

INDIRECT REFOULEMENT: CHALLENGING CANADA'S PARTICIPATION IN THE CANADA-UNITED STATES SAFE THIRD COUNTRY AGREEMENT

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ABSTRACT

In December 2004, the Canada-United States Safe Third Country Agreement (STCA) entered into effect. Pursuant to this agreement, each country recognizes the other as a safe third country in which asylum-seekers are protected from persecution and accordingly requires asylum seekers to request asylum protection in the first of whichever of the two countries they arrive. However, U.S. and Canadian refugee laws are not entirely consistent, and U.S. law and policy does not adequately protect bona fide asylum seekers from *refoulement* (the return of the refugee to a country in which his life or freedom would be threatened). This article argues that U.S. laws and policies that result in the refoulement of bona fide asylum seekers to their country of feared persecution violate U.S. obligations under the UN Refugee Convention. In turn, when Canada refuses to hear the claim of a bona fide asylum seeker arriving from the United States and returns that asylum seeker to the United States pursuant to the STCA, if that asylum seeker is then *refouled*, Canada is also responsible for violating the UN Refugee Convention.

This article then explores a 2007 legal challenge to Canada's participation in the STCA before the Canadian Federal Court, *Canadian Council for Refugees et al. v. Her Majesty the Queen*, which was ultimately unsuccessful on appeal. However, in a March 2011 decision, *John Doe et al. v. Canada*, the Inter-American Commission on Human

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Rights (IACHR) held that Canada was in violation of its obligation under the UN Refugee Convention because of a separate Canadian border policy that also resulted in the refoulement by the United States of bona fide asylum seekers. This article argues that this decision is directly applicable to Canada's legal obligations under the UN Refugee Convention vis-a-vis the STCA, and provides a useful template for a renewed challenge to Canada's participation in the STCA.

INTRODUCTION	144
I. THE CANADA-UNITED STATES SAFE THIRD COUNTRY AGREEMENT	148
A. Criticism of the Canada-United States Safe Third Country Agreement and U.S. Laws and Policies Regarding Refugee Claimants	150
1. U.S. Asylum Law.....	153
a. Asylum v. Withholding	154
i. Statutory Bars that Apply to Asylum Only: The One-Year Bar and Firm Resettlement.....	158
ii. The Role of Discretion in Asylum Decisions.....	161
b. Bars to Asylum and Withholding in Violation of the UN Refugee Convention – Material Support and Particularly Serious Crimes	162
i. Particularly Serious Crimes.....	163
ii. Material Support.....	164
c. Additional Problems with U.S. Asylum Law	166
i. Expedited Removal	166
ii. Inconsistency in Asylum Adjudication	168
2. Recommendations from the Canadian House of Commons Standing Committee on Citizenship and Immigration and UNHCR regarding the Canada-United States Safe Third Country Agreement	169
B. Implementation of the Canada-United States Safe Third Country Agreement and Evident Problems	170
II. CANADIAN COUNCIL OF REFUGEES ET AL. V. HER MAJESTY THE QUEEN	172
III. CHALLENGING THE STCA IN THE INTER-AMERICAN COMMISSION OF HUMAN RIGHTS.....	178
A. <i>John Doe et al. v. Canada</i> and Canada's "Direct-Back" Policy	180

B. Applicability of <i>John Doe et al. v. Canada</i> to the STCA in the Inter-American Commission of Human Rights	185
CONCLUSION.....	188

INTRODUCTION

In 2005, Moustapha, a citizen of Guinea, attempted to enter Canada from the United States in order to apply for asylum.¹ Moustapha had been in the United States for more than one year, and because of a one-year filing deadline under U.S. law, was ineligible for asylum in the United States.² Canada, in contrast, does not have a filing deadline for asylum cases.³ However, at his interview with Canadian officials, he was told he could only apply for asylum in the United States because of the Canada-United States Safe Third Country Agreement (STCA).⁴ Under the STCA, asylum seekers must apply for asylum in whichever of the two countries, Canada or the United States, they arrive in first, unless they qualify for an exception, which includes having certain family members living in the country they wish to enter.⁵ Moustapha believed that he did qualify for an exception because he had a close family member who lived in Canada whom he called a “sister.”⁶ However, she was really only a cousin, not one of the familial relationships covered by the STCA exceptions, and accordingly, he was sent back to the United States, where he was detained and ultimately removed to Guinea after losing his asylum claim in the United States.⁷

¹ This account was provided to an NGO in the United States as described in a report by the Canadian Council for Refugees. CANADIAN COUNCIL FOR REFUGEES, CLOSING THE FRONT DOOR ON REFUGEES: REPORT ON THE FIRST YEAR OF THE SAFE THIRD COUNTRY AGREEMENT 12 (2005) [hereinafter CLOSING THE FRONT DOOR], available at <http://www.ccrweb.ca/closingdoordec05.pdf>.

² 8 C.F.R. § 208.4(a)(2), (4), (5) (2011); see *infra* Section I.A.1.a.i.

³ See Intergovernmental Consultations on Migration, Asylum, and Refugees, Asylum Procedures: Report on Policies and Practices in IGC Participating States at 90 (2009); see also THE SAFE THIRD COUNTRY REGULATIONS: REPORT OF THE STANDING COMMITTEE ON CITIZENSHIP AND IMMIGRATION, 9 (2002) [hereinafter HOUSE OF COMMONS CANADA REPORT].

⁴ 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, U.S.-Can., Dec. 5, 2002, 2002 U.S.T. Lexis 125 [hereinafter STCA].

⁵ *Id.*; see *infra* Section I.

⁶ CLOSING THE FRONT DOOR, *supra* note 1, at 12.

⁷ *Id.*

In 2009, Salim⁸ and his wife fled from Rwanda to the United States after government agents severely tortured him. Salim and his wife had visas to the United States because of Salim's business activities but hoped to travel to Canada to apply for asylum. Salim had a cousin living in Quebec willing to house and support them, and while neither Salim nor his wife spoke English, Salim's wife spoke fluent French. However, at the border, they were told that they did not qualify for an exception to the STCA, and thus, could not apply for asylum in Canada. Salim duly applied for asylum in the United States; however, at his asylum interview before a U.S. asylum officer, Salim learned that he was facing a bar to asylum. Near the end of the 1994 Rwandan genocide, Salim was forcibly recruited by the Rwandan Patriotic Front (RPF), the Tutsi-led armed opposition movement that became the ruling party in Rwanda shortly after the end of the genocide. Once recruited, Salim did administrative work for the RPF; however, because the RPF at that time met the definition of a Tier III terrorist organization under the Immigration and Nationality Act (INA),⁹ Salim's work qualified as material support to a terrorist organization. Giving material support to a terrorist organization, even if that organization later becomes the recognized ruling party of a country, is a bar to receiving asylum.¹⁰ Salim conveyed that his work during that time was done under duress, but unless he qualifies for a waiver, a process that is both lengthy and uncertain, he will be barred from asylum in the United States.¹¹ Had he been allowed to present a claim in Canada, he would not be facing this same bar, as Canada defines support to a terrorist organization more narrowly.¹²

The fact that Moustapha was returned to a country that persecuted him and that Salim is also facing return to his country of persecution illustrates that there is a significant problem inherent in the Canada-United States Safe Third Country Agreement. Both Canada and the United States are parties to the 1951 UN Convention Relating to the Status of Refugees and the 1967 UN Protocol Relating to Status of

⁸ Names and identifying characteristics have been changed to protect the privacy of this individual, who was a client of the author.

⁹ Immigration and Nationality Act (INA) § 212(a)(3)(B)(iii)(V)(bb), 8 U.S.C. § 1182(a)(3)(B)(iii)(V)(b) (2006); *see infra* Section I.A.1.b.ii.

¹⁰ INA § 212(a)(3)(B)(iv)(VI); *see infra* Section I.A.1.b.ii.

¹¹ *See infra* Section I.A.1.b.ii.

¹² *Canadian Council for Refugees v. Her Majesty the Queen*, [2007] F.C. 1262, ¶¶ 189–91 (Can. Ont.).

Refugees (together the UN Refugee Convention)¹³ and accordingly, both have the same obligations under international law to refugees and asylum seekers. The most fundamental of these obligations is the duty of *non-refoulement*, the near-absolute prohibition on the return of the refugee to a country in which his life or freedom would be threatened.¹⁴ However, U.S. and Canadian refugee laws are not entirely consistent. A refugee who decides to flee to the United States may very well have his or her claim for protection denied because of current U.S. law and policy that violate the United States' obligations under international refugee law, whereas they might have been granted protection under Canadian laws.¹⁵ As a result, protection seekers may face refoulement if they arrive in the United States first. However, if Canada returns a bona fide asylum seeker to the United States pursuant to the STCA who is then refouled because of U.S. law, Canada is responsible for indirectly refouling that asylum-seeker and equally in violation of international refugee law.

In 2007, a Canadian Federal Court, after hearing a domestic legal challenge to the STCA, *Canadian Council for Refugees, Canadian Council of Churches, Amnesty International, and John Doe v. Her Majesty the Queen*, found that the United States was not in compliance with its international legal obligations vis-a-vis protection seekers and, thus, was not a safe third country.¹⁶ In turn, the Court found that Canada was therefore in violation of its own international legal obligations under the UN Refugee Convention and in violation of the Canada Charter of Rights and Freedoms.¹⁷ This carefully reasoned and comprehensive decision issued by Canadian Federal Court Judge Michael Phelan accurately highlights the significant problems in U.S. refugee and asylum law and Canada's complicity in the refoulement of protection-seekers returned to the United States. However, this decision was overturned by

¹³ Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter together UN Refugee Convention]. The 1951 Convention was limited in that it applied only to persons who became refugees as a result of events that took place prior to January 1, 1951 and to events that took place in Europe only. W. R. SMYSER, REFUGEES: EXTENDED EXILE 10–11 (1987). The 1967 Protocol abolished the 1951 date and the European geographic restrictions. *Id.* at 13.

¹⁴ UN Refugee Convention, *supra* note 13, art. 33, ¶ 1; *see infra* Section I.A.1.

¹⁵ *See infra* Section I.A.1; *see also infra* Section II.

¹⁶ *Canadian Council for Refugees v. Her Majesty the Queen*, [2007] FC 1262, ¶ 191 (Can. Ont.).

¹⁷ *Id.*, ¶ 190-91.

the Federal Court of Appeals on separate grounds,¹⁸ and the Canadian Supreme Court denied leave to appeal in 2009.¹⁹

There have been no further direct challenges to the STCA since *Canadian Council for Refugees et al. v. Her Majesty the Queen*. However, in March 2011, the Inter-American Commission on Human Rights (IACHR) issued a decision, *John Doe et al. v. Canada*, criticizing Canada's separate "direct-back" policy, a policy under which refugee claimants are sent back to the United States if Canada is unable to process their claims at the time they present themselves at the border.²⁰ The IACHR found that Canada was in violation of its duty of non-refoulement by not giving each claimant an individualized assessment of their claim in light of the third country's refugee laws prior to sending the claimant back to the third country.²¹ This decision is directly applicable to Canada's international obligations vis-a-vis the STCA and provides a useful template for a renewed challenge to Canada's participation in the STCA.

Part I of this article will look at the history of the STCA and will address criticisms of both the STCA and U.S. laws and policies. Part I will also consider problems that have arisen in the implementation of the STCA. Part II of this article will briefly discuss the decision of Judge Phelan in *Canadian Federal Court in Canadian Council of Refugees et al. v. Her Majesty the Queen*. Finally, Part III will look at the IACHR's decision in *John Doe et al. v. Canada* regarding Canada's "direct-back" policy and argue that that decision is directly applicable to the STCA and provides an opportunity for once again challenging the STCA, but this time, before the IACHR.

¹⁸ *Her Majesty the Queen v. Canadian Council for Refugees et al.*, [2008] F.C.A. 229, ¶¶ 104–05 (Can.).

¹⁹ Media Release, Canadian Council for Refugees, Amnesty International & Canadian Council of Churches, Supreme Court Denial of Leave on Safe Third Regretted (Feb. 5, 2009), available at <http://ccrweb.ca/en/bulletin/09/02/05>.

²⁰ *John Doe et al. v. Canada*, Case 12.586, Inter-Am. Comm'n H.R., Report No. 24/11, OEA/Ser.L/V/II.141, doc. 29 ¶ 2 (2011).

²¹ *Id.* ¶ 7.

I. THE CANADA-UNITED STATES SAFE THIRD COUNTRY AGREEMENT

On December 5, 2002, the United States and Canada signed an agreement for the Examination of Refugee Status Claims from Nationals of Third Countries, also known as the Canada-United States Safe Third Country Agreement (hereinafter STCA).²² The STCA went into effect on December 29, 2004.²³ Pursuant to this agreement, each country recognizes the other as parties to the UN Refugee Convention, agrees that each offers “generous systems of refugee protection,”²⁴ and, in turn, recognizes the other as a safe third country.²⁵ A safe third country is generally considered to be one in which asylum-seekers are protected from persecution, and to which they can return safely.²⁶ Accordingly, the two countries agreed that asylum claimants must request asylum protection in the first of the two countries in which they arrive.²⁷ The agreement applies only to protection seekers who present themselves at a Canada-United States land border crossing.²⁸ Thus, if an applicant is in the United States and presents herself at a Canadian land border port of entry to make a claim for asylum, she will be returned to the United States to make her claim, and vice versa.

There are some exceptions to this agreement. Applicants are allowed to apply for asylum in the receiving country if they have a close family member living there with lawful status, if they are an

²² STCA, *supra* note 4. This agreement was enacted as part of the Smart Border Plan, see *The Canada-U.S. Smart Border Declaration: Action Plan for Creating a Secure and Smart Border*, FOREIGN AFFAIRS AND INTERNATIONAL TRADE CANADA (Feb. 07, 2003), <http://www.international.gc.ca/anti-terrorism/actionplan-en.asp> [hereinafter *Smart Border Declaration*]; see also News Release, Citizenship and Immigration Can., Minister Kenney Announces Removal of Exception Relating to Safe Third Country Agreement, (July 23, 2009), available at <http://www.cic.gc.ca/english/department/media/releases/2009/2009-07-23.asp>.

²³ News Release, Citizenship and Immigration Can., *supra* note 22.

²⁴ STCA, *supra* note 4, pmbl.

²⁵ See Rosemary Byrne & Andrew Shacknove, *The Safe Country Notion in European Asylum Law*, 9 HARV. HUM. RTS. J. 185, 186 (1996).

²⁶ *Id.*; While it is generally agreed that the third country to which an asylum-seeker is returned must offer “effective protection,” there is no comprehensive definition of “effective protection” in international law. See Stephen H. Legomsky, *Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection*, 15 INT’L J. REFUGEE L. 567, 573 (2003).

²⁷ STCA, *supra* note 4, art. 4, ¶1; see also *Canada-U.S. Safe Third Country Agreement*, CANADA BORDER SERVICES AGENCY (Oct. 2, 2006), <http://www.cbsa-asfc.gc.ca/agency-agence/stca-etps-eng.html>.

²⁸ STCA, *supra* note 4, art. 4, ¶1.

unaccompanied minor, or if they arrived in the receiving country with a valid visa or entry document or were not required to obtain a visa.²⁹ There is also an exception for the public interest.³⁰ When the STCA was first enacted, Canada also allowed for the entry of protection seekers who would benefit from Canada's Temporary Suspension of Removal policies, whereby protection seekers from Afghanistan, Haiti, Iraq, the Democratic Republic of the Congo, and Zimbabwe could not be removed from Canada because of the dangerous conditions in their home country; however, as of July 23, 2009, this exception no longer applies.³¹

Prior to the implementation of the STCA, most of the traffic of asylum seekers was from the United States to Canada. From 1990 to 2004, approximately 8,750 asylum seekers per year traveled from the United States to Canada to seek asylum, while only 200 per year traveled from Canada to the United States to seek asylum.³² In 2000, Canada received 36,534 new asylum seekers,³³ of which the approximately 8,750 that travelled from the United States represented almost 24 percent of the total, a significant percentage. The United States, on the other hand, received 64,072 asylum claims in 2000,³⁴ so the approximately 200 asylum seekers that came from Canada only represented about .31 percent of the total U.S. claims. Canada had long been asking for a safe

²⁹ *Id.* art. 4, ¶2.

³⁰ *Id.* art. 6.

³¹ News Release, Citizenship and Immigration Can., *supra* note 22 (“This exception was undermining those objectives and therefore the integrity of our asylum system.”); Winston, *Canada's Refugee Rule Change: Responsible or Reckless?*, FRESHLY EDUCATED MEN, (Aug. 9, 2009), <https://freshlyeducatedmen.wordpress.com/2009/08/09/canadas-refugee-changes/>.

³² CLOSING THE FRONT DOOR, *supra* note 1, at 2 n.4; *see also United States and Canada Safe Third Country Agreement: Hearing Before the Subcomm. on Immigration, Border Security and Claims of the Comm. on the Judiciary, H.R.*, 107th Cong. (2002) (statement of Bethany Olson, Church World Service Immigration and Refugee Program) (estimating that the number of persons attempting to cross from the United States to Canada was seventy-five times the number of persons coming the other way).

³³ U.S. COMM. FOR REFUGEES AND IMMIGRANTS, U.S. COMMITTEE FOR REFUGEES WORLD REFUGEE SURVEY 2001 - CANADA (2001), *available at* <http://www.unhcr.org/refworld/docid/3b31e15f1c.html> (last visited 20 Feb. 2011).

³⁴ This includes both affirmative asylum claims filed with the Department of Homeland Security and defensive asylum claims filed with Department of Justice Immigration Courts. U.S. DEP'T JUSTICE, 2000 STAT. Y.B. IMMIGR. NATURALIZATION SERVICE 100 tbl.27 (2000), *available at* <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2000/Yearbook2000.pdf>; EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEPARTMENT OF JUSTICE, FY 2004 STATISTICAL YEAR BOOK 11 (2005), *available at* <http://www.usdoj.gov/eoir/statspub/fy04syb.pdf> (last visited Oct. 12, 2011).

third country agreement from the United States,³⁵ but it was only after the events of September 11, 2001 that the United States was willing to enter into the agreement as part of a larger border security cooperation plan.³⁶

A. CRITICISM OF THE CANADA-UNITED STATES SAFE THIRD COUNTRY AGREEMENT AND U.S. LAWS AND POLICIES REGARDING REFUGEE CLAIMANTS

Safe third country agreements have been in force for some time throughout much of Europe.³⁷ A common justification given for safe third country agreements is the need to prevent asylum seekers from “forum shopping.”³⁸ This justification is based on the premise that forum shopping is tantamount to manipulating the international refugee system, and asylum seekers that are willing to manipulate the system may be less than truthful about their need for protection.³⁹ In other words, if an asylum seeker was truly fleeing his country for fear of his life or safety, he would apply for asylum in the first country in which he would be safe and would not shop around for the best “deal.”⁴⁰ However, asylum seekers are not required by the UN Refugee Convention to apply for asylum in the first safe country to which they are able to travel.⁴¹ There are many legitimate reasons an asylum seeker might choose to apply for asylum in a country other than the one of first arrival, including the existence of support communities, extended family, or language affinity

³⁵ A safe third country clause first appeared in 1988 Amendments to the Canadian Immigration Act; although no country was designated, Canada continued to negotiate with the United States on such an agreement. See *Canadian Council for Refugees v. Her Majesty the Queen*, [2007] F.C. 1262 ¶ 8 (Can. Ont.).

³⁶ *Smart Border Declaration*, *supra* note 22; see also Stephen Clarke, *Canada: Federal Court Rules Safe Third Country Agreement with U.S. is Unconstitutional*, GLOBAL LEGAL MONITOR (Feb. 2, 2008).

³⁷ See Legomsky, *supra* note 26, at 575; see also KAREN MUSALO, JENNIFER MOORE & RICHARD A. BOSWELL, *REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH* 147–48 (3d ed. 2007).

³⁸ See Bill Frelick, *North America Considers Agreement to Deflect Asylum Seekers*, 7 BENDER'S IMMIGR. BULL. 1404 (2002); see also Audrey Macklin, *Disappearing Refugees: Reflections on the Canada-U.S. Safe Third Country Agreement*, 36 COLUM. HUM. RTS. L. REV. 365, 381–82 (2005).

³⁹ See Frelick, *supra* note 38; see Macklin, *supra* note 38 at 381–82.

⁴⁰ See Macklin, *supra* note 38, at 381–82. (In discussing possible explanations for resistance to asylum seekers choosing their country of protection, Macklin describes the view that “[a]sylum seekers are the world’s supplicants—and beggars can’t be choosers.”)

⁴¹ JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 46 (1991).

in the country of choice, or asylum laws that offer greater protection given her particular situation.⁴²

When first unveiled in December 2001,⁴³ the STCA immediately drew much criticism. Human rights groups, scholars, international bodies including the UN High Commissioner for Refugees (UNHCR), and even the Canadian House of Commons Standing Committee on Citizenship and Immigration raised concerns about the impact this agreement would have on asylum seekers in the United States who were trying to reach Canada to present their claim.⁴⁴ In the case of the United States and Canada, there are very real reasons, such as language affinity and extended familial ties, why asylum seekers might choose to present their claim in Canada even if they arrived first in the United States.⁴⁵ In addition, in the United States, asylum seekers are prohibited from working until 180 days after filing their application for asylum, while in Canada, asylum seekers are permitted to work as soon as they make a claim.⁴⁶ Finally, asylum seekers generally are afforded free legal assistance in Canada⁴⁷ but are not provided free legal assistance in the

⁴² Frelick, *supra* note 38; see Legomsky, *supra* note 26 at 568–69.

⁴³ “The agreement became a critical element of the 30-point Action Plan under the Smart Border Declaration signed by Governor Tom Ridge, Director of Homeland Security, and Deputy Foreign Minister John Manley of Canada on December 12, 2001.” *The U.S.-Canada Safe Third Country Agreement Before the H. Subcomm. on Immigration, Border Security, and Claims H. Comm. on the Judiciary 2* (2002) (statement of Joseph E. Langlois, Dir., Asylum Div., Office of Int’l Affairs, Immigration and Naturalization Service, Dep’t Of Justice), available at <http://www.uscis.gov/files/testimony/Langlois101602.pdf>.

⁴⁴ See AUDREY MACKLIN, THE VALUE(S) OF THE CANADA-US SAFE THIRD COUNTRY AGREEMENT (Caledon Institute of Social Policy, 2003); see also Frelick, *supra* note 38; see also *Comments: Proposed Safe Third Country Regulations*, CANADIAN COUNCIL FOR REFUGEES, Nov. 14, 2002, <http://ccrweb.ca/en/comments-proposed-safe-third-country-regulations>; see also *Comments of the Lawyers Committee for Human Rights on the Proposed Safe Third Country Agreement*, HUMAN RIGHTS FIRST, 1 (July 24, 2002), http://www.humanrightsfirst.org/wp-content/uploads/pdf/comment_safe_thirdfinal.pdf [hereinafter *Comments of the Lawyers Committee*]; see also UN High Commissioner for Refugees, 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” (July 26, 2002), <http://www.unhcr.org/cgi-bin/txis/vtx/refworld/rwmain?docid=3d4e69614> [hereinafter UNHCR Comments on Draft STCA]; see HOUSE OF COMMONS CANADA REPORT, *supra* note 3.

⁴⁵ See Frelick, *supra* note 38.

⁴⁶ INA § 208(d)(2), 8 U.S.C. § 1158(d)(2) (2006); see Frelick, *supra* note 38; see also MUSALO ET AL., *supra* note 37, at 904.

⁴⁷ Frelick, *supra* note 38; MUSALO ET AL., *supra* note 37, at 904. In Canada, six provinces have established legal aid procedures for refugee claimants. *Canadian Council for Refugees v. Her Majesty the Queen*, [2007] F.C. 1262, ¶ 229 (Can. Ont.).

United States,⁴⁸ despite the fact that one of the most important factors in determining the success of an asylum claim in the United States is whether or not an applicant is represented by counsel.⁴⁹

Most importantly, many scholars, practitioners, and human rights organizations have questioned whether or not the United States is a safe country for asylum seekers.⁵⁰ In fact, U.S. refugee and asylum law does not adequately protect asylum seekers and in some cases, subjects asylum seekers with bona fide claims to refoulement to a country in which they will face persecution and even death. When Canada returns an asylum-seeker to the United States pursuant to the STCA knowing that she might be refouled even if she is a bona fide asylum seeker, the Canadian Government also violates its obligations under the UN Refugee Convention, even if such refoulement is indirect. Indirect refoulement, or the returning of a protection seeker to a third country that then returns the protection seeker to the country of feared persecution, is also a violation of the UN Refugee Convention.⁵¹ UNHCR, the body charged with overseeing the implementation of the provisions of the UN Refugee Convention, has repeatedly stated that indirect refoulement constitutes refoulement as proscribed by the UN Refugee Convention.⁵²

⁴⁸ In the United States, asylum seekers at all stages in the process may be represented by an attorney, but they must provide one at no cost to the Government, even if detained. INA § 240(b)(4)(A).

⁴⁹ See Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007) (noting that represented asylum seekers were granted asylum 45.6 percent of the time, while those without representation were granted asylum only 16.3 percent of the time); see also Rachel D. Settlege, *Affirmatively Denied: The Detrimental Effects of a Reduced Grant Rate for Affirmative Asylum Seekers*, 27 B.U. INT'L L.J. 61, 81–84 (2009).

⁵⁰ See Andrew F. Moore, *Unsafe in America: A Review of the U.S.-Canada Safe Third Country Agreement*, 47 SANTA CLARA L. REV. 201 (2007); see MACKLIN, *supra* note 44, at 13–16; see also Lynn S. Hodgins, *Domestic Silence: How the U.S.-Canada-Safe-Third-Country Agreement Brings New Urgency to the Need for Gender-Based-Asylum Regulations*, 30 VT. L. REV. 1045 (2006); see also Francois Crépeau, Depohine Nakache, & Idil Atak, *International Migration: Security Concerns and Human Rights Standards*, 44 TRANSCULTURAL PSYCHIATRY, 311, 322 (2007); see also *Comments of the Lawyers Committee*, *supra* note 44; see also CLOSING THE FRONT DOOR, *supra* note 1; see also HARVARD LAW STUDENT ADVOCATES FOR HUMAN RIGHTS, HARVARD LAW SCHOOL, BORDERING ON FAILURE: THE U.S.-CANADA SAFE THIRD AGREEMENT FIFTEEN MONTHS AFTER IMPLEMENTATION, 17–18 (2006), [hereinafter BORDERING ON FAILURE] available at http://www.law.harvard.edu/programs/hrp/clinic/documents/Harvard_STCA_Report.pdf.

⁵¹ See Legomsky, *supra* note 26, at 618–19.

⁵² See UNHCR, Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, ¶ 8, (Jan. 26 2007), <http://www.unhcr.org/refworld/docid/45f17a1a4.html>, (“The principle of *non-refoulement* . . . does mean, however, that where States are not prepared to grant asylum to

1. U.S. ASYLUM LAW

In 1968, the United States ratified the UN Refugee Convention,⁵³ thus obligating itself under international law to provide protection to persons fleeing from persecution. The most fundamental of the obligations that arise under the UN Refugee Convention, and a cornerstone in international refugee protection, is the duty of non-refoulement.⁵⁴ Article 33(1) of the 1951 Convention provides:

No Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.⁵⁵

The United States codified the provisions of the UN Refugee Convention in the Refugee Act of 1980, which established the process for obtaining asylum in the United States, granted the U.S. Attorney

persons who are seeking international protection on their territory, they must adopt a course that does not result in their removal, directly or indirectly, to a place where their lives or freedom would be in danger on account of their race, religion, nationality, membership of a particular social group or political opinion”); *see also* UNHCR, UNHCR Position on Readmission Agreements, ‘Protection Elsewhere’ and Asylum Policy (Aug. 1, 1994), <http://www.unhcr.org/refworld/docid/3ae6b31cb8.html> (“Article 33 of the 1951 Convention reflects a fundamental norm of international refugee law: respect for the principle of non-refoulement. This article requires, that refugees be protected - at all stages of the examination of their claim - against direct or indirect return to a place where their life or freedom might be threatened for reasons mentioned in the 1951 Convention.”); *see also* Note on International Protection, High Comm’r’s Programme, Exec. Comm., 49th sess., ¶14, U.N. Doc. A/AC.96/898, (July 3, 1998) (“In some cases, the *refoulement* was indirect, for example, the asylum-seeker was removed to a third country from where that person was further removed to his or her country of origin, and was the unfortunate result of the inappropriate application of the so-called “safe third country” notion. If the removal of the asylum-seeker to a third country is carried out without a proper evaluation of safety conditions in that country and without sufficient assurances that the country will admit the person to its territory and will consider the asylum claim, there must always be a clear risk that the asylum-seeker will eventually be returned to the country of origin”).

⁵³ UNHCR, States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, at 4, (Apr. 1, 2011), <http://www.unhcr.org/3b73b0d63.html>; *see* UN Refugee Convention, *supra* note 13; Protocol, *supra* note 13.

⁵⁴ *See* UNHCR, Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, *supra* note 52; *see also* Jean Allain, *The jus cogens Nature of Non-refoulement*, 13 INT’L J. REFUGEE LAW 533 (2001).

⁵⁵ UN Refugee Convention, *supra* note 13, art. 33, ¶ 1.

General the authorization and discretion to grant asylum, and codified certain provisions from the UN Refugee Convention, including the definition of “refugee.”⁵⁶ Under the Act, a refugee is defined as:

[A]ny person who is outside any country of such person’s nationality . . .and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . .⁵⁷

However, during the next decade, judicial interpretation of the laws governing asylum in the United States created a two-tier system for protection, asylum and withholding, which actually weakens non-refoulement protection. In addition, U.S. immigration laws enacted in the last few decades, particularly those enacted after the event of September 11, 2001, have made it harder for an asylum-seeker to obtain protection in the United States, which in turn has led to refoulement of those with bona fide refugee claims.⁵⁸

a. Asylum v. Withholding

Once in the United States, an asylum seeker may apply for asylum affirmatively with U.S. Citizenship and Immigration Services (USCIS) in the Department of Homeland Security (DHS).⁵⁹ If an asylum seeker is not granted asylum, in most cases he will be referred to the Executive Office for Immigration Review (EOIR) in the Department of Justice where he or she can again ask for asylum from an immigration

⁵⁶ Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980); INA § 101(a)(42), 8 U.S.C. § 1101 (2006); INA § 208; 8 C.F.R. § 208.14 (2011); Robert D. Sloane, *An Offer of Firm Resettlement*, 36 GEO. WASH. INT’L L. REV. 47, 53 (2004).

⁵⁷ 8 U.S.C.A. § 1101(a)(42)(A) (West 2006).

⁵⁸ See Settlage, *supra* note 49, at 65; see also UNHCR, THE STATE OF THE WORLD’S REFUGEES: HUMAN DISPLACEMENT IN THE NEW MILLENNIUM 61 (2006), available at <http://www.unhcr.org/4a4dc1a89.html> (“More and more, asylum seekers are portrayed not as refugees fleeing persecution and entitled to sanctuary, but rather as illegal migrants, potential terrorists and criminals – or at a minimum as ‘bogus’.”).

⁵⁹ EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, ASYLUM AND WITHHOLDING OF REMOVAL RELIEF CONVENTION AGAINST TORTURE PROTECTIONS 3 (2009), available at <http://www.justice.gov/eoir/press/09/AsylumWithholdingCAT Protections.pdf>.

judge, as well as seek withholding of removal.⁶⁰ Some asylum-seekers are placed into removal proceedings before they can apply affirmatively and so begin the asylum process defensively before an EOIR immigration judge.⁶¹

In order to receive protection in the United States, an asylum seeker must meet the U.S. statutory definition of a refugee;⁶² however, as the asylum process suggests, in the United States, there are two claims for protection that an asylum-seeker can make— asylum or withholding of removal. Asylum is a permanent form of protection that provides a pathway to citizenship and affords derivative asylum status to the immediate family members of an asylee, allowing for family unity.⁶³ Withholding of removal, on the other hand, is only a temporary measure of protection whereby an individual will not be removed to his home country only so long as it is more likely than not that he will face persecution there; however, if country conditions improve so that the threat of persecution is no longer likely, the individual can be removed and even prior to that, may be removed to a non-risk country.⁶⁴ Furthermore, the family members of an individual with a grant of withholding are not granted derivative withholding status and cannot stay with or join their family members in the United States unless they are independently eligible for a grant of withholding.⁶⁵

In interpreting the UN Refugee Convention, the Supreme Court devised a two-tier standard for protection by holding that different standards apply to a grant of asylum and a grant of withholding of removal. In order to be eligible for asylum, an applicant must show that he has a well-founded fear of persecution based on a reasonable possibility that he will be persecuted if returned to his home country, which the United States Supreme Court in *INS v. Cardoza-Fonseca* held to be as little as a one-in-ten chance of persecution.⁶⁶ However, as the

⁶⁰ Id. at 4: Asylum-seekers can also ask for relief under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, although discussion of that form of relief is beyond the scope of this article. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment *adopted* Dec. 10, 1984, S. TREATY DOC. No. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].

⁶¹ EXEC. OFFICE FOR IMMIGRATION REVIEW, *supra* note 59, at 4.

⁶² 8 U.S.C.A. § 1101(a)(42)(A).

⁶³ See THOMAS ALEXANDER ALENIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 849 (6th ed. 2008).

⁶⁴ *See Id.*

⁶⁵ *See Id.*

⁶⁶ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431, 440 (1987).

Court in *Cardoza-Fonseca* made clear, a grant of asylum is discretionary,⁶⁷ and there are statutory bars that apply only to asylum.⁶⁸ In practice, this means an individual may be denied asylum even if they meet the refugee definition and demonstrate a reasonable possibility of persecution. Thus, asylum in the United States is not the mechanism by which the United States purports to meet its obligation under Article 33 of UN Refugee Convention prohibiting the refoulement of a refugee.⁶⁹ In fact, in *Cardoza-Fonseca*, the Court specifically held that Section 208(a) of the INA pertaining to grants of asylum “does not correspond to Article 33 of the 1951 Convention, but instead corresponds to Article 34.⁷⁰ Article 34 asserts that state parties ‘shall as far as possible facilitate the assimilation and naturalization of refugees,’ but does not require the implementing authority to actually grant asylum to all those who are eligible.”⁷¹

Instead, withholding of removal is the form of protection by which the United States claims to meet its obligation of nonrefoulement. Withholding of removal is not discretionary,⁷² and if an applicant meets the standard for withholding of removal she cannot be returned to her home country. However, in *INS v. Stevic*, the U.S. Supreme Court held that those seeking withholding of removal must meet a higher standard and demonstrate that it is more likely than not they will face persecution.⁷³ The Court affirmed this finding in *Cardoza-Fonseca*.⁷⁴ Thus, in *Stevic* and *Cardoza-Fonseca*, the Court established that non-refoulement does not apply to everyone who meets the definition of a refugee, but only to those refugees that can demonstrate they face a

⁶⁷ *Id.* at 441; INA § 208(b), 8 U.S.C. § 1158(b) (2006); *see infra* Section I.A.1.a.ii.

⁶⁸ *See infra* Section I.A.1.a.i.

⁶⁹ UN Refugee Convention, *supra* note 13, art. 33.

⁷⁰ *Cardoza-Fonseca*, 480 U.S. at 441.

⁷¹ *Id.*; UN Refugee Convention, *supra* note 13, art. 34.

⁷² INA § 241(b)(3).

⁷³ *INS v. Stevic*, 467 U.S. 407, 429–30 (1984).

⁷⁴ *Cardoza-Fonseca*, 480 U.S. at 431, 440–41 (“Article 33.1 does not extend this right [of non-refoulement] to everyone who meets the definition of “refugee.” Rather, it provides that “[n]o Contracting State shall expel or return (‘refouler’) a *refugee* in any manner whatsoever to the frontiers or territories *where his life or freedom would be threatened* on account of his race, religion, nationality, membership or a particular social group or political opinion.” . . . Thus, Article 33.1 requires that an applicant satisfy two burdens: first, that he or she be a “refugee,” *i.e.*, prove at least a “well-founded fear of persecution”; second, that the “refugee” show that his or her life or freedom “would be threatened” if deported. Section 243(h)’s imposition of a “would be threatened” requirement is entirely consistent with the United States’ obligations under the Protocol.”) (quoting UN Refugee Convention, *supra* note 13, art. 33, ¶ 1).

probability of persecution if removed.⁷⁵ As the court stated in *Cardoza-Fonseca*, “those who can only show a well-founded fear of persecution are not entitled to anything, but are eligible for the discretionary relief of asylum.”⁷⁶

The duty of non-refoulement as set out in Article 33 of the UN Refugee Convention is textually subject to only very limited exceptions⁷⁷ and in all other respects is a fundamental principle of international law that has arguably achieved the status of *jus cogens*,⁷⁸ or law from which no derivation is permitted.⁷⁹ Thus, the distinction among refugees in U.S. law, with non-refoulement protection being offered only to those refugees who can meet a higher standard and show that it is more likely than not that they will face persecution, is a violation of the obligation of non-refoulement.⁸⁰ As Joan Fitzpatrick has stated, “[n]othing in the Convention or Protocol, the interpretive UNHCR Handbook, or other relevant sources or international refugee law suggests that any group of bona fide refugees, not subject to the exclusion clauses, is left unprotected by Article 33.”⁸¹ In fact, the United States is the only party to the UN Refugee Convention that does not apply the principle of non-refoulement to all refugees.⁸² In practice, this two-tier standard has created an asylum system in the United States in which certain bona-fide refugees are statutorily barred from asylum or unable to convince a judge to exercise his or her discretion favorably, but are unable to meet the

⁷⁵ See James C. Hathaway & Anne K. Cusick, *Refugee Rights are Not Negotiable*, 14 GEO. IMMIGR. L.J. 481, 485-86 (2000) (describing this subset of refugees as “super-refugees”).

⁷⁶ *Cardoza-Fonseca*, 480 U.S. at 444.

⁷⁷ See UN Refugee Convention, *supra* note 13, art. 33, ¶ 2; see *infra* Section I.A.1.b.

⁷⁸ See generally Allain, *supra* note 54; see also Alice Farmer, *Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures That Threaten Refugee Protection*, 23 GEO. IMMIGR. L.J. 1 (2008); see also Hathaway & Cusick, *supra* note 75, at 488 (discussing the non-discretionary nature of refugee rights in general).

⁷⁹ Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331, (entered into force Jan. 27, 1980) (“For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”).

⁸⁰ See Hathaway & Cusick, *supra* note 75, at 486; see also Allain, *supra* note 54.

⁸¹ Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERKELEY J. INT’L L. 1, 7-8 (1997).

⁸² MUSALO ET AL., *supra* note 37, at 80; see also Moore, *supra* note 50, at 226; see *Canadian Council for Refugees v. Her Majesty the Queen*, [2007] F.C. 1262, ¶ 146 (Can. Ont.) (citing statement made by David Martin, former INS official, “I know of no other country that differentiates between the standards for Article 1 and Article 33 of the [Refugee] Convention in this fashion.”).

higher standard of withholding and as a result, face refoulement in direct violation of the UN Refugee Convention.

i. Statutory Bars that Apply to Asylum Only: The One-Year Bar and Firm Resettlement

There are two bars in particular that apply only to asylum, neither of which is an acceptable limitation on the duty of non-refoulement, namely the one-year filing deadline and the firm resettlement bar. In practice, because of these bars, particularly the one-year bar, many protection seekers who meet the definition of a refugee find themselves ineligible for asylum and yet unable to meet the much higher standard required for withholding, thereby placing them at risk for refoulement.

The first of these bars, also known as the one-year filing deadline, was codified in 1996 as part of the Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA).⁸³ As a result of this bar, an asylum seeker must demonstrate “by clear and convincing evidence that [his] application [for asylum] has been filed within one year after the date of [his] arrival in the United States,”⁸⁴ unless the applicant can demonstrate that changed circumstances or extraordinary circumstances exist.⁸⁵ There are no exceptions for missing this deadline if the applicant was unaware of the deadline, did not have the needed language or educational skills to prepare the application, or could not find help to prepare the application.⁸⁶ This deadline is particularly problematic given that the asylum application is exceedingly complex and difficult to understand. In addition, the failure to include information required on the application, or any errors or inconsistencies in the application, regardless

⁸³ Illegal Immigrant Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, § 604(a), 110 Stat. 3009-546, 3009-690 (1996); 8 C.F.R. § 208.4(a)(2) (2011).

⁸⁴ 8 C.F.R. § 208.4(a)(2)(i)(A).

⁸⁵ 8 C.F.R. § 208.4(a)(2), (4), (5). Changed circumstances “may include, but are not limited to: [c]hanges in conditions in the applicant’s country of nationality or . . . [c]hanges in the applicant’s circumstances that materially affect the applicant’s eligibility for asylum . . .” § 208.4(a)(4)(i)(A)(B). Extraordinary circumstances “shall refer to events or factors directly related to the failure to meet the 1-year deadline.” § 208.4(a)(5). Those circumstances may include serious illness, mental or physical disability, legal disability, such as being an unaccompanied minor, or the death or serious illness of the applicant’s immediate family. § 208.4(a)(5)(i)(ii), (vi).

⁸⁶ See 8 C.F.R. § 208.4(a)(2), (4), (5).

of whether or not the inconsistencies were a result of imperfect understanding, can be fatal to an asylum claim.⁸⁷

UNHCR has argued that failure to meet a filing deadline “should not lead to an asylum request being excluded from consideration.”⁸⁸ In practice, the one-year bar results in the denial of numerous asylum claims. A recent comprehensive analysis by Philip Schrag, Andrew Schoenholtz, Jaya Ramji-Nogales and James Dombach found that since the implementation of the one-year filing deadline on April 16, 1998 through June 8, 2009, the Department of Homeland Security determined that nearly a third of all applications were filed late, and of those that were filed late, rejected 59 percent.⁸⁹ In other words, DHS rejected almost 18 percent of all affirmative asylum applications, representing more than 54,000 applicants.⁹⁰ While those asylum applicants who are unable to overcome the one-year bar may still apply for withholding, they may not be able to meet the much higher standard for withholding and face refoulement as a result, despite meeting the definition of a refugee under the UN Refugee Convention.⁹¹

⁸⁷ See Settlage, *supra* note 49, at 83; see Dep’t of Homeland Security & U.S. Dep’t of Justice, OMB No. 1615-0067, Form I-589 Application for Asylum and Withholding, available at <http://www.uscis.gov/files/form/i-589.pdf> (last visited August 31, 2011) (An applicant must first fill out a 12 page application that is full of complicated legal terms and comes with 14 pages of instruction. The applicant is then strongly encouraged to attach corroborating evidence, which can include a personal declaration, identity documents, supporting affidavits from witnesses, and country condition information.); see also U.S. CITIZENSHIP AND IMMIGRATION SERVICES, DEP’T OF HOMELAND SEC. & EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, OMB NO. 1615-0067, I-589, APPLICATION FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL: INSTRUCTIONS (2011), available at <http://www.uscis.gov/files/form/i-589instr.pdf>; see also CITIZENSHIP AND IMMIGRATION SERVS. OMBUDSMAN, DEP’T OF HOMELAND SEC., ANNUAL REPORT 2007 95 (2007), available at http://www.dhs.gov/xlibrary/assets/CISOMB_Annual_Report_2007.pdf. (According to the USCIS Ombudsman, “[c]omprehending these instructions requires at minimum a reading ability at a high level Even more alarming is that Form I-589 specifically serves a population for whom English may be the second language...”)

⁸⁸ UNHCR, Conclusions Adopted by the Executive Committee on the International Protection of Refugees, at 19 (Dec. 2009), <http://www.unhcr.org/refworld/pdfid/4b28bf1f2.pdf>.

⁸⁹ Philip G. Schrag, Andrew I. Schoenholtz, Jaya Ramji-Nogales & James P. Dombach, *Rejecting Refugees: Homeland Security’s Administration of the One-Year Bar to Asylum*, 52 WM. & MARY L. REV. 651, 716–17 (2010).

⁹⁰ *Id.* EOIR does not keep statistics on the number of asylum cases that were denied on the basis of the one-year bar, so it is not possible to know at this time how many of those cases that were referred because of the deadline were ultimately denied by an immigration judge for the same reason. *Id.* at 754.

⁹¹ See Jaya Ramji, *Legislating Away International Law: The Refugee Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act*, 37 STAN. J. INT’L L. 117, 142 (2001); See Note on International Protection, *supra* note 52, ¶16 (UNHCR has expressed its concern regarding “[t]he imposition of unreasonable time-limits for the filing of asylum requests.”).

A second mandatory bar to asylum is the firm resettlement bar.⁹² The doctrine of firm resettlement is found in the UN Refugee Convention, which states that any person who “has acquired a new nationality, and enjoys the protection of the country of his new nationality,” is excluded from the definition of a “refugee.”⁹³ Under U.S. law, a person is considered to have been firmly resettled if “prior to arrival in the United States, he or she entered another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement.”⁹⁴ However, U.S. courts are split on what constitutes “firm resettlement” and, as a result, this has created a gap in the protection offered to asylum seekers.

In particular, the Third, Seventh and Ninth Circuits require that the U.S. Government demonstrate that an offer of firm resettlement was made before the burden shifts to the asylum seeker to show that he or she was not firmly resettled.⁹⁵ This standard is in accordance with the UN Refugee Convention.⁹⁶ However, the Second Circuit uses a “totality of circumstances” test for determinations of firm resettlement, looking at factors including length of stay, employment, and property ownership.⁹⁷ Under this second test, a bona fide asylum seeker who managed to reside in a country for some time before coming to the United States, even if they could have never legalized their status in that country—a not uncommon scenario for asylum seekers from Africa for example—could be barred from receiving asylum and subject to the higher withholding

⁹² 8 C.F.R. §§ 208.13(c)(2)(i)(B), 208.15, 1208.15, (2011); When the United States codified the asylum process in 1980, firm resettlement was not a mandatory bar to a grant of asylum, and it was not until 1990 that new federal regulations were promulgated holding that firm resettlement was a mandatory ground for a denial of asylum. Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30,674, 30,678 (Jul. 27, 1990) (to be codified at 8 C.F.R. pt. 208.14); *see also* Sloane, *supra* note 56.

⁹³ UN Refugee Convention, *supra* note 13, art. 1C.(3).

⁹⁴ 8 C.F.R. §§ 208.15, 1208.15. To rebut a firm resettlement claim, an applicant must show that she was in the country solely as a necessity for her onward flight or that her movements were so restricted by the authority of the country as to constitute non-resettlement. *Id.* Factors that shall be considered include “the conditions under which other residents of the country live; the type of housing, whether permanent or temporary, made available to the refugee; the types and extent of employment available to the refugee; and the extent to which the refugee received permission to hold property and to enjoy other rights and privileges, such as travel documentation that includes a right of entry or reentry, education, public relief, or naturalization, ordinarily available to others resident in the country.” *Id.* §§ 208.15(b), 1208.15(b).

⁹⁵ *See Diallo v. Ashcroft*, 381 F.3d 687, 693–94 (7th Cir. 2004); *see Abdille v. Ashcroft*, 242 F.3d 477, 486 (3d Cir. 2001); *see Maharaj v. Gonzales*, 450 F.3d 961, 977–78 (9th Cir. 2006).

⁹⁶ *See* UN Refugee Convention, *supra* note 13, art. 1C.(3).

⁹⁷ *See Sall v. Gonzales*, 437 F.3d 229, 232–234 (2d Cir. 2006).

bar. Thus, such an asylum seeker might face refoulement from the United States on the grounds of having been firmly resettled, even if the country in which they spent time prior to coming to the United States is not a country in which they could have received legal protection.

ii. The Role of Discretion in Asylum Decisions

Even if an asylum-seeker is statutorily eligible for asylum, an immigration judge may deny asylum as a matter of discretion.⁹⁸ In deciding whether or not to deny asylum as an exercise of discretion, the Board of Immigration Appeals (BIA) has held adjudicators should consider the “totality of circumstances,” but that a well-founded fear “should generally outweigh all but the most egregious of adverse factors.”⁹⁹ Nevertheless, immigration judges have wide latitude to consider a broad range of factors they feel are relevant to an exercise of discretion.¹⁰⁰ Furthermore, while an immigration judge’s exercise of discretion in denying asylum can be appealed, the standard of review is highly deferential and an immigration judge’s exercise of discretion “shall be conclusive unless manifestly contrary to the law and an abuse of discretion.”¹⁰¹

Although discretionary denials of asylum are not common,¹⁰² judges do exercise their discretion to deny asylum to some asylum seekers who are otherwise statutorily eligible for asylum.¹⁰³ For example,

⁹⁸ 8 C.F.R. 208.14(a) (...[A]n immigration judge may grant or deny asylum in the exercise of discretion to an applicant who qualifies as a refugee...”).

⁹⁹ Pula, 19 I. & N. Dec. 467, 473–74 (B.I.A 1987).

¹⁰⁰ The Fourth Circuit has developed the most comprehensive list of factors to be considered. *See Zuh v. Mukasey*, 547 F.3d 504, 511 (4th Cir. 2008) Negative factors listed are: (1) the nature and underlying circumstances of the exclusion ground; (2) significant violations of immigration laws; (3) criminal record and the severity and recency of the record, including recidivism; (4) lack of candor with immigration officials, including an adverse credibility finding; and (5) other evidence of bad character or undesirability.” *Id.* Positive factors listed are: (1) family, business, community and employment ties to U.S. and length of residence and property ownership; (2) evidence of hardship if deported, particularly lack of family reunification; (3) evidence of service to the community and rehabilitation; (4) general humanitarian reasons such as age and health; and (5) consideration of other relief granted such as withholding or CAT. *Id.*; *see also* Kate Aschenbrenner, *Discretionary (In)Justice: The Exercise of Discretion in Claims for Asylum*, 5 U. MICH J.L. REFORM 595, 598 (2012).

¹⁰¹ INA § 242(b)(4)(D).

¹⁰² *See Zuh*, 547 F.3d at 507 (describing denials based on discretion as “exceedingly rare” (quoting *Wu Zheng Huang v. Immigration and Naturalization Serv.*, 436 F.3d 89, 92 (2d Cir. 2006)).

¹⁰³ ALENIKOFF ET AL., *supra* note 63, at 885; *see generally* Aschenbrenner, *supra* note 100.

immigration judges have exercised discretion in denying asylum in cases where the mode of entry into the United States was considered too dangerous,¹⁰⁴ where fraud was found because the applicant had obtained a tourist visa to come to the United States but in fact intended to remain,¹⁰⁵ where the applicant had three convictions, all at least six years old, for driving under the influence;¹⁰⁶ and where the applicant had committed marriage fraud.¹⁰⁷ In some of these cases, the applicant was ultimately granted withholding,¹⁰⁸ but in others, the applicant was unable to meet the higher standard for withholding and was ordered removed to his country of feared persecution.¹⁰⁹ Thus, the discretionary nature of asylum, combined with the higher standard for withholding, does place some protection seekers at risk for refoulement.

b. Bars to Asylum and Withholding in Violation of the UN Refugee Convention – Material Support and Particularly Serious Crimes

It is not just the dichotomy between asylum and withholding of removal standards that subject bona fide asylum seekers to a risk of refoulement. There are also a number of statutory bars to both asylum and withholding that are more restrictive than what is permissible under the UN Refugee Convention. For example, an applicant is barred from asylum and withholding of removal if she has persecuted others,¹¹⁰ has been convicted of a particularly serious crime, constitutes a danger to the U.S. community,¹¹¹ committed a serious non-political crime before arriving in the United States,¹¹² is a danger to U.S. security,¹¹³ or is described as a terrorist.¹¹⁴ On their face, all of these bars appear to be in accordance with the limitations set forth in the UN Refugee Convention.

¹⁰⁴ *Junming Li v. Holder*, 656 F.3d 898 (9th Cir. 2011) (Li traveled into the United States in a box welded to the bottom of a vehicle that crossed through the California desert in extreme heat. The Ninth Circuit upheld the immigration judge's exercise of discretion to deny asylum on the basis that "to grant asylum in this case would encourage other individuals...to enter the United States by risking their lives by cramming themselves into these boxes.").

¹⁰⁵ *Alsaghladi v. Gonzalas*, 450 F.3d 700 (7th Cir. 2006).

¹⁰⁶ *Kouljinski v. Keisler*, 505 F.3d 534 (6th Cir. 2007).

¹⁰⁷ *Aioub v. Mukasey*, 540 F.3d 609 (7th Cir. 2008).

¹⁰⁸ *See Junming Li*, 656 F.3d 898.

¹⁰⁹ *See Kouljinski*, 505 F.3d 534, 544-45; *Aioub*, 540 F.3d 609.

¹¹⁰ INA § 101(a)(42)(B), 8 U.S.C. § 1101(a)(42)(B) (2006).

¹¹¹ INA §§ 208(b)(2)(A)(ii), 241(b)(3)(B)(ii).

¹¹² *Id.* §§ 208(b)(2)(A)(i), 241(b)(3)(B)(iii).

¹¹³ *Id.* § 241(b)(3)(B)(iv).

¹¹⁴ *Id.* §§ 212(a)(3)(B)(i)(I)-(IV), (VI), 237(a)(4)(B).

Article 33(2) of the 1951 convention, in regards to the right of nonrefoulement, states that:

The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.¹¹⁵

However, the United States has defined several of these bars so broadly that they apply to far more refugee applicants than is permissible under the UN Refugee Convention¹¹⁶ and, as a result, prevent legitimate protection seekers from obtaining either asylum or withholding.

i. Particularly Serious Crimes

In the United States, an asylum seeker is barred from a grant of asylum or withholding if, having been convicted of a particularly serious crime, she constitutes a danger to the community.¹¹⁷ While the language of the law regarding exclusion because of particularly serious crimes matches the language of the UN Refugee Convention,¹¹⁸ the application of this language goes beyond what is envisioned in the UN Refugee Convention.¹¹⁹ The category of crimes in the United States that will bar an applicant from asylum and withholding is ever-growing and includes an overly broad categorical enumeration of crimes listed as “aggravated felonies” in the INA.¹²⁰ Even crimes that are not classified as aggravated felonies can be found to be “particularly serious,”¹²¹ and if an applicant is convicted of a “particularly serious crime,” she is presumed to be a

¹¹⁵ UN Refugee Convention, *supra* note 13, art. 33, ¶ 2.

¹¹⁶ See Moore, *supra* note 50, at 228.

¹¹⁷ INA §§ 208(b)(2)(A)(ii), 241(b)(3)(B)(ii).

¹¹⁸ See UN Refugee Convention, *supra* note 13, art. 33, ¶ 2.

¹¹⁹ See Moore, *supra* note 50, at 228.

¹²⁰ INA § 208(b)(2)(B)(i); see Moore, *supra* note 50, at 228 (“[T]he term ‘aggravated felony’ in U.S. immigration law covers a series of non-violent crimes that are not aggravated or a felony.”).

¹²¹ See, e.g. *N-A-M-*, 24 I. & N. Dec. 336 (B.I.A. 2007) (finding that felony menacing, though not an aggravated felony under Colorado law, was still a particularly serious crime); see also *Nethagani v. Mukasey*, 532 F.3d 150, 155-57 (2d Cir. 2008) (finding that shooting a gun in the air, a crime of reckless endangerment in the first degree, is a particularly serious crime).

danger to the community.¹²² However, UNHCR has made clear that individualized assessments are necessary in the context of determining who can be denied refugee benefits and refouled,¹²³ and this categorical approach leaves no room for individualized assessments of the danger that the applicant constitutes to the community or whether the persecution she faces if returned to her country of origin outweighs the nature of her crime.¹²⁴

ii. Material Support

A particularly good example of the type of overly-harsh legislation enacted post 9/11 can be found in the bar to asylum for those determined to have given “material support” to terrorists. The USA PATRIOT Act of 2001 and the REAL ID Act of 2005 expanded the bar on terrorism grounds by amending the INA to broaden the definition of “terrorist activity,” “terrorist,” and “terrorists organizations.”¹²⁵ The definition of “terrorist organization” now includes any group of two or more people that uses a weapon other than for personal monetary gain,¹²⁶ regardless of whether or not the State Department has designated that group as a terrorist organization.¹²⁷ There is no contextual analysis done to determine if the “terrorist” group is one to which the United States is

¹²² 8 C.F.R. § 208.16(d)(2) (2011); *See* Q-T-M-T-, 21 I. & N. Dec. 639, 655–56 (B.I.A. 1996).

¹²³ UNHCR, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees, ¶ 18, U.N. Doc. HCR/GIP/03/05 (Sept. 4, 2003) (“For exclusion to be justified, individual responsibility must be established in relation to a crime covered by Article 1F.”). Comments on Article 1F can be extrapolated to cover Article 33(2) since, as noted by scholars Lauterpacht and Bethlehem, “the threshold of prospective danger in Article 33(2) is higher than that in Article 1F.” Elihu Lauterpacht and Daniel Bethlehem “The Scope and Content of the Principle of Non-refoulement: Opinion,” February 2003, UNHCR at 136, ¶ 170..

¹²⁴ *See also* Moore, *supra* note 50, at 229–30.

¹²⁵ *See generally* Settlege, *supra* note 49, at 89–93; *see also* ELEANOR ACER ET AL., HUMAN RIGHTS FIRST, ABANDONING THE PERSECUTED: VICTIMS OF TERRORISM AND OPPRESSION BARRED FROM ASYLUM 3 (2006), available at www.humanrightsfirst.org/wp-content/uploads/pdf/06925-asy-abandon-persecuted.pdf.

¹²⁶ INA § 212(a)(3)(B)(iii)(V)(bb), 8 U.S.C. § 1182(a)(3)(B)(iii)(V)(b) (2006). The current definition of terrorist organization also includes any group that has a subgroup that meets the new definition. INA § 212(a)(3)(B)(vi)(III).

¹²⁷ For lists of those organizations that the U.S. Department of State has designated as terrorist organizations *see* BUREAU OF COUNTERTERRORISM, U.S. DEP’T OF STATE, FOREIGN TERRORIST ORGANIZATIONS (FTOS) (2012), available at <http://www.state.gov/j/ct/rls/other/des/123085.htm>; and OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP’T OF STATE, TERRORIST EXCLUSION LIST (2004), available at <http://www.state.gov/j/ct/rls/other/des/123086.htm>; *see also* Settlege, *supra* note 49, at 89–90.

sympathetic or supportive, if the group is defending itself against a repressive government, or if many members are non-violent.¹²⁸

A person is inadmissible if they ever engaged in “terrorist activity,” which now includes providing “material support” to an organization that meets the definition of a terrorist organization.¹²⁹ However, it remains unclear what level of support constitutes “material” support and as a result, even minimal support has been found to be material.¹³⁰ In addition, as the bar was originally codified, there was no exception if the material support was given out of duress or in self-defense.¹³¹ DHS, in consultation with the Department of Justice and the Department of State, has the authority to waive the material support bar in certain cases¹³² and has held that persons who provided material support under duress to certain terrorist organizations may be eligible for a waiver to the bar.¹³³ However, this exception for duress is not automatic

¹²⁸ INA § 212(a)(3)(B)(iii); *S-K-*, 23 I. & N. Dec. 936, 941 (B.I.A. 2006) (“[W]e find that Congress intentionally drafted the terrorist bars to relief very broadly, to include even those people described as “freedom fighters,” and it did not intend to give us discretion to create exceptions for members of organizations to which our government might be sympathetic.”).

¹²⁹ Material support includes “a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons . . . , explosives, or training . . . to a terrorist organization . . . or to any member of such an organization.” INA § 212(a)(3)(B)(iv)(VI).

¹³⁰ *Id.*; see *S-K-*, 23 I. & N. Dec. at 945 (“Congress has not expressly indicated its intent to provide an exception for contributions which are de minimis. Thus the DHS asserts that the term “material support” is effectively a term of art and that all the listed types of assistance are covered, irrespective of any showing that they are independently “material.””); *Singh-Kaur v. Ashcroft*, 385 F.3d 293, 298-99 (3d Cir. 2004) (holding that very modest amounts of food and shelter did constitute “material support”).

¹³¹ INA § 212(a)(3)(B)(iv)(VI); see *S-K-*, 23 I. & N. Dec. at 941; The only defense an applicant accused of engaging in a “terrorist activity” is afforded is lack of knowledge if the applicant did not know or should not have reasonably known that the person he or she was providing support to was a member of a terrorist organization or planned to commit a terrorist activity. INA § 212(a)(3)(B)(iv)(VI); see *Settlage*, *supra* note 49, at 91.

¹³² INA § 212(d)(3)(B). For example, in 2008, several groups that would otherwise qualify as Tier III terrorist organizations were designated to not be “terrorist organizations”, including the Karen National Union/Karen National Liberation Army, the Chin National Front/Chin National Army, the Chin National League for Democracy, the Kayan New Land Party, the Arakan Liberation Party, the Tibetan Mustangs, the Cuban Alzados, the Karenni National Progressive Party, appropriate groups affiliated with the Hmong, and appropriate groups affiliated with the Montagnards. Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 691(b), 121 Stat. 1844, 2365 (2007); see *Settlage*, *supra* note 49, at 91; see also *ELEANOR ACER ET AL.*, *supra* note 125 at 4.

¹³³ Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act, 72 Fed. Reg. 26138 (May 8, 2007) (providing specifically that waivers may be available for people who provide support to those organizations that meet the definition of a terrorist organization under the INA (known as Tier III terrorist organizations), but not where the material support was provided to a terrorist organizations designated as such by the Department of State).

but instead is decided on a case by case basis in a lengthy waiver process that does not adequately guarantee protection to those who have themselves been coerced or threatened by organizations deemed to be terrorist groups.¹³⁴

As a result, the class of people who now face a bar to receiving asylum or withholding on terrorism grounds has greatly expanded. Although the UN Refugee Convention does provide that refugees for “whom there are reasonable grounds for regarding as a danger to the security of the country” may be excluded from the protection of non-refoulement,¹³⁵ the material support provision is so broad that it bars those whom are clearly not a danger to the United States. Furthermore, UNHCR has made clear that a duress defense should be allowed under international standards,¹³⁶ yet the current waiver available for the material support bar in instances of duress only applies when the material support given under duress is to certain terrorist organizations and is not automatic in nature where it does apply.

c. Additional Problems with U.S. Asylum Law

Beyond the statutory bars that prohibit granting asylum, and in some cases, withholding, to bona fide protection seekers, the practice of expedited removal in the United States, as well as a deep and pervasive inconsistency in the adjudication of asylum claims, also results in the refoulement of those who meet the UN Refugee Convention definition of a refugee.

i. Expedited Removal

Expedited removal, enacted in the United States in 1996 as part of IIRIRA,¹³⁷ allows for the automatic detention and removal of anyone

¹³⁴ See Settlage, *supra* note 49, at 92–93.

¹³⁵ Convention Relating to the Status of Refugees, *supra* note 13, at art. 33(2).

¹³⁶ U.N. High Comm’r for Refugees, Guidelines on Int’l Prot.: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relation to the Status of Refugees, ¶ 22, HCR/GIP/03/05 (Sept. 4, 2003) (“Factors generally considered to constitute defences to criminal responsibility should be considered. . . . [A]s for duress, this applies where the act in question results from the person concerned necessarily and reasonably avoiding a threat of imminent death, or of continuing or imminent serious bodily harm to him- or herself or another person, and the person does not intend to cause greater harm than the one sought to be avoided.”).

¹³⁷ Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C § 604(a), 110 Stat. 3009.

arriving in the United States at land, air, or sea ports who attempts to enter fraudulently or without proper documents.¹³⁸ In 2004, after the events of 9/11, DHS announced plans to expand expedited removal to anyone arrested within one hundred miles of the Mexico or Canadian border within fourteen days of their arrival in the United States, but ultimately implemented those plans to only specific sectors of the border.¹³⁹ An individual subject to expedited removal is not permitted to see an immigration judge unless determined to have a credible fear of returning to his own country.¹⁴⁰ However, these credible fear determinations do not provide adequate due process protections for asylum seekers and in many cases, bona fide asylum seekers have been subject to expedited removal without seeing a judge.¹⁴¹ For example, in 2005, the United States Commission on International Religious Freedom (USCIRF), a bipartisan federal commission, released a study on expedited removal which showed that in 15 percent of the cases observed by USCIRF members, immigration officials failed to refer illegal immigrants to credible fear interviews, even when the immigrant expressed a fear of return.¹⁴²

¹³⁸ Immigrant and Nationality Act of 1952, Pub. L. No. 82-414, § 235, 66 Stat. 163.

¹³⁹ See Office of the Press Sec'y, Dep't. Homeland Sec., *DHS Announces Expanded Border Control Plans* (Aug. 10, 2004) available at www.dhs.gov/xnews/releases/press_release_0479.shtm (last accessed Oct. 26, 2011); Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877-81 (Aug. 11, 2004) cited in MUSALO ET AL., *supra* note 37, at 133.

¹⁴⁰ Any person who expresses a fear of return or an intention to apply for asylum is referred to an USCIS asylum officer for a "credible fear" interview, and if found to have a credible fear, she is taken out of the expedited removal process, automatically detained, and placed in removal proceedings before an immigration judge. See Simona Agnolucci, *Expedited Removal: Suggestions for Reform in Light of the United States Commission on International Religious Freedom Report and the REAL ID Act*, 57 HASTINGS L.J. 619, 623-24 (February 2006). See *DHS Announces Expanded Border Control Plans*, *supra* note 139; Designating Aliens for Expedited Removal, 66 Fed. Reg. 48877-81 cited in MUSALO ET AL., *supra* note 37, at 133.

¹⁴¹ See Michele R. Pistone & John J. Hoeffner, *Rules are Made to be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 GEO. IMMIGR. L.J. 167, 196 (2006) (estimating in 2006 that "over the entire course of expedited removal's almost nine-year history and based only on our partial accounting of the damage, approximately 20,000 genuine asylum seekers have been refused entry by the United States because those in charge of the process have broken the rules meant to protect persons fleeing persecution abroad"); see also Michele R. Pistone, *Asylum Rights and Wrongs: What the Proposed Refugee Protection Act Will Do and What More Will Need to be Done*, 38 FORDHAM URB. L.J. 247, 252-57 (November 2010).

¹⁴² *Asylum Seekers in Expedited Removal, Volume I: Findings & Recommendations*, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, at 6 (February 2005), available at www.uscirf.gov/images/stories/pdf/asylum_seekers/volume_I.pdf (last accessed October 25, 2011).

ii. Inconsistency in Asylum Adjudication

In the U.S. asylum system, whether or not an applicant is found to have met the definition of a refugee depends largely upon which judge or asylum officer the applicant is randomly assigned. The Transactional Records Access Clearinghouse (TRAC) at Syracuse University has released several reports showing a recurring lack of consistency in asylum grant rates for similarly situated individuals.¹⁴³ Authors of a comprehensive report in 2007 that looked at statistics from both the Department of Homeland Security and the Department of Justice and analyzed decisions of USCIS asylum officers and EOIR Immigration Judges found grant rates to be widely inconsistent, even for similarly situated applicants within the same courthouse or asylum office.¹⁴⁴ As a result, the authors of the study termed the asylum process “Refugee Roulette,” noting their concern with the fact that a grant of asylum “is very seriously influenced by a spin of the wheel of chance; that is, by a clerk’s random assignment of an applicant’s case to one asylum officer rather than another, or one immigration judge rather than another.”¹⁴⁵ Given that a grant of withholding is subject to a much higher standard than asylum, inconsistency in asylum grant rates in the United States poses yet another risk of refoulement for some bona fide refugees in the United States.

¹⁴³ See Transactional Records Access Clearinghouse, *Immigration Judges: Asylum Seekers and the Role of the Immigration Court*, Syracuse University (July 31, 2006), available at <http://trac.syr.edu/immigration/reports/160> (last accessed October 26, 2011); Transactional Records Access Clearinghouse, *Asylum Disparities Persist, Regardless of Court Location and Nationality*, Syracuse University (September 24, 2007), available at <http://trac.syr.edu/immigration/reports/183/> (last accessed October 26, 2011); Transactional Records Access Clearinghouse, *Immigration Courts: Still A Troubled Institution*, Syracuse University (June 30, 2009), available at <http://trac.syr.edu/immigration/reports/210/> (last accessed October 26, 2011); Transactional Records Access Clearinghouse, *The Persistence of Disparity: Did Recent Reforms Help?*, Syracuse University (September 2, 2010), available at <http://trac.syr.edu/immigration/reports/240> (last accessed October 26, 2011).

¹⁴⁴ Ramji-Nogales et al., *supra* note 49, at 373 (noting, for example, that “in the three largest immigration courts, more than 25% of the judges have asylum grant rates in cases from APCs [asylum producing countries] that deviate from their own court’s mean rate for such cases by more than 50%”).

¹⁴⁵ See *Id.* at 378.

2. RECOMMENDATIONS FROM THE CANADIAN HOUSE OF COMMONS
STANDING COMMITTEE ON CITIZENSHIP AND IMMIGRATION AND
UNHCR REGARDING THE CANADA-UNITED STATES SAFE THIRD
COUNTRY AGREEMENT

Prior to the implementation of the STCA, both the Canadian House of Commons Standing Committee on Citizenship and Immigration (Canadian Committee) and UNHCR raised several concerns regarding U.S. policies and made concrete recommendations to ensure adequate protection for asylum seekers under the STCA. For example, both expressed concerns about U.S. expedited removal proceedings.¹⁴⁶ UNHCR noted the need for “greater procedural guarantees to ensure that bona fide refugees are not inadvertently removed to a country of feared persecution.”¹⁴⁷ Both the Canadian Committee and UNHCR recommended that the Canadian Government seek assurances that people returned to the United States under the STCA not be subject to expedited removal in the United States.¹⁴⁸ Both UNHCR and the Canadian Committee also were concerned with U.S. statutory bars to asylum, particularly the one-year filing deadline.¹⁴⁹ The Canadian Committee recommended that the Canadian Government seek assurances that people returned to the United States under the STCA not be subject to the one-year bar found in U.S. law.¹⁵⁰

Finally, the Committee recommended that, in the public interest, claimants who may succeed in a claim for refugee protection in Canada, but would not be protected in the United States because of the nature of their claims, should be allowed to have their claims heard in Canada.¹⁵¹

¹⁴⁶ HOUSE OF COMMONS CANADA REPORT, *supra* note 3, at 7–8; UNHCR Comments on Draft STCA, *supra* note 44, at 2.

¹⁴⁷ UNHCR Comments on Draft STCA, *supra* note 44, at 2.

¹⁴⁸ *Id.*; HOUSE OF COMMONS CANADA REPORT, *supra* note 3, at 8.

¹⁴⁹ UNHCR Comments on Draft STCA, *supra* note 44, at 2 (noting that Canada also has overly broad and automatic criminal and affiliation bars); HOUSE OF COMMONS CANADA REPORT, *supra* note 3, at 9.

¹⁵⁰ HOUSE OF COMMONS CANADA REPORT, *supra* note 3, at 9. Canadian law does not have a deadline for applying for asylum.

¹⁵¹ HOUSE OF COMMONS CANADA REPORT, *supra* note 3, at 14. For example, the Canadian Committee noted the less favorable U.S. treatment of gender-based claims and recommended that women fleeing domestic violence be exempt from the STCA. *Id.* at 8–9, 19. Indeed, the United States does not recognize gender alone as a grounds of persecution sufficient to merit a grant of asylum and until just recently, U.S. courts were dramatically split on whether domestic violence was a grounds for asylum. *See generally* Amy K. Arnett, One Step Forward, Two Steps Back: Women Asylum-Seekers in the United States and Canada Stand to Lose Human Rights Under the Safe Third Country Agreement, 9 LEWIS & CLARK L. REV. 951, 952, 958–61(2005);

UNHCR stated that determinations under the STCA must be reviewable and, noting that the draft agreement was unclear on this point, recommended the inclusion of a provision for an effective review procedure.¹⁵² None of these recommendations were incorporated into the final agreement.¹⁵³

B. IMPLEMENTATION OF THE CANADA-UNITED STATES SAFE THIRD COUNTRY AGREEMENT AND EVIDENT PROBLEMS

Despite the numerous concerns regarding the implementation of the STCA, it did go into effect on December 29, 2004.¹⁵⁴ The first year following the implementation of the STCA saw a significant drop in the number of refugee claims made in Canada.¹⁵⁵ At the land border with the United States, the number of asylum seekers presenting claims for asylum in Canada dropped by 55 percent.¹⁵⁶ A Canadian non-profit organization, the Canadian Council on Refugees, looked specifically at the impact on refugee claims by Colombians, the top country of origin for claimants in Canada in 2004, of which 97 percent made their claims at the land border.¹⁵⁷ Colombians represent a category of claimants that would be particularly impacted by the STCA since most must first pass through the United States to make their way to Canada.¹⁵⁸ From January to November 2005, the number of claims made by Colombians dropped

see also Lynn Hodgens, *Domestic Silence: How the U.S.-Canada-Safe-Third-Country Agreement Brings New Urgency to the Need for Gender-Based-Asylum Regulations*, 30 VT. L. REV. 1045, 1055 (2006). However, the case *Matter of R.A.*, and a recent DHS memo established that in the United State today, domestic violence can be a grounds for asylum in certain cases. *See* Dep't Homeland Sec., *Written Clarification Regarding the Definition of "Particular Social Group,"* submitted to the Exec. Office for Immigration Review, L.A. California (July 13, 2010); *In re R-A-*, 23 I&N Dec. 694 (AG 2005); *Matter of R-A-*, 24 I&N Dec. 629 (AG 2008).

¹⁵² UNHCR Comments on Draft STCA, *supra* note 44, at 6.

¹⁵³ *See generally* STCA, *supra* note 4.

¹⁵⁴ U.N. Human Rights Commission Refugee Agency, *Monitoring Report: Canada-United States "Safe Third Country" Agreement 29 December 2004 – 28 December 2005*, at 3 (June 2006) [hereinafter UNHCR Monitoring Report].

¹⁵⁵ From January to November 2005, refugee claims in Canada dropped by 20 percent as compared to the same period the previous year. CLOSING THE FRONT DOOR, *supra* note 1, at 4.

¹⁵⁶ *A Partnership for Protection: Year One Review*, Citizenship and Immigration Canada, Part IV.B.1.iii. (November 2006) [hereinafter *Year One Review*] (explaining that in 2004 Canadian Border Service officers processed 8,896 refugee claims, but processed only 4,033 refugee claims in 2005).

¹⁵⁷ CLOSING THE FRONT DOOR, *supra* note 1, at 8.

¹⁵⁸ BORDERING ON FAILURE, *supra* note 50, at 17–18.

by 70 percent.¹⁵⁹ This impact is significant given the disparate grant rates for Colombian asylum claims in Canada and the United States: in 2004 in Canada, 81 percent of asylum cases from Columbians were granted, whereas in the United States in 2004 only 45 percent of affirmative Colombian cases were granted and only 22 percent of defensive cases were granted.¹⁶⁰

In addition, irregular border crossings¹⁶¹ and human smuggling¹⁶² from the United States to Canada may be increasing since the implementation of the STCA.¹⁶³ While few comprehensive statistics are available, anecdotal evidence indicates that more and more asylum seekers are crossing into Canada through alternative routes, rather than at regular border crossings, in order to avoid being turned back pursuant to the STCA.¹⁶⁴ Instead of strengthening the Canada-United States border, an increase in irregular migration across the Canada-United States border leads to a more dangerous border where refugees face hazardous conditions when crossing the border and are at risk of exploitation by smugglers.¹⁶⁵

Finally, while the STCA requires that the Governments of Canada and the United States conduct an implementation review no later

¹⁵⁹ CLOSING THE FRONT DOOR, *supra* note 1, at 8.

¹⁶⁰ *Id.* at 9.

¹⁶¹ Irregular border crossings are border crossings which occur when people cross an international border and enter another country without having received legal authorization to do so from the state they are entering. See International Council on Human Rights Policy, *Irregular Migration, Migrant Smuggling, and Human Rights: Towards Coherence*, at 15 (Geneva 2010), available at http://www.ichrp.org/files/reports/56/122_report_en.pdf.

¹⁶² Human smuggling is the voluntary but illegal travel to another country with the assistance of a third party. See *Id.* at 16 citing to U.N. Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the U.N. Convention against Transnational Organized Crime, at Art. 3(a) (2000). (“Technically, a smuggled person is someone who is the object of ‘procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.’”).

¹⁶³ See BORDERING ON FAILURE, *supra* note 50, at 21–22; CLOSING THE FRONT DOOR, *supra* note 1, at 28–30; see also *Refugee Claimants Entering Quebec from U.S.*, CBC NEWS, November 30, 2010. See also Kathryn Blaze Carlson, *Human Smugglers Exploit Immigration Loophole*, NATIONAL POST, Thursday, Dec. 2, 2010, at A1.

¹⁶⁴ In Quebec, Canadian Border officials report that at times, they see dozens of “would-be refugees” on a shift and that in late 2010, arrests of those seeking to evade formal border crossings increased by 400 percent. *Refugee Claimants Entering Quebec from U.S.*, *supra* note 163. See also Carlson, *supra* note 163.

¹⁶⁵ BORDERING ON FAILURE, *supra* note 50, at 21–23, citing to Kelly Patrick, *Deadly Turn for Border Runners: Albanian Man Drowns in Bid to Enter Canada*, WINDSOR STAR, Sept. 7, 2005, at A1; see ALSO CLOSING THE FRONT DOOR, *supra* note 1, at 28–30.

than one year from the date of implementation,¹⁶⁶ there is no required timetable for further reviews by either Government.¹⁶⁷ The STCA also specifies that UNHCR be involved in monitoring the agreement; however, that monitoring is limited to reviewing whether or not the Agreement is being correctly applied, not how the agreement is affecting the lives of bona fide protection seekers.¹⁶⁸ Further, there is no requirement that UNHCR be a participant in later reviews.¹⁶⁹ UNHCR did issue its review of the STCA in June 2006.¹⁷⁰ The overall assessment was that the Agreement had “generally been implemented by Parties according to its terms, and, with regard to those terms, international refugee law;”¹⁷¹ however, UNHCR did recommend that a transparent review mechanism be created for the review and reconsideration of adverse decisions and that removals pursuant to the STCA be suspended pending such reviews.¹⁷² Both Canada and the United States declined to accept this recommendation arguing that this would require a formal administrative review mechanism and judicial review, yet both countries already provided a full and fair determination process.¹⁷³

II. CANADIAN COUNCIL OF REFUGEES ET AL. V. HER MAJESTY THE QUEEN

In December 2005, a coalition of Canadian human rights groups filed a legal challenge to the STCA, *Canadian Council for Refugees, Canadian Council of Churches, Amnesty International, and John Doe v. Her Majesty the Queen*, on the grounds that the United States was not a

¹⁶⁶ STCA, *supra* note 4, at art. 8; *see* CLOSING THE FRONT DOOR, *supra* note 1, at 30. The United States and Canada issued a bi-national review on November 2006, in which both Governments found that the implementation of the agreement has been a success overall. *Year One Review*, *supra* note 156, at Part VI.

¹⁶⁷ CLOSING THE FRONT DOOR, *supra* note 1, at 30.

¹⁶⁸ STCA, *supra* note 4, at Art. 8(3) (“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.”; *see also* CLOSING THE FRONT DOOR, *supra* note 1, at 31.

¹⁶⁹ STCA, *supra* note 4, at art. 8; CLOSING THE FRONT DOOR, *supra* note 1, at 30.

¹⁷⁰ *See generally* UNHCR Monitoring Report, *supra* note 155.

¹⁷¹ *Id.* at 6.

¹⁷² *Id.* at 13.

¹⁷³ *Year One Review*, *supra* note 156.

safe country for protection seekers.¹⁷⁴ The challenge was filed by three human rights organizations and an anonymous individual seeking to apply for asylum in Canada.¹⁷⁵ Specifically, the claimants charged that the United States does not comply with its international obligations under the UN Refugee Convention, and that the STCA is thus in violation of both the UN Refugee Convention and the Canadian Charter of Rights and Freedoms (Charter).¹⁷⁶ Judge Michael Phelan, of the Canadian Federal Court, upheld the challenge in 2007, finding that the United States was not in compliance with its international legal obligations vis-a-vis protection seekers, and thus, was not a safe country.¹⁷⁷ Judge Phelan, in turn, found that Canada was therefore in violation of its own international legal obligations under the UN Refugee Convention and in violation of the Canada Charter of Rights and Freedoms.¹⁷⁸

In reaching his decision, Judge Phelan considered the UN Refugee Convention and the Convention Against Torture, both of which have been codified in the Canadian Immigration and Refugee Protection Act (IRPA).¹⁷⁹ Under the IRPA, the authority to enter into a binding safe third country agreement is delegated to the Governor in Council (GIC) of Canada.¹⁸⁰ Judge Phelan noted that the GIC may only designate countries as safe third countries if they comply with Article 33 of the UN Refugee Convention (prohibiting refoulement with very limited exceptions), and Article 3 of the Convention Against Torture (prohibiting refoulement to torture without exception).¹⁸¹ Specifically, the four factors that the GIC of Canada should consider in designating a safe third country include “(a) whether the country is a party to the Refugee Convention and the Convention Against Torture; (b) its policies and practices with respect to claims under the Refugee Convention and with respect to its obligations under the Convention Against Torture; (c) its human rights record; and (d) whether it is a party to an agreement with the Government of Canada for the purpose of sharing responsibility with respect to claims for

¹⁷⁴ *Canadian Council for Refugees v. Her Majesty the Queen*, [2007] F.C. 1262, ¶ 1-2 (Can. Ont.).

¹⁷⁵ *Id.* ¶ 1

¹⁷⁶ *Id.* ¶ 2

¹⁷⁷ *Id.* ¶ 7, 338.

¹⁷⁸ *Id.*

¹⁷⁹ Immigration and Refugee Protection Act, S.C. 2001, art. 96, 97 [hereinafter IRPA]; see generally UN Refugee Convention, *supra* note 13; see Convention Against Torture, *supra* note 60.

¹⁸⁰ IRPA, *supra* note 179, at art. 5(1).

¹⁸¹ *Id.* at art. 102(1)(a); UN Refugee Convention, *supra* note 13, at art. 33; Convention Against Torture, *supra* note 60, at art. 3.

refugee protection.”¹⁸² Additionally, the GIC must continue to insure continued compliance with these provisions through periodic reviews.¹⁸³

On a preliminary matter, Judge Phelan used his discretion to find that the claimants had public interest standing.¹⁸⁴ He stated that “[i]n this instance, no refugee from within Canada can bring [a] claim [to challenge the STCA].”¹⁸⁵ He went on to remark that claimants in the United States may be unwilling to bring forward a claim due to a fear of being detained or deported in the United States.¹⁸⁶ He also noted that it would be pointless to ask a claimant to come to the border to initiate litigation only to be sent back to U.S. custody and put at risk of the very harm at issue.¹⁸⁷ He also held that the three human rights organizations are legitimate applicants with a clear interest in this type of litigation and that no individual refugee could bring forward this matter.¹⁸⁸

Judge Phelan also held as a preliminary matter that in determining the standard of review it was necessary to consider whether the conditions limiting the GIC’s designation of a Safe Third Country, i.e. the four factors in Section 102(2) of the IRPA and Section 102(1)(a) of the IRPA requiring compliance with Article 33 of the UN Refugee Convention and Article 3 of the Convention Against Torture, had been met on an objective basis.¹⁸⁹ In determining whether the conditions had been met on an objective basis, Judge Phelan analyzed whether or not U.S. refugee law and practice violate the UN Refugee Convention or the Convention Against Torture, and found several areas in which he determined that U.S. refugee law does violate international refugee law.¹⁹⁰

Specifically, Judge Phelan looked first at the one-year bar to asylum and the higher standard that an applicant must meet to be granted withholding of removal and concluded that the one-year bar for asylum combined with the higher standard for withholding may “put some

¹⁸² IRPA, *supra* note 179, at art. 102(2)(a)–(d); *see also* Canada Border Services Agency, *Canada-U.S. Safe Third Country Agreement*, available at <http://www.cbsa-asfc.gc.ca/agency-agence/stca-etps-eng.html> (last visited October 26, 2011).

¹⁸³ IRPA, *supra* note 179, at art. 102(3).

¹⁸⁴ *Canadian Council for Refugees v. Her Majesty the Queen*, [2007] F.C. 1262, ¶ 51 (Can. Ont.).

¹⁸⁵ *Id.* ¶ 43.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* ¶ 48.

¹⁸⁸ *Id.* ¶ 51.

¹⁸⁹ *Id.* ¶ 60.

¹⁹⁰ *See Canadian Council for Refugees v. Her Majesty the Queen*, [2007] F.C. 1262, ¶ 146 (Can. Ont.).

refugees returned to the U.S. in danger of refoulement.”¹⁹¹ While Judge Phelan found that the GIC was reasonable in finding that the U.S. law on exclusions for particularly serious crimes was not in violation of the UN Refugee Convention, he did find that the material support provisions to be extremely harsh and not in compliance with the UN Refugee Convention.¹⁹² Ultimately, Judge Phelan found that these issues, among others,¹⁹³ collectively show that the United States does not meet the standards of Article 33 of the UN Refugee Convention and that “these instances of non-compliance with Article 33 are sufficiently serious and fundamental to refugee protection that it was unreasonable for the GIC to conclude that the U.S. is a ‘safe country.’”¹⁹⁴ He further found that the operations of the STCA are contrary to the right to “life, liberty and security of persons,” under section 7 of the Canadian Charter of Rights and Freedoms,¹⁹⁵ as well as to the anti-discrimination provisions of section 15.¹⁹⁶

The Canadian Government appealed the case to the Canadian Federal Court of Appeal, which, in June 2008, overturned the decision on separate grounds.¹⁹⁷ Specifically, the Federal Court of Appeal held that the correct standard of review for the vires challenge is “correctness,”¹⁹⁸

¹⁹¹ *Id.* ¶ 154.

¹⁹² *Id.* ¶ 191. (Judge Phelan stated “[i]t is difficult to imagine how the GIC could have reasonably concluded that the U.S. complies with the Refugee Convention when the law allows the exclusion of claimants who involuntarily provided support to terrorist groups. . . . In returning claimants to the U.S. under these circumstances, the weight of the evidence is that Canada is exposing refugees to a serious risk of refoulement which is contrary to the applicable article of the Refugee Convention and CAT [Convention Against Torture].”).

¹⁹³ For example, Judge Phelan also discussed the unsettled nature of U.S. law at that time regarding gender persecution claims. He took note of the recommendation from the House of Commons Standing Committee on Citizenship and Immigration that women seeking protection from domestic violence be an excluded category under the STCA (*see supra* note 3) and found that “[t]here is clearly a serious concern that women with these claims are not being sufficiently protected under American law. . . . [t]his could result in a real risk of refoulement, contrary to the Refugee Convention.” *Id.* at ¶ 206.

¹⁹⁴ *Id.* at ¶ 239.

¹⁹⁵ *Id.* at ¶ 338 ; *See* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* schedule B to the Canada Act, at c. 7 (U.K.) (“Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”).

¹⁹⁶ *Canadian Council for Refugees v. Her Majesty the Queen*, [2007] F.C. 1262, ¶ 338 (Can. Ont.); *see* Canadian Charter of Rights and Freedoms, *supra* note 195, at c. 15(1) (“Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”).

¹⁹⁷ *Her Majesty the Queen v. Canadian Council for Refugees et al.*, [2008] F.C.A. 229 (2008).

¹⁹⁸ *Id.* ¶ 63.

and all that should be considered is whether the Canadian Federal Cabinet acted in good faith at the time it negotiated the STCA and designated the United States to be a safe third country after considering the four factors specified by Parliament for such decisions.¹⁹⁹ The Court did not dispute the lower court's finding of non-compliance but ruled "that the U.S. does not 'actually' comply is irrelevant."²⁰⁰ The court also held that Judge Phelan overstepped his bounds by ruling on "wide swaths of U.S. policy and practice."²⁰¹ Regarding the issue of standing, the Federal Court of Appeal held that the human rights groups and the anonymous individual had no direct stake in the case, and that for the court to consider U.S. policy and alleged charter breaches, a case would have to be brought by a refugee claimant who tried to enter at a border point.²⁰² The petitioners sought leave to appeal this decision to the Supreme Court of Canada, but the Supreme Court denied leave to appeal in 2009.²⁰³

There have been no further judicial challenges to the STCA in Canadian Courts, even though the problems inherent in the implementation of the STCA continue.²⁰⁴ Given that the Appeals Court rejected public interest standing, stating that only a refugee claimant who tried to launch a claim while in Canadian custody at the border would have standing to bring a case before the Canadian courts,²⁰⁵ future litigation is unlikely at best. No claimant who is barred from asylum in the United States but is unable to enter Canada pursuant to the STCA would want to present himself at the border knowing that he would be quickly sent back to U.S. border officials.²⁰⁶

¹⁹⁹ *Id.* ¶ 78; see also Edward C. Corrigan, *Safe Third Country Agreement Landmark Ruling Overturned on Appeal*, MEDIA MONITORS NETWORK (July 16, 2008).

²⁰⁰ *Her Majesty the Queen v. Canadian Council for Refugees et al.*, [2008] F.C.A. 229 ¶ 80.

²⁰¹ *Id.* ¶ 120; see also Janice Tibbetts, *Landmark Safe Third Country Agreement Ruling Overturned on Appeal*, CANEST NEWS SERVICE (July 9, 2008).

²⁰² *Her Majesty the Queen v. Canadian Council for Refugees et al.*, 2008 F.C.A. 229 ¶¶ 101–02; see also Tibbetts, *supra* note 201.

²⁰³ *Supreme Court Denial of Leave on Safe Third Regretted*, *supra* note 19.

²⁰⁴ See *supra* Section I.B.

²⁰⁵ *Her Majesty the Queen v. Canadian Council for Refugees et al.*, [2008] F.C.A. 299 ¶¶ 101–02.

²⁰⁶ As Andrew Brouwer, one of the lawyers in the case commented, "[i]n effect, the Court of Appeal is demanding that before a court can hear a challenge to the legality of the agreement a refugee must put her life at risk by coming to the border, getting refused and handed over to U.S. authorities for likely deportation to torture or persecution." Press Release, CANADIAN COUNCIL FOR REFUGEES, *Rights Groups Express Dismay With Appeal Court Ruling On Safe Third Country*, (July 2, 2008), <http://ccrweb.ca/eng/media/pressreleases/02july08.htm>. See also Tibbetts, *supra* note 202 (quoting Janet Dench, the Executive Director of the Canadian Council

Nevertheless, Judge Phelan's comprehensive decision accurately outlined the significant problems in the U.S. asylum system and presented an ideal opportunity for the Canadian Government to revisit its obligations under the UN Refugee Convention and rethink its support of the STCA. Instead, immigration policies in Canada have become more restrictive. For example, in 2009, the Government abolished the STCA exception for asylum seekers from Afghanistan, Haiti, Iraq, the Democratic Republic of the Congo, and Zimbabwe.²⁰⁷ The Canadian Government also now requires visas from Mexican and Czech Republic nationals entering the country in order to limit the number of new asylum applications from these countries.²⁰⁸ These actions indicate that there may be little political will in Canada at this time to revisit the STCA.

While domestic enforcement of international legal obligations is often the most certain way to ensure compliance by states with international obligations,²⁰⁹ compliance with international obligations can also be driven by complaint mechanisms whereby individuals or non-governmental organizations (NGOs) can bring complaints before regional or international bodies.²¹⁰ Accordingly, there are other options available to challenge the STCA, most significantly in the Inter-American Commission on Human Rights (IACHR), which has jurisdiction over Canada as a member of the Organization of American States (OAS).²¹¹ A March 2011 decision issued by the IACHR on

for Refugees - "it is 'completely unrealistic' for a prospective refugee to launch a Canadian court challenge because they are turned away at the U.S.-Canada border within minutes or hours.").

²⁰⁷ News Release, *Minister Kenney Announces Removal of Exception Relating to Safe Third Country Agreement*, Citizenship and Immigration Canada (July 23, 2009), available at <http://www.cic.gc.ca/english/department/media/releases/2009/2009-07-23.asp>; *Canada's Refugee Rule Change: Responsible or Reckless?*, FRESHLY EDUCATED MEN BLOG (August 9, 2009), <https://freshlyeducatedmen.wordpress.com/2009/08/09/canada-refugee-changes/>.

²⁰⁸ News Release, *Canada Imposes a Visa on the Czech Republic*, Citizenship and Immigration Canada (July 13, 2009), <http://www.cic.gc.ca/english/department/media/release/2009/2009-07-13a.asp>; News Release, *Canada Imposes a Visa on Mexico*, Citizenship and Immigration Canada (July 13, 2009), <http://www.cic.gc.ca/english/department/media/release/2009/2009-07-13.asp>; Marina Jimenez, *Ottawa's Visa Decision Leaves Tourists in a Panic: Frustrated Travelers Flood Canadian Embassy in Mexico City; "It's a Kafkaesque Bureaucratic Nightmare,"* THE GLOBE AND MAIL, July 15, 2009, at A4.

²⁰⁹ See Angela Banks, *CEDAW, Compliance, and Custom; Human Rights Enforcement in Sub-Saharan Africa*, 32 *FORDHAM INT'L L.J.* 781, 789-790 (noting that "[d]espite significant disagreement as to why states adhere to their international legal agreements, there is widespread agreement that domestic enforcement is one of the most effective means of enhancing treaty obligations.").

²¹⁰ See Richard B. Bilder, *An Overview of International Human Rights Law*, in *GUIDE TO INTELLECTUAL HUMAN RIGHTS PRACTICE* 3, 12 (Hurst Hannum ed., 4th ed. 2004).

²¹¹ See *infra* Section III.

Canada's "direct-back" policy²¹² demonstrates the potential for a successful challenge to Canada's participation in the STCA in that forum.

III. CHALLENGING THE STCA IN THE INTER-AMERICAN COMMISSION OF HUMAN RIGHTS

Canada and the United States are participants in the Inter-American System of Human Rights, which was born with the 1948 statute of the Organization of American States (OAS)²¹³ and with the adoption by the newly formed OAS of the American Declaration of the Rights and Duties of Man.²¹⁴ The American Declaration, while not intended to be legally binding, has become indirectly binding by its incorporation into the OAS Charter.²¹⁵ Thirty-five states, including the United States and Canada, are members of the OAS by virtue of signing and ratifying the Charter and thus are bound by the provisions of the American Declaration.²¹⁶ The charter of the OAS authorizes the Inter-American Commission on Human Rights (IACHR), created in 1959, to supervise human rights in OAS member states.²¹⁷ All member states of the OAS, including the United States and Canada, are subject to the

²¹² *John Doe et al.*, *supra* note 20.

²¹³ Charter of the Organization of American States, 119 U.N.T.S. 3, *entered into force* Dec. 13, 1951; amended by Protocol of Buenos Aires, 721 U.N.T.S. 324, O.A.S. Treaty Series, No. 1-A, *entered into force* Feb. 27, 1970; amended by Protocol of Cartagena, O.A.S. Treaty Series, No. 66, 25 I.L.M. 527, *entered into force* Nov. 16, 1988; amended by Protocol of Washington, 1-E Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add. 3 (SEPF), 33 I.L.M. 1005, *entered into force* Sept. 25, 1997; amended by Protocol of Managua, 1-F Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add.4 (SEPF), 33 I.L.M. 1009, *entered into force* Jan. 29, 1996 [hereinafter OAS Charter].

²¹⁴ American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992) [hereinafter *The American Declaration*].

²¹⁵ See David Harris, *Regional Protection of Human Rights: The Inter-American Achievement*, in *THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS* 1, 4 (David J. Harris & Stephen Livingstone eds., 1998); See also Thomas Buergenthal, *International Human Rights Law and Institutions: Accomplishments and Prospects*, 63 WASH. L. REV. 1 (1988), *reprinted in* BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 962 (2d. ed. 1995).

²¹⁶ OAS Charter, *supra* note 213 *Signatories and Ratifications*, OAS DEP'T OF INT'L LAW, available at http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States_sign.htm.

²¹⁷ OAS Charter, *supra* note 213, at art. 106; see also Cecilia Medina, *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture*, 12 HUM. RTS Q. 439 (1990).

jurisdiction of the IACHR by virtue of being member states of the OAS.²¹⁸

Any person, group of persons, or NGO may submit a petition to the IACHR.²¹⁹ When a petition alleges a human rights violation by an OAS member state the IACHR applies the American Declaration.²²⁰ When the IACHR has completed an investigation into the matter and fully processed the case, it publishes a report on its conclusions, which generally includes recommendations to the state.²²¹ While the IACHR has criticized the United States and even ruled against it in cases brought before the Commission,²²² the United States has said that it does not consider the American Declaration to be a binding legal instrument.²²³ Indeed, IACHR decisions have been largely unsuccessful in changing U.S. laws and practices.²²⁴ However, the IACHR may be an effective

²¹⁸ Christina Cerna, *The Inter-American Commission on Human Rights: Its Organization and Examination of Petitions and Communications*, in THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 65, 68 (David J. Harris & Stephen Livingstone eds., 1998). (The American Convention on Human Rights, which was drafted in 1969 and entered into force in 1978, incorporated the IACHR Statute into its text and created the Inter-American Court. However, only 25 OAS member states have ratified the American Convention on Human Rights; the United States and Canada have not ratified the Convention and thus are not bound by decisions of the Inter-American Court.); *see also American Convention on Human Rights: Pact of San Jose, Costa Rica, Signatories and Ratifications*, OAS DEP'T OF INT'L LAW, available at <http://www.oas.org/juridico/english/sigs/b-32.html>.

²¹⁹ The petition must show that the victim exhausted all domestic remedies or tried to exhaust domestic remedies but failed because the domestic remedies do not provide adequate due process or because there is not effective access to those remedies or there has been undue delay in a decision on those remedies. Petitions must also be filed within 6 months of the final decision in a domestic proceeding or within a reasonable time of the violation if domestic remedies cannot be exhausted. *Petition and Case System: Informational Brochure*, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, www.oas.org/en/iachr/docs/pdf/HowTo.pdf (last visited Feb. 18, 2012).

²²⁰ *Id.* at 6; *see also* Harris, *supra* note 215, at 8. For member states that are parties to the American Convention, which Canada is not, the IACHR applies the Convention in determining if there is a violation. *Id.*

²²¹ *Petition and Case System: Informational Brochure*, *supra* note 219. The IACHR may also decide to take the case to the Inter-American Court if the member state concerned is a party to the American Convention. *Id.*

²²² *See Haitian Interdiction v. U.S.*, Decision as to the Merits, Case No. 10.675, Report no.51/96 (Mar. 13, 1997), Inter-Am. Comm'n H.R., Report No. 51/96 (1997); *see also* Andrea Mortlock v. U.S., Case No. 12.534, Inter-Am. Comm'n H.R., Report No. 63/08 Admissibility and Merits (Publication) (2008); *see also* Wayne Smith, Hugo Armendariz et al. v. U.S., Case No.12.562, Inter-Am. Comm'n H.R., Report No. 81/10 (July 12, 2010).

²²³ Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory opinion OC-10/89, Inter-Am. Ct. H.R., ¶ 1 (1989).

²²⁴ *See* Inna Nazarova, *Alienating "Human" From "Right": U.S. and UK Non-Compliance with Asylum Obligations*, 25 FORDHAM INT'L L.J. 1335, 1360 (2002). In 1996, in *Haitian Interdiction*

forum in which to challenge Canada's participation in the STCA, particularly given a March 2011 IACHR decision against Canada, *John Doe et al. v. Canada*.

**A. JOHN DOE ET AL. V. CANADA AND CANADA'S "DIRECT-BACK"
POLICY**

For some time, Canada has implemented a "direct-back" policy, started prior to the enactment of the STCA, whereby Canadian border officials send refugee claimants back to the United States temporarily, pending a later scheduled appointment, if they do not have the time or manpower to interview the claimants at the time they presented themselves at the border.²²⁵ Prior to January 2003, this policy could only be applied to refugee claimants if Canadian officials obtained confirmation from U.S. border officials "that the client will be made available for further examination on the date and time specified in the appointment letter."²²⁶ In January 2003, the policy changed, allowing for direct-backs without any confirmation of a return from U.S. border officials.²²⁷ As a result, some refugee claimants have been detained by U.S. Customs and Border Patrol agents upon their return and put into removal proceedings, thus making it impossible for the claimants to appear for their scheduled appointments with Canadian officials.²²⁸ Accordingly, some claimants faced removal from the United States before they could have their cases heard in Canada.²²⁹

v. U.S., the United States ignored an IACHR holding that the U.S. policy of interdicting Haitians asylum-seekers in international waters and returning them to Haiti before they could seek asylum in the United States was a violation of the UN Refugee Convention and the American Convention. *Haitian Interdiction v. U.S.*, *supra* note 222. *see also* Musalo, *supra* note 37, at 131. In two separate cases in 2008 and 2010, the IACHR found that the U.S. practice of deporting legal permanent residents pursuant to an extremely broad statutory definition of "aggravated felony" without allowing the consideration of a waiver for humanitarian reasons violated provisions of the American Declaration; however, the United States refused to comply with the IACHR's recommendations in either case. *Andrea Mortlock v. United States*, Case 12.534, Inter-Am. Comm'n H.R., Report No. 63/08 (2008); *Wayne Smith, Hugo Armendariz et al v. U.S.*, *supra* note 222.

²²⁵ See CLOSING THE FRONT DOOR, *supra* note 1, at 22-3; *see also* Moore, *supra* note 50, at 277.

²²⁶ *John Doe et al.*, *supra* note 20, ¶ 15.

²²⁷ *Id.* ¶ 16.

²²⁸ CLOSING THE FRONT DOOR, *supra* note 1, at 22-3; *See also John Doe et al. v. Canada*, Petition P-554-04, Inter-Am. Comm'n H.R., Report No 121/06, (Oct. 27, 2006).

²²⁹ *See John Doe et al. v. Canada*, Petition, *supra* note 228.

The Canadian Government continued the direct-back policy after the implementation of the STCA.²³⁰ Thus, while those that are eligible for an exception to the STCA should be allowed to enter Canada to make their claim for an exception, those directed back may never benefit from this safeguard if they are detained by U.S. officials.²³¹ In fact, from January 1 to November 16, 2005, forty-seven claimants were directed back and twelve of those never returned for their scheduled interview.²³² In its 2006 monitoring report on the STCA, UNHCR expressed particular concern over Canada's continued use of its direct-back policy, noting that it knew of six individuals directed-back to the United States and subsequently returned to their home countries without being able to have their claims processed by the Canadian Government²³³

In 2004, prior to the filing of *Canadian Council of Refugees et al. v. Her Majesty the Queen*, a group of U.S. and Canadian human rights organizations and law school clinics filed a complaint against Canada before the IACHR, *John Doe et al. v. Canada*, on behalf of three unnamed persons (John Does) who were subjected to the "direct-back" policy.²³⁴ The petitioners contended first that the direct-back policy violates the right to seek asylum under Article XXVII of the American Declaration, since the three John Does were effectively prohibited from applying for asylum in Canada or another country (specifically the

²³⁰ CLOSING THE FRONT DOOR, *supra* note 1, at 23.

²³¹ *Id.*; UNHCR recommended that the United States not detain individuals who were directed back from Canada, absent a security or risk concern, but the U.S., in the joint Canada-United States one year review of the STCA, declined to accept this recommendation. *Year One Review*, *supra* note 156, at V.D.3.

²³² CLOSING THE FRONT DOOR, *supra* note 1, at 23 n. 58.

²³³ UNHCR Monitoring Report, Canada-United States "Safe Third Country" Agreement, *supra* note 154, at 6; *see also* UNHCR Expresses Deep Concern over Canada's Continued Policy of Direct Backs, CNW (Oct. 10, 2007), available at <http://www.newswire.ca/en/releases/archive/October2007/10/c2460.html> ("UNHCR is particularly troubled that despite a written commitment by CBSA to cease the "direct back" practice as a tool of purely administrative convenience, refugee claimants continue to be turned back to the United States without regard for their welfare. This practice is being conducted outside of any refugee protection framework between Canada and the United States and without any procedural safeguards under Canadian law.")

²³⁴ *John Doe et al.*, *supra* note 20, at ¶ 1 (*John Doe et al. v. Canada* was filed by Canadian Council of Refugees, Vermont Refugee Assistance, Amnesty International Canada, Freedom House (Detroit, MI), Global Judge Center, Harvard Immigration and Refugee Clinic, and Harvard Law School Advocates for Human Rights, some of the same groups that later filed *Canadian Council of Refugees v. Her Majesty the Queen*.)

United States), given the many bars to asylum in the United States.²³⁵ Next, the petitioners alleged that the policy violates prohibitions against refoulement under the UN Refugee Convention and Article XXVII of the American Declaration, arguing that refugee claimants face a real risk of refoulement when returned to the United States because U.S. asylum policies and practices fall short of international law requirements.²³⁶ Finally, the petitioners argued that the policy violates Article XVIII of the American Declaration by depriving individuals of due process because there is no existing domestic mechanism in Canada to appeal a direct-back decision.²³⁷

In 2006, the IACHR found the complaint to be admissible²³⁸ and issued a decision on the merits in March 2011.²³⁹ In its March 2011 decision, the IACHR started by noting that in interpreting and applying the American Declaration, it may draw from other relevant international human rights instruments, including the UN Refugee Convention.²⁴⁰ The IACHR also made clear that in this decision, it would not “pronounce on the merits of the Safe Third Country Agreement” nor would it “undertake any analysis or pronounce on the merits of the asylum system in the United States,” rather, it would consider only the “human rights obligations of Canada.”²⁴¹

The IACHR then addressed the requirement that petitioners exhaust domestic remedies before submitting a petition to the IACHR, unless an exception exists.²⁴² The IACHR noted that “domestic remedies must not only exist formally but also be adequate and effective,”²⁴³ and held that domestic remedies in Canada regarding violations caused by the direct-back policy were not adequate and effective, since decisions to direct back an asylum seeker are executed within hours with no time to obtain a stay.²⁴⁴ Even if a federal court action was filed outside Canada,

²³⁵ *Id.* ¶¶ 19–21 (Article XXVII provides that “[e]very person has the rights, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements).

²³⁶ *Id.* ¶¶ 22–3 (John Doe 3, who was directed back to Canada, was, in fact, sent back to Albania by the United States, although reportedly he was later able to return to Canada to apply for asylum).

²³⁷ *Id.* ¶¶ 58–60; The American Declaration, *supra* note 214, at art. XVIII.

²³⁸ *John Doe et al.*, Petition, *supra* note 228.

²³⁹ *John Doe et al.*, *supra* note 20.

²⁴⁰ *Id.* ¶ 71.

²⁴¹ *Id.* ¶ 74.

²⁴² *Id.* ¶ 77.

²⁴³ *Id.* ¶ 78.

²⁴⁴ *Id.* ¶ 80.

there is little the federal court can do to ensure the return of the applicant other than ordering his or her readmission should they be able to again present themselves at the border.²⁴⁵ Later in the decision, the IACHR relied upon this analysis to find that the “right to be heard, [which] is an essential due process right,” was not afforded to the John Does prior to their expulsion, and thus, their due process rights under Article XVIII were violated.²⁴⁶

In regards to petitioners’ complaint that the right to seek asylum under Article XXVII was violated by the direct-back policy, the IACHR noted that it has held this right to include, at a minimum, a hearing to determine refugee status.²⁴⁷ The IACHR held that under Article XXVII, each Member State has an obligation to ensure that each refugee claimant can seek asylum in the State’s own territory or another, and that before removing a claimant to a third country, the Member State must conduct an individual assessment of the refugee claimant’s case “in light of the third country’s refugee laws . . . [and] . . . if there is any doubt as to the refugee claimant’s ability to seek asylum in the third country, then the Member States may not remove the claimant to that third country.”²⁴⁸ In this case, Canada did not evaluate whether or not the John Does could apply for asylum in the United States before directing them back, and accordingly “placed them at possible risk of harm.”²⁴⁹ Therefore, the direct-back policy as applied violated their right to seek asylum under Article XXVII.²⁵⁰

The IACHR then looked at the obligation of nonrefoulement under the UN Refugee Convention, incorporated into the obligations of the American Declaration by virtue of Article XXVII’s language that every person has the right to seek and receive asylum “in accordance with the laws of each country and with *international agreements*.”²⁵¹ The IACHR noted that this obligation extends to indirect refoulement as well.²⁵² On this point in particular, Canada, in its response to the complaint filed by the petitioners, argued that the United States does not pose a real risk of refoulement to asylum seekers and is a safe third

²⁴⁵ *Id.*

²⁴⁶ *Id.* ¶¶ 116–17.

²⁴⁷ *Id.* ¶ 90.

²⁴⁸ *Id.* ¶ 94.

²⁴⁹ *Id.* ¶ 96.

²⁵⁰ *Id.* ¶ 98.

²⁵¹ *Id.* ¶ 99.

²⁵² *Id.* ¶ 103.

country for all refugee claimants.²⁵³ Canada further claimed that it only needed to make generalized determinations regarding whether or not another country is a safe third country, and that it did so when it entered into the STCA.²⁵⁴ The IACHR specifically disagreed with this response, stating again that a State must make an “*individualized assessment* as to the risk of persecution in the third country and an *individualized assessment* as to the risk that the refugee claimant could be refouled to the original country of persecution.”²⁵⁵ The IACHR noted that UNHCR likewise has noted that in order to prevent “indirect refoulement,” states should make an assessment of the risk of refoulement in the third country before removal to that country.²⁵⁶ The IACHR then found that the 2003 direct-back policy did not, in fact, provide for an individual assessment, and this violated Canada’s nonrefoulement obligation under Article XXVII and the UN Refugee Convention.²⁵⁷

Canada’s response to the IACHR’s findings was two sided. Canada responded that it took its obligations under the American Declaration very seriously and “fully supports the important role mandated to the Commission and will always do its utmost to cooperate with its processes and decisions” but then stated that it believed that it was in full compliance with its international obligations.²⁵⁸ Canada also noted its position that “the Commission’s decisions are not binding under international law, as distinct from the human rights obligations themselves.”²⁵⁹ Canada also responded by noting that since 2007, the direct-back policy with respect to refugees has been revised and is only used in “exceptional circumstances” and only after seeking assurances from the U.S. Customs and Border Protection that the claimant will be able to return for their scheduled examination.²⁶⁰

Nevertheless, the IACHR reiterated its findings and recommendation that Canada must conduct individualized assessments of each refugee claimant case “based on the third States’ immigration law to determine whether directed back individuals would have access to

²⁵³ *Id.* ¶ 60.

²⁵⁴ *Id.* ¶ 106.

²⁵⁵ *Id.* ¶ 107.

²⁵⁶ *Id.* (citing UNHCR, Background Paper No. 2 “The application of the ‘safe third country’ notion and its impact on the management of flows and on the protection of refugees” (May 2011)).

²⁵⁷ *Id.* ¶ 112.

²⁵⁸ *Id.* ¶ 120.

²⁵⁹ *John Doe et al.*, *supra* note 20 at ¶ 120.

²⁶⁰ *Id.* ¶ 125.

seek asylum in that State and not face automatic bars.”²⁶¹ The IACHR noted that before a refugee claimant can be sent back to the *United States* specifically, any direct-back policy must include an individualized assessment of the risk of refoulement in the United States.²⁶²

B. APPLICABILITY OF *JOHN DOE ET AL. V. CANADA* TO THE STCA IN THE INTER-AMERICAN COMMISSION OF HUMAN RIGHTS

The decision reached by the IACHR in *John Doe et al. v. Canada* is directly applicable to Canada’s obligations under the Refugee Convention vis-à-vis the STCA. When an asylum seeker in the United States presents himself at a Canadian land border to ask for asylum, the only assessment that is undertaken is an assessment of whether or not the asylum seeker meets one of the exceptions to the STCA.²⁶³ Currently there is no procedure in place whereby Canadian officials assess whether or not each individual asylum seeker is at risk for refoulement in the United States, either because of mandatory bars or other U.S. laws or policies.²⁶⁴ If an individual assessment must be done for each person as to his risk of refoulement if returned to the United States pursuant to the direct-back policy, that same individual assessment must be done when an individual is returned to the United States pursuant to the STCA. In the latter case, there is not even the possibility that the claimant could return later to the border to have his case heard by Canadian officials.

In *John Doe et al. v. Canada*, Canada maintains that individual assessments before “direct-backs” are not necessary because of a generalized determination it made prior to entering the STCA that the United States was a safe third country.²⁶⁵ The IACHR was clear that this generalized assessment was not sufficient in the case of “direct-backs,”²⁶⁶ so it should not be sufficient in the case of protection seekers returned to the United States pursuant to the STCA. Even if a generalized assessment could be considered sufficient to determine the risk of refoulement prior to removal under the STCA, it is clear that Canada’s generalized assessment of the status of the United States as a safe third

²⁶¹ *Id.* ¶ 132.

²⁶² *Id.*

²⁶³ See *Canada-U.S. Safe Third Country Agreement*, CANADA BORDER SERV AGENCY, <http://www.cbsa-asfc.gc.ca/agency-agence/stca-etps-eng.html> (last visited Sept. 18, 2011).

²⁶⁴ *Id.*

²⁶⁵ *John Doe et al.*, *supra* note 20, at ¶ 107.

²⁶⁶ *Id.* ¶ 132.

country is deeply flawed. The Canadian Government has not reassessed this determination,²⁶⁷ not even in light of Judge Phelan's decision or subsequent reports by human rights organizations and academic institutions.²⁶⁸ Nor is further judicial review likely at this point; the Canadian Federal Appeals Court has held that the only issue it could consider when determining whether or not Canada was meeting its obligations under international law with regards to the STCA is whether the Canadian Federal Cabinet acted in good faith at the time it negotiated the STCA, not whether the United States was in reality a safe third country.²⁶⁹

If individualized assessments were to be done for each applicant as to his risk of refoulement if returned to the United States pursuant to the STCA, it would be clear that because of U.S. laws and practices, some returned asylum seekers would face refoulement, particularly those facing mandatory bars such as the one-year bar and the material support bar. Thus, as with "direct-backs," when Canada returns an asylum seeker to the United States pursuant to the STCA without an individual assessment, it has violated the asylum seeker's right to seek asylum under Article XXVII of the American Declaration,²⁷⁰ inadequately protected him from refoulement as mandated by Article XXVII of the American Declaration and the UN Refugee Convention,²⁷¹ and violated his due process right to be heard under Article XVIII of the American Declaration.²⁷²

There are limitations in applying the American Declaration, not the least of which is that there is no effective enforcement mechanism that the IACHR can rely upon when issuing recommendations.²⁷³ As a result, enforcement of IAHCR decisions is largely predicated upon compliance by the state concerned. In the absence of state compliance,

²⁶⁷ The only official review of the STCA that Canada has engaged in occurred one year after the STCA went into effect and was a joint review conducted with the United States that focused on implementation issues. See *Year One Review*, *supra* note 156.

²⁶⁸ See CLOSING THE FRONT DOOR, *supra* note 1; BORDERING ON FAILURE, *supra* note 50.

²⁶⁹ *Her Majesty The Queen v. Canadian Council for Refugees et al.*, [2008] F.C. 229, ¶¶ 78–80 (Can.).

²⁷⁰ The American Declaration, *supra* note 214, at art. XXVII.

²⁷¹ *Id.*; UN Refugee Convention, *supra* note 13.

²⁷² The American Declaration, *supra* note 214, at art. XXVII.

²⁷³ Berta Esperanza Hernandez-Truyol & Kimberly A. Johns, *Global Rights, Local Wrongs, and Legal Fixes: An International Human Rights Critique of Immigration and Welfare "Reform,"* 71 S. CAL. L. REV. 547, 600–601 (1998) (noting that "[u]nfortunately, in reality, the Inter-American Commission's finding would have no meaningful impact upon the U.S. legislation because the Inter-American Commission has no mechanism to enforce compliance.").

enforcement can be achieved by persuading other states to assert influence on the violating state.²⁷⁴ At the heart of any such consideration is an acknowledgement that the enforcement of international refugee and human rights law depends largely upon the voluntary compliance of states with the international obligations to which they have committed themselves.²⁷⁵ States may engage in voluntary compliance out of fear for moral, political or economic repercussions from other states, or out of a desire to not be “shamed.”²⁷⁶ Thus, as in much of international human rights law, the IACHR relies largely upon the wide-spread publication of its report and, in effect, the “shaming” the violating state, thus also creating a will among other states to hold the violating state to its obligations.²⁷⁷ However, the efficacy of this approach is in question. In a 2006 report, the IACHR noted that of eighty-six reports adopted by the IACHR, total compliance had only been achieved in one case, partial compliance in fifty-nine cases, and no compliance in twenty-six cases.²⁷⁸

Furthermore, it is unclear if Canada would, in fact, abide by a decision issued by the IACHR on this matter. Canada indicated in its response to the holding in *John Doe et al. v. Canada* that it does not consider IACHR decisions to be binding, nor has it ended its direct-back policy in response to the IACHR decision.²⁷⁹ However, this does not mean that a successful challenge before the IACHR is without merit, even if it cannot be enforced. Legal scholar Harold Koh has argued that voluntary compliance with international legal obligations is most effective when states undergo the process of “norm-internalization,” whereby human rights norms are developed through the interactions of transnational actors and eventually incorporated into domestic law and policy.²⁸⁰ A successful challenge before the IACHR would help to

²⁷⁴ Tom Farer, *The Rise of the Inter-American Rights Regime: No Longer a Unicorn, Not Yet an Ox*, in THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 31, 52 (David J. Harris & Stephen Livingstone eds., 1998).

²⁷⁵ See generally Hernandez-Truyol & Johns, *supra* note 273.

²⁷⁶ *Id.*; see also Farer *supra* note 274; Bilder, *supra* note 210, at 12.

²⁷⁷ See Veronica Gomez, *The Interaction between the Political Actors of the OAS, the Commission and the Court*, in THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 173, 190 (David J. Harris & Stephen Livingstone eds., 1998).

²⁷⁸ Farer, *supra* note 274, at 32.

²⁷⁹ *John Doe et al.*, *supra* note 20 at sec. V.

²⁸⁰ This norm-internalization process, summarized, is composed of three parts: first, transnational actors (e.g., states, government officials, NGO's, intergovernmental organizations, corporate actors, and even individuals) provoke an interaction with one another, leading to the interpretation or development of a norm to be applied to the situation (norms can be codified in the forms such as treaties or in the specific interpretation of already existing norms); second, this

develop norms on whether and how safe third country agreements can be implemented without violating international human rights obligations. As scholar Denise Gilman has noted in regards to a particular human rights challenge, “the goal was always one of naming the harms as human rights violations and obtaining official international approval of such naming for the purpose of exercising pressure for change.”²⁸¹ A successful IACHR decision could provide strong incentive yet again for Canada to revisit its participation in the STCA or to reconsider what exceptions are appropriate to the STCA. It would also give strength and purpose to Canadian human rights groups strategizing for ways to challenge the STCA internally and would provide the basis for increased dialogue on the legality and wisdom of safe third country agreements.

CONCLUSION

The Canada-United States Safe Third Country Agreement is a flawed agreement because the United States is not truly a safe third country. Protection seekers in the United States face a very real risk of refoulement because of U.S. laws and practices, particularly mandatory bars to asylum and withholding, overly broad or stringent requirements to obtain asylum, and a higher standard for withholding. Canada, because of its participation in the STCA, indirectly refouls protection seekers in violation of its own obligations under the UN Refugee Convention. In 2007, Judge Phelan issued a comprehensive decision that, although it was overturned, accurately outlined the problems in U.S. refugee and asylum law and found that Canada was in violation of its international obligations so long as it continued to support the STCA.²⁸² Although Judge Phelan’s decision did not lead to a reassessment of Canada’s participation in the STCA, a 2011 decision by the Inter-American Commission on Human Rights found that Canada’s direct-back policy was in violation of Canada’s international obligations, particularly its duty of nonrefoulement, under both the American Declaration and the

interaction leads to legal rules to guide future interactions; and third, over time, these interactions lead to the domestic internalization of the norms, which can occur through executive action, legislations, or judicial decisions. Harold Hongju Koh, *Why Do Nations Obey International Law?* 106 YALE L.J. 2599, 2649 (1997).

²⁸¹ Denise Gilman, *Seeking Breaches in the Wall: An International Human Rights Law Challenge to the Texas-Mexico Border Wall*, 46 TEX. INT’L L.J. 257, 290 (2011) (referring in particular to the human rights challenges to the Texas-Mexico border wall).

²⁸² *Canadian Council for Refugees v. Her Majesty the Queen*, [2007] F.C. 1262 (Can. Ont.).

UN Refugee Convention.²⁸³ This decision is directly applicable to Canada's participation in the STCA and provides a blueprint for bringing a challenge to the STCA before the IACHR. Even if Canada refuses to abide by an IACHR decision, a positive IACHR decision would strengthen and expand the dialogue on the STCA and its failure to protect bona fide asylum seekers.

²⁸³ *John Doe et al.*, *supra* note 20 at ¶ 107.