language in their domestic legislation, why then are refugees finding it increasingly difficult to find asylum in western states? First, these states shift the language and terminology, using words like *displaced persons, illegal immigrants, economic migrants, quasi-refugees, aliens, queue jumpers, asylum shoppers, and boat people* to describe asylum seekers. This shift from the traditional terminology gives states an excuse to treat these people harshly, since the public does not see them as 'real' refugees and thus not worthy of protection. Second, receiving states spend large

⁷ The Convention originally applied only to events occurring before 1 January 1951, and it allowed signatories to choose to apply the time limit more specifically to events occurring in Europe. The adoption of the 1967 Protocol did away with these time and space limitations. See UNHCR, "Convention and Protocol Relating to the Status of Refugees" [article online] (Geneva: March 1996, accessed 8 May 2003), available from <http://www.asylumsupport.info/publications/unhcr/convention.pdf>.

⁸ UNCHR, "Convention and Protocol," Article 1(A)(2).

amounts of energy and resources trying to keep people from accessing the system at all. This leads to policies which prevent claims at the border of a state and allow them to summarily send claimants back to other states. These policies are embodied in actions like interdiction, visa requirements, carrier sanctions, safe third country agreements, and security zones.⁹ In short, while the Convention definition looks strong, governments continue to come up with new definitions to shirk their treaty obligations.

As Lavenex has written, refugees are an interesting phenomenon existing at the nexus between state sovereignty, human rights and interstate interdependence. Refugees represent the tension between state rights to govern their territory and the universal human rights system, which applies to everyone, everywhere. When people lose the security of their own state, they are forced to seek protection from another – which is why it is an issue of interstate interdependence. The actions of one state force the hand of another.¹⁰

For decades Canada has subscribed to the ideal of refugee protection, indeed it has been a world leader in resettlement programs and protecting women at risk. This current STA, however, moves Canada backward rather than forward, and will have a detrimental effect on refugee claimants that come to our border. As this paper will show, the agreement is contrary to the international tradition on this subject as well as Canada's own court history. There are alternatives within the safe third country regime, however, that would make this STA more agreeable to refugee advocates while keeping in mind Canada's traditions and security concerns.

⁹ Guy S. Goodwin-Gill, *The Refugee in International Law* (Oxford: Clarendon Press, 1996), 30-1.

¹⁰ Sandra Lavenex, *The Europeanisation of Refugee Policies: Between Human Rights and Internal Security* (Aldershot, UK: Ashgate, 2001), 8, 10.

I. Overview of 1951 Refugee Convention and Canada's refugee protection tradition

1. Convention history

Refugee law challenges the established ideas of state sovereignty because it forces states to accept a group of non-citizens inside its borders. The obligations states accept by acceding to the Convention do not come from any responsibility for the human rights violations or violent situations that spurred the refugee movement. In this context, it is no wonder that complying with refugee law often comes at a political cost for governments of receiving states.¹¹ A serious study of this issue, then, must keep in mind this constant tension.

While the previous section has specified the definition of 'refugee' used by international refugee law, in general usage it tends to take on a broad, loose meaning. People use the word to describe someone in flight from intolerable conditions. There are myriad reasons for flight, fleeing from threat to life and freedom, from oppression, from deprivation, from civil war, from natural disasters. Implicit in this general definition of refugee is that the person is deserving of protection and that the host country ought to offer it to the one seeking asylum. However, in international law this term takes on a much more narrow definition. 'Economic refugees' are discouraged and painted in unflattering terms. While the exercise in definition may seem petty and one of semantics, the international community (including Ottawa) has defined the rules of the game, and it is therefore important to know whom we are talking about.¹² The definition question is at

¹¹ Joan Fitzpatrick, "Temporary Protection of Refugees: Elements of a Formalized Regime," *American Journal of International Law* 94, no. 2 (April 2000): 281. See also Jens Vedsted-Hansen, "Non-admission Policies and the Right to Protection: Refugees' Choice Versus State's Exclusion?" in Frances Nicholson and Patrick Twomey, eds., *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge: University Press, 1999), 273-4.

¹² Goodwin-Gill, *The Refugee in International Law*, 3-4.

the heart of the issue, for all claimants must define themselves in a way that will prove they are worthy of protection.

The 1951 Convention and the ensuing 1967 Protocol both specified who could fit the definition of refugee. In general, the 1951 Convention, modified by the 1967 Protocol, establishes the international regime which protects the human rights of those people who flee their homelands, provided that they meet the definitional criteria. Both Canadian and US laws mirror the substantive provisions of the Convention by giving protection to those individuals who can show they have a well-founded fear of persecution based on one of the five specified Convention grounds.¹³

Canadian legislation has picked this up and used the same terms when describing refugees in Canadian jurisdiction. Since 1976 Canadian law has reflected the Convention definition, but has additionally made provision for designating other classes whose admission keep the tradition of humanitarian protection. Such designations have included Indo-Chinese, Latin Americans, Self-exiled Persons, and Political Prisoners and Oppressed Persons.¹⁴

The reason is that while the Convention was created during a time when wars were more often fought between states, in the ensuing decades, the trend has been for wars to be fought internally. Countries like Canada have adapted and laid down guidelines for assessing asylum seekers from such events. For example, in 1996 the chair of the IRB released Guidelines on Civilian Non-Combatants Fearing Persecution in Civil War Situations, which distinguish the “types of harm that [befall] civilian victims of conflict and they provide a carefully crafted framework for assessing whether the harm is

¹³ Mark R. von Sternberg, *The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law* (The Hague: Martinus Nijhoff Publishers, 2002), 1.

¹⁴ Goodwin-Gill, *The Refugee in International Law*, 23, footnote 104.

severe enough and adequately linked to a protected status ground to establish asylum eligibility under the 1951 Convention.”¹⁵

“Unlike most other people who leave their country, refugees seek admission to another country not out of choice but out of absolute necessity, to escape threats to their most fundamental human rights from which the authorities of their home country cannot or will not protect them.”¹⁶ While factors come into play as to where they end up, the main point is to remember that refugees do not choose to leave their home.

Furthermore, the UNHCR has declared that:

“A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. *He does not become a refugee because of recognition, but is recognized because he is a refugee*” [emphasis mine].¹⁷

Another important element of the Convention is that it requires the asylum seeker to be outside his or her country of origin.¹⁸ James Hathaway has pointed out a threefold historical rationale for this requirement. First, the drafting of the Convention happened

¹⁵ Joan Fitzpatrick, “Human Rights and Forced Displacement: Converging Standards,” in Anne F. Bayefsky and Joan Fitzpatrick, eds, *Human Rights and Forced Displacement* (The Hague: Martinus Nijhoff Publishers, 2000), 5.

¹⁶ UNHCR, “Note on International Protection (Submitted by the High Commissioner)” [article online] (7 September 1994, accessed 12 June 2003), available from [http://www.unhcr.ch/cgi-bin/texis/vtx/home/](http://www.unhcr.ch/cgi-bin/texis/vtx/home/.opendoc.pdf?tbl=EXCOM&page=EXEC&id=3ae68c120) opendoc.pdf?tbl=EXCOM&page=EXEC&id=3ae68c120, 6.

¹⁷ UNHCR, “Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees” [article online] (1979, Reedited, Geneva, January 1992, accessed 12 June 2003), available from http://www.unhcr.ch/cgi-bin/texis/vtx/home/+6wwBm_el4VpwwwwwwwwwwwwhFqhT0yfEtFqnp1xcAFqhT0yfEcFqewzaxwDmxddAadDapGnqnm1Gn5awDmaqGoBnGowahdGamnBnGMOdoDtaGnh1tnna5BwB15Dzmxwwwwww1FqmRbZ/opendoc.pdf, 7.

¹⁸ UNHCR, “Convention and Protocol,” Article 1(A)(2).

during a specific context of limited resources to deal with refugee crises. The goal was to assist those outside their country of residence who needed surrogate international rights until they gained new national protection.¹⁹

Second, the framers feared that the inclusion of internal refugees in the Convention would allow states to shift the responsibility of this segment of their population onto the shoulders of the international community.²⁰

Third and most important, Convention delegates were concerned that attempting to deal with internal refugees would be a breach of national sovereignty of states that had internal refugee movement. Instead, the refugee regime would at best shelter those able to escape the territory of a persecutory state.²¹

As Hathaway explains, none of these factors was a matter of principle, instead reflecting the limited scope of international law. "[T]he physical presence of the unprotected person outside her country of origin is not a constitutive element of her refugeehood, but it is rather a practical condition precedent to placing her within the effective scope of international protection."²²

This requirement becomes particularly important for Canada, which both as a signatory to the Convention and within its domestic law, defines refugees as a person outside his or her country of origin. Since Canada shares only one border, and that with a country that is not a refugee producer, it is evident that Canada knows refugees will have to travel to get to Canada. Since it is difficult to come to Canada directly from a refugee producing country, there is an inherent implication that they will have to come through

¹⁹ James C. Hathaway, *The Law of Refugee Status* (Markham, Ontario: Butterworths, 1991), 30.

²⁰ Hathaway, *The Law of Refugee Status*, 30-1.

²¹ Hathaway, *The Law of Refugee Status*, 31.

²² Hathaway, *The Law of Refugee Status*, 31-2.

third countries. Therefore, Canada cannot acknowledge spontaneous refugees arrivals without accepting that they will travel through third countries. In this context, this STA acts more as a barrier to spontaneous arrival than to the ideal of refugee protection.

This paper will look at the security concerns posed by refugees in more detail in section five, but it is relevant to point out that the framers of the Convention did not want war criminals and others who posed a security risk to have access to asylum. "The decision to exclude such persons, even if they are genuinely at risk of persecution in their state of origin, is rooted in both a commitment to the promotion of an international morality and a pragmatic recognition that states are unlikely to agree to be bound by a regime which requires them to protect undesirable refugees."²³ Article 1(F) of the Convention bars those who commit crimes against peace, war crimes, and crimes against humanity.²⁴ It also forbids protection for those who have committed serious non-political crime. This exclusion allows refugee-granting states to act in line with extradition laws by making sure that fugitives from justice cannot avoid the jurisdiction of a state where they may lawfully face punishment.²⁵

The new Canadian Immigration and Refugee Protection Act (IRPA), enacted 28 June 2002, mirrors these exclusion clauses, thus keeping the refugee system from being an easy way in for those who are running from legitimate prosecution. As Waldman has summed up Article 1(F), it "provides for exclusion of persons from Refugee Convention protection based upon their conduct, and is grounded upon the belief that persons who have engaged in reprehensible conduct in violation of international norms of acceptable

²³ Hathaway, *The Law of Refugee Status*, 214.

²⁴ Hathaway, *The Law of Refugee Status*, 217.

²⁵ Hathaway, *The Law of Refugee Status*, 221.

behaviour, should not be entitled to protection in a third country.”²⁶ The UNHCR consistently maintains that the Convention already has all the provisions it needs to exclude dangerous people from the asylum process. As the agency has said, “the Convention does not provide a safe haven to terrorists, nor does it protect them from criminal prosecution... On the contrary, it is carefully framed to exclude persons who commit particularly serious crimes.”²⁷

2. *Concept of non-refoulement*

One of the fundamental principles of the international refugee regime, found in Article 33 of the Convention, is *non-refoulement*; the concept that no contracting state will send an applicant back to his or her home state where he or she may face persecution. While this normally covers those claiming asylum under the Convention definition, countries (Canada included) have increasingly used it to protect people from potential torture. This protection is offered whether the person will receive ill treatment at the hands of state or private actors. Also, the notion of chain *refoulement* is important, as a state will not want to send an applicant to a third country who may then *refoule* the claimant to his or her home country.²⁸

Many states that are anxious to avoid *non-refoulement* obligations have instead restricted access to their borders. We see this in the use of visa policies and carrier sanctions. When refugees do make it to the domain of a host country, these countries may deny them access to services such as health care, education, or help securing legal

²⁶ Lorne Waldman, *The Definition of Convention Refugee* (Markham, Ontario: Butterworths, 2001), 8.311-8.312.

²⁷ Ray Wilkinson, “After the Terror... The Fallout,” *Refugees*, 4, no. 125 (2001): 7, 9.

²⁸ Richard Towle, “Human Rights Standards: A Paradigm for Refugee Protection?” in Anne F. Bayefsky and Joan Fitzpatrick, eds, *Human Rights and Forced Displacement* (The Hague: Martinus Nijhoff Publishers, 2000), 33-4.

representation. When states restrict access to their border by refusing a visa or obstructing flight on a domestic carrier, they do not specifically breach the prohibition against returning refugees to frontiers of persecution, since they were not technically under domestic jurisdiction.²⁹

3. Synopsis of Canada's immigration and refugee policy history

Canadian refugee policy grew out of Canada's immigration history, so it is important to quickly describe that history. Since Confederation, one unsurprising goal of immigration has remained constant: control. Whether by blatant or subtle means, the government's policies have always revolved around the notion of regulated access. Initially, the law and policies were race-based in their orientation, assimilationist in their intent, and economic in their justification. Lawmakers long-desired to keep the British character of this country. Non-whites were the least desirable and the law assumed they were the least likely to assimilate.³⁰

During Canada's nation-building period, however, immigration from preferred countries could not keep up with Canada's labor needs, so the government admitted immigrants of color to fill the shortage. When the work was done, the federal government passed blatantly discriminatory legislation to curtail the number of visible minorities who attempted to make Canada their new home.

In the early decades of Confederation, even with all the restrictions in place, many Asians came to Canada, so the government placed unique financial restrictions on them. The Chinese Immigration Act of 1885 put a \$50 "head tax" on each Chinese immigrant. The government increased this to \$100 in 1900 and to \$500 in 1903. It is no coincidence

²⁹ Goodwin-Gill, *The Refugee in International Law*, 251-2.

³⁰ Lisa Marie Jakubowski, *Immigration and the Legalization of Racism* (Halifax: Fernwood Publishing, 1997), 92.

that the government first enacted this legislation in 1885, as that was the year of the CPR's completion. Since the railway-building project was concluded, the Chinese labor was no longer necessary.³¹

Between 1923 and 1947, the government repealed the head tax and instead imposed a total ban on Chinese immigration except for:

a) diplomatic and consular personnel b) children born in Canada of Chinese race or descent who had left Canada for educational or other purposes c) merchants, a merchant being defined as a 'a person who devoted his undivided attention to mercantile pursuits, who had not less than \$2,500 invested in an enterprise importing to Canada or exporting to China goods of Chinese or Canadian origin or manufacture, and who had conducted such a business for at least three years' and d) students coming to Canada for study at or in attendance at recognized Canadian educational institutions.³²

In addition to these financial restrictions, no vessel carrying Chinese immigrants to Canada could have more than one such immigrant for every 50 tons of cargo.³³ At this time, Canada entered into an agreement with Japan in which Japan arranged to limit the number of its citizens allowed to emigrate to Canada. Canada did not want to shut the doors completely to Japanese immigration because England and Japan were allies, and Canada did not want to jeopardize its relations with England.³⁴

A 1908 Order-in-Council required all potential immigrants to have \$25 with them upon arrival to Canada. The government increased this stipulation for Asians to \$200.

³¹ B. Singh Bolaria and Peter S. Li, *Racial Oppression in Canada* (Toronto: Garamond Press, 1988), 107.

³² Freda Hawkins, *Critical Years in Immigration: Canada and Australia Compared* (Montréal and Kingston: McGill – Queen's University Press, 1991), 20.

³³ Hawkins, 19.

³⁴ Jakubowski, 14.

The tougher requirement for Asians was because of the government's view that "their language and mode of life render them unsuited for settlement in Canada, where there are no colonies of their own people to ensure their maintenance in case of their inability to secure employment."³⁵

And yet, even with these restrictions, Asians still traveled to Canada, so the Canadian government instituted the Continuous Passage Rule in 1914 which barred any immigrant from landing in Canada unless he traveled by continuous journey from his native country or country where he had received naturalized citizenship. Since there was no way to travel directly from India or Ceylon to Canada at this time without making a stop, this Order was a de facto rule barring immigration from these two countries.³⁶ As was the case with the Japanese agreement, for Canada this was a pragmatic decision, since it did not want to create ripples between itself and England, as India was part of the British Empire at the time. In order to make this policy effective, the government issued orders to the CPR not to sell through tickets from India to Canada. This allowed Canada to discriminate against Asian immigrants from the British Empire without appearing (on the surface) to do so.³⁷

Over the course of time, Canadian policy moved from a racist policy to an egalitarian one that granted all potential new arrivals equality under the law. While domestic pressures certainly played a part in this progression, the great shift in policy that occurred in the 1960s was directly related to the work of Ellen Fairclough, Minister of Citizenship and Immigration. However, she did not have a grand notion of a multi-ethnic

³⁵ David Matas and Ilana Simon, *Closing the Doors: The Failure of Refugee Protection* (Toronto: Summerhill Press, 1989), 30.

³⁶ Matas and Simon, 32; K. W. Taylor, "Racism in Canadian Immigration Policy," *Canadian Ethnic Studies* 23, no. 1 (1991): 3.

³⁷ Jakubowski, 14.

Canada but rather believed that Canada's economic conditions required a revamped immigration policy that should accept the most useful skilled workers, even if they came from 'non-traditional' source countries.

In June 1957, a federal election took the Conservatives to power under John Diefenbaker. During the campaign, he promised to overhaul Canada's Immigration Act, claiming that the country needed to populate or perish. Once the Conservatives came to power however, nothing happened on this front, so the Minister of Citizenship and Immigration, Ellen Fairclough, and her Deputy Minister, Dr. George Davidson, decided they needed to create new regulations which would eliminate any discrimination based on color, race or creed. Instead of using race as the determiner, employable skills would become the main criteria for entrance to Canada.³⁸ She enacted change through new regulations because she believed it easier than trying to get a new law passed, and it was also a much quicker way to make such dramatic change. These new Immigration Regulations, tabled on 19 January 1962, removed racial factors as the major determiner in Canadian immigration policy, leaving only one privilege for European immigrants: the ability to sponsor a wider range of relatives. The federal government removed this final discriminatory clause from the Immigration Regulations in 1967.³⁹

Ultimately, all these transformations, starting with Fairclough's plans, culminated in the introduction of the points system on 1 October 1967. This new system of determining immigration eligibility completely eliminated the remnants of racial preference in Canada's immigration policy and allowed the characteristics of potential

³⁸ Jakubowski, 17.

³⁹ Hawkins, 38.

immigrants to change dramatically.⁴⁰ No longer would place of origin put a candidate in either a preferred or a relegated position.

Until 1976 Canadian legislation did not distinguish between refugees and immigrants, instead lumping them together. However, in 1976 Ottawa passed new immigration legislation, which set out for the first time a refugee definition. Since then Canada has based refugee protection more on the asylum seeker's need for protection than for Canada's need for immigration. The value of delineating the difference between the two groups is that in asylum claims applicants are fleeing states experiencing internal conflict and they may have experienced or may risk experiencing major violations of human rights such as torture or execution.⁴¹ Thus, for refugees the issue is about human security rather than simply choosing a more advantageous lifestyle. Canada has gone even further in its designation of people who need asylum, expanding the boundaries of protection. For example, Canada's system recognizes that people who face persecution at the hands of someone other than *state actors* still require protection. This is articulated in Canada's newest legislation, the Immigration and Refugee Protection Act (IRPA).

The new IRPA has consolidated many of the previous classes of protection determination by looking at the specific Convention designation, danger of torture, or risk to life or of cruel and unusual punishment. Thus, people who need Canada's protection but would not otherwise fit under the strict Convention grounds can get asylum. The goal of this class of protection is to grant asylum to a person who does not fit the Convention definition but is still at risk if returned to their country of origin. The legislation

⁴⁰ Jakubowski, 10.

⁴¹ Fitzpatrick, "Human Right and Forced Displacement," 6.

distinguishes between people facing persecution versus prosecution, for it is not intended to allow people to escape lawful punishment in their home state.⁴²

Section 96 of the IRPA is a virtual copy of the Convention definition and Section 97 describes a *person in need of protection* as

- ...a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally
- (a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or
 - (b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
 - (i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,
 - (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
 - (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
 - (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

Person in need of protection

- (2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.⁴³

Although Canada has clearly expanded the list of those who can receive protection, the STA shuts the door for those who would fit this broader Canadian terminology. Since Canada will apply the agreement in light of the Convention rather

⁴² Jay Sinha and Margaret Young, "Legislative Summary, Bill C-11: The Immigration and Refugee Protection Act" (Ottawa: Library of Parliament, 2002), 28-9.

⁴³ "Immigration and Refugee Protection Act," *Statutes of Canada 2001*, Chapter 27 (Ottawa: Queen's Printer, 2001), §97.

than Canadian law, immigration officers at the border will use the narrower international definition when making the decision to return someone or not. Of course, the purpose of the agreement is to limit access to the Canadian system, and as this paper will show there is a real question as to whether immigration officials will even be applying the most basic standards of the international classification.

However, at a policy level at least, Ottawa defends the importance of protecting refugees, which we can see in the objectives expressed in the IRPA. Section 3(2) lays these out and includes the need:

- (a) to recognize that the refugee program is in the first instance about *saving lives* and *offering protection* to the displaced and persecuted;
- (b) to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement;
- (c) to grant, as a fundamental expression of Canada's humanitarian ideals, fair consideration to *those who come to Canada claiming persecution*;
- (d) to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment;
- (e) to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings...[emphasis mine]⁴⁴

While these goals cite Canada's humanitarian nature, this paper will attempt to show that the STA acts counter to the purposes defined by the legislation itself. It is this inherent inconsistency which makes the application of the Agreement disturbing.

4. Initialing of the Safe Third Country Agreement

⁴⁴ "Immigration and Refugee Protection Act," §3(2).

How does Canada's legislation describe the boundaries for such an agreement?

IRPA requires the government to look at four factors when considering the designation of another state as a safe third partner:

- (a) whether the country is a party to the Refugee Convention and to the Convention Against Torture;
- (b) its policies and practices with respect to claims under the Refugee Convention and with respect to obligations under the Convention Against Torture;
- (c) its human rights record; and
- (d) 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.⁴⁵

While the US does not *technically* fill the first requirement, as it has only acceded to the 1967 Protocol, not the 1951 Convention, it is a moot point. As has been described, the Protocol merely expands the time and geographical limitations that the Convention imposed. So, in fact it is more important for a country to be party to the Protocol than just the Convention.

Canada has pursued this as an international treaty, and as such it is under the prerogative of the Federal Cabinet. There were several rounds of negotiation and after the second round the two sides produced a draft in June 2002. The next month the delegates traveled to Geneva and presented the draft to the UNHCR and asked the international body to play a role as a "safeguard." UNHCR's response was that insofar as the agreement would work to address refugee flows, it supported the notion of a safe third country agreement. The organization made some suggestions to the draft, which the two governments incorporated. For example, Article 3 deals with adjudication of refugees,

⁴⁵ "Immigration and Refugee Protection Act," §102(2).

but in the original draft the door was left open for possible further removal (e.g. if Canada removed a refugee claimant to the States which then removed her to the UK without either government giving her an adjudication). The result was Article 3b, which commits the two sides to making sure every refugee claimant has access to the asylum procedure in either country and will not be sent away without access to one of the asylum systems. In addition to giving suggestions, the UNHCR also agreed to act as a monitoring and reviewing third party (as opposed to the Dublin Convention which gives no allowance for third party involvement. Section II of this paper looks closely at this European STA).⁴⁶

While the implementation appears to be just months away, this is not the first time the two parties have created a safe third country draft agreement. Even though the federal Liberal Party opposed such a deal during their opposition days, by 1995 they were in support of it. During his tenure as Minister in the mid-1990s, Sergio Marchi said that Canada would *not* pursue such an agreement with the US because the playing field between the two was not level. Clearly, however, Ottawa apparently justified itself past that hurdle, coming to a tentative agreement with the Americans in October 1995.⁴⁷

During March 1996 dozens of witnesses testified before the House of Commons Standing Committee on Citizenship and Immigration. The Minister at the time, Lucienne Robillard, admitted that differences existed between the Canadian and American refugee systems, but her justification was that the UNHCR advised that the US met international standards. She also noted that the Agreement was designed to come into effect in stages, with the two countries only applying the restrictions to the first 500 claimants in the first

⁴⁶ Interview with Bruce Scofield, Director, Policy Development and International Coordination, Refugees Branch, Citizenship and Immigration Canada. Notes from personal interview 12 June 2003. Notes approved by Mr. Scofield via email 9 July 2003.

⁴⁷ David Matas and Nancy Worsfold, "Federal Budget: Anti-refugee Policy Shifts Made under Smokescreen," *The Ottawa Citizen*, 10 March 1995, Final Edition, A11.

year.⁴⁸ This is a completely different method from the current all-or-nothing approach, and later the paper will discuss the benefits of such an approach.

In May 1996 the Committee published its report on the preliminary draft agreement. The Committee had several recommendations to make the Agreement stronger, one of which was that the government should expand the exception for family reunification. In its view, the definition of “close” family members was too restrictive by leaving out family members such as grandparents, grandchildren, aunts and uncles, nieces and nephews, and first cousins.⁴⁹ The governments included this expanded family definition in the present Agreement.

Another difference between the two Agreements is that in 1995 it carried some time limit restrictions on claimants,⁵⁰ and the Committee argued that the Agreement needed to incorporate some allowance for unavoidable delays during transit. The worry was that one of the governments might detain a passenger for more than the allotted time, thus precluding him from making a refugee claim in his destination country.⁵¹

Additionally, the Committee proposed that the Canadian system should handle French-speaking refugee claimants who would otherwise have to access the US. The Report pointed to the discretionary powers given to both governments under Article 7 as

⁴⁸ Canada, Parliament, House of Commons, Standing Committee on Citizenship and Immigration, *Evidence of Proceedings*, (Meeting No. 2, 19 March 1996), 35th Parliament, 2nd Session [online] (accessed 4 November 2002), available from http://www.parl.gc.ca/committees352/cits/evidence/02_96-03-19/cits-02-cover-e.html.

⁴⁹ Canada, Parliament, House of Commons, Standing Committee on Citizenship and Immigration, “The Preliminary Draft Agreement Between Canada and the United States Regarding Refugee Claims,” Eleni Bakopanos, Chair, (Ottawa: Canada Communication Group–Publishing, Public Works & Government Services Canada, 1996), 5-6.

⁵⁰ The deal would have given air travelers passing through the US 48 hours to get to Canada and make their claim. Asylum seekers traveling by land would have ten days to travel through the US before making their claim in Canada.

⁵¹ Canada, Parliament, House of Commons, “The Preliminary Draft Agreement...,” 6.

the rationale, arguing that it made more sense for Francophones to apply in Canada, where they could access the system in their first language.⁵²

Ultimately the attempt to get the agreement signed in 1997 failed when the two sides suspended their negotiations “largely as a result of priority given by the U.S. government to implementing new [immigration] legislation and managing litigation subsequently brought against it.”⁵³ CIC has also argued that the agreement fell through because there was a belief that “the same number of claimants cross the border each way and that consequently the agreement would not be to either country’s advantage.”⁵⁴ However, in my research I have seen no other evidence by either party or from the advocacy community to back up this latter claim. Rather, the common understanding was that more refugees traveled into Canada than into the US.

Section four of this paper will look more closely at the reasons Canadian officials have given to defend this agreement, but it is useful at this point to take a quick look. On 3 December 2001, less than three months after the attacks on New York and Washington, US Attorney General John Ashcroft, then Minister of CIC Elinor Caplan, and then Solicitor General Lawrence MacAulay signed the Joint Statement of Cooperation on Border Security and Regional Migration Issues. CIC described it as an agreement that would support the emerging *public security* and border strategy.⁵⁵ Minister Coderre has added to this sentiment, placing the 30-point Border Plan firmly within the language of

⁵² Canada, Parliament, House of Commons, “The Preliminary Draft Agreement...,” 6-7.

⁵³ CIC, “Response to the Recommendations Made by the Standing Committee on Public Accounts in its Report on the Processing of Refugee Claims” [report online] (accessed 8 May 2003), available from <http://www.cic.gc.ca/english/pub/pubacc.html>.

⁵⁴ CIC, “Government Response to the Second Report of the Standing Committee on Citizenship and Immigration, ‘Refugee Protection and Border Security: Striking a Balance’” [report online] (accessed 7 May 2003), available from <http://www.cic.gc.ca/English/pub/ref-protect.html>.

⁵⁵ CIC, “Canada-United States Issue Statement on Common Security Priorities” [statement online] (accessed 8 May 2003) available from <http://www.cic.gc.ca/english/press/01/0126-pre.html>.

“today’s heightened security requirements.”⁵⁶ In response to unfounded allegations that five men of concern to the FBI crossed illegally into the US, the Minister sent a letter to the Canadian media arguing that the border agreement would “help ensure the safety of Canadians in the fight against terrorism.”⁵⁷ From the beginning, then, the government has couched this agreement in the language of security.

The record on the American side is mixed, but it is clear that Washington does *not* really see this agreement as a security measure, even though the Department of Justice has described it as “taking the campaign against terrorism to the northern border.”⁵⁸ Within the context of the 30-point Secure and Smart Border Action Plan, the agreement fits under the section relating to the secure flow of people.⁵⁹ The White House has instead explained the goal by stating that it will “improve the operation of our common border...[and] will promote the orderly handling of asylum applications and reduce the misuse of our respective asylum systems.”⁶⁰ This description has more to do with convenience and less with security or counter-terrorism.

The clearest statement from an American official was that from Kelly Ryan of the State Department as she gave testimony before the Subcommittee on Immigration of the House of Congress. In her statement, she made it clear that the negotiations “were

⁵⁶ CIC, “Notes for an Address by the Honourable Denis Coderre Minister of Citizenship and Immigration, Meeting at the Renaissance Club” [notes online] (accessed 8 May 2003), available from <http://www.cic.gc.ca/English/press/speech/detroit.html>.

⁵⁷ Denis Coderre, “To Canadian News Editors” [letter online] (accessed 8 May 2003), available from <http://www.cic.gc.ca/english/press/03/letter-terror.html>.

⁵⁸ United States Department of Justice, Immigration and Naturalization Service, *Communiqué* 23, no. 11 (December 2001): 7.

⁵⁹ Office of Homeland Security, “Specifics of Secure and Smart Border Action Plan,” [report online] (accessed 8 May 2003), available from <http://www.whitehouse.gov/news/releases/2002/01/20020107.html>.

⁶⁰ The White House, “Progress Report – Security and Opportunity at the U.S.-Canada Border,” [report online] (accessed 14 July 2003), available from <http://www.whitehouse.gov/news/releases/2002/06/20020626.html>.

undertaking at the request of the government of Canada... [and that] Canada has had a long-standing interest in concluding such an agreement with the U.S.”⁶¹

When committee chair George Gekas asked Ryan how the agreement would keep terrorists from entering the US, Ryan replied that her Department has not tied this agreement with the other counterterrorism measures found in the 30-point plan. She contended that the agreement does not address US security. In her words, “It is important to the Government of Canada, and it is important for us getting the other objectives of the border plan, and that is how [Secretary of Homeland Security] Tom Ridge and Attorney General [John] Ashcroft envisioned it working... But, in order to get the important counterterrorism pieces of the 30-point action plan, this was a trade-off in order to get that.”⁶²

Evidently for the Americans this agreement is not expected to increase safety measures, but by including it in the 30-point plan, it allows the Canadian government to couch it in security language on this side of the border. For example, in a web document entitled “CIC’s Role in Public Safety,” CIC stated that one of the specific measures it has taken to improve the protection of Canadians was by negotiating the STA with the US. And yet, in further describing the agreement, it only mentioned that it will “reduce the misuse of our asylum systems and will free up resources that could be used to address

⁶¹ United States, Congress, House of Representatives, Subcommittee on Immigration, Border Security, and Claims of the Committee on the Judiciary House of Representatives, 107th Congress, 2nd Session, “United States and Canada Safe Third Country Agreement,” 16 October 2002, Serial No. 111 (Washington, D.C.: U.S. Government Printing Office, 2002), 3-4.

⁶² United States, Congress, House of Representatives, 26-7.

other security systems.”⁶³ So, even though on one hand Ottawa appeals to the security concern, this description does not show how it will enhance Canadian safety.

Although the US was willing to negotiate the treaty, it made sure to do so in a way that would result in the smallest number of refugees possible being returned to US jurisdiction. The Americans made sure the deal only applies at the land borders, citing the difficulties European states have experienced under the Dublin Convention in determining which state(s) migrants have transited through. By applying the rules only at land border points of entry, Washington contends, there will be no argument as to which country the claimants have transited through.⁶⁴ In her statement to the Congressional Subcommittee, Ryan also made it clear that the inclusion of the family member exceptions came at the request of the US negotiators.⁶⁵ Since both parties realize the deal will place more of a burden on the US asylum system, it was obviously in the US interest to seek exceptions that would shrink the number of claimants Canada can return.

So, the US is only consenting to this deal in order to get concessions out of Canada. It is a Canadian initiative, and Washington has negotiated in a way that will keep the numbers of refugee claimants that Canada returns as low as possible. While Canadian officials continue to allude to the security aspect of this agreement, this paper will show that it actually does little to address this valid concern.

⁶³ CIC, “CIC’s Role in Public Safety” [article online] (29 April 2003, accessed 7 May 2003), available from <http://www.cic.gc.ca/english/pub/sept11.html>.

⁶⁴ United States, Congress, House of Representatives, 4-5.

⁶⁵ United States, Congress, House of Representatives, 5. This statement is corroborated by Joe Langlois of the Immigration and Naturalization Service, 10.

II. The International Framework

1. Analysis of Articles 31 and 33 of the 1951 Convention

A look at the international context of refugee protection shows many reasons why STAs can be so harmful. First, an overview of the international collection of UNHCR Conclusions and global treaties shows that refugees do indeed have a right to choose their country of asylum, with some limitations that will be spelled out later. Second, the European states have been working on such agreements and legislation for a decade, so the example there will help understand the pros and cons of the Canada-US draft agreement (CUDA).

First, however, we must realize that there is an inherent contradiction embedded in the discussion of refugee policy: a state's right to control who it admits versus the right of an individual to obtain international protection. Signatories to the Convention must address these two opposing issues if they truly desire an effective international regime of protection.⁶⁶ Of course, the fact that a state has signed the Convention forces it to relinquish some border control, since the state has agreed to the concept of *non-refoulement* (the principle of not returning someone to face persecution, which is addressed in subsection 4), thus allowing the refugee's right to supercede the state's right in this instance. This is an important point to keep in mind as we look at the arguments for and against the right for refugees to choose where they will make their claim.

The Convention actually says very little about excluding refugees and restricting their choice of asylum country. Article 1E points out that states *can* exclude someone from asylum proceedings if the person already has residence and the ensuing "rights and

⁶⁶ Vedsted-Hansen, 269.

obligations which are attached to the possession of the nationality of that country.”⁶⁷ In other words, people who already enjoy residence in a country outside their own cannot receive refugee status. Of course, at this point there is no need for such status, since the person is no longer in danger. It would be better for us, then, to refer to this as a cessation clause rather than an exclusion clause.⁶⁸ The following will show that the Convention and international decisions have given much leeway to refugees when choosing the country of asylum.

The reason that any safe third country agreement deserves to be scrutinized is because of the possibility of *refoulement* or *indirect refoulement*. As found in Article 33 of the Convention, the notion of *non-refoulement* prescribes that no state shall return a refugee to any country where she or he may face persecution. *Refoulement* is different from deportation or expulsion, because the latter two have built into them a legal process that allows for such removal.⁶⁹ While this notion is constrained by security concerns, generally, states have recognized that the principle applies from the instant a refugee makes a claim for entry.⁷⁰ The UNHCR Executive Committee (ExCom) has consistently upheld this fundamental characteristic of protection. In its Conclusion 19 of 1980, it said that “in the case of large-scale influx, persons seeking asylum should always receive at least temporary refuge.”⁷¹ Likewise, “in situations of large-scale influx, asylum seekers should be admitted to the State in which they first seek refuge ... In all cases the

⁶⁷ UNHCR, “Convention and Protocol,” Article 1(E).

⁶⁸ Vedsted-Hansen, 271.

⁶⁹ Goodwin-Gill, *The Refugee in International Law*, 117.

⁷⁰ Goodwin-Gill, *The Refugee in International Law*, 123-4.

⁷¹ Cited in Goodwin-Gill, *The Refugee in International Law*, 479.

fundamental principle of *non-refoulement* – including non-rejection at the frontier – must be scrupulously observed.”⁷²

2. Issue of refugee right to choose country of asylum

Proponents of STAs point to Article 31 of the Convention as justification for these types of agreements. This Article declares that “Contracting States 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 in the sense of Article 1, 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” [emphasis added].⁷³

The words that defenders of STAs latch onto are “coming directly from a territory.” However, two factors must be kept in mind. First, it deals specifically with *penalties* that states may or may not impose on refugees for entering illegally.⁷⁴ Those who support deals like the Dublin and Schengen Conventions use this as a starting point, saying that refugees must make their claim in the first country they enter. A reading of the Convention or the Protocol does not support this, for nowhere does it say that refugees must claim asylum in the first country outside of their country of origin or habitual place of residence.

Second, it is useful to look at the intent of the original framers of the Convention. Dr. Paul Weis’s careful study of the *travaux préparatoires* leading up to the signing of the Convention shows that the delegates realized that refugees did not always travel from their home state to a country of asylum without crossing any other frontiers. The High

⁷² Cited in Goodwin-Gill, *The Refugee in International Law*, 480.

⁷³ UNHCR, “Convention and Protocol,” Article 31.

⁷⁴ Vedsted-Hansen, 277-8.

Commissioner at the time, Gerrit Jan van Heuven Goedhart, pointed out that he himself would have been affected by such a narrow reading. In 1944 he left the Netherlands because of persecution and hid in Belgium for five days. When his life remained in danger, he traveled to France, through Spain, and finally to Gibraltar.⁷⁵

Article 31 went through several amendments, and early on it alluded to a refugee “coming direct from his country of origin.”⁷⁶ The delegates accepted the situation proposed by the High Commissioner, and in the end they came up with the wording that appears in the final draft. The intent, as described by Dr. Weis, was to refer to persons coming directly from their country of origin as well as those who were in an intermediary country for a short time without receiving asylum.⁷⁷

Canada’s own legislation reflects this distinction, accepting that the context of Article 31 deal with penalties for illegal entry. IRPA realizes that the original Convention language is ambiguous and clarifies it in Canadian law by exempting from prosecution those who come either directly *or indirectly* from the country of persecution. IRPA’s acceptance of Article 31’s context allows the Canadian legislation to do away with the ambiguity of the original Convention language by adding the word ‘indirectly’. This change is new to *IRPA*,⁷⁸ and is a recognition by the Canadian government that refugees often are not able to travel directly from the country where they face persecution.

3. *UNHCR Executive Committee Conclusions*

Article 14(1) of the Universal Declaration of Human Rights (UDHR) asserts that “[e]veryone has the right to seek and to enjoy in other countries asylum from

⁷⁵ Paul Weis, ed., *The Refugee Convention, 1951* (Cambridge: University Press, 1995), 297.

⁷⁶ Weis, 296.

⁷⁷ Weis, 297-302.

⁷⁸ Sinha, and Young, 38. See also “Immigration and Refugee Protection Act,” §133.

persecution.”⁷⁹ This Declaration sets the foundation for the Convention, Protocol, and the various domestic legal opinions that would come after it. The following section will show that there is no compulsion for a refugee to seek asylum in the nearest country or the first country which he or she flees to.⁸⁰

In 1975 the Executive Committee (ExCom) of the UNHCR established a Sub-Committee of the Whole on International Protection, whose purpose was to study in detail various aspects of refugee protection. The ExCom usually adopts the results of this sub-committee as conclusions. While it only has an advisory role, these conclusions have an important standard-setting effect. These conclusions reflect the consensus of the international community on specific protection matters, and as the ExCom is the only specialized forum at the international level to develop international standards, these conclusions are important for the protection of refugees.⁸¹

The ExCom’s 1979 Conclusion 15 has been used by both proponents and opponents of STAs, for it states that:

The interests of the asylum seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account. Regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another state. Where, however, it appears that a person, before requesting asylum, already has a connection or close links with another

⁷⁹ United Nations, General Assembly, *Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

⁸⁰ Hathaway, *The Law of Refugee Status*, 46.

⁸¹ Volker Türk, “The Role of UNHCR in the Development of International Refugee Law,” in Frances Nicholson and Patrick Twomey, eds., *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge: University Press, 1999), 164-5.

state, he may, if it appears fair and reasonable, be called upon first to request asylum from that state. [emphasis mine]⁸²

The main lesson to take from this Conclusion is that *mere transit* through a third country should not preclude someone from seeking asylum. The international community, at the 1977 UN Conference on Territorial Asylum, reiterated the goal of Conclusion 15.⁸³ While there is a debate between government representatives and refugee advocates about this issue, the strongest argument is that travel route alone should not make a refugee claimant ineligible for protection.

The ExCom has made other conclusions that propose limiting refugee choice, but these deal with multiple claims. In its 1985 Conclusion 36, the ExCom noted that there was a growing trend for refugees who, having found asylum in one country, move in an irregular fashion to another country to make a new claim. The ExCom hoped that global solutions would be able to help quell this growing phenomenon. The next year it produced Conclusion 41, which recognized that durable solutions to refugee problems included solving this issue of onward movement once asylum seekers found protection. During the next three years the ExCom noted the problem of protected persons moving on in Conclusions 46, 50 and 58, but again these all dealt with those who already had found asylum.⁸⁴

Looking particularly at Conclusion 58, it advises refugees not to move from countries where they have *already found protection*. Furthermore, it allows states to return refugees, but only if they have indeed already found protection in the third

⁸² Cited in Patricia Tuitt, *False Images: The Law's Construction of the Refugee* (London: Pluto Press, 1996), 112.

⁸³ Cited Goodwin-Gill, *The Refugee in International Law*, 510.

⁸⁴ Cited in Vedsted-Hansen, 281-282.

country.⁸⁵ So, international opinion holds that mere transit is not enough to bar a person from making a refugee claim, and the claimant must have some personal connection to the third country, if she or he is to be returned. Both the ExCom and the UN General Assembly have consistently pointed out the need for access to refugee procedures and the ability to sign responsibility agreements.⁸⁶

While some may point out that ExCom Conclusions carry no legal international weight, they are not irrelevant, “given the regulatory intent and the normative content embodied in a number of the provisions. [Conclusion 15 itself] implies certain *minimum standards* of refugee protection” [emphasis in original].⁸⁷ Additionally, in the absence of another international organization charged with setting standards for dealing with asylum seekers, its Conclusions are the UN’s attempt at describing protection under the Convention.⁸⁸ Furthermore, both Canada and the US are part of the ExCom, along with 59 other states.⁸⁹ As members who subscribe to the principles of the UN, they should follow the ExCom’s recommendations. As this paper will discuss, these conclusions all fit with Canadian jurisprudence, but the Canada-US draft agreement (CUDA) will move us away from that history.

In sum, “there is neither a strict ‘direct flight’ requirement, nor any legally protected right of individual choice. Yet the totality of international law pertinent to the

⁸⁵ UNHCR, “Conclusion 58 (XL) of the Executive Committee” [conclusion online] (1989, accessed 12 July 2003), available from <http://www.unhcr.ch/cgi-bin/texis/vtx/home/openssl.htm?tbl=EXCOM&id=3ae68c4380&page=exec>.

⁸⁶ Goodwin-Gill, *The Refugee in International Law*, 333-4.

⁸⁷ Vedsted-Hansen, 282.

⁸⁸ Nazare Albuquerque Abell, “The Compatibility of Readmission Agreements with the 1951 Convention relating to the Status of Refugees,” *International Journal of Refugee Law* 11, no. 1 (January 1999): 72.

⁸⁹ UNHCR, “States Members of the Executive Committee of the High Commissioner's Programme” [article online] (accessed 13 July 2003), available from http://www.unhcr.ch/cgi-bin/texis/vtx/excom/+VwwBmewx80_wwwFqzvmX8_6_h6mFqh0kgZThFqh0kgZTtFqnnLnqzFqn0k0gAFqh0kgZTDzmxwwwwww5Fqw1Fqn0k0g/openssl.htm.

issue, including especially human rights standards and refugee protection principles, results in a relatively limited scope of action for states intending to restrict refugee's choice."⁹⁰ With this in mind, Canada's push to get the US to sign this agreement is unsettling, especially for a country that prides itself on being a model member of the international community.

An example of this in the international community is in the Danish Aliens Act, which states that the government may reject a residence permit "if the alien has already obtained protection in another country or if, because of a prolonged stay or close relatives living there or other like circumstances, the alien has closer ties with another country where he must be deemed to be able to obtain protection."⁹¹ Abiding by international norms, this legislation is significant because it makes the decision based on an individual basis, rather than across the board, as is done in STAs.

So, while the Convention does not explicitly say refugees do or do not have the right to choose where to make their claim, it does give the refugee the benefit of the doubt. There is certainly no express rule that says refugees can only travel to one country and must claim shelter in the first country they enter. Vedsted-Hansen has proposed three levels helpful in identifying the problems relating to safe country agreements. The first is the *quality* of refugee protection the third state affords. Second is the *personal relationship* that exists between the applicant and the other state. Third is the question of what *procedure* a state of arrival should use when determining if it should return a claimant.⁹²

⁹⁰ Vedsted-Hansen, 287.

⁹¹ Cited in Vedsted-Hansen, 272.

⁹² Vedsted-Hansen, 280.

The importance of this discussion is that CIC bases the agreement on the supposed principle of country of first asylum, which does not exist in the international tradition. So, the main argument proffered by the Department falls flat, for there is no international enshrined principle or law that says states can turn away refugees *solely* on the basis of where they have come from.

4. *Principle of non-refoulement and indirect refoulement*

As Achermann and Gattiker describe, current theory and practice prohibits *refoulement* as well as *indirect refoulement*, that is, return to a third state that will not itself persecute the person but may send her back to the territory of a state that will. This would happen in the case of a refugee claimant who “would be recognized as a refugee in the country in which application is now made, but has virtually no chance of being accepted in the third country to which he or she is deported, because of its more restrictive practice. Expulsion to a third country should not take place, especially if the recognition rates differ widely.”⁹³ This is precisely the argument to be made against the Canadian policy.

One of the bases of refugee protection is the notion that refugees need to have a full and complete determination of their refugee claim before they are ordered removed, in order to safeguard against *refoulement*. Article 32 of the Convention clearly articulates that a state cannot “expel a refugee lawfully within their territory unless in accordance with the law and with adequate opportunities for challenging the decision...”⁹⁴ However, the scope of this provision is limited because states have the power to determine ‘lawful’ entry into their territory. Often refugee claimants must use alternate routes to gain access

⁹³ Alberto Achermann and Mario Gattiker, “Safe Third Countries: European Developments,” *International Journal of Refugee Law* 7, no. 1 (January 1995): 26.

⁹⁴ UNHCR, “Convention and Protocol,” Article 32.

to a country of asylum.⁹⁵ In Canada, as we will see in the section devoted to Canadian jurisprudence, it has been determined that a person within Canada's borders has access to all the Charter rights.⁹⁶ The Canada-US STA brings this into question, because the Canadian government is taking the position that the claimant is not legally in Canada and thus precluded from the refugee determination process. The danger then is that Ottawa may send a person away without having given them access to due process, thus contravening the sacrosanct idea of *non-refoulement*.

Tied to this principle is the concept that a claimant "does not become a refugee because of recognition, but is recognized because he is a refugee."⁹⁷ Since a person is a refugee before the determination by the appropriate state body, it is therefore evident that she or he is a refugee at the border of a state as well as inside a state. It follows then that "the principle of *non-refoulement* applies at the borders of the state, which may apply where there has not been any or an adequate investigation of the applicant's claim for asylum, as well as to the more obvious case where a refugee is returned at any stage during the determination process, or after her case has been determined..."⁹⁸ In other words, Article 33 does not kick in only once a refugee has been so determined but as soon as she or he has engaged the immigration official. This is necessary to maintain safeguards for a refugee who has been wrongly denied access to the determination process.⁹⁹ Ottawa must be mindful of this, because with the STA Canada will be in a position where it denies people access to the refugee determination system, which in turn could lead to indirect *refoulement*.

⁹⁵ Tuitt, 107.

⁹⁶ Section III of this paper looks at this in more depth.

⁹⁷ Cited in Tuitt, 107.

⁹⁸ Tuitt, 107.

⁹⁹ Tuitt, 107.

In applying the *non-refoulement* standard to STAs, states would do best to “not return an asylum seeker to another State, unless there is an assurance that the application will be dealt with in accordance with the same standards that apply in the jurisdiction of the returning state, and thus does not lead to *refoulement*.”¹⁰⁰ Unfortunately, Canada is only applying international standards to this deal rather than the broader Canadian ones.

5. European experience with safe third country initiatives

While Canadian Ministers of Immigration and Department officials have referred to the European STAs in justifying the current Agreement, the two situations are quite different. In Europe, because of the official halt to recruitment of foreign labor in the 1970s, asylum has been the primary avenue for immigration.¹⁰¹ However, both Canada and the United States remain countries of immigration, and asylum only accounts for a small portion of overall immigration numbers in these two countries.¹⁰² For Canada, landed refugees have accounted for approximately ten percent of total immigration for the last ten years.¹⁰³ Keeping this in mind, it is perhaps more understandable why the European states have pursued STAs, but for Canada it simply is not the case that a majority of immigrants come via refugee channels. However, since the European deals serve as models for the CUDA, it is essential to see what the effect has been.

¹⁰⁰ Abell, “The Compatibility of Readmission Agreements...,” 70.

¹⁰¹ Gary P. Freeman, “Migration Policy and Politics in the Receiving States,” *International Migration Review* 26, no. 4 (Winter 1992): 1154; Ryszard Cholewinski, “The EU *Acquis* on Irregular Migration: Reinforcing Security at the Expense of Rights,” *European Journal of Migration and Law* 2, no. 3/4 (2000): 363.

¹⁰² Lavenex, 3.

¹⁰³ CIC, “Citizenship and Immigration Statistics: 1995” [statistics online] (accessed 2 May 2003), available from <http://www.cic.gc.ca/english/pdf/pub/1995stats.pdf>; CIC, “Facts and Figures 1998” [statistics online] (accessed 2 May 2003), available from <http://www.cic.gc.ca/english/pdf/pub/facts1998.pdf>; CIC, “Facts and Figures 2002” [statistics online] (accessed 2 May 2003), available from <http://www.cic.gc.ca/english/pdf/pub/facts2002.pdf>.

When the European Community Ministers of Immigration met in 1992, they adopted a resolution that called for several requirements that must be in place before designating safe countries. These included provisions such as ensuring the applicant's life would not be threatened, that she or he would not be subject to torture or inhuman treatment, that she or he must have already been granted protection or had the chance to seek protection, and she or he must not be endangered of being *refouled* by the third country. Additionally, Germany and the UK both introduced new legislation in 1993 that allowed for government agents to return applicants back to third countries.¹⁰⁴ So, this type of agreement is certainly not new, but the situation in Canada is different due to the fact that we share only one border.

The result of the European discussions has been the Schengen and Dublin Conventions. Belgium, Netherlands, Luxemburg, Germany and France adopted the Schengen Convention in 1990, with Portugal, Spain and Italy joining later. The European Union states also signed the Dublin Convention in 1990.¹⁰⁵ Schengen also deals more broadly with border control issues, and with its incorporation into the EU framework, it will eventually lead to borderless movement between member states.¹⁰⁶ The rules of both allocate the member country responsible for determining refugee asylum claims, regardless of in which state the claimant actually makes his or her application.¹⁰⁷

¹⁰⁴ Goodwin-Gill, *The Refugee in International Law*, 334-5.

¹⁰⁵ Nazare Albuquerque Abell, "Safe Country Provisions in Canada and in the European Union: A Critical Assessment," *International Migration Review* 31, no. 3 (Autumn 1997): 571.

¹⁰⁶ U.S. Committee for Refugees, "European Union Asylum Harmonization" [article online] (accessed 12 July 2003), available from http://www.refugees.org/world/statistics/wrs00_tablea.htm.

¹⁰⁷ Abell, "Safe Country Provisions in Canada and in the European Union," 571.

These European STAs developed as the parties sought to ease the transition to the eventual dissolution of internal border management and to strengthen external controls.¹⁰⁸ Ottawa has consistently relied on the European experience to defend its desire for the present deal with the Americans, but the previous section showed that they go against the intent of the Convention and the ExCom.¹⁰⁹ Of course, the Europeans have also desired to keep people from 'asylum shopping' by refusing them access if they have already been through another state's determination procedure. The European agreements have taken various forms, such as by refusing asylum or excluding someone from the asylum procedure, including expulsion during the claim; but in general they look much like the procedure the CUDA envisions.¹¹⁰

Specifically, the Dublin and Schengen Conventions attempt to expel someone to a third country by actually setting the criteria by which to decide which country has responsibility. The goal is to limit the possibility of refugees in orbit by making sure that one state, *and only one state*, has the duty to examine the refugee claim.¹¹¹

As in the Canadian case, the Dublin Convention assumes that the signatories are in fact safe countries for every person searching for protection, for the mere fact that a person has had an opportunity to make a claim in another country would preclude him from the asylum procedure of the arriving country.¹¹² Dublin makes this determination by applying the following criteria: "if the applicant has a visa, the state which issued the

¹⁰⁸ Arthur C. Helton, "The Future of Refugee Protection," in Anne F. Bayefsky and Joan Fitzpatrick, eds., *Human Rights and Forced Displacement*, (The Hague: Martinus Nijhoff Publishers, 2000), 218.

¹⁰⁹ Bill Frelick, "Who's on First? The Canada-U.S. Memorandum of Agreement on Asylum," *Interpreter Releases* 73, no. 8 (26 February 1996): 218.

¹¹⁰ Achermann and Gattiker, 19-20; Robert F. Barsky, *Arguing and Justifying: Assessing the Convention Refugees' Choice of Moment, Motive and Host Country* (Aldershot, UK: Ashgate, 2000), 35-6.

¹¹¹ Achermann and Gattiker, 20-1; Abell, "Safe Country Provisions in Canada and in the European Union," 570.

¹¹² Achermann and Gattiker, 23.

visa, or if several visas the state which issued the visa with the longest period of validity, is responsible for assessing the claim to refugee status; if the applicant does not have a visa, the first of the member states of the Dublin or Schengen Conventions at whose frontier the applicant presents himself or herself is responsible.”¹¹³

One of the differences between these agreements and that proposed by the CUDA is that the European agreements allow contracting states to send an asylum claimant to a third country not covered by the pact. The obvious result of this is that it immediately undermines the basic concept of the arrangement, which is to make sure that one country will take responsibility, leaving the possibility of orbit for those seeking protection.¹¹⁴ In theory, this cannot take place under the CUDA, since the two partners have pledged in theory to not expel an affected claimant to yet another country.

a. UK Example

The UK and Germany both serve as valuable case studies, as they applied safe third country principles before the implementation of the European agreements.

The UK was one of the leading states in Europe’s development of STAs, and as far back as 25 July 1990 the Home Office produce a policy that required refugees to seek asylum in the first safe country reached. In 1993 the UK decided that refugee claimants coming through safe countries would be sent back without access to substantive consideration of his or her claim. This was a unilateral policy, and the UK sent people away without reentry agreements in place from the countries of reception.¹¹⁵

Until 1993, asylum seekers in the UK had no right to appeal a rejection of their refugee claim by the government. The Asylum and Immigration Appeals Act 1993

¹¹³ Abell, “Safe Country Provisions in Canada and in the European Union,” 571-2.

¹¹⁴ Achermann and Gattiker, 22.

¹¹⁵ Tuitt, 114-18.

changed this, giving a general right of appeal against refusal. However, the Act also introduced the notion of a safe third country by creating a fast track procedure for refugee claimants who came from 'safe' countries. This was itself made subject to an appeal process with a suspensive effect. London anticipated that this would bring about a quick and formal removal of such refugee claimants by the independent appellate authority created to hear the appeals.¹¹⁶

To the surprise of the government, however, the next two years brought frequent findings by the independent bodies that the Secretary of State had failed to adequately argue the safety of proposed removals. In many cases they decided that in both *individual* and *general* cases the removal would raise issues with respect to the UK's Convention obligations. As a result of this litigation, between 1994 and 1996 the Secretary of State could not remove a number of asylum seekers to France, Italy, Austria, Portugal, Belgium and Greece and he decertified Austria, Greece, Italy and Portugal as 'safe' countries. In preparation for the Dublin Convention, London introduced the Asylum and Immigration Act 1996, which essentially abolished the suspensive right of appeal in cases of removal to an EU member.¹¹⁷

From this point, refused asylum seekers only had recourse to appeal to the High Court, which was not concerned with the merits of the decision, only the legality of it. In the cases of *Adan* and *Aitseguer*, heard before the Court of Appeal, the question of the safety of removal to Germany and France arose. Ms. Adan feared persecution as a member of a minority clan in Somalia's civil war, a state with no functioning central authority. Mr. Aitseguer feared attacks by armed Islamic groups in his native Algeria,

¹¹⁶ Andrew Nicol and Stephanie Harrison, "The Law and Practice in the Application of the Dublin Convention in the United Kingdom," *European Journal of Migration and Law* 1, no. 4 (1999): 465-6.

¹¹⁷ Nicol and Harrison, 466.

where it was accepted that the state could not provide sufficient protection. The Court accepted that since the applicants feared non-state persecution, Germany and France would reject their claims while the UK would accept them. The Court rejected the Secretary of State's argument that the touchstone for safe third country removal under the Dublin Convention should be an 'irreducible core minimum.' The Court instead held that the 1951 Convention has an 'international meaning' which must be decided by the national court. Since UK courts had decided that a refugee claim did not require state complicity in persecution, the approach of France and Germany could be rejected. The result was that the Secretary of State could not remove the applicants.¹¹⁸

As Nicol and Harrison demonstrate, the litigation in the UK shows that 'trust' of the third country's safety for the deportee is not a sufficient foundation to assure protection for all claimants. While the Dublin Convention provides an effective way to ensure admissibility to procedures for those returned under its jurisdiction, it does not "secure the proper application of the 1951 Convention *in all cases* and nor would a harmonized approach based upon the 'irreducible minimum' of the current EU Joint Position" [emphasis mine].¹¹⁹ These UK examples bolster the argument that refugee protection decisions must be based on individual situations and not on classes of people or assumptions of safety.

b. German Example

¹¹⁸ Nicol and Harrison, 478-9; see also Guy S. Goodwin-Gill, "The International Protection of Refugees: What Future?" *International Journal of Refugee Law* 12, no. 1 (2000): 3-4; see also Joanne Van Selm, "Access to Procedures: 'Safe Third Countries', 'Safe Countries of Origin' and 'Time Limits'," a paper commissioned by UNHCR and Carnegie Endowment for International Peace [article online] (2001, accessed 12 June 2003), available from http://www.unhcr.ch/cgi-bin/texis/vtx/home/+OwwBmewzEd_wwwmwwwwwwwhFqA72ZR0gRfZNtFqrpGdBnqBAFqA72ZR0gRfZNcFqpdwDDnaVwDa5ncMDzmxwwwwww/opensoc.pdf, 30.

¹¹⁹ Nicol and Harrison, 481.

Germany passed a constitutional amendment that came into force 1 July 1993 which denied asylum claimants access to the German protection determination system based on travel through any country in the European Community, and Finland, Norway, Austria, Poland, Sweden, Switzerland and the Czech Republic. This rule applied only at Germany's borders. The result was that the 1993 number of asylum claims dropped by 26% compared to 1992.¹²⁰ From 1977 to 1992 the number of claims had increased from 16,410 to 438,191.¹²¹ However, as Canada's House of Commons Standing Committee heard from the UNHCR representative in Ottawa, when Germany closed its borders to asylum claims, it has still had an average of 100,000 people claim refugee status in-land there every year since.¹²² This should raise Ottawa's antennas, as it shows that refugees continue to find ways into a country even when the borders are closed to refugee applicants.

Taking the European lessons to heart, the Standing Committee recommended that the government closely monitor irregular migration and people smuggling. If the IRB does not see a subsequent drop in asylum claims after the implementation of the deal, the Report continues, and if the number of illegal entries increases, the government should terminate the agreement.¹²³ This is perhaps the strongest evidence that those in government who have spent many hours looking at this deal realize that it may simply

¹²⁰ Achermann and Gattiker, 28-9.

¹²¹ Abell, "The Compatibility of Readmission Agreements," 61.

¹²² Judith Kumin, then UNHCR representative in Canada pointed this out to the Standing Committee on Citizenship and Immigration. See Canada, Parliament, House of Commons, Standing Committee on Citizenship and Immigration, *Evidence of Proceedings*, (Meeting No. 4, 19 November 2002), 37th Parliament, 2nd Session [online] (accessed 28 February 2003), available from <http://www.parl.gc.ca/InfoCom/CommitteeDocument.asp?DocumentID=32709&Language=E>.

¹²³ 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," Joe Fontana, Chair, [report online] (December 2002, accessed 10 February 2003), available from <http://www.parl.gc.ca/InfoComDoc/37/2/CIMM/Studies/Reports/cimmrp01/cimmrp01-e.pdf>, 10.

not fill its expectations and that this agreement may not be the tool necessary to fulfill the wishes of the government.

c. Impact of European STAs on refugees

While the Canada-US Agreement claims to guard against chain refoulement, the example of Europe raises questions as to whether such a safeguard will work. For example, there have been cases such as the return of claimants by Greece to Turkey, Libya, and Sudan, which then returned the asylum seekers to their country of origin. The broad point to keep in mind in all of these examples is that such preemptive negative determinations take little or no account of the individual circumstances applicable to each claimant.¹²⁴

As already noted, the Netherlands provides that transit time and route cannot be the sole factor in making a determination about a refugee. However, because of the Dublin Convention, applicants at the border who have traveled through countries considered safe can receive a negative decision within hours.¹²⁵ Canada needs to heed this, because the Canada-US STA could lead to a situation where someone who would otherwise gain protection in Canada may be returned to the US within hours. When a claimant is at a port of entry, return is much easier to affect than after the person has been granted entry. As the Dutch example shows, in such circumstances national policies may in fact lose out.

The real result of these agreements is a restriction of the flow of refugees coming from Eastern Europe and North Africa even though the official justification is to stop multiple claims or repeat claims after a negative determination. In Europe, some

¹²⁴ James C. Hathaway and John A. Dent, *Refugee Rights: Report on a Comparative Survey* (Toronto: York Lanes Press, 1995), 15.

¹²⁵ Abell, "Safe Country Provisions in Canada and in the European Union," 574.

agreements are based on financial or political incentives, which encourage countries to take back unwanted asylum claimants. Poland, as an example, signed a deal with the Schengen states to accept returned refugees in return for financial assistance and visa free entry for Polish citizens of up to three months. The German readmission agreement with Bulgaria came with DM 28 million and a similar pact with Romania came with DM 30 million for resettlement costs.¹²⁶ The Canada-US agreement mirrors these European examples, not because money is changing hands, but because refugee protection is losing ground to the desire to control borders. If increased control led to increased protection, these STAs could perhaps prove helpful, but so far this has not been the case.

A look at the time frame built into the Dublin Convention is eye opening, for it gives member states *six months* to make a request to return a claimant.¹²⁷ This seems to tacitly admit the difficulties inherent in the process of determining responsibility in such arrangements. Fortunately the CUDA has done away with this (in theory) by applying the rule only at land border ports of entry. With all of the resources in place, the Dublin Convention has still proven to be a bust. From 1 September 1997 to 31 December 1998 only 6.9% of all asylum applications ended in a request for return to a third country. Of these, only 58.7% were accepted, which means that about 4% of claimants were set for return.¹²⁸ A study of data including 1999 showed in many cases that when the claimant learned of the imminent deportation, she or he disappeared; therefore only about 40% of those set for return actually were. In the end, *less than 2% of all claims* ended in transfer

¹²⁶ Abell, "The Compatibility of Readmission Agreements," 65.

¹²⁷ Agnès Hurwitz, "The 1990 Dublin Convention: A Comprehensive Assessment," *International Journal of Refugee Law* 11, no. 4 (October 1999): 667.

¹²⁸ Hurwitz, 674.

to the third country.¹²⁹ While the final result of the CUDA is impossible to tell before its implementation, the European example shows that such agreements do little to manage the borders and simply are another level of barriers that refugees must surmount on their trip to protection.

In March 2000 the European Commission issued a working paper focused on revisiting the Dublin Convention citing two reasons: 1) The Dublin convention was to be replaced by a Community instrument; and 2) *there was a general agreement that the Dublin system was not working as well as the members had hoped.*¹³⁰ As this paper shows, the European STAs have not been an effective tool in determining responsibility for refugees, but they have led to harm to asylum seekers.

6. Canada's commitment to the international refugee regime

Canada has committed to the international regime of refugee protection, and it has argued that that protection is made up of *both* settlement and asylum. However, much of current Canadian policy is attempting to squeeze out the chance of asylum for most refugees by keeping potential asylum claimants from ever entering our borders.

As states have analyzed their refugee policies, they have chosen to avoid the assumed risks of refugee claimants, instead putting in place less visible policies which end up being more destructive to refugees by keeping them as far away as possible from their borders.¹³¹

¹²⁹ Stephen H. Legomsky, "Secondary Refugee Movement and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection," paper commissioned by UNHCR (Department of International Protection) [article online] (accessed 12 June 2003), available from <http://www.unhcr.ch/cgi-bin/texis/vtx/home/+nwwBmKetYTpwwwwnwwwwwwwhFqA72ZR0gRfZNtFqrpGdBnqBAFqA72ZR0gRfZNcFq35BnprnDacntdM5AODzmxwwwwww/opendoc.pdf>, 11.

¹³⁰ Van Selm, 31.

¹³¹ James C. Hathaway, ed., *Reconceiving International Refugee Law*, Nijhoff Law Specials; v. 30 (The Hague: Martinus Nijhoff Publishers, 1997), xx-xxi.

A student of Canada's refugee policy must understand that the determination system exists within a context in which a significant goal of the government is to restrict entry into the system. Ottawa implements this goal by putting visa controls on refugee-producing countries, training airline personnel in international airports to detect fake documents, placing Canadian officials in key places overseas to stop travelers with improper documents, putting penalties on transportation companies, and by signing this safe country agreement. Much of the continual antagonism between Ottawa and the advocacy community revolves around the fact that while Canada's determination system serves as a world model the goal of the government is to deter claimants from entering the system.¹³²

Canada's STA is simply another way for it to decrease its responsibilities to asylum seekers. As Hathaway has noted, "States pay lip service to the importance of honouring the right to seek asylum, but in practice devote significant resources to keep refugees away from their borders."¹³³

These types of policies have created a barrier for those fleeing persecution, especially since states will not issue visas to persons seeking protection. Visa requirements and carrier sanctions are rude instruments implemented outside the realm of legal responsibility. In the case of carrier sanctions, decision makers only look to the financial cost to their transportation company, they are not in business to protect refugees.¹³⁴ They do not receive any punishment for keeping a refugee claimant off a flight, but may incur financial costs if that person is allowed to land in the carrier's home

¹³² Margaret Young, "Canada's Refugee Status Determination System," (Ottawa: Library of Parliament, July 1993): 2.

¹³³ Hathaway, ed., *Reconceiving International Refugee Law*, xvii.

¹³⁴ Hathaway and Dent, 14.

state – so the incentive is to keep as many such travelers off as possible. While these types of sanctions do not expressly violate the letter of Article 33, the result is an increased risk of refoulement, the foundation of the Convention.¹³⁵

Besides, Canada only has one international border, and the border we do share is with a country that has not been a traditional refugee producer, and it will most likely remain that way (for its citizens). Canada, however, has taken on the role of protector, and thus we have admitted that people will seek us out for asylum. It is thus illogical for Ottawa to try to keep asylum seekers from reaching our shores, for this then renders our commitment useless.

If Canada and the US implement this deal, it will be another door slamming in the face of those who need protection. The vast majority of asylum claimants come to Canada from outside the Western world, and therefore most claimants necessarily transited either through the US or Europe on their way to Canada.¹³⁶

As we have seen, the basic definition of ‘refugee’ assumes that the claimant will be outside of his or her country of nationality. Canada has accepted the refugee convention, and thus acknowledges that in order for a person to make a claim in Canada, he or she will have to leave his or her home country. It is virtually impossible to arrive directly in Canada from any of the refugee producing countries, and we share only one border. It is logical, then, that for many refugees their only route to Canada includes transit through the United States.

As governments seek to control access for refugees, the governments often use the language of illegality to describe refugee claimants. “The imposition of visa

¹³⁵ Hathaway and Dent, 14.

¹³⁶ Barsky, *Arguing and Justifying*, 37.

restrictions on countries which are likely at a given time to produce large numbers of refugees, with no allowance made for refugees to bypass those conditions, is an extremely cynical move made by governments who appear to be determined at all costs to reduce immigration – whether it be ‘normal’ immigration or refugee migration.”¹³⁷

Canada has followed this trend, and the current list of countries requiring visas to travel to Canada includes all of the top ten refugee producing countries since 1995. The result is that refugees are forced to enter ‘irregularly,’ leaving them with the ‘option’ of staying in their country of persecution or finding false documentation to facilitate transit.¹³⁸ Then the press and government officials describe refugee claimants without proper documents or who enter clandestinely as ‘fraudulent’ or ‘bogus,’ thus adding to the negative view of refugees that the public holds. To put it plainly, restrictive policies have created fraudulent entry.¹³⁹

It was not a coincidence that one day after Canada and the US signed the border declaration on 3 December 2001, Canada imposed visa requirements on Dominica, Granada, Kiribati, Nauru, Tuvalu, Vanuatu, Zimbabwe and Hungary. While the first six are small island nations, the inclusion of Zimbabwe and Hungary is significant. Hungarian and Zimbabwean refugees were in the list of top ten countries of asylum applicants. The majority of Zimbabweans who claim status receive a positive determination.¹⁴⁰ These are the kinds of impositions which make it increasingly difficult for refugees to even get to Canada, let alone gain access to the determination system. However, Ottawa has said that while it is willing to harmonize visa requirements to some

¹³⁷ Tuitt, 73.

¹³⁸ Tuitt, 74.

¹³⁹ Tuitt, 73.

¹⁴⁰ Howard Adelman, “Canadian Borders and Immigration Post 9/11,” *International Migration Review* 36, no. 1 (Spring 2002): 26.

extent, it is not committed to creating an identical list with the US. For example, Canada does not require a visa for Cubans, and this has been a sticking point between Ottawa and Washington.¹⁴¹

In the past six years Canadian overseas officers have stopped between 40,000 and 45,000 people with improper documents from boarding planes bound for North America, with 8,000 of those occurring in the year leading up to March 2003.¹⁴² We will never know how many of these had legitimate claims to refugee protection, and this extension of our border adds to the already great difficulties people face when trying to reach a country of safety.

The ultimate consequence of the STA is that Canada will in effect be saying to refugees, "We support your right to ask for asylum, just don't claim it here. The one border we have is now no longer available for refugee claimants." It puts Ottawa in a contradictory situation, for on one hand CIC sets targets each year for refugees landed in Canada, but at the same time the aforementioned sanctions are aimed at stopping inland refugee claims. Something has to give, and unfortunately it appears that it will be Canada's commitment to give protection to those who desperately need it.

Taken to the extreme, safe third agreements and other travel restrictions could force the following scenario on refugees: Western, refugee-protecting states could designate all other Western, refugee protecting states as *safe*. At the same time, all of

¹⁴¹ Norma Greenaway, "U.S., Canada to Announce Border Security Pact," *St. John's Telegram*, 2 December 2001, Final Edition, A5.

¹⁴² CIC, "Notes for an Address by the Honourable Denis Coderre Minister of Citizenship and Immigration, Meeting at the Renaissance Club;" CIC, "Partial Transcript for an Address by the Honourable Denis Coderre Minister of Citizenship and Immigration, 'National Security, Immigration and Our American Neighbours Post 9/11'" [transcript online] (4 April 2003, accessed 8 May 2003), available from <http://www.cic.gc.ca/english/press/speech/Kingston.html>; CIC, "Notes for Remarks by the Honourable Denis Coderre Minister of Citizenship and Immigration to the Canadian Chamber of Commerce and the International Trade Club of Toronto" [notes online] (7 March 2003, accessed 8 May 2003), available from <http://www.cic.gc.ca/english/press/speech/itc.html>.

these states could impose visa sanctions on citizens from refugee-producing nations. The result would be a life-threatening Catch-22 where a refugee could find it nearly impossible to ever make a refugee claim in a Western state. The following section will show why such a picture does not match with the history of Canada's refugee law.

III. Canadian Jurisprudence

When looking at Canadian court decisions dealing with refugees, we must keep in mind the landmark *Singh* decision which ruled that the *Charter of Rights and Freedoms* applies to everyone physically in Canada (including refugee claimants) and not just to citizens or permanent residents.

The term 'everyone' in s. 7 includes every person physically present in Canada and by virtue of such presence amenable to Canadian law. The phrase 'security of the person' encompasses freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself. A Convention refugee has the right under s. 55 of the Immigration Act, 1976 not to '... be removed from Canada to a country where his life or freedom would be threatened...' The denial of such a right amounts to a deprivation of 'security of the person' within the meaning of s. 7. Although appellants are not entitled at this stage to assert rights as Convention refugees, having regard to the potential consequences for them of a denial of that status if they are in fact persons with a 'well-founded fear of persecution', they are entitled to fundamental justice in the adjudication of their status.¹⁴³

So, the Supreme Court has decided that everyone physically in Canada has Charter rights and those rights extend to persons who are refugee claimants.

In her opinion, Judge Wilson stated:

99 What remains to be decided is whether in the cases at bar, the appellants were afforded "a fair hearing in accordance with the principles of fundamental justice".

100 I have no doubt that they were not.

¹⁴³ *Singh et al v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177.

101 What the appellants are mainly justified of complaining about in my view is that their claims to refugee status have been finally denied *without their having been afforded a full oral hearing at a single stage of the proceedings before any of the bodies or officials empowered to adjudicate upon their claim on the merits. They have actually been heard by the one official who has nothing to say in the matter, a senior immigration officer.* But they have been heard neither by the Refugee Status Advisory Committee, who could advise the Minister, neither by the Minister, who had the power to decide and who dismissed their claim, nor by the Immigration Appeal Board which did not allow their application to proceed and which determined, finally, that they are not Convention refugees” [emphasis mine].¹⁴⁴

The Supreme Court also decided in this case that a person who made a claim in Canada was entitled to an oral hearing.¹⁴⁵ While IRPA allows for signing of Safe Third Country agreements, this has not yet been challenged in court, but the Canada-US STA goes against the principle of an oral hearing with the assumption being that the immigration officers will make the decisions at the border.

Note also that Judge Wilson declared that a senior immigration officer is the one person who can hear the case, but who actually has “nothing to say in the matter.” Decisions about the application of the STA will also be made by this officer level, and thus the claimants will have no real “full oral hearing” before anyone who can decide their case on the merits of their claim.

Minister Coderre admits that refugee claimants have Charter protection, but his conclusion is that “we don’t have any choice, every citizen and non-citizen is protected under the Charter of Rights and Freedoms, and the only way to make sure we can

¹⁴⁴ *Singh et al v. Minister of Employment and Immigration.*

¹⁴⁵ Cited in Samuel Berman and Caroline McChesney, *Refugee Determination Proceedings* (Scarborough, Ontario: Carswell Thomson Professional Publishing, 1994), 2.

regulate the system would be to have a safe third country agreement.”¹⁴⁶ The inference is that the best way to keep refugees from accessing Charter rights is by keeping them out of Canada in the first place. What the Minister failed to point out is that refugee claimants have Charter access as soon as CIC officials engage them at the border, so even if CIC has not technically admitted the person into Canada, she or he still has the rights afforded by the Charter.¹⁴⁷

In addition to this Supreme Court precedent, a perusal of Canadian jurisprudence will show that courts have decided on numerous occasions that refugee determination must happen on an *individual* basis, and travel through a third country and time spent there cannot be the *only* factor used to make a refugee determination. A major problem with these types of agreements is that the decisive criteria for granting asylum no longer rests on persecution but on the choice of flight route.¹⁴⁸ Surely this is a perversion of the intent of the 1951 Convention.

In evidence given to the Standing Committee, the *Association québécoise des avocats et avocates en droit d'immigration* similarly concluded that there is

no principle in international law preventing someone from claiming refugee status because he might have lived in another country before arriving in Canada... The fact that he did not make a claim in a third signatory country is one of a number of criteria, and [the Association stressed] that it is just one of a number, used to assess the validity, credibility, and plausible fears of the individual. There is no principle in international law which presumes that a refugee or a refugee status claimant – if he is a genuine refugee – will necessarily make his claim in the first

¹⁴⁶ Canada, Parliament, House of Commons, Standing Committee on Citizenship and Immigration, *Evidence of Proceedings*, (Meeting No. 6, 21 November 2002). 37th Parliament, 2nd Session [online] (accessed 28 February 2003), available from <http://www.parl.gc.ca/InfoCom/CommitteeDocument.asp?DocumentID=32747&Language=E>.

¹⁴⁷ Scofield interview.

¹⁴⁸ Achermann and Gattiker, 29; Waldman, 8.17.

signatory country that he crosses. Nor is this a principle in assessing the evidence. The Federal Court of Canada, which was set up long before the IRB, and has been ruling on issues of this type for a few decades, has recognized in a number of decisions that a refugee claimant might have reasonable grounds for not making the claim in countries which are parties to the Convention, and which he might cross when fleeing his country on his way to Canada.¹⁴⁹

When Val Meredith, MP interjected that democracies evolve and therefore it is not necessarily bad if states think of new ways to deal with old problems, the Association answered was that the government did not say it was creating a new regime. Instead Ottawa justifies the agreement based on a principle that does not exist.¹⁵⁰

It is useful to first look at some examples where refugee applications were rejected because of transit choice and time spent in third countries. The argument here is not that such transit has no bearing on a refugee claim, but rather it cannot be the deciding factor. The Immigration Appeal Board, for example, rejected the petition of a Hungarian who never claimed refugee status during his nine-year stay in Sweden. In the case of an Ethiopian claimant, the Board noted negatively that the individual had spent six years in Iraq, Sudan, Saudi Arabia and Kuwait before making a claim in Canada. In another example, a Chilean claimant received a negative determination because he had spent four months in Spain, where he did not have permission to work.¹⁵¹ The point here is that not everyone should receive a positive determination, for there are certainly those who do not fear persecution which the Convention sets out to protect. As the following cases will show, though, each person needs the opportunity to tell his or her story.

¹⁴⁹ Canada, Parliament, House of Commons, Standing Committee on Citizenship and Immigration, *Evidence of Proceedings*, (Meeting No. 5, 26 March 1996). 35th Parliament, 2nd Session [online] (accessed 4 November 2002), available from http://www.parl.gc.ca/committees352/cits/evidence/05_96-03-26/cits-05-cover-e.html.

¹⁵⁰ Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 5, March 26, 1996.

¹⁵¹ See footnotes 105 and 106 in Hathaway, *The Law of Refugee Status*, 48.

However, in the case of *Marcel Simon Chang Tak Hue v. Minister of Employment and Immigration*, the Board had refused the claim of the sailor because of his failure to apply for protection in another country. The Court rejected this reasoning, pointing out that his failure to claim does not raise a credibility issue if the applicant can explain himself. In this case, he had no fear of *refoulement* as long as he had his sailor's papers and a ship to sail on. When he no longer had this option, he claimed asylum in Canada. The Court held that the Board had erred in discrediting his claim *solely* on his failure to seek asylum from another country.¹⁵²

In the case of *Owusu-Ansah v. Canada (Minister of Employment & Immigration)*, the IRB came to a negative determination against the applicant based on the fact of transit through Togo, Nigeria and Brazil before finally coming to Canada. The court ruled that even though the applicant had traveled through these third states he offered explanations why he did not claim protection earlier in his journey. The court believed the explanations plausible and that the IRB did not find them to be otherwise. It held that the Board ignored these reasons only to remark that others from the applicant's political movement were living in Togo and Nigeria.¹⁵³ This decision also allowed that a refugee claimant may indeed look for protection in a country based on language needs, and accepted that the asylum seeker preferred to search for refuge in English-speaking Canada over Portuguese-speaking Brazil.¹⁵⁴

In *Tung v. Canada* the Federal Court did not accept the Board's negative decision based on a claimant's desire to look for protection from Canada because he knew it had a reputation of respecting human rights. While the court argued partly that the IRB erred in

¹⁵² Hathaway, *The Law of Refugee Status*, 49.

¹⁵³ Cited in Waldman, 8.17.

¹⁵⁴ Cited in Waldman, 8.18.

assuming the countries he passed through had implemented the Convention and had implementing legislation, the main point was that the claimant was “at all times in transit to Canada and had already decided to claim Convention Refugee status after he arrived here.”¹⁵⁵

The opinion rendered in *Ilie v. Canada*, however, appears at first to come to a contradictory conclusion. In this case the applicant had spent eight months traveling through Italy, France and Belgium before coming to Canada. The court ruled that the board had not erred in denying his refugee claim because it weighed his evidence in light of his travels. The tribunal concluded that he was not really in danger, and the court seconded this opinion.¹⁵⁶ As Waldman has noted, while this decision initially seems out of step, it actually upholds the principle that each claimant’s story must be heard on its own merits.¹⁵⁷

In the decision of *Gavryushenko v. Canada*, the court concluded that travel though third countries cannot be determinative and that the Board cannot ignore reasons that claimants give for such transit.¹⁵⁸ So, the IRB can only impugn the credibility of a claimant who claims asylum in Canada after traveling through other states *if* those third states would offer protection to the claimant *and if* the claimant cannot offer a reasonable explanation for such movement.¹⁵⁹

The decision in *El-Naem v. Canada* further illustrates this point, because the court rejected the IRB’s negative decision which was based solely on the applicant’s failure to claim protection in Greece, where the Syrian citizen remained for one year after fleeing

¹⁵⁵ Cited in Waldman, 8.17.

¹⁵⁶ Cited in Waldman, 8.18.

¹⁵⁷ Waldman, 8.18.

¹⁵⁸ Cited in Waldman, 8.18.

¹⁵⁹ Waldman, 8.18.

Iran. He explained that he had heard that making a refugee claim in Greece was difficult and he wanted to join his brother in Canada (who was a Convention refugee). His testimony was that he had run out of funds and needed to remain in Greece in order to accumulate the capital necessary to travel to Canada. The court noted that the Tribunal had made no mention of his age (19), lack of experience and the need to get the necessary funds to travel to Canada in its rejection of his claim. Rather, the Tribunal denied his petition based on his prolonged stay in Greece. The court subsequently quashed the original rejection.¹⁶⁰

In much the same way that travel through third countries cannot be the only factor in rejecting a claim, neither can the IRB reject a claim simply because of a *delay* in applying. Again, the Board must take into account mitigating factors and the claimant must have an opportunity to plead his or her case. While it is perhaps not immediately evident why this matters in a discussion of an STA, it is further evidence to support the position that refugees must have ample opportunity to make their cases. The jurisprudence in Canada says that even when there are reasons that may seem to immediately bar a claim, refugees should receive the benefit of the doubt. While length of stay in Canada may affect the several hundred who travel *to* the US each year to claim asylum, it is more useful as an argument as to why Ottawa should amend the deal: In Canada the courts have said that time cannot be the only factor in an asylum case, but this agreement uses that argument as one of its pillars. The first is that they are in a third country where they could have (or should have, in the government's opinion) made their

¹⁶⁰ Cited in Waldman, 8.19-8.20.

claim. Canadian courts have repeatedly rejected this argument. The second is that of time spent in the US. However, the courts have also discarded this reasoning.

In the case of *Hue v. Canada* the court determined that “While we do not dispute that the delay in making a claim for refugee status *may be an important factor* to take into consideration in trying to assess the seriousness of the applicant’s contentions, we disagree completely with the Board’s reasoning in the present case” [emphasis added].¹⁶¹

Furthermore, in *Saez v. Canada (Minister of Employment & Immigration)*, the judge ruled that “delay in making a claim, *while relevant, is not a decisive factor in itself*. ... In finding the applicant lacked subjective fear on the basis of delay, the tribunal neglected to give sufficient weight to the past torture and assassination of the applicant’s sister and the persecution of other members of her family” [emphasis added].¹⁶²

Two decisions upholding negative determinations will finish this argument. First, in *Huerta v. Canada (Minister of Employment & Immigration)*, the court found that the claimant’s delay was not consistent with someone fearing determination. In this case the woman returned to work after the problems she cited, she made a claim after losing her job, and finally she took more than four months to make her asylum request. The court pointed out that the delay was not a determining reason, but when considered with the other factors, there was reason to reject her application.¹⁶³ Finally, in the case of *Cruz v. Canada (Minister of Employment & Immigration)* the court agreed that the applicant’s delay of over two years in claiming asylum in Canada was an important factor in the rejection, since it bolstered the argument that he did not fear persecution.¹⁶⁴ However, it

¹⁶¹ Cited in Waldman, 8.20.

¹⁶² Cited in Waldman, 8.20.

¹⁶³ Cited in Waldman, 8.21.

¹⁶⁴ Waldman, 8.21.

its decision the court still pointed out that “[d]elay *is an important factor* in the assessment of a refugee claim, because it addresses the existence of a subjective fear of persecution” [emphasis added].¹⁶⁵

So in overturning and staying decisions, the courts have noted that delay can only be one of many factors that the IRB can take into account when determining claims for refugee protection.

A succinct look at some US judgments will show that courts there have decided in much the same manner as Canada’s. Amnesty International (AI) USA has pointed to several cases showing that asylum seekers traveling through third countries still had the right to look for protection in the US. In one the Board of Immigration Appeal (BIA) decided that a man who had traveled through the Netherlands and Belgium could receive asylum because the Board saw that he had no right to *permanently remain* in either state. In a second case the Ninth Circuit Court of Appeals determined that a stay in a third country (in this case Malaysia) *does not automatically bar* a person from protection in the US. In a third case, the Ninth Circuit remanded a case back to the BIA and pointed out that just because someone had spent a considerable amount of time in another jurisdiction does not automatically mean they are firmly settled there. The fourth case showed that the BIA listed factors to consider when looking at travel through third countries, and these included such things as family ties, the intent of the person, and business connections. The balance of such cases show that in US case law the mere physical presence in another country cannot automatically preclude the right to request asylum.¹⁶⁶

¹⁶⁵ Cited in Waldman, 8.21.

¹⁶⁶ Cited in United States, Congress, House of Representatives, p. 21.

In this Canada and the US share a history, which will unfortunately be disregarded with the implementation of the STA.

IV. Canada's stated objectives in implementing the STA

In light of the international and domestic legal tradition, it seems that Ottawa is on the verge of putting into action a deal that will be contradictory, a deal that has been supported in principle by the Committees dealing with immigration in both houses of Parliament.¹⁶⁷ It is necessary, then, to look at the reasons Ottawa has given for moving ahead with this STA. Generally, the government's arguments fall into four broad categories: increasing security, discouraging 'asylum shopping,' managing the border, and dealing with the claims backlog.

As far back as 1996 Canadian Ministers of Immigration have been relying on these various reasons to explain their desire for such an agreement. While giving evidence to the Standing Committee, then Minister Lucienne Robillard delineated two main objectives: sharing the responsibility with the US while maintaining public confidence in the integrity of the system by making sure that refugees get a hearing in one country or the other, but not both. She goes on to say that the draft agreement was based on "one basic principle, that is on the rule of the country of first arrival. This principle holds that refugee claims should be decided by the country in which the claimant was first physically present, unless the refugee claimant is only briefly in transit in that country or is seeking to be reunited with members of his family."¹⁶⁸

¹⁶⁷ CIC, "Government Response to the Report of the Standing Committee on Citizenship and Immigration, 'Hands Across the Border: Working Together at our Shared Border and Abroad to Ensure Safety, Security and Efficiency'" [report online] (May 2002, accessed 7 May 2003), available from <http://www.cic.gc.ca/english/pub/hab.html>; Canada, Parliament, Senate, Standing Committee on Social Affairs, Science and Technology, "Report of the Committee" [report online] (23 October 2001, accessed 9 May 2003), available from <http://www.parl.gc.ca/37/1/parlbus/commbus/senate/com-e/soci-e/rep-e/rep09oct01-e.htm>.

¹⁶⁸ Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 2, Tuesday, March 19, 1996.

While the desire for burden sharing is a legitimate concern, the previous draft deal (like the current one) was not about multiple-claim-making refugees. Furthermore, there is no 'rule' of country of first arrival, and the Minister failed to point out where this rule exists. As previously discussed, evidence shows that refugees have the general right to choose where to seek protection.

During Minister Robillard's tenure, Yilma Makonnen, UNHCR representative in Canada, expressed his unease about CIC officials making reference to the Convention as if it forces refugees to apply in the first country of arrival. Mr. Makonnen instead referred to this 'principle' as "an established administrative procedure,"¹⁶⁹ something that European states have only recently created. He instead referred to ExCom Conclusion 15, which this paper has already noted calls for states to take into account the intentions of asylum seekers when making refugee determinations.¹⁷⁰

Recently, Joan Atkinson, the Assistant Deputy Minister for Policy and Program Development at CIC spoke before the Standing Committee. She declared that the objective of the STA is to share the responsibility for refugee claimants. She also pointed out that the premise of the agreement is that a refugee should make a claim in the first country of arrival. Out of this, she claimed would come better management of the refugee program as well as enhanced security for both countries.¹⁷¹ However, she also admits that the Convention neither affirms nor rejects the notion of safe third country agreements.¹⁷²

¹⁶⁹ Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 2, Tuesday, March 19, 1996.

¹⁷⁰ Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 2, Tuesday, March 19, 1996.

¹⁷¹ Canada, Parliament, House of Commons, Standing Committee on Citizenship and Immigration, *Evidence of Proceedings*. (Meeting No. 3, 19 November 2002). 37th Parliament, 2nd Session [online] (accessed 28 February 2003), available from <http://www.parl.gc.ca/InfoCom/CommitteeDocument.asp?DocumentID=32678&Language=E>.

¹⁷² Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 3, November 19, 2002.

Even though Ministers and department officials make reference to the 'principle' of claiming asylum in the first country of arrival, as Hathaway has pointed out, it makes no sense, because for many people the US is not the first country of arrival. Refugees transit through a number of states, and the US is simply the penultimate country of arrival for many before moving on to Canada.¹⁷³

1. Security

So, let us turn now to Ottawa's assertions that refugees undermine the security of the Canadian state. Unlike the Americans, who are more ambivalent about the security value of this agreement, various Canadian officials have linked the two. For example, upon signing the 30-point action plan in 2001, John Manley commented on the safe third portion of it, saying, "We're well on our way to creating a smart border for the 21st century, one that is open for business but closed for terrorists."¹⁷⁴

Also, CIC promises that the efforts of the 30-point plan will focus on "deterrence, detection and prosecution of *security threats*, the *disruption of illegal migration* and the efficient management of legitimate travel" [emphasis mine].¹⁷⁵ While the agreement pledged to do these things, there is a false connection between these goals and refugee policy. It is not *illegal* for someone to make a refugee claim. In fact, it is expressly legal within the Canadian and US legislation. There is also no automatic connection between refugees and *security threats*, but the two are often used as synonyms, and Ottawa has succumbed to this. The agreement was just one part of a multifaceted deal that included such things as a visitor visa policy review, the development of joint units to assess

¹⁷³ Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 2, Tuesday, March 19, 1996.

¹⁷⁴ Adrian Humphreys, "'Smart Border' to Turn Away More Refugees: Canada, U.S. Sign Deal: Asylum Seekers Will Not Be Able To 'Shop for a Country'," *National Post*, 29 June 2002, National Edition, A4.

¹⁷⁵ CIC, "Canada-United States Issue Statement on Common Security Priorities."

incoming passenger information, increased numbers of overseas immigration officers and the expansion of the Integrated Border Enforcement Teams.¹⁷⁶

While CIC often cites the support it has from the UNHCR on the STA, Judith Kumin, UNHCR's current representative in Canada, in testimony before the Standing Committee, raised the concern that this particular agreement could actually encourage human smuggling across the border, which results in more insecurity, not more security.¹⁷⁷

What we have seen in the current context, is that "the discourse has turned to the 'refugee crisis.' However, the crisis of concern isn't necessarily that crisis experienced by refugees, but rather the crisis that refugees allegedly pose to receiving states."¹⁷⁸ While this sense of crisis comes from many causes (such as the perceived challenge to state sovereignty and the view that some use the refugee channel to gain a better economic situation), perhaps the greatest supposed danger that refugee claimants present is to the security of the state, especially through terrorist activities. Even though asylum seekers did not carry out the attacks of 11 September 2001, the Canadian government has responded because of fear and not because of danger, and the result is that Ottawa's strategies of exclusion threaten the human security of asylum seekers.¹⁷⁹

The reason that this particular STA will bring more insecurity is because it only applies to claims made at land border ports of entry. People are free to make claims at inland CIC offices or at airports. The effect of this policy is that it will encourage people to find alternate, unsafe and uncontrolled routes into Canada.

¹⁷⁶ CIC, "Canada-United States Issue Statement on Common Security Priorities."

¹⁷⁷ Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 4, November 19, 2002.

¹⁷⁸ Michelle Lowry, "Creating Human Insecurity: The National Security Focus in Canada's Immigration System," *Refuge* 21, no. 1 (November 2002): 31.

¹⁷⁹ Lowry, 31-32.

Bill Frelick, speaking on behalf of Amnesty International USA argues that the agreement will likely “cause in fact a more insecure border with greater criminality, in addition to creating a new bureaucracy, increased costs, [and] new disputes between Canada and the United States that simply don’t exist under the current system.”¹⁸⁰

Christopher Owens, director of VIVE La Casa, a safe house for refugees in transit situated near Buffalo, NY has proposed that the agreement is “a disaster. [He thinks] it will destroy a system that functions pretty well right now. People walking through the Maine woods, God help us, or trying to take a raft across the Niagara River or hiding in truck bodies to travel through Detroit, Windsor or here at the Peace Bridge... That cannot enhance anyone’s security. It certainly puts refugees at grave risk.”¹⁸¹ The realization is that this agreement will lead to insecurity for *both* refugees and the STA partners.

The fact that the Agreement only applies at land border ports of entry caused the Standing Committee some concern as well. It pointed out that many of the non-governmental organizations (NGOs) representatives feared that such a rule would force people to enter the country surreptitiously. In its report about the safe third country regulations, the Committee observed that human smugglers would be beneficiaries of the agreement and that coming into Canada illegally had the potential to cause injury or even the loss of life. Furthermore, there was concern that what is now an orderly system (which allows CIC officials to fingerprint, photograph, and issue medical instructions to

¹⁸⁰ United States, Congress, House of Representatives, 17.

¹⁸¹ Alyson Springer, “Canada, United States Near Agreement on Returning Asylum Seekers,” [article online] (accessed 11 June 2003), available from http://www.refugees.org/world/articles/RR_September_2002_recentdev.cfm#canada.

claimants, as well as run background checks¹⁸²) could pose new security and health risks as refugees find alternate routes into Canada.¹⁸³

The case of Ahmed Ressam often comes up when criticizing Canada's refugee policy. In 1999 US border authorities caught Ressam, an Algerian national, while he attempted to cross into the US with a trunk full of explosives. His target was apparently the Los Angeles Airport. Several years earlier the IRB had heard Ressam's claim but subsequently rejected it. Canadian officials did not deport him, and this could be due to the fact that Ottawa had suspended deportations to Algeria at the time. However, CSIS also wanted to keep him under surveillance in Canada. He was eventually able to obtain a fraudulent Canadian passport and left Canada to train with al Qaeda in Afghanistan. He returned to Canada with the fake passport and a new identity, alluding CSIS. Taking all of this into account however, the fact remains that the determination process in Canada was not the weak link, for his claim failed. The IRB realized he was not a legitimate refugee.¹⁸⁴

As Adelman maintains, "there is virtually no evidence linking *global* terrorism with refugees. Global terrorists have not exploited the refugee determination system to gain access to Canada, though several tried. There is an obvious reason for this. Entering Canada via the refugee stream exposes a refugee claimant to authorities, to a security clearance, to divulging information in filling out a refugee claim form. Any sophisticated

¹⁸² Amnesty International Canada, "Canada: Are Canadians Prepared to Forcibly Return People to a Country Which...." [article online] (20 June 2002, accessed 8 May 2003), available from <http://www.amnesty.ca/library/news/June20-2002.htm>.

¹⁸³ Canada, Parliament, House of Commons, "The Safe Third Country Regulations," 10.

¹⁸⁴ Audrey Macklin, "The Refugee Scapegoat: Refugee Policies Are Now Blamed for Canada's Porous Border when the Real Culprit Is Liberal Trade Rules," *The Ottawa Citizen*, 22 November 2001, Final Edition, A19; Howard Adelman, "Refugees and Border Security Post-September 11," *Refuge* 20, no. 4 (August 2002): 7.

terrorist would reasonably be expected to avoid such an exposure. Further, there are far easier options for gaining entry into either Canada or the United States.”¹⁸⁵

If Canada really wants to enhance security, it should keep in mind another recent policy change that specifically addresses security issues: the adoption of front-end screening (FES). This policy means that CIC now asks the Canadian Security and Intelligence Service (CSIS) to identify the potential security and criminal risks of refugee claimants before they go to the IRB. The FES process means that CSIS checks asylum seekers’ records against its own records and RCMP files at the start of the process, rather than after a positive determination (which was the old practice).¹⁸⁶ CIC collects information such as addresses for the last ten years, places of travel, employment history and association with organizations, passing the collected data on to CSIS.¹⁸⁷ In the wake of the attacks of 11 September 2001, CSIS also began security checks of all refugee claimants who were in the determination process at the time.¹⁸⁸ So, with these two procedures in place, CSIS will run security checks on everyone who was, is, or will be in the determination procedure. This is a better way to assess security risks, instead of simply shutting the door on claimants because their travel route included passage through the US.

For those who may question the actual danger that STAs pose to refugee claimants, a look at some data gathered by United, a cooperation of more than 550 organizations from 49 European countries, will shed some light. From 1 January 1993 to

¹⁸⁵ Adelman, “Refugees and Border Security Post-September 11,” 11.

¹⁸⁶ CSIS, “Security Screening,” [article online] (accessed 8 May 2003), available from http://www.csis.gc.ca/eng/backgrnd/back9_e.html.

¹⁸⁷ Canadian Council for Refugees, “Refugees and Security,” [article online] (February 2003, accessed 30 June 2003) available from <http://www.web.net/~ccr/security.PDF>, 3.

¹⁸⁸ CSIS, “Canadian Security and Intelligence Service 2001 Public Report,” [report online] (accessed 8 May 2003) available from http://www.csis.gc.ca/eng/publicrp/pub2001_e.html.

25 February 2003, 3777 people died due to European policies created to restrict or deter refugee arrival.¹⁸⁹ A read through this document is sobering. People committing suicide for fear of being deported to their country of origin. People drowning in capsized boats. People freezing to death in wheel wells of airplanes. People asphyxiating in cargo containers on ships. People crushed by trucks. A man from India died from exhaustion in the mountains between Slovakia and Ukraine. To add to this grim picture, in “2000 there were between 388 and 430 known migrant deaths along the US-Mexico border. Between 1995 and 2000 there were over 1,400 known migrant deaths.”¹⁹⁰ Why does Ottawa want to expand procedures that restrict refugee’s ability to come to Canada when the results are literally life threatening?

2. *Asylum Shopping / Multiple Claims*

A general definition of ‘asylum shopping’ is “the effort by asylum seekers to maximize their chances to receive asylum or to enjoy better living conditions by choosing the state to which they will present their asylum claim.”¹⁹¹ Canadian officials use this term to describe two basic types of refugee claimants; those who are simply looking for an economic gain, and those who have already found protection or been rejected in another state.¹⁹² However, the government does not describe what type of abuse Canada suffers at the hands of economic migrants, nor can it provide data to show the extent to which it occurs.

¹⁸⁹ United, “List of 3777 Documented Refugee Deaths through Fortress Europe,” [report online] (April 2003, accessed 13 July 2003), available from <http://www.united.non-profit.nl/pdfs/listofdeaths.pdf>.

¹⁹⁰ Migration Policy Institute, “U.S. in Focus,” [article online] (accessed 13 July 2003), available from <http://www.migrationinformation.org/USFocus/display.cfm?ID=32>.

¹⁹¹ Joan Fitzpatrick, “Commentary: Ethical Refugee Policy and the Moral Relevance of Numbers: Response to Adelman and Churgin,” *International Migration Review* 30, no. 1, Special Issue: Ethics, Migration, and Global Stewardship, (Spring, 1996): 330.

¹⁹² CIC, “Estimates: Performance Report for the Period Ending March 31, 2002,” [report online] (2002, accessed 2 May 2003), available from <http://www.cic.gc.ca/english/pdf/pub/dpr2002.pdf>.

The Canada-US agreement plays into the current fears and misperceptions the public holds about refugees, particularly by policies that ever more criminalize refugees. Increasingly there are allegations in both the media and by members of the government that refugees are engaged in fraudulent claims in all manner of social areas, from their initial claim to welfare and social security. They are increasingly painted as 'economic refugees' with the assumed corollary that they are not legitimate and are simply milking the system. This suspicion of refugee claimants has led to compulsory fingerprinting of refugees in many Western European states, but these policies apply to all refugees, whether or not there has been any evidence or proof of criminality. With the current rules of automatic detention for refugees in countries like Australia and the US, it is no wonder that public opinion holds that refugees are a fraudulent group of people. These negative assumptions in turn legitimate the policies which make it easier to expel refugee claimants before giving them access to a full and fair hearing.¹⁹³

“[Refugee law] is designed, not primarily to offer a solution to refugee problems, but to control those migration flows which cannot readily be curtailed by the simple transference of domestic immigration policies between economic and involuntary migrants. Being thus pragmatically focused, international refugee law constantly turns away from the needs of the refugee and towards the sovereign interests of Western states.”¹⁹⁴

When looking at the issue of asylum shopping we must realize that 80% of refugees come from the world's least developed countries and remain in adjacent nations,

¹⁹³ Tuitt, 19-20.

¹⁹⁴ Tuitt, 23.

which are usually as poor and unstable as the originating countries.¹⁹⁵ And as we have seen, only the smallest portion of the global refugee population makes it to Canada.

Proponents of STAs, then, argue that refugees, if indeed they are in danger, should want to lodge an asylum claim as soon as possible. They wonder why a person would live in a 'safe' country for weeks, or months before moving on to a country like Canada and finally making a claim. This philosophy overlooks the cases where claimants may have suspicions about the actual security offered by the country they are currently in. It is not certain that an asylum seeker is trying to circumvent procedures by not claiming in the first country they arrive in.¹⁹⁶

While CIC has long desired to stop people from making claims in both Canada and the US, since 1996 the department has not been able to present numbers to show it to be a major problem. Mr. Craig Goodes, then Director of Asylum at CIC noted that the Department had no "good statistical record" enabling the government to keep track of double claimants.¹⁹⁷

In 2003 CIC still does not have statistics on the number of dual claims that asylum seekers make. However, department officials admit there are only a "small number" of known cases at this point.¹⁹⁸ So, after seven years of talking about 'double dippers' and 'asylum shoppers' the government still has no way to back up their claim that this presents a problem worthy of the broad application of the STA.

Minister Coderre claims that this deal will in fact stop dual claims, for he says it "will prevent asylum shopping or filing of claims in both countries from tying up

¹⁹⁵ Abell, "The Compatibility of Readmission Agreements," 76.

¹⁹⁶ Tuitt, 115-116.

¹⁹⁷ Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 2, March 19, 1996.

¹⁹⁸ Scofield interview.

resources needed to deal with claims from those in genuine need of refugee protection... [and it] will reduce the abuse of our respective asylum systems..."¹⁹⁹ The reality, however, is that it will *not* stop multiple claims, except in one very specific circumstance – according to §159.4(2)(b) of the Regulations, while the STA would not normally apply at an airport, it will apply to a person *in transit* through Canada from the US who makes a claim at an airport.²⁰⁰ According to Bruce Scoffield, CIC's Director of Policy Development and International Coordination, Refugees Branch, only 5% of people traveling through the US made a claim at an airport or after arrival at an in-land office.²⁰¹ With 95% of claimants who travel through the US making application at the border, this particular rule hardly counts as stopping dual claimants, since such a small portion come via air.

Again, in her testimony before the Standing Committee, Atkinson proves this is the case in answering a question from Yvon Charbonneau, MP. He asks what happens to a claimant who has been rejected by the US system (i.e. received a negative determination) and then makes a claim at the Canadian border? Atkinson replies that such a person can only make a claim in Canada *if she or he fits within the exemptions* of the agreement.²⁰² Clearly, then the STA does not target those who try to make dual claims, even though this is an oft-given reason for its implementation. What this means is that if

¹⁹⁹ CIC, "Safe Third Country Agreement, Proposed Regulations Pre-Published," [article online] (accessed 8 May 2003), available from www.cic.gc.ca/english/press/02/0236-pre.html. See also CIC, "Notes for an Address by the Honourable Denis Coderre Minister of Citizenship and Immigration, Meeting at the Nova Scotia Immigration Partnership Conference," [notes online] (11 April 2003, accessed 8 May 2003), available from www.cic.gc.ca/english/press/speech/imm-partners.html; Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 6, November 21, 2002; CIC, "Minister Coderre Seeks Government Approval of Safe Third Country Agreement," [article online] (10 September 2002, accessed 8 May 2003), available from www.cic.gc.ca/english/press/02/0226-pre.html.

²⁰⁰ "Regulations Amending the Immigration and Refugee Protection Regulations," *Canada Gazette Part I*, 26 October 2002, §159.4(2)(b).

²⁰¹ Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 3, November 19, 2002.

²⁰² Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 3, November 19, 2002.

someone claims at the border, or in-land, or at an airport after a terminating flight, it does not matter if she or he has already made a claim in the US. It is only a factor if the person is in transit at a Canadian airport.

The Minister has also proposed that the deal is “a tool that allows us to fully assume our responsibilities in terms of fighting abuse of the system.”²⁰³ He does not specify why Canada cannot assume its responsibilities without it and what abuse to the system he is referring to. Coderre then noted that with the introduction of IRPA the department “put more tools in the hands of our people on the border to work with, and we believe that now, by having that agreement, we will be able to be respectful also of our own judgment of other cases, like the Singh case, *saying now the only way to make sure we can regulate a system and be respectful of the rule of law is to send back to a safe third country those people who want to come here*” [emphasis mine].²⁰⁴ According to this statement, Canada’s Minister of CIC thinks that “the only way” to respect the rule of law and regulate the system is by sending refugee claimants away. This is certainly a new twist on the argument for protecting refugees and contradicts decades of Canadian refugee policy.

The Regulatory Impact Analysis Statement accompanying the regulations implementing the STA also makes reference to asylum shopping, reasoning that “the government seeks to cut the link between migratory preferences and protection needs, and shares the responsibility of providing to those in need.”²⁰⁵ Here we see the government arguing that refugee claimants are abusing the system and trying to find a short cut to the immigration process. The regulations do not mention security concerns or

²⁰³ Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 6, November 21, 2002.

²⁰⁴ Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 6, November 21, 2002.

²⁰⁵ “Regulations Amending the Immigration and Refugee Protection Regulations,” 3241.

the desire to stop 'asylum shopping' by keeping applicants from claiming in both jurisdictions. The only other justification the Impact Statement points to is in the Benefits section, where it claims that the practice of returning refugees to the US "will reduce the number of refugee claims made by persons arriving from the United States."²⁰⁶

Ottawa continues to make contradictory statements regarding this STA. On one hand, it claimed that the deal would allow the asylum systems "to focus on genuine refugees in need of protection."²⁰⁷ But, this agreement will not assist in this process at all. These types of statements from the government do a disservice to the refugee community because they make it sound like *claiming* asylum equals *getting* asylum. However, the function of the IRB is to make sure that those who gain protection in Canada are running from a real threat to their lives and not just to a more advantageous economic situation. Cutting the number of claims does nothing to "focus on genuine refugees."

Washington has also relied on the language of asylum shoppers, asserting that the deal between Canada and the US "spells out greater cooperation on asylum claims, aimed at ending the practice of 'asylum shopping' between Canada and the United States."²⁰⁸ This statement is more accurate, for the fourth point of the border plan is to cooperate on sharing asylum information. But, this will require an additional agreement, outside of the parameters of the STA.²⁰⁹ So, if the goal of the partners is to stop multiple claimants one of the easiest ways to address this is through the establishment of an information-sharing

²⁰⁶ "Regulations Amending the Immigration and Refugee Protection Regulations," 3242.

²⁰⁷ CIC, "Canada-United States Issue Statement on Common Security Priorities." See also CIC, "Notes for an Address by the Honourable Denis Coderre Minister of Citizenship and Immigration, Appearance before the Standing Committee on Citizenship and Immigration," [notes online] (20 March 2003, accessed 8 May 2003), available from www.cic.gc.ca/english/press/speech/committee.html.

²⁰⁸ United States, Department of Justice, 7.

²⁰⁹ Office of the Press Secretary, "Summary of Smart Border Action Plan Status," [summary online] (9 September 2002, accessed 8 May 2003), available from <http://www.whitehouse.gov/news/releases/2002/09/20020909.html>.

regime,²¹⁰ which is already in the works with such agreements as that between the RCMP and FBI who have agreed to an arrangement to improve the exchange of fingerprint data.²¹¹

Those who wish to put a halt to asylum shopping also claim that some asylum seekers abuse the system by staying as long as possible in the United States, only making a refugee claim in Canada when they are in danger of deportation from the US. However, Canada's own information shows that the majority of refugee claimants who come through the US only stay there for a short period of time before heading to Canada. Department statistics also show that the "majority of in-Canada claimants present their claims within a few weeks of arrival."²¹² While the numbers do change from year to year, there is a pattern of transit through the US that the Canadian government recognizes.²¹³ Unfortunately, the perception remains, resulting in an agreement that catches everyone who has traveled through the States, not distinguishing between those who have been there for an hour, day, month or year. As Canada shares only one international border, for the government to try to shut its door to spontaneous arrivals in this way is disheartening.

As the section on Canadian jurisprudence showed, asylum seekers cannot be precluded from protection simply because of transit choice. Additionally, there are a variety of reasons why someone chooses Canada. In his study of people from the former Soviet Union who had chosen to make refugee claims in Canada, Barsky found that over half of his sample had traveled through Europe and one third had come through the US en

²¹⁰ Bill Frelick, "Canada, U.S. Resort to Refugee Dumping," [article online] (10 January 1996, accessed 11 June 2003), available from http://www.refugees.org/news/op_ed/011096.htm.

²¹¹ "U.S., Canada Tighten Border Security: Agreement Will See the Two Countries Share More Information, Expand Integrated Border Patrol Units and Coordinate Visa Requirements," *The Guardian (Charlottetown)*, 4 December 2001, Final Edition, A1.

²¹² CIC, "Government Response to the Second Report of the Standing Committee on Citizenship and Immigration, 'Refugee Protection and Border Security: Striking a Balance.'"

²¹³ Scoffield interview.

route to Canada. For many of the claimants, the reason they gave was that their profile or country of origin would have precluded them from being safe in another country. Some came to Canada because they did not think that they would have a positive determination elsewhere. For half of them friends and family ties led them to claim in Canada.²¹⁴

Moreover, the UNHCR has also pointed out that there are sometimes legitimate reasons for a claimant to make a dual request for protection. If US officials intercept someone on his way to Canada, even though he or she fully intended to claim only in Canada, sometimes the only way to stave off deportation is to make a claim in the US.²¹⁵ Moreover, as the Canadian Council for Refugees (CCR) points out, many refugees have few financial resources and must travel through the US to get to Canada. They may sometimes have to stop en route in order to get additional resources in order to continue. They may have to choose less expensive, slower modes of transportation. It is not uncommon for a person to fly to the US, then take a bus to Buffalo or Detroit, where they then cross the border into Canada and make a claim.²¹⁶ These people get caught in the STA net, even though they do not fit Ottawa's definition of asylum shoppers.

Also, the UNHCR contends that if states want to put an end to abuse of the asylum systems, they should commit to processing applications "fairly and expeditiously" rather than by "erect[ing] additional barriers."²¹⁷ The Canadian Bar

²¹⁴ Robert F. Barsky, "Arguing the American Dream à la Canada: Former Soviet Citizens' Justification for their Choice of Host Country," *Journal of Refugee Studies* 8, no. 2 (1995): 127, 129-30.

²¹⁵ UNHCR (Ottawa), "Issues to be Considered in the Context of Discussions Regarding a Responsibility-Sharing Agreement Between Canada and the United States," [article online] (29 January 2002, accessed 12 June 2003), available from <http://www.web.net/~ccr/safethirdunhcr.html>.

²¹⁶ Canada, Parliament, House of Commons, Standing Committee on Citizenship and Immigration, *Evidence of Proceedings*, (Meeting No. 4, 21 March 1996). 35th Parliament, 2nd Session [online] (accessed 4 November 2002), available from http://www.parl.gc.ca/committees352/cits/evidence/04_96-03-21/cits-04-cover-e.html.

²¹⁷ UNHCR (Ottawa), "Comments on Bill C-11: 'An Act Respecting Immigration to Canada and the Granting of Refugee Protection to Persons Who Are Displaced, Persecuted or in Danger,'" submission to

Association (CBA) supports this, maintaining that the best way to deter abuse of the refugee system is to have an efficient system that comes to accurate conclusions in a short amount of time. In fact, STAs actually prolong the system by adding an extra step to the process.²¹⁸ Furthermore, this kind of agreement does not target those who are 'illegal migrants' for it catches people who are traveling within the legal channels as well. As David Matas of the CBA has pointed out, the problem with such an agreement is that "[i]t catches all the legals as well, people who conform with all the requirements consistent with making a refugee claim and have never been underground at any time."²¹⁹

Furthermore, in his view, the Canadian version of the STA is "a solution for which there is no problem."²²⁰ "This agreement is not about illegal migration. It's about legal migration as well. In fact most of the people who will be affected by it will be people who are legal in either or both countries. It's not about people who are going straight to Canada or the United States. It's not about family reunification. This agreement is simply an agreement of first arrival – legal or illegal, family or no family, directed or non-directed... It cannot be justified on the basis that you're concerned about illegal migration, because that's not what it's about. It can't be justified on the fact that you believe in family reunification, because that's not what it's about. The principle of first arrival, which is what it's about, has no resonance in international standards, and it's going to create conflicts with international standards."²²¹ This sentiment is just as applicable seven years later.

the House of Commons Standing Committee on Citizenship and Immigration [comments online] (5 March 2001, accessed 12 June 2003), available from <http://www.web.net/~ccr/c11hcr.PDF>, 14.

²¹⁸ Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 4, March 21, 1996.

²¹⁹ Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 4, March 21, 1996.

²²⁰ Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 4, March 21, 1996.

²²¹ Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 4, March 21, 1996.

No one should be returned to a third country with which she or he lacks meaningful links, but casting a net as wide as the Canada-US STA to catch asylum shoppers will result in this. This is why 'best practice' for states requires not counting mere transit or short-term presence in that country as such a link. Meaningful links would include "family connections, cultural ties, knowledge of the language, the possession of a residence permit, the applicants' previous period of residence in the other State, and any other connections that would expedite or enhance the prospects of integration."²²²

3. Managing Numbers

Another reason the government submits in defense of the STA is that it will "reduce the number of refugee claims being referred to the IRB, in particular the large number of claims from people who are granted visitor visas to enter the United States and who then proceed to the Canadian border to initiate a refugee claim."²²³ Again, this is a goal without strong data backing it up, rather it is an excuse the government uses in an attempt to simply cut the number of spontaneous claims made in Canada.

Looking at the numbers, CIC officials pointed out that in 2001 95% of the 13,497 claimants coming through the US made their claim at land border points of entry. This represented about 34% of all claims made in Canada. With these numbers representing a rather typical year, the Department can expect over 12,000 claimants each year would be affected by this policy. However, with the exceptions in place, the best "guesstimate" the Department can make is that Canada would force between 5,000 and 6,000 claimants to make their claims in the US.²²⁴

²²² Legomsky, 90.

²²³ Canada, Parliament, House of Commons, "Safe Third Country Regulations," 6.

²²⁴ Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 3, November 19, 2002.

Minister Coderre has also appealed to the need to lower the number of claimants. When asked by the Standing Committee what the agreement intended to achieve, the Minister asserted first that it was his desire to find a balanced approach between openness and vigilance. The Minister said that the Department agreed to “receive and protect about 25,000 to 29,000 refugee claimants a year, and the new system for the last three years brings us an average of 45,000 to 50,000.”²²⁵ On this point the Minister seems to be mixing his numbers between immigration and refugee patterns. Also, the ‘new system for the last three years’ is unclear, as IRPA was passed only last year.

According to the 2001 Immigration Overview CIC’s planned range for refugee settlement was between 22,100 and 29,300. Perhaps the Minister was referring to the IRB? If so, he should have talked about the numbers that the department had to make determinations about, not how many it had agreed to “receive and protect,” for the IRB does not make a positive decision in every case. If the Minister was referring to the IRB, he should have used different numbers, since in the IRB 2002 Performance Report, the Board had projected an upper range of claimants of 36,500 during the 2001-02 year. CIC actually referred 45,100 to the Board during that year. Furthermore, the IRB had expected to make determinations in 32,500 cases, but due to fewer decision-makers in place the Board only finalized 27,500 claims.²²⁶

In 2002, CIC numbers show that 33,453 people applied for refugee protection,²²⁷ which is very close to those projected. The way the Minister describes it, one would get the impression that there was a vast increase in the number of protected refugees when in

²²⁵ Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 6, November 21, 2002.

²²⁶ Immigration and Refugee Board, “Performance Report for the Period Ending March 31, 2002,” (Ottawa: Minister of Public Works and Government Services Canada, 2002), 15-16.

²²⁷ CCR, “Refugee Claim Statistics,” email to the CCR listserv 28 March 2003.

fact the numbers for 2001 show that the final number was between the lower and upper planned ranges for the year.²²⁸ While there was a spike in claimants, it has since dropped off again, but it is nevertheless important for people to understand the difference between the numbers that Canada receives and protects each year and those who make an asylum claim.

The problem with western governments like Canada focusing on the number of refugee claimants is that it leads to a shirking of their responsibilities. In turn, they relegate the countries of the south to taking on more of the burden of harboring those in need of asylum. For example, in the mid-1990s, Africa housed more than twice the number of refugees in all of North America, Europe, and Oceania combined.²²⁹

Besides, while the public perception is that Canada is inundated with refugees, the truth is that we are protecting less of the whole than in years past. While Canada ranked sixth out of western refugee-protecting states in the absolute numbers of refugees it accepted in 2002 (and fifth overall between 2000 and 2002), its per capita rank was only 15th in 2002 (2000: 12th, 2001: 14th).²³⁰ Also, when the determination process takes so long, there are often cases where rejected claimants have become de facto residents in the meantime, and this makes it difficult for the government to deport them. This undermines public confidence in the system and adds to the perception that claimants are only

²²⁸ The lower range was 22,100 and the upper range was 29,300, with the final number being 27,894. Data from CIC "Facts and Figures 2001," [report online] (accessed 2 May 2003), available from <http://www.cic.gc.ca/english/pdf/pub/facts2001.pdf>, p. 4.

²²⁹ Hathaway, *Reconceiving International Refugee Law*, xxi.

²³⁰ UNHCR, "Asylum Applications Lodged in Industrialized Countries: Levels and Trends, 2000-2002," Population Data Unit UNHCR [report online] (Geneva, March 2003, accessed 12 June 2003), available from <http://www.unhcr.ch/cgi-bin/texis/vtx/statistics/+TwwBmejuhKwwwwwwwwwwwwmFqAIRERfIRfglhFqAIRERfIRfgltFqA5BwBo5Boq5zFqAIRERfIRfgIAFqAIRERfIRfgIDzmxwwwwwwwwwlFqAIRERfIRfgI/opendoc.pdf>, 7.

seeking economic advantage.²³¹ To lay the blame at the feet of refugees for the bureaucratic holdup is simply unfair.

As we have already seen in the discussion of European asylum control regimes, when Germany shut its borders to refugee claimants, tens of thousands still found ways to make claims inside the country. There is no reason to think Canada's experience will be any different. Ottawa has already implemented many tools to keep refugees out of Canada, but approximately 30,000 people each year find a way to claim in Canada. While the implementation of the STA will block some of the access, the desire of refugees to find protection will lead to them finding alternate ways to enter.

4. Claims Backlog / Sharing the Burden

The final argument that Canada makes to necessitate the STA is that there is a backlog in the claims process and that Canada and the US should share the refugee burden. As Minister Coderre said to the Standing Committee, he expects the agreement to reduce backlogs, improve efficiency in Canada's determination system and improve management of the border.²³² If this is in fact one of his goals, he would do better to simply impose a quota or a cap on the number of asylum seekers. Making the system better and more efficient is a laudable goal, but this agreement does not have the tools to actually do that since it simply imposes the same restriction on the entire class of people traveling through the US to make their claims in Canada.

²³¹ Erin Patrick, "Asylum Under Siege," *Foreign Policy* no. 129 (March/April, 2002): 28-29.

²³² CIC, "Government Response to the Report of the Standing Committee on Citizenship and Immigration, 'Safe Third Country Regulations,'" [report online] (May 2003, accessed 7 May 2003), available from <http://www.cic.gc.ca/english/pub/safe-third.html>; CIC, "Government Responds to the Safe Third Country Reports of the Standing Committee on Citizenship and Immigration," [report online] (1 May 2003, accessed 8 May 2003), available from <http://www.cic.gc.ca/english/press/03/0313-pre.html>.

The CCR has observed that while several thousand refugee claimants travel to Canada through the US, the American system itself has a backlog of several hundred thousand. As the Council points out, even though Canada tends to have higher refugee acceptance rates than the US, clearly hundreds of thousands already choose to make their claim in the US.²³³ Thus, while there is already burden sharing, the result of this agreement will be an increase in the US backlog.

A quick look to the European situation will again show one of the pitfalls of what is supposedly a burden-sharing arrangement, is that perimeter EU states such as Germany, Austria, Spain, Italy and Greece end up taking more of the burden than the core states.²³⁴ Under the Canada-US STA, the US will act like a perimeter state because it shares a border with Mexico and has a closer proximity to Central and South America. Also, more international flights terminate in US airports than in Canadian ones. Right now, the STA does not address the issue, and as we have seen the US realizes that it will take the brunt of the claims under this formalized regime.

Admittedly, the UNHCR has decided that "States may legitimately establish co-operative mechanisms designed to allocate or share responsibility for examining asylum claims, provided that the procedures incorporate necessary safeguards. UNHCR's principal concern is that refugees receive the protection they need, and that responsibility-sharing agreements do not lead directly or indirectly to *refoulement*."²³⁵ Minister Coderre refers to this type of statement when he cites the UNHCR's support for the agreement as recognizing "as positive the ultimate objective of this Agreement, which

²³³ Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 4, March 21, 1996.

²³⁴ Hurwitz, 676.

²³⁵ UNHCR (Ottawa), "Comments on Bill C-11," 19.

is to ensure an appropriate allocation of State responsibility for determining refugee status.”²³⁶

However, the Minister also needs to keep in mind that the UNHCR has also noted that if this STA is indeed about sharing responsibility, the governments should include a mechanism to account for situations when applications become overwhelming in one country as compared to the other.²³⁷ While this last does not expressly state it, there is an understanding that the vast numbers travel north as opposed to south, and thus Canada will be giving up much of the responsibility for refugee claims made at the border. The inference is that the US should put a cap in place so that after a certain number each year the deal will cease to have effect.

Also, if the function of the agreement is really to alleviate pressure on the system and share responsibility, it would specify numbers and percentages. Unfortunately though, the desired outcome by the Canadian camp is simply to reduce the numbers of claims made in Canada.

Even the Standing Committee realized that the numbers may not play out as promised and recommended that the government be prepared to suspend the deal if asylum claims do not drop or if there is an increase in illegal entries into Canada. In spite of this, the Minister replied that the success or failure of the agreement cannot be based on these factors alone. It is the Department’s view that the any review must take into consideration the entire 30-point border plan and not just the repercussions of the STA.²³⁸ This is a frustrating response because part of the stated purpose of the agreement was to

²³⁶ Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 6, November 21, 2002.

²³⁷ UNHCR (Ottawa), “Issues to be Considered...”

²³⁸ CIC, “Government Response to the Report of the Standing Committee on Citizenship and Immigration, ‘Safe Third Country Regulations.’”

bring about a drop in claims and to secure the borders, but the Minister has said that we cannot judge the deal on its outcomes. In this light, it is hard to imagine the Canadian government will accept any rationale for suspending the agreement once it is in place.

So, to conclude this discussion of Canada's stated reasons for implementing an STA at this time, Minister Coderre has claimed that the agreement will "better help people who need Canada's protection,"²³⁹ but how the deal will accomplish this is unclear. It does not specifically target security risks, or multiple claimants, or those simply looking for a better life via the asylum system. Neither does it take any real steps toward the goal of sharing the burden of those seeking refugee protection at the 49th parallel.

A statement by David Matas, a member of the CBA's National Immigration Law Section is as pertinent today as it was eight years ago:

When the stated rationale for the agreement and the scope of the agreement diverge so significantly, there are two possibilities. One is that the governments have bungled, drafting an agreement that mismatched their intentions. The other is that they have a hidden agenda. Either possibility is disturbing and justifies giving the draft a close second look.²⁴⁰

²³⁹ Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 6, November 21, 2002.

²⁴⁰ Cited in Frelick, "Who's on First?" 219.

V. Consideration of United States as a Safe Partner

1. General comments

Now that we have looked at the agreement in the historic, international, and domestic context, we must then ask one of the most important questions: Is the US a safe country for *all* refugee claimants? While the evidence shows that for many people the process between the two countries is very similar, there are several groups of refugee claimants who face harsher treatment in the US. For some asylum applicants, it is clear that Canada offers a better chance for them to receive protection. As the section on Canadian jurisprudence has shown, both Canadian and US courts have said that refugee determination should be based on the individual story. Unfortunately, this is the one thing that is most lacking in this type of arrangement.

And, as the CCR has argued, since even Canadian citizens have received poor handling in the US, how can Ottawa be confident that those in the tumultuous refugee process, who have no status in Canada or the US, will receive fair conduct? The most distressing example is the case of Ottawa businessman and Canadian citizen Maher Arar, who was arrested while in transit in the US and deported to the Middle East, rather than to Canada. He remains in a Syrian prison to this day. In the fall of 2002, Ottawa warned Canadian citizens who were born in Iran, Iraq, Libya, Syria and Sudan that they may consider delaying travel to the US because they could face excessive scrutiny by US officials.²⁴¹ This warning substantiates that Ottawa itself cannot guarantee the safety of Canadian travelers in the US, therefore to claim it is safe for those without any status is simply misleading.

²⁴¹ J.W. Campbell, "We Must Ensure All Canadian Fairness at the Border: Canadians With Origins in Certain Countries Are Being Unfairly Associate with Terrorism," *The Guardian (Charlottetown)*, 7 November 2002, Final Edition, A7.

In fact, the Canadian refugee determination system accepts claimants who are American citizens, and the US has accepted the refugee claims of three Canadians in the last two years.²⁴² If both countries acknowledge that their partners have the potential to produce refugees, how then can they argue that the other is safe in *every* case? This shows why it is vitally important for both countries to look at each case on its own merits, rather than making policy that affects an entire class of people.

CIC instead contends that the US presents a safe alternative to the Canadian system for all who transit through there, so how do they arrive at such a different conclusion? To answer this, we must look at how CIC formed its opinion of the US determination process. As noted earlier, in order for the Canadian government to sign an STA, the other party (as defined by IRPA) must be signatory to the Refugee Convention and the Convention Against Torture. It must also adhere to international human rights, have a refugee claims procedure, and it must agree to join into such an agreement (which is important, for this will keep Canada from returning an asylum seeker to a country that does not agree to accept him or her). The first requirements are easy to test in the US's case, as it has signed the requisite international treaties. CIC admits that the more difficult question to answer deals with the US claims procedure and that way in which it discharges its obligations under the Protocol.²⁴³

In general, CIC believes that the US has a complex system which is subject to judicial oversight. In the view of the Canadian government, then, it meets the requirements laid down by the UNHCR ExCom conclusion 8,²⁴⁴ which sets guidelines for

²⁴² BCIS, "Refugees/Asylees, Fiscal Year 2002," [data online] (accessed 4 June 2003), available from <http://www.immigration.gov/graphics/shared/aboutus/statistics/RA2002yrbk/RA2002.pdf>, 20.

²⁴³ Scofield interview.

²⁴⁴ Scofield interview.

how states should set up their domestic refugee determination system. This Conclusion recommended, among other things:

...that procedures for the determination of refugee status should satisfy the following basic requirements:

- (i) The competent official (e.g. immigration officer or border police officer) to whom the applicant addresses himself at the border or in the territory of a Contracting State, should have clear instructions for dealing with cases which might be within the purview of the relevant international instruments. He should be required to act in accordance with the principle of *non-refoulement* and to refer such cases to a higher authority.
- (ii) The applicant should receive the necessary guidance as to the procedure to be followed.
- (iii) There should be a clearly identified authority – wherever possible a single central authority – with responsibility for examining requests for refugee status and taking a decision in the first instance.
- (iv) The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned. Applicants should also be given the opportunity, of which they should be duly informed, to contact a representative of UNHCR.²⁴⁵

As explained by CIC representative Bruce Scoffield, there are two tracks to the US asylum system, the affirmative and the defensive. In the affirmative track, when a person makes a claim within the United States, they appear before a member of the “asylum corps” who only has the power to accept, not to reject. If they cannot give a positive determination, the claimant will then move on to an Immigration Judge (IJ) who can grant asylum or make a decision of “withholding of removal.” Mr. Scoffield likened

²⁴⁵ UNHCR, “Conclusion 8 (XXVIII) of the Executive Committee” [conclusion online] (1977, accessed 12 July 2003), available from <http://www.unhcr.ch/cgi-bin/texis/vtx/home/openssldoc.htm?tbl=EXCOM&id=3ae68c6e4&page=exec>.

these two processes to the IRB and the Pre-Removal Risk Assessment (PRRA)²⁴⁶ systems in the Canadian context.²⁴⁷

In the defensive track a claimant goes straight to an IJ, which occurs when officials apprehend someone and refer him to removal proceedings.²⁴⁸ The BIA has the authority to overturn this decision, and it also allows for a *de novo* review (which would be similar to the as-yet-unimplemented Refugee Appeal Division, which would allow a paper review of negative determinations). Finally, there is a further possibility of appeal to the Federal Court and then to the US Supreme Court.²⁴⁹ However, with respect to the STA, US legislation specifies that “[n]o court shall have jurisdiction to review any determination of the Attorney General under paragraph (2),” which is the portion of US law that sets out the return of refugee claimants under an STA.²⁵⁰ So, while there is judicial oversight once someone is in the determination system, it does not exist for those deemed returnable to a third country.

Furthermore, while Scofield proposes that the US system complies with ExCom Conclusion 8, the Bureau of Citizenship and Immigration Services (BCIS, until March 2003 known as Immigration and Naturalization Service, or INS) does not provide

²⁴⁶ Rejected refugee claimants in Canada can apply for a PRRA once they have been given a removal order.

²⁴⁷ Scofield interview.

²⁴⁸ James Sloan, “The Application of Article 1F of the 1951 Convention in Canada and the United States,” *International Journal of Refugee Law* 12, supplement 1 (July 2000): 226. Sloan points out that the affirmative application is better since it gives the applicant “two bites at the cherry” since initial rejection in this channel does not lead to automatic rejection, 226.

²⁴⁹ Scofield interview.

²⁵⁰ United States. Congress. *Immigration and Nationality Act*, [legislation online] (accessed 5 May 2003), available from [http://www.bcis.gov/lpBin/lpext.dll/inserts/slb/slb-1/slb-21?f=templates&fn=document-frame.htm#slb-act, §208\(a\)\(3\)](http://www.bcis.gov/lpBin/lpext.dll/inserts/slb/slb-1/slb-21?f=templates&fn=document-frame.htm#slb-act,%208(a)(3)).

interpreters during the asylum interview, but it requires the claimant to bring an interpreter if he or she does not speak English fluently.²⁵¹

To sum up this look at general trends in the US asylum determination structure, Hathaway has explained that in the US, refugee claimants do not have the benefit of due process provisions under the American Constitution, which is completely different from Canada, as Section III of this paper has shown. In his estimation, the draft agreement is about taking away the right of people to choose where they make their claim. In an international system where each state chooses what its asylum system will look like, the only choice refugees have is actually where they go. As for international norms, Hathaway confirms that they are skeletal at best. They do not set out in detail what asylum procedures should look like, and that is why it is important to keep a higher standard by using the Canadian system as the common denominator, rather than relying only on 'international standards.'²⁵²

2. Expedited removals / one-year deadline

There are two important facets to the issue of expedited removals in the US. The first is how it affects claimants not part of the STA and the second is how it will affect claimants subject to return under the agreement. In 1996 Washington passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). It included the expedited removal process, which allows an immigration officer to order the removal of an asylum claimant without further review or hearing if the officer concludes the claimant arrived with improper documentation or is in the country illegally. The one-year deadline requires people to submit asylum claims within one year of arrival, while

²⁵¹ BCIS, "Frequently Asked Questions About Asylum," [article online] (accessed 8 May 2003), available from www.immigration.gov/graphics/services/asylum/faq.htm.

²⁵² Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 2, March 19, 1996.

allowing for exceptions in cases of changed circumstances in the home country.²⁵³ Even with this potential safeguard, UNHCR's Canadian representative noted that such procedures do not appear to be in line with international norms.²⁵⁴

The Standing Committee of the House of Commons looked at the provision as it pertained to returned people under the STA, realizing the concern within the advocacy community that undocumented refugee claimants turned away by Canada could then be subject to the expedited procedure. The Committee pointed out that CIC officials countered these claims by arguing that since expedited removal only applies at ports of entry, claimants returned under the agreement would not be affected as they would technically still be in the United States.²⁵⁵

This argument was made by Bruce Scoffield, as he submitted that since Canada presumably will not officially admit someone subject to the terms of the STA, the person in question, when returned to US custody, would not actually have left US territory and would therefore not be subject to an expedited removal. With this understanding, he then proposed that Canada could have signed the Agreement without getting assurance from the US, for in the view of the Department it was a moot point. However, it was an impediment to not have this detail clearly spelled out, and Canada asserts that the government received assurances that returned claimants will go straight to the defensive track of the US procedure.²⁵⁶

²⁵³ This could cover a situation where a person is in the US on a student visa, and the situation in the home country deteriorates during her studies. If the situation warrants, she could apply for asylum, even if she has been there for more than twelve months.

²⁵⁴ Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 4, November 19, 2002.

²⁵⁵ Canada, Parliament, House of Commons, "The Safe Third Country Regulations," 7-8.

²⁵⁶ Scoffield interview.

However, the UNHCR indicated that US officials have not confirmed this, noting that while “U.S. government officials have stated that they expect that most persons returned from Canada would not be subject to expedited removal, this has not yet been confirmed...”²⁵⁷ David Martin, who completed a report on the US asylum procedure on behalf of Canada’s Attorney General, was not sure if the US would apply expedited criteria to such people.²⁵⁸ He did note that the return would trigger a new clock in the context of the US one-year application deadline,²⁵⁹ thus the Committee assumed that since they would technically be a ‘new arrival’ the US government could then place them in expedited removal proceedings. Because of these ambiguities, the Committee requested in a report to the Minister that the Canadian government seek assurance from the US that returned claimants not face expedited removal.²⁶⁰

There is clearly some hesitance about this procedure, but Scofield argues that if a person indicates fear (even if he or she does not use the word *refugee* or fails to refer to the Convention definitions), then the claimant *must* be referred and is not eligible for expedited removal. Over 99% of claimants are determined to have credible fear and are thus referred. The officer’s decision is subject to a review, and since the numbers are so low, in the Canadian government’s view, it is “not a substantial bar”²⁶¹ for gaining access to the US asylum procedure.

²⁵⁷ UNHCR (Ottawa), “UNHCR Comments on the Proposed Regulations Amending the Immigration and Refugee Protection Regulations: Relating to the 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,” [comments online] (14 November 2002, accessed 12 June 2003), available from http://www.web.net/~ccr/regula_11.html.

²⁵⁸ David Martin, “Memorandum Prepared for the Attorney General of Canada,” Personal electronic copy sent from the Department of Citizenship and Immigration Canada, Footnote 1.

²⁵⁹ David Martin, 13.

²⁶⁰ Canada, Parliament, House of Commons, “The Safe Third Country Regulations,” 7-8.

²⁶¹ Scofield interview.

It seems fair to conclude that in this instance the possibility of application may be worse than the actual application, but it is certainly an issue for Canada to keep in mind as it moves forward with the STA. The problem of claimants getting caught by the one-year deadline is also pertinent, and the Committee recommended that the Canadian government seek assurance from American counterparts that “claimants returned under the Agreement will not be precluded from accessing the America asylum system on [this] basis.”²⁶² In any case, this situation shows how domestic law can have a negative impact on STAs, and with this issue specifically, either returned claimants are new arrivals and thus subject to expedited removal but not the one-year deadline, or they are not new arrivals, subject to the deadline, but not the expedited procedure. They cannot be both.

3. Lack of legal aid

While the issue of legal aid does not get as much attention, it is an important factor in determining the value of a given refugee determination procedure. Generally publicly funded legal aid is not available to claimants in the US, while it is generally accessible in Canada. In discussion with Bruce Scoffield, I found that CIC admits that the system is “different” in the US, but he points out that in Canada itself there are different rules for each province. In the view of CIC, the Americans take a “different approach,” and because the Department does not see it as a black and white issue it maintains that it is unfair to summarize the US procedure as an inherently bad system. The Canadian government argues that in America the civil society (through NGOs, advocacy organizations and *pro bono* work by law firms) allows for “essentially effective access to

²⁶² Canada, Parliament, House of Commons, “The Safe Third Country Regulations,” 9.

legal council.” Scoffield cited an example he had come across of a New York law firm that had done over 400 hours of *pro bono* work on behalf of refugee claimants.²⁶³

However, a study of the American system shows the flaw in relying on the good intentions of civil society to give counsel to refugee seekers. More than one in three claimants in immigration court have *no representation* and for detainees they are two times as likely to have *no legal counsel* than non-detained asylum seekers in the defensive proceedings. Additionally, US refugee claimants are four to six times likelier to get asylum when represented by legal counsel.²⁶⁴ While CIC may want to believe in the fairness of a system that does not ensure representation for all people, it is easier to make the case that refugee claimants have a more difficult time in the US system.

4. Claims based on gender

Until the 1980s the profile of a refugee was of a skilled or educated young man. The dilemma of course is that the capacity to move is at the foundation of the Convention definition, and travel had often restricted the ability of women and dependent children to seek refuge outside their home state. However, changing patterns have shown a rise in the ability of women and children to look for asylum in other states.²⁶⁵ It is thus important that the agreement take into account the unique reasons why women flee persecution. We must also keep in mind, as the UNHCR has pointed out, that taking a gender-sensitive interpretation of the Convention “does not mean that all women are automatically entitled

²⁶³ Scoffield interview.

²⁶⁴ Eleanor Acer, “Living up to America’s Values: Reforming the U.S. Detention System for Asylum Seekers,” *Refuge* 20, no. 3 (May 2002): 50.

²⁶⁵ Laura Barnett, “Global Governance and the Evolution of the International Refugee Regime,” Commissioned by the Evaluation and Policy Analysis Unit UNHCR, [report online] (accessed 8 May 2003), available from <http://www.unhcr.ch/cgi-bin/texis/vtx/home/+wwBmezP5yswwwwhwwwwwwwhFqo20I0E2gltFqoGn5nwGqrAFqo20I0E2glcFqDcw1GwaxwGDnBBDzmxwwwwww/opendoc.pdf>, 16.

to refugee status.”²⁶⁶ Nevertheless, Canada has decided that the issue deserves considerable attention.

Refugee women may have faced violence such as rape and abduction during refugee movements, and they are often discriminated against in access to health, welfare, and education services. These issues are known and have been part of UNHCR ExCom agendas since 1985. In 1991 the UNHCR drafted guidelines for personnel involved with refugee women protection. In 1993 the UN General Assembly passed the Declaration on the Elimination of Violence against Women, thereby firmly stating that this issue has the eye of the international community.²⁶⁷ It is therefore an important point for Canada and the US to consider in the implementation of the safe third agreement.

In the Regulatory Impact Analysis Statement which accompanied the publishing of the regulations enacting the Agreement on the Canadian side, there is a statement that says the STA will likely produce “differential impacts by gender.”²⁶⁸ CIC argues that this could mean that the two governments will return more men than women and that it is not an automatic admission the agreement will have a negative impact on women. In the Department’s view, the results may be different for men than for women, but that does not mean they will necessarily be negative.²⁶⁹

However, reading the statement in context, it is clear that the reference is to women who face gender-based persecution, for the next sentence states that “Canada and the United States have different approaches to the treatment of claims based on gender-

²⁶⁶ UNHCR, “Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees,” HCR/GIP/02/01, (Geneva, 7 May 2002), 2.

²⁶⁷ Goodwin-Gill, *The Refugee in International Law*, 256.

²⁶⁸ “Regulations Amending the Immigration and Refugee Protection Regulations,” 3243.

²⁶⁹ Scofield interview.

based persecution...”²⁷⁰ Clearly the Department acknowledges that the difference in this process between the two countries is an important issue, so important that the Department commits to collect data relating to gender issues in order to “address unintended differential impacts”²⁷¹ which may result from the implementation of this agreement.

In fact, the Attorney General of Canada commissioned an “expert review” on the subject, but is not willing to release it to the public, pending possible legal action. CIC as a department held its own gender-based analysis, though it did not produce a specific document. Instead, they sent memoranda to Cabinet and consulted with NGOs and women’s groups across Canada. After the agreement has been in place for one year, the department commits to examining the gender-specific impacts that it may have resulted in.²⁷² CIC’s stated goal is to act prudently and take these issues under consideration at the one-year review, that way they will not be dealing with hypothetical situations but with concrete examples. According to the department there is a strong desire to be very careful and closely monitor this situation.²⁷³

With regard to the number of gender-based determinations made in Canada, while the Department does not have specific numbers, they are “low.” Generally, with the implementation of the gender guidelines, there has not been a large broadening of the overall numbers of refugees, which some feared would come with the new gender-based guidelines.²⁷⁴

In order to look at how the US deals with gender-based claims, Mr. Scofield proposes that we get past the “rhetoric.” He argues that the international instruments are

²⁷⁰ “Regulations Amending the Immigration and Refugee Protection Regulations,” 3243.

²⁷¹ “Regulations Amending the Immigration and Refugee Protection Regulations,” 3244.

²⁷² Scofield interview.

²⁷³ Scofield interview.

²⁷⁴ Scofield interview.

silent on this issue, the Convention does not deal with it, and there are no ExCom recommendations which expressly look at such claims. He continues by observing that while Canada was the first state to adopt gender guidelines, the US was second. He also comments that even before the US produced these guidelines, there was a court decision that recognized the social group definition as encompassing gender, even before Canadian courts did. So, the department's summary of this is that "there is no basis to feel the US does not recognize that gender can't be a basis of persecution."²⁷⁵ However, there has been some worry within the department that US Attorney General Ashcroft may reverse his Department's opinion on this, but there is "no indication yet of backward movement."²⁷⁶ The paper will deal with these concerns at the end of this section.

Minister Coderre has contended that the US government's approach "at a policy level" is "substantively similar" to Canada's.²⁷⁷ That the Minister notes the similarity "at the policy level" implies that the implementation might not actually be similar. An inspection of the writing on this subject shows that this is in fact the case: the US system is more difficult to navigate than the Canadian. The government even acknowledges the on-going debate, and promises to review these types of cases in the monitoring process.²⁷⁸

In Canada, the *Ward* decision of the Supreme Court coupled with the IRB Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution have confirmed that gender-based claims can fall within the category of groups with an innate or unchangeable characteristic. "Since then, there has been a broad recognition that

²⁷⁵ Scofield interview.

²⁷⁶ Scofield interview.

²⁷⁷ CIC, "Government Response to the Report of the Standing Committee on Citizenship and Immigration, 'Safe Third Country Regulations.'"

²⁷⁸ CIC, "Government Response to the Report of the Standing Committee on Citizenship and Immigration, 'Safe Third Country Regulations.'"

women who fear persecution on the basis of their gender constitute a particular social group within the Convention refugee definition.”²⁷⁹

The rallying point for inclusion of gender-based refugee claims in Canada came in 1992 as a result of the case of “Nada” (a pseudonym) who was denied refugee status. This led to the introduction of gender guidelines for IRB decisions.²⁸⁰ In 1995 the US Department of Justice, acknowledging the Canadian lead, issued gender guidelines for its asylum system. Both countries addressed the issue without changing the refugee definition in their respective legislation. The result of this is that the asylum seekers must show a nexus between their gender-based persecution and the Convention grounds.²⁸¹ As the following cases will show, this has led to some mixed decisions in the US.

In the 1996 case of *Kasinga*, the BIA overturned a refusal of asylum for a young Togolese woman who fled her country to escape being forced into a polygamous marriage to a man thrice her age who insisted she go through the ritual of female genital mutilation. The Board rejected the INS arguments and concluded that FGM amounted to persecution and that it would be imposed because of her membership in a particular social group. While the case was a watershed, the experience since has shown that it is difficult for women to receive positive determinations on gender-based claims in the US.²⁸²

In 1999 the difficulty inherent in showing the nexus between gender-based persecution and the Convention grounds surfaced in the BIA case of the *Matter of R-A-*

²⁷⁹ Krista Daley and Ninette Kelley, “Particular Social Group: A Human Rights Based Approach in Canadian Jurisprudence,” *International Journal of Refugee Law* 12, no. 2 (April 2000): 154.

²⁸⁰ Margaret Young, “Gender-Related Refugee Claims,” (Ottawa: Library of Parliament, March 1994), 1-3.

²⁸¹ Chantal Tie, “Sex, Gender, and Refugee Protection in Canada under Bill C-11: Are Additional Protections Required in Light of *In re R-A-?*” *Refuge* 19, no. 6 (August 2001): 55.

²⁸² Karen Musalo and Stephen Knight, “Steps Forward and Steps Back: Uneven Progress in the Law of Social Group and Gender-Based Claims in the United States,” *International Journal of Refugee Law* 13, no. 1/2 (January 2001): 53-4.

²⁸³ This case involved a Guatemalan woman who had been accepted as a refugee because of terrible spousal abuse she suffered at the hands of her husband. The IJ had specifically relied on the *Kasinga* determination to decide her case.²⁸⁴ While her credibility was impeccable, the BIA overturned the IJ's decision, even though the Board did not question her claims of physical and sexual abuse, either at the initial determination stage or on appeal. The Board's only question was the link between her acknowledged abuse and the Convention definition.²⁸⁵

The distressing point for those opposed to the BIA conclusion was that it went against the INS Gender Guidelines as well as against earlier Board decisions.²⁸⁶ Furthermore, the Board argued that since the claimant was not part of a social group that was publicly acknowledged in Guatemala, she was not actually a member of such a group. Of course, public acknowledgement of spousal abuse has taken years to come out in the most open societies, and thus it is a significant hurdle for refugee women to surmount.²⁸⁷

This is an important case to keep in mind in discussing the Canada-US STA because Canadian courts have ruled out the BIA approach used in the *Matter of R-A* case. In the case of *Chan*, the Supreme Court of Canada said:

In order to avoid any confusion on this point, let me state incontrovertibly that a refugee alleging membership in a particular social group does not have to be in a voluntary association with other persons similar to him- or herself. Such a claimant is in no manner required to associate, ally, or consort voluntarily with

²⁸³ Tie, 55.

²⁸⁴ Musalo and Knight, "Steps Forward and Steps Back," 54.

²⁸⁵ Tie, 55-6.

²⁸⁶ Tie, 56.

²⁸⁷ Tie, 59.

kindred person. The association exists by virtue of a common attempt made by its members to exercise a fundamental human right.²⁸⁸

The BIA, in contrast, decided that members of a social group must “understand their own affiliation with the grouping, as do other persons within the particular society.”²⁸⁹

The immediate result of the *Matter of R-A-* decision was that the Board denied asylum to at least five women raising the issue of domestic abuse, citing the precedence in *R-A-*. In one case, a woman from Zaire suffered beatings and rape at the hands of her husband, often in front of their own children. These attacks frequently made her lose consciousness and ended in serious health problems and left her face permanently disfigured and her body infected with sexually transmitted diseases. In the wake of *R-A-*, Immigration Judges and the BIA have denied asylum to people whose cases involved the threat of honor killings and others who had been forced into prostitution. In the case of a 21-year-old woman from a former Soviet republic, the IJ rejected her claim, citing *R-A-*. The IJ did not doubt the veracity of her story, or the possibility that if she were deported she would either be forced back into prostitution or be targeted for ritualized execution.²⁹⁰ In general, IJs around the country “began to deny not only domestic violence claims, but a broad scope of gender asylum cases – sometimes refusing even to take testimony on the claim.”²⁹¹

After an 18-month national campaign that included congressional demands, media pressure and grassroots support, then Attorney General Janet Reno vacated the BIA’s decision in *R-A-*. This happened on the last day of the Clinton administration, and rather

²⁸⁸ Cited in Tie, 61.

²⁸⁹ Cited in Karen Musalo and Stephen Knight, “Gender-Based Asylum: An Analysis of Recent Trends,” *Interpreter Releases* 77, no. 2 (30 October 2000), 1534, fn 4.

²⁹⁰ These cases cited in Musalo and Knight, “Gender-Based Asylum,” 1535-37.

²⁹¹ Musalo and Knight, “Steps Forward and Steps Back,” 56.

than issuing a decision on the case, the AG remanded the case back to the BIA, instructing it to reconsider the case under a set of so far unimplemented draft regulations.²⁹²

The proposed regulations could have significant influence in asylum recognition, for they acknowledge that gender can form the basis for a particular social group category and also remove the requirement found in *R-A-* that a claimant has to prove that her persecutor directed abuse at other members of her social group.²⁹³ Unfortunately, as CIC admits, though the Reno decision came over two years ago, the current White House administration has not implemented the draft regulations.²⁹⁴

After the *Matter of R-A-* was remanded to the BIA, there was hope that subsequent decisions would lay a better foundation for gender-based claims. In March 2001 a three-member panel of the US Ninth Circuit Court of Appeals ruled in the case of *Aguirre-Cervantes* that a 19-year-old Mexican asylum seeker should be granted protection from her abusive father. Unfortunately, because of the US Circuit Court system, this decision was only precedent setting for nine western states.²⁹⁵ For example, later in 2001 an IJ in Chicago (not covered by the Ninth Circuit) denied an asylum claim by an Indian woman who feared continued beatings from her husband, beatings that were so violent that she had to have a hysterectomy.²⁹⁶ The decision in *Aguirre-Cervantes* appeared to be a positive step for women fearing domestic violence, but it is important to note that the Department of Justice moved for a rehearing of this case by the Ninth

²⁹² Musalo and Knight, "Steps Forward and Steps Back," 58.

²⁹³ Musalo and Knight, "Steps Forward and Steps Back," 58-9.

²⁹⁴ Scofield interview.

²⁹⁵ Patrick McDonnell, "Ruling Allows Asylum for Foreign Victims of Abuse," *Los Angeles Times*, 22 March 2001, A3, A22.

²⁹⁶ Quindlen, Anna, "Torture Based on Sex Alone," *Newsweek* 138, no. 11 (10 September 2001): 76.

Circuit.²⁹⁷ This does not bode well for those hoping to see the Bush administration implement the draft regulations laid down by Clinton's team.

Furthermore, on 23 October 2001 the Ninth Circuit allowed the INS motion to rehear the case before the full panel of the Court. In the meantime, the father was killed in Mexico, and on 7 December 2001 the Court vacated the opinion and remanded the case back to the BIA for a new hearing.²⁹⁸ While the reasons for Aguirre-Cervantes' request for asylum now appear moot, the broader point is that the current American government has fought to limit the application of gender-based protection, rather than expand it as the Canadian government has done. The broadening of the definition in Canada, in contrast to those who felt it would lead to a rush of claims, has only resulted in about 300 claims per year since 1995 based on the IRB's Guidelines.²⁹⁹

This "unsettled situation" in the US admittedly gave CIC the most cause for concern in the signing of the STA with the US. Nevertheless, the Department does not see it as an overwhelming problem, even in light of the spotty record of protection in the US since the vacating of the *R-A*- decision. For CIC the main point is that right now it is a hypothetical situation and at this time it believes there is no reason to think women will have a more difficult time making a claim in the US than in Canada.³⁰⁰

But, this argument ignores the fact that the US BIA had denied asylum in the *R-A*- case, only to be vacated by the Attorney General. Surely CIC is not concluding that every

²⁹⁷ Musalo and Knight, "Steps Forward and Steps Back," 70.

²⁹⁸ David Weissbrodt, Joan Fitzpatrick and Frank Newman, "Supplement to Chapter 15: Refugee and Asylum Law; Jurisprudence of Human Rights; Cultural Relativism," [supplement online] (22 October 2002, accessed 14 July 2003), available from <http://www1.umn.edu/humanrts/intlhr/chapter15.html>; see also Jason Hoppin, "9th Circuit to Rehear Domestic Abuse Asylum Case," [article online] (24 October 2001, accessed 14 July 2003), available from http://www.uchastings.edu/cgrs/documents/media/sfr_10-01.htm.

²⁹⁹ Nahla Valji, "Women and the 1951 Refugee Convention: Fifty Years of Seeking Visibility," *Refuge* 19, no. 6 (August 2001): 32.

³⁰⁰ Scofield interview.

gender-based claim will have the ability or resources to call upon the protection of the AG. Furthermore, current AG Ashcroft has done nothing to give anyone the impression that he would do otherwise – he is for tightening, not loosening asylum.

The Standing Committee of the House of Commons also took exception to the CIC assertion that gender-based asylum claims would be fairly dealt with in the US. In a 2002 Committee Report dealing with the STA, the members note that the Regulatory Impact Analysis Statement itself concedes that Canada and the US have different approaches to this subject.³⁰¹ And the David Martin report, commissioned by Ottawa, which the Committee referenced, showed that while there have been some positive changes in US policy, until new gender-based regulations come into being, there remains uncertainty about the current American standards.³⁰² With these points in mind, the Committee recommended that the government make an exemption in the Agreement for women facing domestic violence until the American regulations on gender-based persecution are consistent with the Canadian ones.³⁰³

Again, the concluding point is that while the US may be safe for most asylum claimants, refugee determination must happen on an individual level. With the current uncertainty in the American domain, the committee's recommendation is a wise one.

5a. Detention

Another topic that raises heated discussion is the efficacy of detaining asylum seekers. While most criminal codes have procedures for determining the detention of suspected or convicted criminals, refugee claimants frequently face detention through a simple administrative process. Often this power is held at the discretion of the executive

³⁰¹ Canada, Parliament, House of Commons, "The Safe Third Country Regulations," 8-9.

³⁰² David Martin, 12.

³⁰³ Canada, Parliament, House of Commons, "The Safe Third Country Regulations," 8-9.

and does not come under the same scrutiny by the judiciary as in more routine criminal cases.³⁰⁴ So, for refugee claimants, their human rights can easily be sidestepped. The International Covenant on Civil and Political Rights, ratified by both Canada and the US, states in Article 9(1) and (4) that:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law[...]

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.³⁰⁵

There is no question that states have the authority to detain non-nationals pending removal from or entry into their jurisdiction. The issue for refugees is not whether this can happen but if there are rules to limit its use or duration in cases pertaining to refugee claimants. Article 31(2) of the Covenant restricts the length and scope of detention regimes. International human rights law bolsters this implication, for human rights treaties affirm that states shall not subject anyone to arbitrary arrest or detention. This means that any such restriction on mobility must be in accordance with the standards in a democratic society. The conditions that states inflict in detaining asylum seekers is also

³⁰⁴ Towle, 35.

³⁰⁵ United Nations High Commissioner for Human Rights, *International Covenant on Civil and Political Rights*, [covenant online] (16 December 1966, accessed 8 May 2003) available from http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

restricted by these international policies, and there is a general recognition that all detainees should have access to basic procedural rights and guarantees.³⁰⁶

The point of this section is not to ignore Canada's deficiencies in this area, for our Immigration department also detains people in prisons when the three detention centers are full, and children sometimes get detained, though IRPA calls for such action only as a last resort.³⁰⁷ But, in general the use of detention is much less prevalent in Canada.

This reluctance to use detention mechanisms fits with the international standards, for the UNHCR has noted that if "asylum-seekers have not committed crimes, their detention raises significant concern... Detention should not be imposed as part of a policy to deter future asylum-seekers or to discourage those who have commenced asylum procedures from pursuing them."³⁰⁸ However, the United States arbitrarily detains asylum seekers who arrive by boat as well as detaining all asylum seekers who have no identity documents. Such automatic detention goes against the spirit of this Covenant on Civil and Political Rights.

CIC officials admit that detention occurs more often in the US, but they argue that it is a result of a difference in emphasis. Both Canada and the US follow the same UNHCR ExCom Conclusion 44 which says detention can occur if there is a flight risk, an identity question, or a risk to national security.³⁰⁹ As the CIC representative put it, "We each make choices" and the Canadian government has no problem with the US choice to

³⁰⁶ Goodwin-Gill, *The Refugee in International Law*, 247-9.

³⁰⁷ Catherine Gauvreau and Glynis Williams, "Detention in Canada: Are We on the Slippery Slope?" *Refuge* 20, no. 3 (May 2002): 68-9.

³⁰⁸ UNHCR (Ottawa), "Comments on Bill C-11," 28.

³⁰⁹ UNHCR, "Conclusion 44 (XXXVII) of the Executive Committee" [conclusion online] (1986, accessed 8 May 2003), available from <http://www.unhcr.ch/cgi-bin/texis/vtx/home/openssl.htm?tbl=EXCOM&id=3ae68c43c0&page=exec>.

automatically detain people without proper ID.³¹⁰ Of course, Conclusion 44 also says that “whenever possible, [asylum seekers should] not be accommodated with persons detained as common criminals.”³¹¹ To the contrary, as Amnesty International has demonstrated, since the US immigration branch operates less than ten detention centres, Washington forces many asylum claimants to stay in prisons with criminal inmates.³¹²

Some may think that Amnesty International will only point out negative conditions, but the UNHCR backs this position up, also decrying the more prevalent use of detention in the US, and especially the fact that detainees often have to stay in state, county, or local jails.³¹³

Of course, detention impugns the political rights of the detainees as well as harming their mental health. Automatic detention for those with improper documentation penalizes refugees who simply do not have the required international travel identification. It is obviously difficult for a person fearing persecution at the hands of the state to ask that same government for documentation.³¹⁴ And, for many people from less developed countries, there is generally less infrastructure in these states to provide documentation.³¹⁵

Referring specifically to this struggle, CIC’s own analysis shows the difficulty women have in getting proper documentation:

³¹⁰ Scofield interview.

³¹¹ UNHCR, “Conclusion 44 (XXXVII) of the Executive Committee.”

³¹² Canada, Parliament, House of Commons, Standing Committee on Citizenship and Immigration, *Evidence of Proceedings*, (Meeting No. 3, 19 March 1996). 35th Parliament, 2nd Session [online] (accessed 4 November 2002), available from http://www.parl.gc.ca/committees352/cits/evidence/03_96-03-19/cits-03-cover-e.html.

³¹³ UNHCR (Ottawa), “UNHCR Comments on the Draft Agreement between Canada and the United States of America for ‘Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries,’” [comments online] (26 July 2002, accessed 12 June 2003), available from <http://www.web.net/~ccr/safethird.htm>.

³¹⁴ Acer, 48.

³¹⁵ Lowry, 33.

Women and children often have less access to documents because of prevailing traditions and cultural norms, the administrative inefficiency of source countries, remote geographical locations, overt discriminatory practices and persecution, or the destruction of documents through wars or armed conflicts. Proposals that place a priority on documentation, and that base credibility assessments on documentation, without weighing this kind of evidence against other forms of validation, could have disproportionate and negative impacts on women.³¹⁶

Martin Collacott, formerly the Canadian ambassador to Sri Lanka, Syria, Lebanon and Cambodia, and a previous director-general of security services at the department of Foreign Affairs, is another opponent of Canada's immigration and refugee policies. He argues that the best way to deal with terrorists accessing the Canadian system by making refugee claims is to detain every claimant until Canada can verify their identity and complete security checks.³¹⁷ While on the surface this may seem to be an easy solution, a closer look at the effects of detention on asylum seekers will show that the ramifications can be as traumatic as the initial suffering they sought to flee.

When people talk about detention for refugees, what do they want it to look like? This paper has already shown that arbitrary detention goes counter to international standards. It is now pertinent to look at what detention does to the mental health of those it puts behind locked doors.

These questions go as far back as 1995, when a psychiatrist at a European Council on Refugees and Exiles seminar described such detention as torture unaccompanied by

³¹⁶ CIC, "Gender-Based Analysis Chart," [document online] (21 February 2002, accessed 13 July 2003), available from <http://www.cic.gc.ca/english/irpa/c111-gender.html>.

³¹⁷ Donna Jacobs, "The Case for Detaining Refugees: A Retired Canadian Ambassador Says Canada Could Save Money, and Help True Refugees, by Detaining Refugee Claimants for Security Checks," *The Ottawa Citizen*, 4 November 2001, Final Edition, A4.

physical violence. Her study had shown that for people detained for long duration (up to five years for some), they displayed the symptoms more commonly akin to torture under dictatorial regimes such as those in Latin America.³¹⁸

The picture under US detention is no prettier. Under current US legislation, anyone arriving without proper documentation faces mandatory detention.³¹⁹ Of the 22,000 non-citizens detained by BCIS, approximately 2,000 are seeking asylum.³²⁰ A recent report by Physicians for Human Rights and The Bellevue/NYU Program for Survivors of Torture examined the mental state of asylum detainees. The report notes that in case after case the detention of refugee claimants causes further damage to an already traumatized group of people.³²¹

In general the study found that:

the psychological health of detained asylum seekers is extremely poor and worsens the longer asylum seekers remain in detention. Detention appears to be a substantial contributing factor to this psychological distress. Rates of anxiety, depression and [Post-Traumatic Stress Disorder] PTSD symptoms were extremely high among detained asylum seekers. Clinically significant symptoms of depression were present in 86% of detainees, anxiety was present in 77%, and PTSD in 50%. Further, study doctors documented that these levels of psychological distress worsened as the length of detention increased. While more than half (58%) of the asylum seekers interviewed reported having poor

³¹⁸ Cited in Marie-Claire Caloz-Tschopp, "On the Detention of Aliens: The Impact on Democratic Rights," *Journal of Refugee Studies* 10, no. 2 (1997): 176.

³¹⁹ Acer, 45.

³²⁰ Acer, 46.

³²¹ Physicians for Human Rights and The Bellevue/NYU Program for Survivors of Torture, "From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers (Advance Copy)," [report online] (June 2003, accessed 12 July 2003), available from http://www.phrusa.org/campaigns/asylum_network/detention_execSummary/detention_pdf.pdf, 9.

psychological health at the time that they fled their country, 70% stated that overall their mental health had worsened substantially while in detention.³²²

For some the trauma of detention pushed them to their limit, with 25% of those in the study reporting thoughts of suicide. Two attempted suicide, but fortunately survived. One woman who had fled her country due to familial political affiliations tried to hang herself, but friends in her detention dormitory stopped her. In her words, "Before detention, I had never thought of killing myself. I had never had such an idea, my goal was to save my life. It was when I got into detention, that I started losing hope and thought that it is useless to live. In my mind, I just kept thinking there is no reason to live and I thought about what would happen to me if I was sent back to my country- I thought I would be killed if I was sent back. So I thought it would be better to just get it over with now rather than to be sent back."³²³

An exacerbating problem was that the availability of counseling and psychological help was either non-existent, limited or not sustained. While 69% of the report subjects expressed a desire to receive such help, only 6.13% had obtained it. Additionally, while the detention centers provided medication for some detainees, about 40% of those who wanted medication did not get them, in part because they did not know they were available.³²⁴

A quick look at the detention regime in Australia will reinforce the proposition that detention of refugee claimants causes real emotional damage. The Baxter Immigration Detention Facility, which Australia opened near Port August, South Australia in 2002 has a 1200-volt outer fence and movement detectors between its fences.

³²² Physicians for Human Rights, 11.

³²³ Physicians for Human Rights, 13.

³²⁴ Physicians for Human Rights, 14.

Each of its nine compounds has a perimeter fence with steel gates. Rooms have no windows, so the detainees only have sight of the sky from the central courtyard, and they are locked in their rooms each night from 9 pm until 8 am.³²⁵ In 1998 the Department of Immigration privatized the detention centers, thus absolving itself from the day-to-day running of the centers.³²⁶

From 24 May to 2 June 2002 Justice P. N. Bhagwati, Regional Advisor for Asia and the Pacific of the United Nations High Commissioner for Human Rights (UNHCHR) conducted a review of Australia's detention practices. The report pointed to the distressing fact that many men, women and children had been in detention facilities for many months, some of them up to two years. It went on to point out that the prison-like conditions turned the initial hope of the detainees into despair as they realized their incarceration would not come to a quick end.³²⁷

The Australian Human Rights and Equal Opportunity Commission carried out a review of Australia's detention facilities in 2001 and found some disturbing trends with respect to detainees' mental health. The report noted the prevalence of stress and depression among the asylum seekers as well as accounts of self-harm. In one case a man attempted suicide by cutting himself with broken glass. A detained child saw this act and subsequently had nightmares and refused to eat. Several of those who had been in

³²⁵ Human Rights Watch, "By Invitation Only: Australian Asylum Policy," 14, no. 10 (C) (December 2002): 79.

³²⁶ Francesco P. Motta, "'Between a Rock and a Hard Place': Australia's Mandatory Detention of Asylum Seekers," *Refuge* 20, no. 3 (May 2002): 16.

³²⁷ Justice P.N. Bhagwati, "Report of Justice P. N. Bhagwati, Regional Advisor for Asia and the Pacific of the United Nations High Commissioner for Human Rights: Mission to Australia 24 May to 2 June 2002," [report online] (accessed 12 July 2003), available from <http://www.chilout.org/files/BhagwatiReportJuly2002.pdf>, 7.

detention for prolonged periods were only able to sleep with the assistance of sleeping pills.³²⁸

The Commissioner observed the correlation between attempted and successful acts of self-harm during times of particular crisis, such as occurred during a hunger strike in the Woomera facility in January 2002. In general, the mental health care facilities were found to be lacking, and in the facilities that did have counseling and psychologist services, as in the American example, some detainees did not even know they existed. Even for those who had access to the services, however, they felt that the help was of no use, since the doctors and nurses could not change the root cause of their problems: the fact that they were in detention. As an Afghan man declared, "It's about 16 months since I arrived here. I've been under a lot of pressure. My life has been taken away from me. Within this 16 months I have become mentally and also physically ill. Every day my physical well-being is getting worse... I've become a useless person who wishes for death every day."³²⁹ For refugees arriving by boat, the average stay in detention is 155 days. As of 1 February 2002 Australian detention centers housed 259 women, 224 male children and 141 female children, totaling 637. As of 1 November 2001 there were a total of 2,736 people in detention.³³⁰

For those who argue for increased or across-the-board detention in Canada, these examples should give cause for second thought, for such practice lead to further damage to an already fragile group of people.

³²⁸ Australian Human Rights and Equal Opportunity Commission, "A Report on Visits to Immigration Detention Facilities by the Human Rights Commissioner," tabled in Australia's Federal Parliament 22 October 2002, [report online] (accessed 12 July 2003), available from http://www.humanrights.gov.au/human_rights/idc/index.html.

³²⁹ Australian Human Rights and Equal Opportunity Commission.

³³⁰ Motta, 18.

5b. Detention of minors

A sub-topic of detention is the US practice of detaining minor asylum claimants as well as adults. International acceptance of the need for special protection for all children first came in the 1924 League of Nations declaration on the rights of children. However, only in 1989 did the UN Convention on the Rights of the Child (CRC) come as an additional milestone in protecting the child. It has been ratified by all but two UN members – the US and Somalia. Children are actually ensured of better protection than other members of the refugee class because the CRC does not have a derogation clause in times of emergency. Thus, the international community has committed to uphold children's right at all times, in war and in peace. The UNHCR first issued *Guidelines on Refugee Children* in 1988, updating them in 1994. The *Guidelines* emphasize the importance of using detail and verification when working with children, as well as taking action as soon as possible to bring families together.³³¹ Unfortunately for young claimants in the US, that system applies less discriminate use of detention for minors.

Part of the tension in the US system is that the US Immigration Bureau plays the role of caretaker of the children as well as their prosecutor, leading to an inherent conflict of interest. In 2000 the INS took almost 5,000 children into custody, and approximately one-third of those spent time in a juvenile jail for times ranging from a few days to more than a year.³³²

While the number of unaccompanied minors coming from the US into Canada is another figure that CIC does not keep track of, the department is “working on it quite actively” and will start collecting this data soon. The “best numbers” that the department

³³¹ Goodwin-Gill, *The Refugee in International Law*, 257-9.

³³² Andrew Morton and Wendy A. Young, “Children Asylum Seekers Face Challenges in the United States,” *Refuge* 20, no. 2 (February 2002): 14.

can provide is that five years ago there were approximately 200 per year and that this has now increased to about 400 or 500 per year.³³³ While the Canada-US STA makes an exception for unaccompanied minors, the issue is still important for two reasons. First, it shows a protection problem for claimants in the US and second, as the following paragraphs describe, US age-determining procedures are outmoded and can lead to detention of minors who otherwise wish travel to Canada. Finally, Canada treats minors differently, with the IRPA clearly stating that “it is affirmed as a principle that a minor child shall be detained only as a measure of last resort, taking into account the other applicable grounds and criteria including the best interests of the child.”³³⁴

The aforementioned Physicians for Human Rights report criticized BCIS’s use of dental exams and X-rays as a means to determine if a claimant is less than 18 years old. Citing several medical reports, the document argues that chronological age, dental age and skeletal age are not necessarily identical within an individual. The discrepancies can be as much as five years, which is especially substantial when dealing with a subject in his or her first two decades of life. The Greulich/Pyle test, the most commonly used bone age standard in the US, is based on a study of white, upper socioeconomic class children from 1931-1942, and should be used with reservation, especially on a multiethnic pediatric population. The Physicians for Human Rights report referred to a 15-year-old girl who told immigration officials that she was trying to reunite with her mother in Canada. Based on a dental exam, the department detained her in an adult center, claiming

³³³ Scoffield interview.

³³⁴ “Immigration and Refugee Protection Act,” §60.

that she lied about her age. US officials subsequently released her, and she was able to join up with her mother in Canada, who corroborated her age.³³⁵

Other US agencies such as the Department of State and Office of Refugee Resettlement have done away with these exams as the sole means of determining age because of their inherent inaccuracy. Netherlands has even ruled them to be unconstitutional.³³⁶ The reason the issue is so important in the US is that children are eligible for a juvenile status visa, which would allow young people like Mohamed Boukragé to stay in the US. The seventeen-year-old Mohamed was detained as an adult, based on the radial and x-ray evidence. Detained on 23 October 2000, he was in detention until at least May 2002.³³⁷ His birthday was June 2002, and while his status is unknown, after that point the age factor would be moot, since he would then be an adult.

6. US interdiction of asylum seekers in international waters

Another critique to be made against the US system is on its policy of interdicting asylum seekers in international waters. On this point, the Canadian government absolutely disagrees with Washington's policy, for Ottawa argues that someone should be responsible for interdicted people in international waters, and since there is no one else there to take accountability, the state who takes custody must also assume responsibility.³³⁸ So, how does the department get around this stumbling block? CIC argues that interdiction on the high seas is unrelated to the issue of the safety of the US asylum system. This line of reasoning states that since interdicted people are not technically claimants, the issue neither adds to nor subtracts from the safety of asylum

³³⁵ Physicians for Human Rights, 123-125.

³³⁶ Leonard S. Glickman, "Seeking Freedom: A Child Finds Himself behind Bars," *Refuge* 20, no. 3 (May 2002): 65.

³³⁷ Glickman, 65-66.

³³⁸ Scofield interview.

claimants in the US system. Canada simply “distinguishes” between these two issues and simply ignores interdiction as a refugee policy.³³⁹

For a Canadian government official to make this statement is dumbfounding. In the course of researching for this paper, it was clear that when authors wrote about interdiction, there was a clear and definite link to the control of refugee movement. Minister Coderre himself has linked the two issues on several occasions by taking great pride in pointing out that Canada has interdicted over 40,000 possible refugee claimants in the past half decade.³⁴⁰ It is disingenuous for the department to artificially de-link these two elements for the purpose of deeming the US a ‘safe’ country in order to move ahead with the STA.

It is even more distressing because Scofield admitted that it is not clear exactly how the US carries out asylum procedures at sea for Haitians. He noted that there “appears” to be a “higher test” of credible fear, and if the US officer finds a credible fear, the US then diverts the claimant to Guantanamo.³⁴¹ How is it that the Canadian government can separate this issue from the US asylum procedure, when those interdicted at sea go through a refugee determination process? All the language is that used to describe refugees, the people interdicted are refugee claimants, and yet Ottawa argues that US interdiction is *not* part of the refugee determination system. This is a tenuous argument at best and simply misleading at worst. Scofield admitted that the US will not send Haitians with credible fear back to Haiti because that would breach the principle of *non-refoulement*, but he also said that the US government will not allow

³³⁹ Scofield interview.

³⁴⁰ See footnote 143.

³⁴¹ Scofield interview.

them into US territory. Again, the language is that of refugees, used by a Canadian official to describe US refugee policy, but somehow CIC still claims that there is no link.

American legislation itself counters this claim by Canada's Immigration Department, for in its Immigration and Nationality Act (INA) §208(a)(1) it says, "In general – Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum..."³⁴² If the US government links interdiction and the asylum procedure, it is hard to see why Canada does not. The answer, of course, is that Canada was the instigator of this agreement and would have had a difficult time declaring the US a 'safe' partner if interdiction were included in the analysis, since Canada does not support the practice. Taking this issue out of the equation may be effective in moving forward with the STA, but it certainly does a disservice to refugee claimants.

Amnesty International has also pointed out that the cases of interdicted Haitians serves as an example of the danger in the US asylum system. During Haiti's military dictatorship in the early 1990s, many Haitians left by boat for Florida. The US coast guard intercepted the boats, which the US then destroyed. The coast guard ships took the asylum seekers aboard, forcing them to return to their ravaged country of origin, a clear violation of *non-refoulement*. However, the United States Supreme Court ruled that neither domestic law nor the Convention limited the power of the US president to intercept and repatriate people intercepted in international waters.³⁴³

³⁴² United States. Congress. *Immigration and Nationality Act*, §208(a)(1).

³⁴³ Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 3, March 19, 1996.

Linked to this interdiction subject is the so-called 'side deal' of the STA, which would see Canada resettle up to 200 asylum claimants each year that the US designates. This falls under Article 9 of the agreement, which deal with resettlement of people in need of protection outside this border deal. The UNHCR has called for the complete omission of this article, since it is not related to the issue of cross-border asylum applications and the parties should therefore leave it out.³⁴⁴

A quick look at CIC's defense of this particular initiative is useful. This supplementary agreement came about when US negotiators asked what Canada would find acceptable under Article 9, with the Canadian delegates proposing up to 200 refugee referrals per year from the US. According to the Minister, originally the US had asked to refer as many as 2,400, but Canada negotiated the number down to 200.³⁴⁵ One of the main potential problems of this "clarification" is that Canada will be quietly endorsing the US policy of interdicting people in international waters, a policy it claims to condemn. There is a growing perception that the 200 referred under this arrangement will come from those held at the US base in Guantanamo, with Stephen Kelly, Deputy Chief of Mission at the US Embassy in Ottawa stating that they would be interdicted Haitians held in Guantanamo.³⁴⁶

So, does Ottawa believe that resettling people from Guantanamo is a tacit condoning of the US policy it purportedly disagrees with? According to CIC, this is not the issue. For the Department it is beside the point. The important thing, contends CIC is

³⁴⁴ UNHCR (Ottawa), "UNHCR Comments on the Draft Agreement between Canada and the United States of America for 'Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries.'"

³⁴⁵ Elizabeth Thompson, "New Deal on Refugees: No More Entry to Canada via U.S. Agreement will Prevent System from Collapsing: Immigration Minister," *The Montreal Gazette*, 22 November 2002, Final Edition, A13.

³⁴⁶ CCR, "Safe Third Country," email to the CCR listserv, 28 April 2003.

the people detained in Guantanamo and that the Canadian tradition responds to humanitarian need, and the process must be about the individual claimant.³⁴⁷ This, of course, is the argument of this paper. The Canadian government only appeals to individual protection when it is in its own interest (in this case de-linking interdiction from the US asylum system). But, this standard needs to be applied consistently, not just when it serves the government's purpose.

7. Political influence on who can claim asylum

While the United States is a signatory to the 1967 protocol (and thereby accepts the universalistic approach of the refugee regime), foreign policy objectives have played a large role in its refugee determination programs. This has led to clearly discriminatory refugee policies based on country of origin, rather than fear of persecution. Since the start of the Cold War, US refugee policy has revolved around its anticommunist stance. In the 1950s this led to the large-scale admission of Hungarians under the Refugee Escape Act (REA) of 1957. The REA repealed what had been a quota system, and it defined refugee escapees as victims of communist controlled or dominated countries or as coming from the Middle East. This led to 160,000 Cubans gaining permanent status during the 1960s and a large intake of people from Vietnam and other Indochinese states during the 1970s. In fact, almost 97 percent of all refugee arrivals from 1971 to 1980 came from communist or Middle Eastern countries.³⁴⁸

³⁴⁷ Scoffield interview.

³⁴⁸ Michael J. McBride, "Migrants and Asylum Seekers: Policy Responses in the United States to Immigrants and Refugees from Central America and the Caribbean," *International Migration* 37, no. 1 (March 1999): 292-3.

This narrow definition remained on the books until 1980, when Washington broadened its definitions.³⁴⁹ It was at this time that the law adopted the universal standard of well-founded fear found in the Convention. However, in 1986 the Justice Department announced that Polish nationals requesting asylum would be presumed to fit the refugee definition. Several days later the INS announced that it would suspend deportations to Nicaragua, which the INS district director in Florida noted was the only Communist country in Central America.³⁵⁰ For Nicaraguans, the result was immediate: while only 27 percent of asylum applicants were successful, by 1987 the success rate had shot to 82 percent.³⁵¹

In the ensuing years, the examples of Cuban and Haitian refugees exemplify the differing policies depending on country of origin. In 1959 Fidel Castro seized power in Cuba and installed communist rule. In 1961 Washington severed diplomatic ties with the country and in the following year imposed a trade embargo. In the intervening years thousands of Cubans fled to the US, with as many as 1700 per week making the trip by the end of 1960. In 1965 President Johnson promised asylum for Cuban asylum seekers, and then Washington established an orderly departure program called the Freedom Flight Program. This allowed the US to provide air transportation from Cuba to Miami at levels of about 3000 and 4000 people each month. Between 1965 and 1973 the FFP brought more than a quarter million Cubans and an additional 70,000 came through Spain. Castro

³⁴⁹ Norman L. Zucker and Naomi Flink Zucker, *Desperate Crossings: Seeking Refuge in America* (Armonk, New York: M.E. Sharpe, 1996), 28-9.

³⁵⁰ Norman L. Zucker and Naomi Flink Zucker, "The Uneasy Troika in US Refugee Policy: Foreign Policy, Pressure Groups, and Resettlement Costs," *Journal of Refugee Studies* 2, no. 3 (1989): 360-1.

³⁵¹ Zucker and Zucker, "The Uneasy Troika in US Refugee Policy," 361.

terminated this program in 1973, but another 38,000 Cubans made it to the US until 1979.³⁵²

In contrast, Washington's policy against Haiti was one of restriction. Since Haitian governments were needed as allies in the war against Cuban communism, the US did not want to describe those regimes in negatives, preferring to call refugees from there 'economic migrants.' For almost four decades the US propped up vicious Haitian regimes out of fear of seeing another communist government in the Caribbean. While Washington may have ignored the plight of Haiti's citizens, the Haitians could not ignore conditions in their home, and thousands fled to the US. When the first group of Haitians arrived by boat in 1972, the INS declared that the escaped political prisoners had nothing to fear from the Haitian government.³⁵³

Under the Reagan Administration the Haitian regime agreed to accept Haitians that the US had interdicted at sea. Even though the Immigration Service maintained that this agreement allowed determination of refugee status, until 1989 only 6 of more than 20,000 interdicted Haitians got a chance to continue the process in the US. From 1991 to 1992 the US intercepted over 40,000 Haitians on the sea, sending 34,000 to Guantanamo, and allowing 10,000 asylum in the US.³⁵⁴

These types of arbitrary admission policies have benefited mostly people from Southeast Asia, Cuba, people from Eastern Europe, the USSR (and what is now the former USSR). While there have been attempts to implement ideologically neutral admission and asylum policies, it has not been implemented across the board.³⁵⁵

³⁵² Zucker and Zucker, *Desperate Crossings*, 29-34.

³⁵³ Zucker and Zucker, *Desperate Crossings*, 34-5.

³⁵⁴ McBride, 294.

³⁵⁵ Zucker and Zucker, *Desperate Crossings*, 43.

Even though the Refugee Act of 1980 attempted to set up a permanent and systematic procedure for admission and resettlement of refugees, nearly 95 percent of refugees until 1990 came from communist and Middle Eastern nations.³⁵⁶

In May 1985 the case of *American Baptist Churches v. Thornburgh* was filed against the INS alleging bias in the determination system against Salvadorans and Guatemalans. (From 1984-1990, while Nicaraguan claimants had a 26 percent success rate, those from Salvador had a 2.6 percent success rate and Guatemalan claimants only a 1.8 percent rate of success.)³⁵⁷ In 1990 the two sides came to a settlement, and a federal court approved the terms in January 1991. Under the terms, the US could not deport any Salvadoran present in the country as of 19 September 1990 or any Guatemalan present as of 1 October 1990 until they had a *de novo* adjudication of their claims.³⁵⁸ Over 190,000 Salvadorans took advantage of this settlement.³⁵⁹ One 1988 study showed that there were approximately one million Salvadorans in the US, or one fifth of the entire Salvadoran population.³⁶⁰

Amnesty International has also referred to the fact that while Canada was extending protection to people from Central America, the US system gave protected status to about two percent of refugees arriving from Central America. While that number

³⁵⁶ McBride, 293.

³⁵⁷ McBride, 296.

³⁵⁸ BCIS, "The American Baptist Churches (ABC) v. Thornburgh Settlement Agreement," [agreement online] (accessed 12 July 2003), available from <http://www.bcis.gov/graphics/services/residency/ABC.htm>.

³⁵⁹ Bill Frelick and Barbara Kohnen, "Filling the Gap: Temporary Protected Status," *Journal of Refugee Law* 8, no. 4 (1995): 343.

³⁶⁰ Segundo Montes, "Migration to the United States as an Index of the Intensifying Social and Political Crises in El Salvador," *Journal of Refugee Studies* 1, no. 2 (1988): 110; Cecilia Menjivar, "History, Economy and Politics: Macro and Micro-level Factors in Recent Salvadoran Migration to the US," *Journal of Refugee Studies* 6, no. 4 (1993): 357.

went up a bit since the late 1980s, the numbers accepted still hovered at around five or six percent in the mid 1990s.³⁶¹

Today the picture is still mixed, especially for those interdicted at sea. When the US officials stop Cubans in international waters, they give them instructions in Spanish and ask if anyone has a fear of return to Cuba. Chinese are given no verbal instructions, but receive a sheet printed in Chinese, asking for their information. Of course, this assumes literacy on the part of all Chinese asylum seekers. Finally, Haitians are given virtually no opportunity to make a claim, instead being diverted to Guantanamo.³⁶² And, as this section has shown, Canada admits that Haitian asylum seekers face a tougher asylum procedure. So, today we see that the foreign policy objectives hold sway in the US determination regime.

8. *Lowering of standards*

The combined problems of the US asylum system and the Canada-US STA are likely to result in a weakening of standards, not strengthening. The ultimate ramification is that refugees will lose out on the ability to find protection in the partner states. Canada should be cautious about this agreement, for right now we are literally a model for the world, since the UNHCR uses Ottawa's system "in training of States newly acceded to the 1951 Convention/1967 Protocol."³⁶³

While STAs are designed to give assurance of a determination procedure for everyone and assume that the members are all equally safe, the reality does not approach

³⁶¹ Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 3, March 19, 1996.

³⁶² Bill Frelick, notes from a presentation given during the Canadian Council for Refugees Spring Consultation 2003 at Carleton University, 29 May 2003.

³⁶³ UNHCR, "Summary of the Strategic Oral Presentation of UNHCR's Operations in the Americas," [summary online] (5-7 March 2002, accessed 12 June 2003), available from <http://www.unhcr.ch/cgi-bin/texis/vtx/home/+NwwBmeVVH-swwwwwnwwwwwwhFqh0kgZTtFqnnLnqAFqh0kgZTcFqX+vGmaMnnBoDtadhaBrna5BwDmoDtaqdMMoBBnna9e2kmDMwGqra+XX+Dzmxwwwwww/opendoc.pdf>, 1.

this goal. As we have seen, in Europe some states recognize persecution by nonstate agents while others do not. Covenants like the Dublin Convention, however, lower the standard so that the least common denominator becomes the norm for all the contracting states. The result is a tightening of standards to conform to the strictest state laws.³⁶⁴

Over the past decades the Canadian government has realized that the international standards do not do enough to fully protect refugees, and this is why we have the quasi-judicial IRB, gender guidelines, and a class of shelter specifically for those who do not fit the Convention definition but are nonetheless “persons in need of protection.”³⁶⁵ Our unique history requires that we use *Canadian standards* as the common denominator when negotiating safe third agreements.

However, the Canadian government does not see it this way, for it simply notes that the United States has a system that meets *international standards*. There is a clear understanding that the two systems are different, and nowhere during the course of researching this topic does the government contend that the American asylum system meets *Canadian standards*. In Ottawa’s response to the 2002 Standing Committee Report on the STA, the government points out that the UNHCR supports such agreements, “where appropriate safeguards are in place.”³⁶⁶

But the UNHCR also proposes that implementing appropriate safeguards requires contracting states to harmonize asylum differences up, not down. Again, Yilma Makonnen, then UNHCR representative in Canada, pointed out that his organization was concerned that the agreement could lead to a lowering of the procedural safeguards in

³⁶⁴ Abell, “Safe Country Provisions in Canada and in the European Union,” 573.

³⁶⁵ “Immigration and Refugee Protection Act,” §97.

³⁶⁶ CIC, “Government Response to the Report of the Standing Committee on Citizenship and Immigration, ‘Safe Third Country Regulations.’”

place to protect refugees. He acknowledged that while the UNHCR supported the goal of states sharing the asylum burden, the example of Europe showed that such deals could lead to a lower common denominator.³⁶⁷

Again in 2002 the UNHCR representative in Canada noted that “in many situations, not just the US-Canada agreement but also in the European context, the cart has been put before the horse, *because procedural arrangements are being made among states before material law has been aligned or harmonized*” [emphasis mine].³⁶⁸ The result of this is that when standards differ from one country to the other, individual claimants do not have the same assurance of finding protection as they would have before the agreements came into place.³⁶⁹

Finally, Ruud Lubbers, the current UN High Commissioner for Refugees, urged Canada not to lower its standards when negotiating the agreement. He instead pushed for Ottawa to “go for the better standard than the lower standard.”³⁷⁰

As Abell writes, because Canada’s “refugee determination system has higher standards than that of the United States... [a]n agreement between [the two] should also take into consideration harmonization of procedures for determining refugee status, and not only harmonization of entry requirements, without resulting in the ‘lowest common denominator’ for Canada, but in higher standards for the United States.”³⁷¹

³⁶⁷ Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 2, March 19, 1996.

³⁶⁸ Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 4, November 19, 2002.

³⁶⁹ Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 4, November 19, 2002.

³⁷⁰ Norma Greenaway, “Keep Canada’s Standards for Refugees, Advocate Urges: Don’t Lower ‘Fair’ System to Harmonize with U.S., UN Commissioner Says,” *The Ottawa Citizen*, 6 February 2002, Early Edition, A6.

³⁷¹ Abell, “Safe Country Provisions in Canada and in the European Union,” 587.

VI. Specific problems with this Agreement

The last argument to be made against this safe third agreement is that it will lead to some general implementation problems. If the two governments move forward with the deal, they should at least keep in mind these issues, otherwise they could see a rise in a host of problems that did not even exist previously.

1. Potential implementation difficulties / Bureaucratic obstacles

First, it is only reasonable to admit that this STA is at least better than the European agreements since it stipulates that refugees will have access to a determination hearing in the country of return, which is something that gets lost in the myriad European arrangements.³⁷² Furthermore, the Canadian position requires an agreement from the third country, which is also an improvement on the European model. Making sure the third party will actually admit the returned claimant is an important international legal principle that Canada has accepted.³⁷³ The family exemptions, which were included because of US pressure, are also broader than those specified in Dublin. The European pact lists a family member as a spouse, unmarried minor child, or the father or mother of an unmarried minor,³⁷⁴ while the Canadian implementing regulations list spouse or common-law partner, legal guardian, child, father, mother, brother, sister, grandfather, grandmother, grandchild, uncle, aunt, nephew or niece as family members.

However, even with this broad definition for the family exemption, there is a case where the spirit of the Convention on the Rights of the Child (CRC) could be abrogated under this STA. The UNHCR has affirmed that the CRC clearly shows that when a child or his or her parents applies to enter a State Party for family reunification, the state

³⁷² Abell, "The Compatibility of Readmission Agreements...", 66.

³⁷³ Abell, "The Compatibility of Readmission Agreements...", 66.

³⁷⁴ Hurwitz, 653.

should deal with them in positive, humane and expeditious manner. Furthermore, if an unaccompanied minor gains refugee status, governments should apply the principles of family reunification, unless it can show strong reason why this would not be in the best interest of the child.³⁷⁵ While the agreement would apply the exemption for a minor child who has received status, it would not apply in a case where a child has been accepted by Canada to a hearing before the IRB. This could lead to a case where a child is in Canada but cannot reunite with his or her parent who is in the US.

Even though the Minister has the prerogative to accept any claimants that would otherwise be returned, this will not safeguard against women claimants and others that this paper has shown could face a more difficult process in the US. Minister Coderre does not want to see an expansion of the exceptions because he feels that the ministerial prerogative coupled with the exceptions will act as a good safeguard against unfair results.³⁷⁶

Another potential hitch in this STA is that it will certainly require a change in the border procedure, but CIC has still not given any indication how it will fulfill this need. Part of the administrative process that CIC proposes is making sure that “two sets of eyes” review each border claim. The initial immigration officer who comes in contact with claimants at the border will report recommendations to a senior officer.³⁷⁷

The problem with this, Jeannette Meunier-McKay, representing the Public Service Alliance of Canada, maintains, is that there are many border points that only have

³⁷⁵ UNHCR (Ottawa), “UNHCR Comments on CIC’s Draft Discussion Paper ‘Unaccompanied Minor Refugee Claimants’” [comments online] (13 September 2000, accessed 12 June 2003), available from <http://www.web.net/~ccr/uam.htm>.

³⁷⁶ Elizabeth Thompson, “Government Urged to Seek Safeguards for Refugees in U.S.: MPs fear those sent back to U.S. Will Be Deported to Countries They Fled,” *The Ottawa Citizen*, 4 December 2002, Final Edition, A2.

³⁷⁷ Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 3, November 19, 2002.

one officer, so having two sets of eyes on the paperwork simply will not be possible.³⁷⁸ In addition, the agreement will actually increase the workload at border points, “both in the complexity of the decision-making and also in the quantity of work to be done.”³⁷⁹ This is a result of the more detailed and probing examinations they border officers will have to carry out in order to apply the new regulations. These are the kinds of administrative questions the government needs to deal with in detail, according to PSAC.³⁸⁰

With this in mind, it is surprising then that CIC does not think the execution of the agreement will require more resources. The Department proposes that it will simply be able to shift current resources as they see fit. The Regulatory Impact Statement gives us a glimpse into the possible rationale for this. In the ‘Benefits’ segment there is an expectation that the workload at land border ports will “be significantly reduced by these measures, [but] there will be added complexity in the decision-making of port of entry officers to determine whether an exception appl[ies]. *An increase in refugee claims at inland offices and airports may result as persons seek to bypass the provisions of the Act and Regulations.* CIC is developing operational contingency strategies to prepare for these impacts and will re-allocate resources as required” [emphasis mine].³⁸¹

This is a clear admission of the point made earlier in this paper, that refugee claimants will find alternate routes (which the Statement euphemistically refers to as ‘bypassing the provisions’) into Canada instead of the orderly system which is currently in place. While it is admittedly a guessing game in the absence of the start of the

³⁷⁸ Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 4, November 19, 2002.

³⁷⁹ Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 4, November 19, 2002.

³⁸⁰ Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 4, November 19, 2002.

³⁸¹ “Regulations Amending the Immigration and Refugee Protection Regulations,” 3242.

agreement, the evidence presented shows that refugees are not going to stop finding a way into Canada.

The Standing Committee realized the need for additional resources, and recommended that the government provide them in the face of this deal; however, the Minister completely refused this recommendation, confident it can just shift current personnel to bridge the gap.³⁸² It is hard to believe that government will not need any new resources to get the arrangement in place. This is an international treaty they have signed, not a new policy about casual-dress Fridays. The Minister anticipates that this agreement will affect thousand of claimants each year, and CIC will have to assess each claimant at the border to see if they qualify to enter Canada under any of the exceptions.

To deal with this problem, the UNHCR has recommended that when administrators cannot meet the deadlines for making determinations in safe third agreements, they should give refugee claimants access to the formal procedure within that state. Because decisions at border points will occur within tight time frames, the chance of an inaccurate decision rises, so this safeguard is necessary. The paper also states that people in this circumstance should have access to legal advice, the UNHCR, and to NGOs.³⁸³ Keeping this admonition in mind, CIC needs to set realistic time frames so that claimants do not live in limbo while bureaucrats decide their fate.

Furthermore, there is an issue of time and space inherent in this agreement. According to CIC, government officials will not officially be admitting people past the

³⁸² CIC, "Government Response to the Report of the Standing Committee on Citizenship and Immigration, 'The Preliminary Draft Agreement between Canada and the United States Regarding Refugee Claims.'"

³⁸³ UNHCR, "Asylum Processes (Fair and Efficient Asylum Procedures)," Global Consultations on International Protection [document online] (31 May 2001, 12 June 2003), available from http://www.unhcr.ch/cgi-bin/texis/vtx/home/+AwwBme1zzd_wwwAwwwwwwhFqA72ZR0gRfZNtFqrpGdBnqBAFqA72ZR0gRfZNcFq+w5Oc1MapGdqN55n5aeNVwwoGawDmanhhoqonDBaw5Oc1MapGdqnm1Gn5elX3qmxwwwwww/opensoc.pdf, 5-6.

border.³⁸⁴ Where will they stay during the time it takes to come to the conclusion that they fit under one of the exemptions or that they must return? How long will the process take? When questioned by the Standing Committee about the time frame necessary to determine an asylum seeker's ability to bypass the STA, CIC had no clear answer, other than to say that the department "will turn them around as quickly as [it] can."³⁸⁵ However, in practice the removal of refugee claimants under STAs often requires a time of physical presence in the destination country, in waiting zones, detention centres or other types of facilities designed to house such 'irregular' aliens.³⁸⁶ With the anticipation that the governments will implement the deal by this autumn, it is imperative for the Department to make public their solutions soon.

The last general point is that this STA has no effective appeal built into its structure, and several witnesses before the Standing Committee pointed to this fault. Members from the Table de concertation des organismes au service des personnes réfugiées et immigrantes reminded the Committee that those turned back at the border can only appeal to the Federal Court. The representatives from the Table propose that we should allow the same level of procedural fairness to a person fleeing for his or her life as we do to someone who loses employment insurance benefits or makes a small claim because of a faulty car repair.³⁸⁷ The UNHCR representative³⁸⁸ and the Canadian chapter of Amnesty International second this conclusion.

AI Canada and the UNHCR both reasoned that having access to a Federal Court review is problematic for a claimant at the border because this Court does not do a

³⁸⁴ Scoffield interview.

³⁸⁵ Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 3, November 19, 2002.

³⁸⁶ Vedsted-Hansen, 272.

³⁸⁷ Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 4, November 19, 2002.

³⁸⁸ Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 4, November 19, 2002.

substantive review of the decision, it only determines whether the decision is in accordance with the law, as defined in the legislation, and whether the decision maker followed due process. Second, getting leave from the Court is very difficult since it is a very legalistic process that is done by paper. The vast majority of refugee claimants will not have the ability to make their case without a lawyer. Clearly, people snared by the STA will not have easy access to a lawyer. In AI Canada's view, then, it is an illusion to say that review by the Federal Court is an effective remedy.³⁸⁹

Nick Summers from the CCR also noted how long a review before the Federal Court can take. He gave the example of a case he filed in February of 2002, which was still pending nine months later. If the Court grants leave, it would be another six months before it will even hear the arguments. A fifteen-month timeframe is no use when the immigration officers have already sent the person back to the US asylum system.³⁹⁰ Finally, the Federal Court only grants leave in about 16% of the immigration cases it receives.³⁹¹

While the newly created Pre-Removal Risk Assessment could serve as an appeal mechanism, we have already seen that it is not available to those returned under the application of the STA.³⁹² CIC's reason for this is that Canada's "international and domestic obligations require a review of risk before removal particularly in cases where a significant period of time has elapsed between the original protection determination and

³⁸⁹ Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 4, November 19, 2002; UNHCR (Ottawa), "UNHCR Comments on the Proposed Regulations Amending the Immigration and Refugee Protection Regulations."

³⁹⁰ Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 4, November 19, 2002.

³⁹¹ Daley and Kelley, 153.

³⁹² "Immigration and Refugee Protection Act," §112(2)(b). This is also stated clearly on the CIC website: CIC, "Canada's Immigration Law," [article online] (August 2002, accessed 7 May 2003), available from www.cic.gc.ca/English/pub/imm-law.html; CIC, "Fact Sheet 9," [article online] (11 June 2002, accessed 8 May 2003), available from www.cic.gc.ca/english/irpa/fs-risk.html.

removal.”³⁹³ With this possibility closed, a returned claimant’s only hope is to get a lawyer and appeal to the Federal Court – clearly an unlikely proposition.

2. Agreement will likely create new problems

During the 1996 Standing Committee hearings, the CBA pointed out that a possible outcome of such an agreement would be to create refugees in orbit where none exist now. The problem, according to the CBA, is that when two parties sign an agreement about allocating responsibility for determining refugee status, there will inevitably be cases where disputes arise. This will have an adverse affect on the people looking for refugee protection, as they will be caught in the middle of a bureaucratic wrangle, leaving their fate in limbo.³⁹⁴

Six years later the Committee realized that such STAs force a heavier burden of proof onto the shoulders of claimants. The Committee wrote that it “may be difficult for claimants who do not have legal counsel or who do not speak one of Canada’s official languages, and who may require some time to establish that they are exempt under the Agreement. As well, the Committee is aware that many may have been forced to flee their homelands without documentation or may come from countries where no central government exists to issue documentation that could assist the person.”³⁹⁵ The committee recommended that the claimants receive the benefit of the doubt from administrators. Following the advice of the UNHCR, the Committee proposes that when delays occur in the process, a deemed referral to the IRB will take place after three days in most cases.³⁹⁶

³⁹³ CIC, “Bill C-11: Immigration and Refugee Protection Act: What Is New in the Proposed ‘Immigration and Refugee Protection Act’” [article online] (July 2001, accessed 8 May 2003), available from www.cic.gc.ca/english/irpa/c11-new.html.

³⁹⁴ Canada, Parliament, House of Commons, *Evidence of Proceedings*, Meeting No. 4, March 21, 1996.

³⁹⁵ Canada, Parliament, House of Commons, “The Safe Third Country Regulations,” 15.

³⁹⁶ Canada, Parliament, House of Commons, “The Safe Third Country Regulations,” 15.

This is an important point because it leads to two possible outcomes. The first is that CIC expects its officers to make most of their decisions on these claims within days. The experience in Europe tells us that these types of decisions can often take weeks, even months.³⁹⁷ So, the Agreement may actually force officials to make rushed decisions. On the other hand, if it takes longer than three days, the claimant will get to make their claim before the IRB. The effect is either hasty decisions or claims referred to the IRB. The unintended result is adding a layer of uncertainty to a process that currently works quite smoothly.

Another harmful consequence of this agreement is that it catches people whom the IRB may have found to be 'persons in need of protection' even though they may not expressly fit the Convention definition. Such persons could face the risk of torture, loss of life, or be subject to cruel and unusual punishment.³⁹⁸

Even James Bissett, a former Canadian ambassador and an outspoken critic of Canadian refugee policy, opposes this STA. He reasons that the agreement is deeply flawed and will increase insecurity by encouraging people to seek clandestine routes into Canada. He takes issue with the exceptions, particularly for citizens of a country that Canada has a stay of removal on and the one for those facing the death penalty.³⁹⁹

Alliance MP Diane Ablonczy comes to the same conclusion about those facing capital

³⁹⁷ See discussion on pp. 41-2.

³⁹⁸ Cited in Christine Aubin, "Consolidated Protection Grounds under IRPA," speaking points from a presentation on behalf of UNHCR (Office) given at the Catholic Immigration Centre in Ottawa, 13 September 2002, 3.

³⁹⁹ James Bissett, "A Welcome Mat For Murderers: A New Canada-U.S. Agreement on Refugees Threatens the Safety of Canadians, says James Bissett," *The Ottawa Citizen*, 5 December 2002, Final Edition, A19.

punishment, describing the agreement as “a Liberal open door policy for migrant murderers and capital criminal fugitives and escapees.”⁴⁰⁰

Bissett would like to see the deal scrapped, but for the wrong reason, based on a misreading of the implementing regulations. He believes that Canada will accept people from countries where Canada has instituted a stay of deportations, even if the IRB decides they are not legitimate refugee claimants. This is simply wrong. The agreement only says which system a claimant will have access to; it does not guarantee a positive determination. The same is true for people facing the death penalty. They will have access to the IRB system, but they will also be subject to the front-end security screening and are not guaranteed of a positive outcome. The agreement is about access, it does not give landed status to everyone who meets the exceptions. As Minister Coderre put it, “There is no question of creating a paradise for murderers.”⁴⁰¹ The real issue here is one of perception, for the public may conclude that anyone who comes to Canada through this deal will automatically become a permanent resident.

The most dangerous problem that this agreement will cause is that the individual loses the guaranteed ability to tell his or her story in Canada. During global consultations on international protection in 2001, the UNHCR delegates noted that best practice procedures in the context of STAs included making sure that there is an individual assessment certifying that the third country is safe for each claimant. Government officials should give the person a chance to rebut the general presumption of safety. The claimant could, for instance, argue that the third state would apply a more restrictive

⁴⁰⁰ Elizabeth Thompson, “Canada No Safe Haven for Killers: Minister,” *The Telegram (St. John’s)*, 26 November 2002, Final Edition, A8.

⁴⁰¹ Elizabeth Thompson, “Canada Runs ‘Open-Door’ Policy on Murderers – Alliance: Plan Slammed by Refugee Advocates,” *Edmonton Journal*, 26 November 2002, Final Edition, A6.

standard in her particular case.⁴⁰² The STA clearly ignores this recommendation, and while there are some exceptions to the deal, on the whole it fails to decide on a case-by-case basis. As AI explains, no person fits exactly into a previously defined group of people, but this agreement tries to shoehorn all refugee claimants coming through the US into the same definition.⁴⁰³

⁴⁰² UNHCR, "Asylum Processes," 4.

⁴⁰³ Amnesty International Canada, "Response to the Report of the Legislative Advisory Group," [report online] (March 1998, accessed 12 June 2003), available from http://www.maytree.com/PDF_Files/IntOblig.pdf, 16.

VII. Alternatives and Conclusions

The evidence presented in this paper has shown that safe third agreements, while theoretically permissible, fall apart at the implementation stage. The goal has not been to show that all STAs are problematic but that the one that Canada and the US have signed will lead to decreased refugee protection as well as decreased border security. What, then, are some possible alternatives?

1. International refugee protection system / temporary asylum regime

Hathaway has written that one of the problems with the current international refugee protection system is that it is defined by the relationship between the claimant and the specific asylum state, which neither addresses nor ensures the ongoing viability of the complete global system. The result is that today's refugee seekers must navigate the myriad interdiction schemes that states put in place and then satisfy the state (acting in loose concert with the UNHCR) that they are in genuine need of protection.⁴⁰⁴

He sees in its place a system without interdiction schemes that allows for the unrestricted right of refugees to choose their place of asylum. While this may scare western states like Canada, as Hathaway notes, this really only applies to a very small minority of claimants, since the vast majority of refugees find protection in bordering countries or are in fact unable to leave. In addition, he argues that there should be an international supervisory agency that is directly involved in the determination of claims and the designation of procedures pending the possibility of safe passage back to the home state. His vision looks to the possibility of wealthier states negotiating the transfer of their share of admissions quotas to states that could use the financial support to deal

⁴⁰⁴ Hathaway, "Reconceiving Refugee Law as Human Rights Protection," 118.

with similar populations.⁴⁰⁵ While this vision of international cooperation seems a long way off, it does help with the discussion of the Canada-US agreement. If the government's are really looking for cooperation and burden sharing, then they should stipulate what the burden will look like. Also, Hathaway's point about allowing refugees to choose the place of asylum is important, because it takes into account the individual nature of the refugee situation. However, considering the hard time the UN has getting funds currently, it is unlikely that the UNHCR will be more successful in securing the needed dollars to support such an international regime.

Plus, in rebuttal, Warner remarks that few states will be willing to give up the right of determining who has access to their territory to an international agency (and he was writing several years *before* the ubiquitous 'war on terror' encompassed the world). He goes on to surmise that international agencies are invariably subject to politics, and the goal of establishing an agency devoted to humanitarianism detached from politics is simply a dream.⁴⁰⁶ Hathaway's subsequent reply is that the important thing is that states guarantee temporary asylum, rather than turning their determination systems into a duty to provide medium or long-term protection.⁴⁰⁷

While it appears that Hathaway's dream of a truly international refugee regime is a long way off (if not simply a dream), what about the possibility of incorporating his notion of temporary asylum that CIC could institute during times of refugee influx?

We have seen that the Minister laments what he sees as a large number of refugee applications, so perhaps during such times the government could institute a system that

⁴⁰⁵ Hathaway, "Reconceiving Refugee Law as Human Rights Protection," 126-9.

⁴⁰⁶ Daniel Warner and James Hathaway, "Refugee Law and Human Rights: Warner and Hathaway in Debate," *Journal of Refugee Studies* 5, no. 2 (1992): 167.

⁴⁰⁷ Warner and Hathaway, "Refugee Law and Human Rights," 170.

would give a 12 or 24 month protected visa to people from certain countries, after which time they could return to their home state or make an asylum application. During times of civil war or other fighting, arrivals will increase from certain countries, but the flow will include a mix of those who would meet the Convention definition, others who face danger but not persecution, and still others who face no danger at all. Giving temporary protection to the group as a whole would delay the need to make the Convention determination and would serve the needs of protection and as well as guarding against refoulement.⁴⁰⁸

This is one way for Canada to keep the IRB numbers down while targeting specific groups of people from 'hot spots.' To keep such a program from becoming a magnet for others from the same country, CIC would need to set a deadline for applications,⁴⁰⁹ as this procedure would obviously need to come into place *after* the arrival of a large group from a specific country. It is always impossible to predict exactly the *where* and *when* of refugee flows.

In 1994 the UNHCR wrote a report on international protection, supporting the goal of temporary protection as long as states guard against *refoulement* and do not force people to return until the conditions in the country of origin are stable.⁴¹⁰

2. Making the agreement amenable to all interested parties

An overarching factor to keep in mind though, is that since CIC itself realizes the unsettled situation of gender-based claims in the US, Canada should first and foremost wait for the outcome of *R-A* before moving ahead with any of the following proposals. The protection of women refugee claimants and their dependent children is simply too

⁴⁰⁸ Fitzpatrick, "Temporary Protection of Refugees," 294-5.

⁴⁰⁹ Fitzpatrick, "Temporary Protection of Refugees," 296.

⁴¹⁰ UNHCR, "Note on International Protection," 23.

important to take a “wait and see” approach. We should only wait and see what the US does, especially when CIC admits that the two systems are different and that the Department has concerns in the wake of the *R-A-* decision. The current US refugee situation is simply too nebulous for us to be signing a bilateral treaty that will affect claimants who have to travel through the US. If Ottawa insists on moving ahead, then at the very least there should be an exception for women and their dependent children until the picture becomes clear.

But, if Ottawa does not want to set up a temporary protection regime, then we must return our attention to the safe third agreement. Clearly the possibility of scrapping the relevant sections of IRPA itself is not going to happen, since it has been on the books for over a decade and successive Ministers have agreed with it. However, there are ways to have a safe third deal that the UNHCR, the CCR and other members of the refugee advocacy community would agree with. The international writing shows that travel through another country is simply not enough to preclude someone from refugee determination. But, there *are* factors that can require people to make a claim in a third state, such as close links to that country, demonstrated protection from that country, or a failed claim in that country’s determination system.

Having said this, here are some alternatives to the current version of the agreement.

1. Security: While all stakeholders admit that we must take into account the protection of Canada and its Citizens, there is simply nothing in this STA that adds to the overall security picture. The two governments are already dealing with security concerns outside of the agreement through joint information sharing procedures. Furthermore,

front-end security screening has been in place for over a year, which means that currently every person who claims asylum in Canada has to undergo a security check from the very beginning of the procedure. These security measures do not require the implementation of a safe third agreement to make them a reality, since they are already in place. Furthermore, the agreement has the potential to lead to increased *insecurity* by encouraging refugees to find alternate routes into Canada. This hurts both the claimants themselves, since they will put their life and resources on the line to get into Canada, but it will also hurt the Canadian public because we will lose the ability to keep track of people who are at present moving across the border in an orderly fashion.

2. Asylum Shopping: As this paper has shown in detail, this specific STA does not target dual claimants. The deal treats someone who has spent six months in the US determination system exactly the same as someone who spent 24 hours there before making a claim at the Canadian border. Even refugee advocacy groups see the value in requiring refugees to make one claim, but this arrangement casts too wide a net. If the agreement focused on those who have already made a claim in the US, it would be much more palatable. As we have seen, the requisite information-sharing procedures are in place, and both governments claim to want to stop the practice. It makes sense then that the deal should better reflect this goal.

Furthermore, there is already a system in place to deal with 'economic migrants,' and that is the IRB. Its purpose is to make sure that only those truly in need gain protection from Canada. This deal does not assist the IRB in its decision-making process.

Clearly some are concerned that some claimants spend too long in the US before making a claim in Canada. Even though CIC's information shows that this is not the case

for the majority of claimants, it has proven a popular stereotype. Rather than barring access to everyone who transits through the States, then, the STA should be drafted in a way to incorporate time limits, as was done back in 1996. Of course, there are legitimate reasons for people to take time transiting through a third country. However, a deal with time limits is better than one with no time limits. The previous draft agreement's time frame was too short, however, and a more reasonable time limit would be to allow 30-days of transit for those traveling by air and 180 days for those traveling by land. While this would still catch some who truly intend to claim only in Canada, it is better than the current approach.

3. Sharing responsibility: Both governments acknowledge that the vast majority of border movement is done northbound. The US has made it apparent that the STA is Canada's initiative, since it is clearly to Canada's advantage. The only way the US got on board was by securing Canada's approval for the other 29 points of the border plan. Also, there was a specific agreement drawn up for Canada to take 200 Haitians from Guantanamo (a dubious agreement, since the US courts have declared it out of US jurisdiction). Nevertheless, if the deal is really about sharing, then the two governments should come up with some specific numbers. The previous agreement also included a 'rolling cap' which was to start at 500 in the first year. This number is surely too low to be acceptable to Canada now, since it hopes to keep five or six thousand people from claiming in Canada. An alternative is to implement the agreement only after a total of two or three thousand claimants have arrived at the border. This would give Canada an opportunity to live up to its commitments, it would allow the US to have fewer claimants, and it would give at least a few thousand people the choice to claim in Canada

Some may say we should use Australia as an example and subtract the number of refugees settled inland from those resettled from overseas.⁴¹¹ But this does not fit Canada's promises, for CIC's immigration plans *expressly* account for refugees coming through resettlement programs and those coming through the in-land determination system. Plus, it goes against the balanced approach the government has defended in international meetings, where it has argued that the two coincide and must work in tandem, not in exclusion.⁴¹² UNHCR has applauded Canada for running the world's second largest refugee resettlement program and it pleads for Ottawa not to allow trade-offs between the two systems.⁴¹³

Of course, these do not have to be either/or alternatives, they could be combined to fulfill a number of goals. For example, an STA that set time limits could still bar those who have already made a claim or had a successful determination. A deal that kicked in only after a certain threshold has been met could apply barriers from the beginning for those who are attempting to make another refugee claim in a new jurisdiction.

Ultimately, then, any agreement needs to be sure to deal with the individual nature of the refugee community. Canada confers refugee status one at a time, so we should only take that opportunity away one at a time. This current safe third agreement with the Americans is deeply flawed and will lead to increased problems for the refugees and the states involved. The real question remains, what is this deal trying to fix? This paper has laid out the arguments that Canada makes in defending this policy, but at the same time it has attempted to show that the agreement fails to really address any of the

⁴¹¹ Motta, 20.

⁴¹² CIC, "IGC Workshop on Resettlement," [paper online] (8 November 2002, accessed 8 May 2003), available from <http://www.cic.gc.ca/ref-protection/english/infocentre/settlement-etablissement/igc-cig/igc-cig.htm>.

⁴¹³ UNHCR (Ottawa), "Comments on Bill C-11," 7.

concerns. Only when such a deal specifically targets those people it wants to keep from abusing the system will this STA be something that will gain wide support outside of government circles.

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Appendix A

Final Draft Text *Safe Third Country Agreement*

The Government of Canada and the Government of the United States of America (reverse order in U.S. original) (hereinafter referred to as the Parties)

CONSIDERING that Canada is a party to the 1951 Convention relating to the Status of Refugees, done at Geneva, July 28, 1951 (the "Convention"), and the Protocol Relating to the Status of Refugees, done at New York, January 31, 1967 (the "Protocol"), that the United States is a party to the Protocol, and reaffirming their obligation to provide protection for refugees on their territory in accordance with these instruments;

ACKNOWLEDGING in particular the international legal obligations of the Parties under the principle of non-refoulement set forth in the Convention and Protocol, as well as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, done at New York, December 10, 1984 (the "Torture Convention") and reaffirming their mutual obligations to promote and protect human rights and fundamental freedoms.

RECOGNIZING and respecting the obligations of each Party under its immigration laws and policies;

EMPHASIZING that the United States and Canada offer generous systems of refugee protection, recalling both countries' traditions of assistance to refugees and displaced persons abroad, consistent with the principles of international solidarity that underpin the international refugee protection system, and committed to the notion that cooperation and burden-sharing with respect to refugee status claimants can be enhanced;

DESIRING to uphold asylum as an indispensable instrument of the international protection of refugees, and resolved to strengthen the integrity of that institution and the public support on which it depends;

NOTING that refugee status claimants may arrive at the Canadian or United States land border directly from the other Party's territory where they could have found effective protection;

CONVINCED, in keeping with advice from the United Nations High Commissioner for Refugees (UNHCR) and its Executive Committee, that agreements among states 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;

AWARE that such sharing of responsibility must ensure in practice that persons in need of international protection are identified and that the possibility of indirect breaches of the fundamental principle of non-refoulement are avoided, and therefore determined to

safeguard for each refugee status claimant eligible to pursue a refugee status claim who comes within their jurisdiction, access to a full and fair refugee status determination procedure as a means to guarantee that the protections of the Convention, the Protocol, and the Torture Convention are effectively afforded;

Have agreed as follows:

Article 1

In this Agreement,

“Country of Last Presence” means that country, being either Canada or the United States, in which the refugee claimant was physically present immediately prior to making a refugee status claim at a land border port of entry.

“Family Member” means the spouse, sons, daughters, parents, legal guardians, siblings, grandparents, grandchildren, aunts, uncles, nieces, and nephews.

“Refugee Status Claim” means a request from a person to the government of either Party for protection consistent with the Convention or the Protocol, the Torture Convention, or other protection grounds in accordance with the respective laws of each Party.

“Refugee Status Claimant” means any person who makes a refugee status claim in the territory of one of the Parties.

“Refugee Status Determination System” means the sum of laws and administrative and judicial practices employed by each Party’s national government for the purpose of adjudicating refugees status claims.

“Unaccompanied Minor” means an unmarried refugee status claimant who has not yet reached his or her eighteenth birthday and does not have a parent or legal guardian in either Canada or the United States.

Each Party shall apply this Agreement in respect of family members and unaccompanied minors consistent with its national law.

Article 2

This Agreement does not apply to refugee status claimants who are citizens of Canada or the United States or who, not having a country of nationality, are habitual residents of Canada or the United States.

Article 3

In order to ensure that refugee status claimants have access to a refugee status determination system, the Parties shall not return or remove a refugee status claimant referred by either Party under the terms of Article 4 to another country until an adjudication of the person’s refugee status claim has been made.

The Parties shall not remove a refugee status claimant returned to the country of last presence under the terms of this Agreement to another country pursuant to any other safe third country agreement or regulatory designation.

Article 4

Subject to paragraphs 2 and 3, 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.

Responsibility for determining the refugee status claim of any person referred to in paragraph 1 shall rest with the Party of the receiving country, and not the Party of the country of last presence, where the receiving Party determines that the person:

Has in the territory of the receiving Party at least one family member who has had a refugee status claim granted or has been granted lawful status, other than as a visitor, in the receiving Party's territory; or

Has in the territory of the receiving Party at least one family member who is at least 18 years of age and is not ineligible to pursue a refugee status claim in the receiving Party's refugee status determination system and has such a claim pending; or

Is an unaccompanied minor; or

Arrived in the territory of the receiving Party:

With a validly issued visa or other valid admission document, other than for transit, issued by the receiving Party; or

Not being required to obtain a visa by only the receiving Party.

The Party of the country of last presence shall not be required to accept the return of a refugee status claimant until a final determination with respect to this Agreement is made by the receiving Party.

Neither Party shall reconsider any decision that an individual qualifies for an exception under this Agreement.

Article 5

In cases involving the removal of a person by one Party in transit through the territory of the other Party, the Parties agree as follows:

Any person being removed from Canada in transit through the United States, who makes a refugee status claim in the United States, shall be returned to Canada to have the refugee status claim examined by and in accordance with the refugee status determination system of Canada.

Any person being removed from the United States in transit through Canada, who makes a refugee status claim in Canada, and:

whose refugee status claim has been rejected by the United States, shall be permitted onward movement to the country to which the person is being removed; or

who has not had a refugee status claim determined by the United States, shall be returned to the United States to have the refugee status claim examined by and in accordance with the refugee status determination system of the United States.

Article 6

Notwithstanding any provision of this Agreement, either Party may at its own discretion examine any refugee status claim made to that Party where it determines that it is in its public interest to do so.

Article 7

The Parties may:

Exchange such information as may be necessary for the effective implementation of this Agreement subject to national laws and regulations. This information shall not be disclosed by the Party of the receiving country except in accordance with its national laws and regulations. The Parties shall seek to ensure that information is not exchanged or disclosed in such a way as to place refugee status claimants or their families at risk in their countries of origin.

Exchange on a regular basis information on the laws, regulations and practices relating to their respective refugee status determination system.

Article 8

The Parties shall develop standard operating procedures to assist with the implementation of this Agreement. These procedures shall include provisions for notification, to the country of last presence, in advance of the return of any refugee status claimant pursuant to this Agreement.

These procedures shall include mechanisms for resolving differences respecting the interpretation and implementation of the terms of this Agreement. Issues which cannot be resolved through these mechanisms shall be settled through diplomatic channels.

The Parties agree to review this Agreement and its implementation. The first review shall take place not later than 12 months from the date of entry into force and shall be jointly conducted by representatives of each Party. The Parties shall invite the UNHCR to participate in this review. The Parties shall cooperate with UNHCR in the monitoring of this Agreement and seek input from non-governmental organizations.

Article 9

Both Parties shall, upon request, endeavor to assist the other in the resettlement of

persons determined to require protection in appropriate circumstances.

Article 10

This Agreement shall enter into force upon an exchange of notes between the Parties indicating that each has completed the necessary domestic legal procedures for bringing the Agreement into force.

Either Party may terminate this Agreement upon six months written notice to the other Party.

Either Party may, upon written notice to the other Party, suspend for a period of up to three months application of this Agreement. Such suspension may be renewed for additional periods of up to three months. Either Party may, with the agreement of the other Party, suspend any part of this Agreement.

The Parties may agree on any modification of or addition to this Agreement. When so agreed, and approved in accordance with the applicable legal procedures of each Party, a modification or addition shall constitute an integral part of this Agreement.

<http://www.cic.gc.ca/english/policy/safe-third.html>

Appendix B

Methodological Description

The goal of this thesis was to evaluate the safe third country agreement in the Canadian context. While this type of agreement is not unique globally, there are several issues that are unique to Canada. Having looked at the various aspects pertinent to this agreement, I then wanted to suggest some alternatives and amendments that would situate it more carefully within the Canadian tradition. The evaluative approach seems most useful at this point since so far this is only a policy that has yet to be implemented. I have presented some possible outcomes in my paper, but admittedly we will only know how it affects the refugee claimant once the rules are in place. So, the focus of this paper has been to carry out an evaluation of this policy, with some attention to options in my conclusion.

During the course of researching for this paper I made an access to information request for government documents, memoranda and data that were not in the public domain. My request pertained to the review of the American asylum system that the Department of Citizenship and Immigration carried out before entering into this agreement. With one exception, I was unfortunately unable to get the specific documents, memoranda, or data that resulted from this review. I was told that the information was protected for reasons of cabinet confidentiality, intergovernmental confidentiality, and solicitor-client privilege. The exception was a short review of the American asylum system carried out by Professor David Martin, which the Department forwarded to me. Furthermore, as a result of my access to information request, I was able to interview

Bruce Scoffield, the Director of Policy Development and International Coordination, Refugees Branch, Citizenship and Immigration Canada.

The result of all this is that I had to rely mostly on the public statements of Department officials and Ministers of Immigration to ascertain the government's desires and goals relating to the signing of this agreement. I looked at the evidence of the Standing Committee on Citizenship and Immigration of the House of Commons, the Department website and documents, and news reports to attempt to discover why the Canadian government wants to implement this agreement.