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Seeking Asylum Across the International Boundary: Legal Terms and Geopolitical Conditions of Irregular Border Crossing and Asylum Seeking Between the United States and Canada, 2016 - 2018

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Seeking Asylum Across the International Boundary:
Legal Terms and Geopolitical Conditions of Irregular Border Crossing and Asylum
Seeking Between the United States and Canada, 2016 - 2018

*Examining the annulment of Temporary Protected Status in the United States and asylum
in North America under the Canada-U.S. Safe Third Country Agreement*

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ABSTRACT

This thesis explores the acute surge in the irregular border crossings of asylum seekers across the International Boundary into Canada between late 2016 to early 2018. The goal of this project is to compile an account of the legal terms and geopolitical conditions that act to generate and shape this migration. The trajectory of this research necessitated study of the evolving nature of Temporary Protected Status (TPS) in the United States as well as the Canada-U.S. Safe Third Country Agreement (STCA) and its legal controversy. I explore how both respectively act to produce and structure these trends in irregular border crossing and asylum seeking. While the annulment of TPS is situated within a broader landscape of anti-immigrant and anti-refugee policy in the U.S. under the Trump administration, I place a particular focus on TPS because of the way in which its capacity for protection has been diminished by 75 percent¹ over the course of this research.

This project considers how the problematizing of asylum seekers has eroded the refugee determination regime in North America as situated within unprecedented levels of forced displacement globally. The accumulating deficiencies of the U.S. asylum system, in particular, lead both the U.S. and Canada to fail to meet their obligations to international standards of protection under the ongoing application of the STCA. This is a distinct concern in consideration of the way in which the annulment of TPS under the Trump administration has swelled the ranks of vulnerable populations in need of protection within the U.S. While the deteriorating conditions of asylum and humanitarian protection simultaneously produce and criminalize vulnerable populations in the U.S., Canada seeks to deflect and deter access to their own asylum system. I explore how the intersection between the annulment of TPS and the antecedent conditions of the STCA act to generate the legal and geopolitical environment that produces and structures this particular contemporary migration event.

¹ Immediately following the submission of this thesis to the Defense Committee on April 18, 2018, the U.S. Secretary of Homeland Security announced the termination of two additional TPS programs (DHS [Press Release], 2018a; DHS [Press Release], 2018b). Coupled with the terminations discussed in this paper, this collectively represents annulment of 98 percent of the program's capacity for protection under the Trump administration. This statistic is current as of May 11, 2018.

GLOSSARY

1948 Declaration of Human Rights (UNDR or the “Declaration”)

- The Universal Declaration of Human Rights defined, for the first time, the basis of fundamental human rights to be universally protected. The 1951 Refugee Convention is grounded in Article 14 of the Declaration.

1951 Refugee Convention (the “Convention”)

- The United Nations Convention Relating to the Status of Refugees is the centerpiece of international refugee protection. It endorses and defines a single definition of the term ‘refugee’ as someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion. Individuals who meet this definition are referred to as “Convention refugees” and are afforded certain rights to protection and asylum under international law.

1967 Protocol (the “Protocol”)

- The Protocol Relating to the Status of Refugees amends the Convention to remove the geographic and temporal limits it first described. As a post-World War II instrument, the Convention was originally limited in scope to persons fleeing events occurring before January 1951 within Europe. The Protocol removed these limitations and thus gave the Convention universal coverage.

1984 Convention Against Torture (the “Torture Convention”)

- The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also defines standards of protection within international human rights law. Specific to asylum, the Torture Convention describes the principal of non-refoulement in Article 3.

American Civil Liberties Union (ACLU)

- The ACLU is a nonprofit organization in the U.S. that works to defend and preserve the individual rights and liberties guaranteed by the Constitution and laws of the U.S. The ACLU is active in the legal efforts to protect TPS beneficiaries in the ongoing annulment of the program.

American Immigration Council (AIC)

- The AIC is a nonprofit organization that works to defend and promote the rights of immigrants in the U.S. The AIC is active in the legal efforts to protect TPS beneficiaries in the ongoing annulment of the program.

Amnesty International (AI) / (AI Canada)

- AI is an international nongovernmental organization and global movement that works to protect and promote human rights through research and advocacy.

- AI is active in the legal challenges to the Safe Third Country Agreement (STCA) in the Federal Court of Canada. AI joins the Canadian Council for Refugees (CCR) and the Canadian Council of Churches (CCC) to challenge the constitutional validity of the designation of the U.S. as a safe third country.

Asylum

- Asylum is the right to be recognized as a refugee and receive the legal protection defined in the Convention and its Protocol. Asylum claims are made directly to the national government of the state in which the displaced asylum seeker finds themselves. Thus, asylum is the provision of sanctuary granted directly from a state.

Asylum claim

- Referred to as “asylum applications” in the U.S. and “claims for refugee protection” in Canada, an asylum claim is the process by which an asylum seeker applies for asylum and presents their case to the state in which they hope to receive protection.

Asylum seeker

- An asylum seeker is someone whose request for sanctuary has yet to be processed. An asylum seeker must demonstrate that their fear of persecution in their home country is well-founded per the definition of a ‘refugee’ as described in the Convention.

Asylum system

- National asylum systems are in place to determine who qualifies for the international protection described in the Convention and its Protocol. Because asylum is a fundamental right, granting asylum is an international obligation. Yet while the Convention and its Protocol provide nations with a common definition of a ‘refugee,’ the process by which countries determine who meets these qualifications varies widely from state to state. This process is referred to as a “refugee determination regime” or “refugee status determination system.”

Blanket relief

- The term “blanket relief” refers to protection from removal that is administered to a group of individuals that share a common identity, usually nationality. It is premised on generalized conditions of turmoil or deprivation in a country of origin rather than the case-by-case determination of asylum.

Canada Border Services Agency (CBSA)

- The CBSA is responsible for border security at official Canadian ports of entry.

Canada-U.S. Safe Third Country Agreement (the “Agreement” or STCA)

- The STCA is bilateral treaty between the U.S. and Canada. The premise of the Agreement is that the U.S. and Canada recognize the other as equally safe countries for refugees. The terms of the Agreement bar asylum seekers from filing an asylum claim at official land border ports of entry between the U.S. and Canada.

Canadian Charter of Rights and Freedoms (the “Charter”)

- The Charter is one part of the Canadian Constitution.

Canadian Citizenship & Immigration Resource Center (CCIRC) Inc.

- The CCIRC is authorized by the Government of Canada to provide legal counsel for immigration to Canada.

Canadian Council for Refugees (CCR)

- The CCR is a national nongovernmental umbrella organization committed to the rights and protection of refugees and other vulnerable migrants in Canada. The CCR is active in the legal challenges to the Safe Third Country Agreement (STCA) in the Federal Court of Canada. The CCR joins AI and the CCC to challenge constitutional validity of the designation of the U.S. as a safe third country.

“Claims for refugee protection”

- Asylum claims are referred to as “claims for refugee protection” under Canadian law.

“Convention refugees”

- The term “Convention refugees” refers to individuals who meet the legal definition of a ‘refugee’ as defined by the 1951 Refugee Convention and its 1967 Protocol.

Environmentally induced displacement (EID)

- EID refers to forced migration driven by human-made processes, the effects of natural disasters, and climate change.

President Trump’s Executive Orders (EOs) of January 25 and 27, 2017

- EO 13767: “Border Security and Immigration Enforcement Improvements”
 - (“Border Enforcement Order”)
- EO 13768: “Enhancing Public Safety in the Interior of the United States”
 - (“Interior Enforcement Order”)
- EO 13769: “Protecting the Nation from Foreign Terrorist Entry into the United States”
 - (“Seven Country Ban”)

The Global Compact for Safe, Orderly, and Regular Migration (GCM)

- The GCM is expected to be the first intergovernmentally negotiated agreement, prepared under the auspices of the United Nations, to cover all

dimensions of international migration in a holistic and comprehensive manner. The process to develop the GCM began in April 2017 and is currently in its preliminary stages.

Harvard Immigration and Refugee Clinical Program (HIRC)

- HIRC combines representation of individual applicants for asylum and humanitarian protection with appellate litigation, policy advocacy, and research. HIRC has released comprehensive reports on the implications of the STCA as well as access to asylum in the U.S. under the Trump administration.

Human Rights Watch (HRW)

- HRW is an international nongovernmental organization that conducts research and advocacy for the advancement of human rights.

Immigration and Nationality Act (INA) – U.S.

- The INA is the basic body of U.S. immigration law. Temporary Protected Status (TPS) is codified in section 244 of the INA.

Immigration and Refugee Board of Canada (IRB)

- The IRB is Canada's largest independent administrative tribunal. It is responsible for deciding who qualifies for refugee protection among the thousands of claimants who come to Canada annually.

Immigration and Refugee Protection Act (IRPA) – Canada

- The IRPA incorporates the definition of a Convention refugee into Canadian law in section 96. The IRPA is the primary federal legislation regulating immigration to Canada.

Immigration, Refugees and Citizenship Canada (IRCC)

- IRCC facilitates the arrival of immigrants, provides protection to refugees, and grants Canadian citizenship.

“Irregular border crossing”

- The term “irregular” refers an unauthorized, illegal border crossing. Irregular border crossings are defined by the IRB as the current influx of individuals crossing the Canada-U.S. border between official ports of entry.

“Irregular border crossers”

- Irregular border crossers defined by the Canada's IRB as individuals who enter Canada between official ports of entry. Most irregular border crossers make a claim for refugee protection (asylum) upon arrival in Canada. Like all other refugee protection claimants, irregular border crossers are referred to the IRB's Refugee Protection Division (RPD) where their claim will be heard and decided.

National Immigration Project of the National Lawyers Guild (NIPNLG)

- The NIPNLG is a national membership organization working to defend and expand the rights of all immigrants. The NIPNLG is active in the legal efforts to protect TPS beneficiaries in the ongoing annulment of the program.

Non-refoulement

- Non-refoulement asserts that a refugee should not be returned to a state in which they face serious threats to their life and freedom. The principal of non-refoulement is described in Article 33 of the Convention as well as Article 3 of the Torture Convention. This is considered a rule of customary international law.

Northwest Immigrant Rights Project (NWIRP)

- The NWIRP is a nonprofit legal services organization that works to defend and advance the rights of immigrants. The NWIRP is active in the legal efforts to protect TPS beneficiaries in the ongoing annulment of the program.

Removal (deportation)

- In both the U.S. and Canada, removal refers to deportation or the enforcement of the return of an individual to their country of origin. U.S. Immigration and Customs Enforcement (ICE) executes removal operations in the U.S. while the CBSA is responsible for carrying out removal orders in Canada.

Royal Canadian Mounted Police (RCMP)

- The RCMP is the national, federal, provincial and municipal policing body of Canada. The RCMP is responsible for border security in between ports of entry. The RCMP works to deter and intercept irregular entry to Canada.

RCMP interceptions

- RCMP interceptions refer to the apprehension of asylum seekers between official ports of entry upon irregular border crossing. No enforcement actions are taken against irregular border crossers who seek asylum per section 133 of the IRPA.

Refugee

- A refugee is a displaced person that has been processed by the UNHCR and determined to meet the definition of a refugee as described in the Convention (a “Convention refugee”).
- While Convention refugees are referred for resettlement through the UNHCR (a process that takes several years to complete), refugee claimants (asylum seekers) present themselves directly to the government of the country in which they hope to receive protection. Less than 1 percent of Convention refugees are referred for resettlement.

“Refugee claimants”

- Under Canadian law, asylum seekers are referred to as “refugee claimants.”

“Refugee determination regime” / “refugee status determination system”

- The process by which a national asylum system decides who meets the definition of a Convention refugee and qualifies for asylum within their borders is referred to as a “refugee determination regime” or “refugee status determination system.”

Refugee Protection Division (RPD) – Canada

- The RPD of the Immigration and Refugee Board (IRB) hears and decides claims for refugee protection made in Canada.

Temporary Protected Status (TPS) – U.S.

- TPS is a form of relief from removal (deportation) and detention codified in section 244 of the INA. TPS is a temporary immigration status provided to nationals of certain countries who are present in the U.S. at the time of an ongoing armed conflict, environmental disaster, epidemic, or other extraordinary or temporary conditions in their country of origin. Without TPS, these individuals would otherwise be subject to deportation due to their lack of legal immigration status in the U.S.
- The Secretary of the U.S. Homeland Security may designate a country for TPS due to such conditions that prevent the country’s nationals from returning in safety. During a designated period, TPS beneficiaries may remain in the U.S. and obtain an employment authorization document (EAD) for designated periods. TPS is a temporary benefit that does provide the means to lawful permanent resident status or any other immigration status. TPS recipients are *not* considered to be present in the U.S. under color of law.

U.S. Citizenship and Immigration Services (USCIS)

- USCIS is a component agency of the U.S. Department of Homeland Security.

U.S. Immigration and Customs Enforcement (ICE)

- ICE is a U.S. federal government law enforcement agency under the jurisdiction of the U.S. Department of Homeland Security. ICE executes criminal and civil enforcement of federal laws governing border control and immigration. This includes the arrest, detention, and removal of undocumented immigrants and some asylum seekers.

United Nations High Commissioner for Refugees (UNHCR)

- UNHCR is the UN Refugee Agency, a global organization that serves to protect refugees, forcibly displaced communities, and stateless persons. The office of the UNHCR was created in 1950 during the aftermath of World War II. UNHCR serves as the ‘guardian’ of the Convention and its Protocol.

U.S. Department of Homeland Security (DHS)

- The DHS is a cabinet department of the U.S. federal government. The DHS serves to prevent terrorism, enhance security, enforce and administer immigration laws, and secure and manage the U.S. borders.

CHAPTER 1: Introduction to the Project

This research began in September 2017 as an inquiry into the irregular (illegal) border crossing of asylum seekers across the International Boundary into Canada. The vast majority of this migration movement is concentrated at the New York-Quebec border. This acute surge in vulnerable populations fleeing the United States in the hopes of finding sanctuary on Canadian soil began in 2016 and continues to this day as this project concludes in April 2018. This research commenced with three sets of primary questions. First, to examine the populations that are seeking asylum, the push factors driving these populations across the border, and their reasons for seeking asylum in Canada. Second, to review how law and geopolitics structures the lives of these particular asylum seekers in consideration of the driving forces behind this policy and the differentiations in status and rights to protection between asylum seekers, refugees, and undocumented immigrants. Finally, this research hopes to consider what the future may hold for those seeking asylum in Canada as well as the future of Temporary Protected Status (TPS) in the United States. The trajectory of this research came to identify the legal terms and geopolitical conditions that act to produce and structure this migration event within the evolving nature of TPS and access to asylum under the Canada-U.S. Safe Third Country Agreement (the “Agreement” or STCA).

Evolution of Research

Upon embarking on this research, it became nearly immediately apparent that many of those seeking asylum between 2016 to 2017 were of Haitian origin. This was statistically confirmed upon the close of 2017 by the Immigration and Refugee Board of Canada (IRB) with the finding that greater than one third of asylum claims made by irregular border crossers listed Haiti as their country of alleged persecution (Immigration and Refugee Board of Canada [IRB], 2018a). This

surge of asylum seekers – particularly the first wave of Haitians – fleeing the U.S. was motivated in part by the fear that these populations would soon lose their TPS in the U.S. under the incoming Trump administration and, as result, be at high risk of deportation (Sommerstein, 2017; Levin, 2017a; Stevenson, 2017a; Muschi, 2017). As this research continued through the end of 2017 and into the beginning of 2018, the U.S. Department of Homeland Security (DHS) under the Trump administration announced not only the termination of Haiti’s TPS designation but also that of Sudan, Nicaragua and El Salvador (“Termination of Sudan,” 2017; “Termination of Nicaragua,” 2017; “Termination of Haiti,” 2018; “Termination of El Salvador,” 2018).² These cancellations affect over 75 percent of the TPS recipients passed to the new administration.

This ongoing annulment of the humanitarian program evidences the way in which the Trump administration has “adopted a new, far narrower interpretation of the federal law governing TPS” and applied that interpretation to the DHS decisions regarding the terminations of these four countries’ TPS designations (*Ramos v. Nielsen*, 2018; American Civil Liberties Union of Southern California [ACLU SoCal], 2018). As such, the bipartisan program has been entirely transformed under the Trump administration as its capacity for protection has been curtailed by 75 percent.³ TPS does not offer a pathway to permanent residence and, because TPS is a form of blanket relief from removal (deportation), the termination of a TPS designation revokes the legal status of its former beneficiaries and, as such, returns them to their prior status in the U.S. as ‘deportable aliens’ under the *Immigration and Nationality Act* (INA). These terminations affect an estimated 327,439 vulnerable individuals in need of protection,⁴ including

² Immediately following the conclusion of this project in April 2018, the DHS also announced the termination of TPS status for both Nepal and Honduras (DHS [Press Release], 2018a; DHS [Press Release], 2018b).

³ Collectively, the termination of all six countries’ TPS designations represents annulment of 98 percent of the program’s capacity for protection under the Trump administration. This statistic is current as of May 11, 2018.

⁴ These six terminations affect a total of 428,261 former TPS recipients.

approximately 58,557 of Haitian origin (U.S. Citizenship and Immigration Services [USCIS], 2018; Wilson, 2018). Thus my research came to focus on the evolving nature of TPS under the Trump administration as a factor of production in the irregular migration of asylum seekers fleeing the U.S. in the hope of finding protection in Canada.

The border crossing of asylum seekers between the U.S. and Canada is governed by the bilateral Canada-U.S. Safe Third Country Agreement. While the terms of the Agreement bar claims of asylum at official land ports of entry between the U.S. and Canada, the law allows for claims to be made if asylum seekers cross unauthorized, between official ports of entry (“irregular border crossing”). Thus the irregular border crossings of asylum seekers considered herein are incentivized under the STCA (HIRC, 2006; Arbel & Brenner, 2013; Amnesty International Canada [AI Canada] & Canadian Council for Refugees [CRC], 2017) and as such these legal terms act to structure this particular migration event. I argue that the STCA not only incentivizes irregular border crossing but actually necessitates such activity within the terms and implications of the Agreement. This specifically pertains to those in need of protection upon the termination of their TPS designation as they are inherently crossing from U.S. to Canadian soil in the effort to access their right to asylum under international standards of protection.

The evolving nature of TPS in the U.S. coupled with the further erosion of the already deficient U.S. asylum system, both as impacted by the Trump administration, contribute to the conditions that drive this particular migration of vulnerable populations out of the U.S. in the hope of gaining protection in Canada. I examine the intersection between the ongoing annulment of TPS as a push factor in producing this migration event and the role of the STCA in incentivizing and necessitating such irregular border crossing. Herein, I consider the way in

which the Canadian authorities immediately identified and continue to mitigate such an intersection within their proactive patterns of response to this migration event.

...

CHAPTER 2: Methodology

I frame this research through the lens of critical event analysis and a case study of the intersection between the annulment of TPS and the implications of the STCA. This critical events approach allows us to ‘see a way through’ the expansive number of factors that must be understood to contextualize this particular migration event. Such a lens resists the “preliminary design of outcomes so firmly entrenched in other research traditions” (Webster & Mertova, 2007) and allows the critical events to arise out of the qualitative and quantitative data collected.

I conduct a thorough analysis of the legal terms and geopolitical conditions that respectively structure and produce this migration event. I have engaged in an exhaustive study of the evolving nature of temporary protected status in the U.S. This includes its origins, statutes, basis in law and the context of its capacity for humanitarian protection. I consider the conditions that necessitate the program as situated within the global refugee determination regime and its shortcomings, particularly related to environmentally induced displacement (EID). I examine the statistical and demographic profiles of these TPS populations as well as their economic and familial ties to the U.S. In particular, I examine the implications of the ongoing annulment of the program. I consider this in relation to the decisions made by the DHS under the Trump administration as coupled with the emergent immigration and refugee policy put forth by President Donald J. Trump. I draw legal analysis from four class action lawsuits filed in the past four months (January to March 2018) that challenge the legality of the termination of each TPS program.

I also engage in a careful study of the STCA. I consider Canada’s incentives in proposing such a policy, the geopolitical context in which it was produced and signed, and the implications of its application. Herein I review the basis of the legal challenges that contest the constitutional

validity of the Agreement in the Federal Court of Canada. I discuss the asylum systems of both the U.S. and Canada in consideration of their basis in international law, their adherence to international standards of protection, and their critiques and deficiencies. I draw from an extensive body of scholarly literature and research and I apply this knowledge to the conditions of this particular migration event. I use data analysis triangulation to verify the credibility of all informational sources (Leech & Onwuegbuzie, 2007). Throughout, I consider the impact of President Trump's first three Executive Orders, issued in January 2017, and the manifestation of his anti-immigrant and anti-refugee rhetoric within the policies and practices of the new administration.

I draw from a number of primary source documents. This includes the INA of the U.S., the *Immigration and Refugee Protection Act* (IRPA) of Canada, and the final text of the bilateral STCA. I also consider the international standards of protection described within the 1948 Declaration of Human Rights (the "Declaration"), the 1951 Refugee Convention (the "Convention") and its 1967 Protocol (the "Protocol"), and the 1984 Convention against Torture (the "Torture Convention") as they are incorporated into the U.S. and Canada's own bodies of national law. In regard to current affairs, I analyze President Trump's first three Executive Orders, TPS notices published on the Federal Register, and the public communications of the DHS, Immigration, Refugees and Citizenship Canada (IRCC), and the UN Refugee Agency in Canada (UNHCR Canada). I draw from secondary sources including reports issued by the Harvard Immigration and Refugee Clinical Program (HIRC), Amnesty International Canada (AI Canada), the Canadian Council for Refugees (CCR), and the active lawsuits pertaining to both TPS and the STCA. The irregular border crossing of asylum seekers cannot be analyzed or

understood without this careful consideration of both the evolving nature of TPS in the U.S. and the legal terms of the STCA.

Qualitative Research

I gather qualitative data from a series of six interviews with a range of key informants on both sides of the border. On the Canadian side, this includes a Canadian Government official, a knowledgeable Canadian law professor, and Marjorie Villefranche, Director General of La Maison d'Haiti in Montreal. On the U.S. side, I interviewed Pablo Bose, Ph.D., an academic professional engaged in research related to migration, diasporas, and displacement; as well as a local immigration expert well-versed in cross-border asylum seeking, and a professional researcher from an NGO working to defend the rights of refugees and asylum seekers. Some of these stakeholders opted to remain confidential due to the sensitive diplomatic and political implications of this study. As such I have removed the identifiers for four of these subjects. I refer to them as they themselves asked to be described. Because those crossing the border are in an incredibly vulnerable position, I was not able to interview any asylum seekers themselves. Instead, I spoke with a range of key informants who work on various levels of this migration on both sides of the border. I have removed any and all identifiers for asylum seekers referred to in these subjects' comments. I note that Dr. Bose contributed to this research as both informant and thesis advisor. I am careful in my use of Dr. Bose's contributions from these dual positions.

In order to reduce the potential for confirmation bias throughout the entirety of my research, including the dual involvement of Dr. Bose, I utilized methods of triangulation as described by Patton (1999). This qualitative research strategy tests validity through the convergence of information from different sources. This provides the means to check and establish validity by analyzing this research and its questions from multiple perspectives. Patton

(2002) notes that the goal of triangulation is not to arrive at pure consistency, but rather that inconsistencies are likely given the relative strengths of different approaches. Such inconsistencies do not act to weaken the evidence as they should be viewed as an opportunity to uncover deeper meaning in the data (Patton, 2002). I engage in four types of triangulation throughout this research. This includes data triangulation in the use of different sources and stakeholders; theory triangulation in the use of key informants from a range of disciplines and positions; methodological triangulation in the use of multiple quantitative and qualitative methods to study this phenomenon; and environmental triangulation in the use of geopolitical and chronological analysis on both sides of the border. The benefits of this methodology include “increasing confidence in research data, creating innovative ways of understanding a phenomenon, revealing unique findings, challenging or integrating theories, and providing a clearer understanding of the problem” (Thurmond, 2001, p. 254). These benefits largely result from the diversity and quantity of contextual analysis.

These interviews serve to answer my primary qualitative questions related to who is seeking asylum, why they are crossing the border, and what the future may hold for these vulnerable populations. These interviews are semi-structured to allow flexibility and open response in the participants’ own words (Clifford, Cope, Gillespie, & French, 2016, p. 145). These qualitative interviews are necessary to “elicit biographical meanings related to the present but also the past and future” (Bryman, Lewis-Beck & Liao, 2004, p. 524). These interviews serve to obtain “descriptions of the life world of the interviewee with respect to interpreting the meaning of the described phenomena” (Kvale as cited in Bryman et al., 2004, p. 521). I follow the methodology for geographical studies prescribed by Clifford et al. (2016) for such qualitative research. Namely I adhere to the methods for semi-structured interviews under their guidelines

for working in different cultures and different languages, understanding of difference and sameness, power relations and positionality (Clifford et al., 2016). These interviews provide contextual accounts of this migration and its conditions beyond surface review of available data and basic policy analysis.

I utilized a structured interview instrument with open-ended research questions. This instrument was adapted to fit the knowledge and expertise of each of these key informants. I prepared this in consultation with my thesis advisor, Dr. Bose. As prescribed by Bryman et al. (2004), these interviews consist of 10-15 questions – “about the life worlds of correspondents” – as well as prepared probes (p. 522). I am “careful and systematic with the things people tell [me]” (Clifford et al., 2016, p. 144) as I personally audiotape and transcribe all interviews. I provided all respondents with the full transcriptions of their interviews so that they may have the opportunity to review and approve all attributed comments before they were incorporated into my research. These transcriptions serve as the textual basis for analysis in which I identify conceptual patterns (Bryman et al., 2004, p. 521). Dr. Bose and I consider best practices for counting frequencies (content), examining themes (discourse), and coding. I utilize these interviews and their codes in consideration of data reduction, systematization of organization and search aids, content analysis and the distinction between manifest and latent messages.

To supplement this interview series, I also engage qualitative analysis of the public communications released by Immigration, Refugees and Citizenship Canada (IRCC) and the United Nations Refugee Agency in Canada (UNHCR Canada). I am careful and systematic in my reading and discussion of these systems of information exchange. I consider these press releases and publications in consideration of their temporal and political context. Throughout the qualitative methodology described herein, I consider the best practices advised by Dr. Bose for

reading data in content analysis, including both manifest (dominant) messages and latent (oppositional, negotiated, rogue) messages found within.

Quantitative Research

I situate statistical data profiles of irregular claims within a chronological account of the political and environmental conditions that surround these trends. There are a few important considerations in evaluating this quantitative analysis. Prior to March 2017, immigration data collected by the Canada Border Services Agency (CBSA) and IRCC did not take account of how an asylum seeker entered Canada and the IRB did not track their decisions on the basis of entry because it does not factor into their determination on an asylum claim. As such it was not possible to track how many individuals intercepted by the Royal Canadian Mounted Police (RCMP) went on to file a claim of asylum. Despite the irrelevance of entry on the claims themselves, the Office of the Minister of Public Safety announced in March that the Government of Canada would begin to release data on a monthly basis that would provide statistics for asylum claims made by irregular border crossers (IRB, 2018b). The IRB (2018b) notes that it is unable to report on irregular border crossers until February 2017 when the implementation of system changes provided the capacity to capture data on this population. However, due to some early inconsistencies in data entry, the IRB also notes that it is possible that not all irregular border crossers are reflected in the statistics between February to December 2017. In addition, only partial data is available for the months of February and March 2017.

All quantitative data on irregular border crossings and asylum claims is gathered from primary sources; namely original reports from the Government of Canada and its official immigration agencies. Much of this data comes directly from the official government websites for IRCC and the IRB. Some data analytics have been pulled from the Canadian Citizenship &

Immigration Resource Center (CCIRC) Inc. The CCIRC is recognized and authorized by the Government of Canada to provide legal counsel for immigration to Canada (CCIRC, 2018a).

Any and all statistics or data analytics from the CCIRC or primary news sources has been cross-checked with the original primary data from IRCC and/or the IRB. While I consider this data in relation to the intersection between the annulment of TPS and the application of the STCA, these statistics do not reflect the numbers of irregular claimants who had TPS status in the U.S. as such data has not been recorded or released.

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CHAPTER 3: Literature and Fact Review

1. Essential Background

The Global Forced Displacement Crisis

This migration of asylum seekers is situated within the current global forced displacement crisis. The magnitude of this contemporary crisis is unprecedented in recorded history. Over the past two decades, the global population of forcibly displaced persons has grown from 33.9 million in 1997 to 65.6 million by the end of 2016. The current crisis eclipsed previous records of displacement in 2013 when the number surpassed 50 million for the first time since World War II. This means that 1 in every 113 of the world's population is "an asylum seeker, internally displaced, or a refugee" (UNHCR, 2017a). The Migration Policy Institute (MPI) (2018) explains that the "link between migration and development policies has become increasingly prominent in global policy debates." This has been articulated in two major policy documents: the United Nations' 2030 Agenda for Sustainable Development and the New York Declaration for Refugees and Migrants, adopted in September 2016 (Migration Policy Institute [MPI], 2018). In the latter, UN Member States committed themselves to negotiate a 'Global Compact for Safe, Orderly, and Regular Migration.' This will be the first, intergovernmentally negotiated agreement to cover all dimensions of international migration in a holistic and comprehensive manner (United Nations [UN], 2018a). Upon the conclusion of this project, the most recent revised draft of the Global Compact is dated March 26, 2018.

Currently, the United Nations High Commissioner for Refugees (UNHCR) counts and tracks the numbers of refugees, IDPs, asylum seekers, and stateless persons. The UNHCR defines a refugee based on grounds of personal persecution and location external to one's own country of nationality or habitual residence. Displaced persons who can legally meet these

qualifications are referred to as “Convention refugees” and afforded certain rights and protections under international law. Those who do not fall into the category of Convention refugees do not qualify for the same type of recognition under international standards of protection. IDPs do not qualify for Convention refugee status because they fail to meet the requirement for external location and, as such, legally remain under the protection of their own government. Those affected by EID do not qualify for Convention refugee status because they most often fail to meet the requirement of personal persecution.

While 65.6 million people are forcibly displaced worldwide, only 22.5 million are recognized as Convention refugees. Of these, just 189,300 are referred for resettlement in a safe third country each year (UNHCR, 2018a). While the UNHCR estimates that 8 percent of the refugee population may be in need of resettlement, less than 1 percent of the world’s refugees are being resettled. The number of refugees resettled dropped by over 50 percent worldwide between 2016 to 2017 (UNHCR, 2018a). This leaves an incredible margin of forcibly displaced persons who can neither return to their home country nor live safely in their current host country. These vulnerable populations include those formerly protected under TPS who are now at risk of return to their country of origin.

Literature of Migration and Displacement

On the historical-structural origins of global migration and displacement, Dickinson (2017) writes that while globalization is eliminating barriers between countries and facilitating the flow of goods and capital around the world, the industrialized countries of the Global North are simultaneously erecting barriers to restrict the flow of people. This acts to inhibit migration of those from the Global South (Haitians and Latin Americans) to the Global North (the U.S. and Canada). He thus describes how we have arrived at this paradoxical point in history in which

governments are “enacting policies that protect borders instead of people” (Dickinson, 2017). I contend that such policies include the STCA enacted by the U.S. and Canada as well as several policies contained within the deficiencies of the U.S. asylum system. This will be further discussed in Chapter 5.

Dickinson (2017) also emphasizes the recent developments in global politics as well as the effects on climate change on international migration and restrictions thereupon. While the environmental disasters that prompted the TPS designations of Haiti, El Salvador, Honduras, Nepal and Nicaragua cannot individually be directly attributed to climate change, it is an established scientific fact that climactic change increases the frequency and severity of such events. EID created by these disasters displaced and dislocated hundreds of thousands of people, leading the U.S. to grant humanitarian protection in TPS to nationals of these states who could not return home in safety. Specific to the focus on asylum seekers of Haitian origin, Ackerman (2015) critically examines the role of climate change in the displacement of Haitians and the resulting infrastructural breakdown of the country that inhibits voluntary repatriation today.

Martin, Weerasinghe and Taylor (2014) provide a useful case study of displacement and migration in Haiti, most vitally noting that “[b]y most indicators Haiti has been in crisis almost since its independence in 1804, and migration has been an essential part of Haitians’ strategies for coping with their situation” (p. 91). At large, this work also maps the global governance of crisis migration and highlights gaps in the current provisions for crisis-related movement across multiple levels (Martin et al., 2014). Such analysis is useful in considering the current movement of Haitians across the International Boundary today.

On the broader topic of contemporary border crossing and policy, Sassen (2000) contributes significantly to the understanding of the politics of immigration. In this work,

under the premise of making immigration policy today, Sassen (2000) analyzes migration as an embedded process, the geopolitics of migration, cross-country regularities -- the “where, when, and who of immigration” (p. 140) -- and the transnationalizing of immigration policy. Sassen (2000) asserts that, “migrations do not simply happen. They are produced” (p. 155) and outlines the way in which migrations are embedded in historical phases and patterns. This understanding helps to explain the production of these crossings today as well as define them within their own distinct historical phase. As Sassen (2000) notes, “acknowledging these traits opens up the immigration policy question beyond the familiar range of border control, family reunion, naturalization and citizenship law” (p. 155) and thus allows a broader analysis and understanding of related policy. Throughout this project, I have considered the fundamental “where, when and who” in examining the way in which this migration was produced. This analysis led me to identify the annulment of TPS as a factor of production as situated within both historical phases and patterns; particularly that of Haitian crisis and migration to North America, as discussed in Section II of this chapter.

The Convention and Definition of a ‘Refugee’

ARTICLE 1:

~~“As a result of events occurring before 1 January 1951⁵ and owing to well- founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”~~
(UNHCR, 1951; UNHCR, 1967).

⁵ **The 1967 Protocol** removed the geographic and temporal limits of the 1951 Convention.

The 1951 Convention Relating to the Status of Refugees (the “Convention”) was produced in response to the Holocaust and thus designed to protect Europeans displaced prior to 1951. It is grounded in Article 14 of the 1948 Universal Declaration of Human Rights (UDHR or the “Declaration”). The 1967 Protocol Relating to the Status of Refugees (the “Protocol”) removed the geographic and temporal limits of the Convention. As such, states must sign and ratify, or accede to, the Protocol in addition to the Convention in order to be legally obligated to protect all refugees. As of April 2018, 145 states have committed to the implementation of the Protocol and 146 have committed to the implementation of the Convention (United Nations Treaty Collection [UNTC], 2018).

According to the legislation, this means that states are expected to cooperate with the UNHCR to ensure the rights of refugees are respected and protected. Canada became a party to both the Convention and the Protocol on June 4, 1969. The United States became a party to the Protocol on November 1, 1968 and remains party to the Protocol only (UNTC, 2018). The work of the UNHCR is built upon the foundation of the Convention as it is the primary legal document describing the standards of protection for refugees. As such, the UNHCR serves as the ‘guardian’ of the 1951 Convention and its 1967 Protocol. In addition to these two primary legal instruments, both Canada and the United States are party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the “Torture Convention”) since 1985 and 1988, respectively (UNTC, 2018). In theory, states are legally bound to uphold the standards of protection described within these documents.

The Right to Asylum

This paper deals exclusively with asylum seekers and will not further discuss Convention refugees. An asylum seeker is defined as someone who may meet the standards of qualification

for a Convention refugee, but whose request for sanctuary has yet to be processed. In other words, an asylum seeker is an individual who has applied for asylum and is waiting for a decision as to whether or not they will be recognized as a refugee. Because this claim is made directly to a state, it is the national government that will process the application and either grant or deny refugee status. The national asylum systems of each state are in place to determine who qualifies for international protection within their own borders. This makes it somewhat difficult to estimate numbers of asylum seekers worldwide. The last UNHCR global estimate stated that approximately 1.8 million people around the world waiting for a decision on their asylum claims (UNHCR, 2017a). This project discusses the asylum systems of both the U.S. and Canada in consideration of their critiques and deficiencies in relation to this migration event.

The right to asylum is protected in Article 14 of the UDHR. The UDHR, however, does not itself constitute a legal obligation on states to implement its articles. The rights described in the UDHR must be formalized within a treaty to create the legal obligation for states to uphold these standards of protection. A treaty is defined as a formal agreement between two or more states in which they commit to implement the obligations described within. The 1951 Convention is the treaty that builds upon the right to asylum defined in the UDHR and, as such, the Convention is the primary legal instrument that prescribes the standard of global refugee protections. The Convention defines the term ‘refugee’ and describes the rights of the forcibly displaced. The core principle of the Convention is non-refoulement as described in Article 33 of the Convention as well as Article 3 of the Torture Convention. Non-refoulement asserts that a refugee should not be returned to a state in which they face serious threats to their life and freedom; as defined within the definition of a Convention refugee. This means that a state cannot return (“refouler”) a refugee who has reached its borders to a place where their lives or freedom

may be threatened on account of race, religion, nationality, membership of a particular social group or political opinion. Asylum claims and obligations to non-refoulement are evaluated entirely on a case-by-case basis. As such, neither pertain to risk under the generalized instability, violence, or environmental devastation that prompt either TPS designations or their extensions. This is critical to keep in mind when considering the asylum claims of former-TPS recipients. Though the risk of return for these populations may be empirically evident, these individuals will not meet the requirements of asylum unless they can prove personal terms of persecution. It is increasingly more difficult to prove such persecution the longer one is away from the state in which it occurred. This is relevant to TPS populations in that many of these individuals have lived in the U.S. for up to twenty years.

Protection of the Rights of Asylum Seekers in Canada

This paper will primarily focus on the rights of asylum seekers in Canada because this research deals with those asylum seekers who have fled the U.S. in order to make their claim on Canadian soil. The deficiencies of the U.S. asylum system will later be discussed in consideration of Canada's own obligations to uphold the rights of asylum seekers per the international standards of protection of which they are party.

Under Canadian law, an international treaty that has been signed and ratified or acceded to by the Government of Canada does not immediately become national law. To actually implement the treaty, the federal government must work with the provinces and territories to pass domestic laws that give the terms of the treaty the force of law in Canadian legislation (Law and Government Division & Dupras, 2000). There are a number pieces of domestic legislation that serve to implement Canada's international obligations to refugees under Canadian law. The primary legal document describing refugee protection within Canada is the 2001 *Immigration*

and Refugee Protection Act (“IRPA”) (S.C. 2001, c. 27). Section 115 of the IRPA enshrines the principle of non-refoulement into Canadian law. Particular to the protection of asylum seekers is the decision made in *Singh v. Minister of Employment and Immigration* (1985) by the Supreme Court of Canada. This applied the rights contained in the constitutional Canadian Charter of Rights and Freedoms (the “Charter”) to asylum seekers, regardless of their immigration or migratory status. This decision recognized that although not all asylum claimants will receive refugee status, all claims must be heard and the principle of non-refoulement must be respected. This is a landmark case in the protection of the rights of asylum seekers in Canada.

The STCA governs the flow of asylum seekers between the U.S. and Canada. In Chapter 5, this paper will explore the implications of the Agreement in consideration of whether or not Canada violates its own Charter as well as the Convention and the Protocol as they have been adopted into Canadian law.

2. Haitian Crisis and Migration to North America

While this paper discusses research on these irregular border crossings, TPS, and asylum in North America at large, there is a particular focus on Haitian asylum seekers because of their centrality in this migration event. There is a long history of Haitian immigration to Quebec with a significant influx between the mid-1960s to 1970s. Haitian migration to Quebec began in 1963 and by 1973, 92.9 percent of Haitian immigrants were settling in Montreal (Jadotte, 1997, p. 489-490). This early immigration built the foundation of the large and vibrant Haitian community currently present in Montreal. Villefranche (2014) has written on the history of Haitian diaspora in Montreal. This francophone community seems to play a role in drawing today’s Haitian asylum seekers towards Montreal today. All the same, there has been “an uninterrupted stream of Haitian immigration to the United States” first peaking between 1791-

1810 during the Haitian revolutionary era and its aftermath (Laguerre, 1998, p. 2). As such, there is also a significant Haitian diaspora in the U.S.

Yet Haitian presence in the U.S. is colored by a long history of discrimination and racism, particularly in terms of the policy and practice related to the treatment of Haitians seeking asylum (Laguerre, 1998; Little, 1993). While TPS has been the primary vehicle for the protection of displaced Haitians in the U.S. -- and the only form of blanket relief offered -- there is a lengthy record of Haitians fleeing to North America in the hope of seeking asylum and gaining protection. When the first boatload of Haitians seeking asylum arrived in the U.S. in 1963, “all were denied political asylum and deported” (Little, 1993, p. 270). Emblematic examples of this type of discriminatory treatment include between 1972 and 1980 when “approximately 50,000 Haitians sought asylum in the United States” yet “only twenty-five succeeded” (Laguerre, 1998, p. 82). Again, during the first Reagan administration between 1981 to 1985, approximately 3,000 asylum seeking Haitians were intercepted by the U.S. Coast Guard and “not one Haitian was found by U.S. authorities to have presented a valid claim to asylum” or taken to the U.S. to have their claim more carefully examined (Laguerre, 1998, p. 82). In 1990, only two percent of claims for asylum by Haitians were accepted, “giving Haitians the lowest rate of asylum approval of any nationality” (Little, 1993, p. 272). There was “well-documented political oppression in Haiti” (Little, 1993, p. 270) throughout these decades that should have feasibly qualified higher numbers of Haitians for political asylum in the U.S. during this time (p. 270-281). Little (1993) argues that examples such as these demonstrate that “the fundamental principles of refugee protection have been abandoned time and again in favor of returning Haitians to a country where its people [are] routinely victimized” (p. 270) and as such, the U.S.

has established a long history of singling out Haitians for discriminatory treatment, particularly in terms of denial to the right of asylum.

This racially biased discrimination against Haitians in the U.S. continues to this day as evidenced by the policy and practice of the Trump administration (Davis et al., 2018; NAACP, 2018; ACLU, 2018; National Immigration Project of the National Lawyers Guild [NIPNLG], 2018). Since the termination of Haiti's TPS designation, as coupled with President Trump's racially discriminatory rhetoric regarding Haitians, four lawsuits have been filed by major civil society organizations in the U.S. between January to March 2018. These suits are based upon the discriminatory agenda and racial animus exhibited by President Trump and administration officials towards Haitians (*NAACP v. DHS*, 2018; *ACLU v. DHS*, 2018; *Saget v. Trump*, 2018; *NIPNLG v. DHS*, 2018). In addition, another lawsuit filed by the American Immigration Council (AIC) et al. argues that the DHS has violated the INA and *Administrative Procedure Act* (APA) in refusing to recognize that TPS holders, including Haitians, have the right to adjust to a legal status in the U.S. upon the termination of their TPS program (*Moreno v. Nielsen*, 2018). Perhaps most infamously, President Trump made his position clear in labeling Haiti (and some African nations) as "shithole countries" alongside discriminatory statements regarding Haitians, including but not limited to: "[Haitians] all have have AIDS," "[w]hy would we want any more Haitians?" and the desire to "take them out" of a proposed bipartisan immigration deal (*Saget v. Trump*, 2018; Davis et al., 2018). Such statements reveal the discriminatory agenda and racial animus described in the lawsuits filed by the NAACP, ACLU, and NIPNLG on behalf of Haitian TPS beneficiaries.

In regard to the migration of Haitians to North America in the past two decades, the succession of major natural disasters in Haiti, coupled with political and economic structural

factors, has “brought about the extreme vulnerability of the Haitian society” thus producing mass emigration and expansion of the Haitian diaspora in North America (Audebert, 2017).

Significant environmental displacement over the past 15 years has been primarily produced by Hurricane Jeanne in 2004, four storms in hurricanes in 2008, and the 7.1 magnitude earthquake in 2010 (Audebert, 2017). It is estimated that the 2010 earthquake displaced 1.5 million Haitians (Amnesty International [AI], 2014). The relationship between this environmental insecurity and immigration explains the location of Haitian asylum seekers in North America today, however, “the complex roots of Haitian emigration have often left the field open to fluctuating and ambivalent migration policies in the countries of destination” and as such Haitian migrants are considered alternately as economic migrants or as refugees (Audebert, 2017). While it is widely recognized that “Haitians are fleeing in order to survive” many do not fit into the legal definition of a Convention refugee (Edmonds, 2017). This is largely due to the fact that Convention refugee status does not afford protection for those displaced by environmental disaster, as will be discussed later in this paper. This will be considered under the conditions of the annulment of TPS in Chapter 4.

3. Relevance of Temporary Protected Status

The revocation of legal status in the U.S. for TPS beneficiaries upon each program’s end-date will render these former beneficiaries as undocumented immigrants or asylum seekers if they are to remain in the U.S. Transitioning to either category puts these formerly-protected persons at high risk of detention or deportation. This risk is intensified by the fact that these individuals are registered with the Department of Homeland Security (DHS) and its component agencies, including U.S. Citizenship and Immigration Services (USCIS) and U.S. Immigration and Customs Enforcement (ICE). As such, their personal data is available for the purposes of

identification and monitoring; thus facilitating the ease of arrest, detention, and deportation of these populations.

While the 18-month transition period for Haitian TPS beneficiaries is presented as time allowed for these populations to either self-deport or adjust to alternative legal status (“Termination of Haiti,” 2018), neither of these options proves either entirely feasible or reasonable upon review of the conditions in both Haiti and the U.S. In regard to the current conditions in Haiti, it is widely recognized that Haiti has not yet been able to sufficiently recover from the 2010 earthquake that introduced Haiti’s TPS designation (Edmonds, 2017; Shapiro & Charles, 2017; World Bank, 2018; Human Rights Watch [HRW], 2018). The World Bank (2018) notes that “Haiti is extremely vulnerable to natural disasters with more than 90 percent of the population at risk” as well as the fact that Hurricane Matthew (the most devastating disaster since the 2010 earthquake) caused damage equivalent to 32% of Haiti’s GDP in 2017. This is resulting in ongoing and long-term losses to agriculture, fishing, and livestock. Thus as Haiti’s TPS designation under INA § 244 (b) was granted upon review of “environmental disaster ... resulting in a substantial, but temporary, disruption of living conditions” and there *still today* “exist extraordinary and temporary conditions” that prevent its nationals from returning in safety; as well as in consideration of the fact that Haiti has, again “officially” (Edmonds, 2017; Shapiro & Charles, 2017; World Bank, 2018; HWR, 2018) requested TPS as recently as November 2017 (a qualification of TPS designation), it seems unreasonable to expect Haitians to return to Haiti in review of the terms of TPS designation and extension.

In regard to the Secretary Duke’s suggestion to adjust to alternative legal status (“Termination of Haiti,” 2018), TPS recipients are not offered a path to permanent residence and lack access to options for adjustment of legal status in the U.S. In February 2018, the AIC,

Northwest Immigrant Rights Project (NIRP), and several TPS holders filed a class action lawsuit against officials at the DHS and USCIS challenging “the government’s unlawful practice of depriving [TPS beneficiaries] . . . from becoming lawful permanent residents” (*Moreno v. Nielsen*, 2018). Because TPS recipients are currently barred from adjusting to alternative legal status, Haitians who remain in the U.S. after the end-date of September 22, 2019 will be rendered undocumented immigrants and become immediately at risk of deportation. This will be further discussed in Chapter 4.

Because these populations are unable to return to their countries of origin in safety, many are put in the position to seek asylum. However, due to both the deficiencies of the U.S. asylum system and the changes to the U.S. asylum system under the Trump administration, these populations have a poor chance of receiving asylum in the U.S. This reality, coupled with a well-documented spread of misinformation among Haitian communities in the U.S. regarding the “ease” and “guarantee” of receiving asylum in Canada (Stevenson, 2017; Zilio, 2017; Sommerstein, 2017) pushed thousands of Haitian TPS beneficiaries across the border in the hope of gaining protection in Canada. Upon the rejection of a claim for asylum, these Haitians will again be subject to risk of removal and return to Haiti.

4. Temporary Protected Status Under the Trump Administration

Since the start of this project in September 2017, Acting-DHS Secretaries appointed by President Trump have announced the termination of four TPS designated countries: Sudan, Nicaragua, Haiti, and El Salvador. Then Acting-DHS Secretary Duke failed to make a decision on the TPS designation of Honduras in November 2017 and as such the program has been granted an automatic six-month extension. It is reported that the John F. Kelly, President Trump’s Chief of Staff tried unsuccessfully to pressure Secretary Duke to terminate the program in November

(Nixon & Sullivan, 2017). As the new deadline approaches in May 2018, I predict that the designation of Honduras will also be terminated.

TPS recipients from the four countries already terminated account for approximately 75 percent (Wilson, 2018) of all TPS beneficiaries passed from the Obama administration to the Trump administration. If the designation of Honduras is terminated next month, nearly 90 percent of TPS' capacity for protection will have been eliminated since the inauguration of President Trump. With such a massive annulment of TPS executed under the Trump administration, alongside overt anti-immigrant and anti-refugee practice and policy (particularly the Executive Orders of January 25 and 27, 2017), the evolving nature of TPS in the U.S. is an increasingly urgent concern as it serves to produce undocumented populations who lack protection on U.S. soil. Chapter 4 will consider TPS and its annulment under the Trump administration.

5. Relevance of the Safe Third Country Agreement

While the Canadian refugee determination regime better meets international standards of protection when compared to that of the U.S., the STCA acts to prevent asylum seekers from leaving the U.S. to seek asylum in Canada. This treaty requires that persons seeking refugee protection must make a claim in the first country in which they arrive. In other words, an asylum seeker who wishes to leave the U.S. in order to claim asylum in Canada will typically be denied the ability to do so because they have implicitly first arrived in the U.S. While the STCA proposes the aim of better managing the flow of refugee claimants between the two countries, it acts to deter eligible asylum seekers from accessing the more lawful refugee determination in Canada and therefore functionally restricts would-be refugees from accessing their right to asylum as guaranteed under international law.

However, a “legal loophole” exists in the Agreement as it pertains only to official land ports of entry. It therefore applies to the arrivals of asylum seekers at U.S.-Canada land ports of entry, by train, and at airports. But because the Agreement specifies its application as pertaining to *official* land ports of entry, the STCA creates a situation in which persons seeking to enter Canada for reasons of protection are incentivized to cross the border unauthorized and illegally, away from official land ports of entry. If a person seeking asylum crosses from the U.S. into Canada at an official land port of entry, the STCA applies and they are ineligible to make a claim of asylum in Canada. However, if a person seeking asylum leaves the U.S. to illegally cross the border into Canada away from an official land port of entry, they are allowed to make a claim of asylum and will be considered for asylum under the same standards as those who enter Canada legally. Because the Agreement is designed only to apply to official land ports of entry, these border crossings do not occur through a “loophole” but rather the terms of the Agreement itself.

While the premise of the Agreement is that each country recognizes the other as a safe country for refugees, the STCA is broadly criticized for two reasons. First, because many advocates of refugee rights argue the U.S. is not, in fact, a safe country for asylum seekers; and second, because this “loophole” incentivizes unauthorized, unregulated, and often dangerous border crossings. This will be further discussed in Chapter 5.

6. Executive Orders, Racialization and Imagery of ‘Mass Invasions’ in Crisis

Mentality

Sassen (2000) identifies a series of dynamics associated with immigration in the U.S.: “anti-immigrant feelings, racialization, [and] a crisis mentality about controlling immigration” (p. XIII). While this seems particularly consistent with the policy and practice of the Trump

administration, these dynamics are embedded in the historical phases and patterns of immigration policy in the U.S.; specifically that of the 1920s and 1950s. Sassen (2000) asserts that such racialization structured U.S. immigration policy throughout the twentieth century. I argue that this racialization continues to inform and instruct U.S. immigration policy today, especially in regard to vulnerable and undocumented populations in need of protection. Such animus is particularly evident in the ongoing annulment of TPS, the efforts to repeal DACA, and the Executive Orders issued by President Trump during his first week in office. The motives within these measures reveal the crisis mentality in the Trump administration's imagery of 'mass invasions' in such racialized immigration policy and practice.

The first two Executive Orders, "Enhancing Public Safety in the Interior of the United States" (hereinafter "Interior Enforcement Order") and "Border Security and Immigration Enforcement Improvements" (hereinafter "Border Enforcement Order"), were signed on January 25. The third order, "Protecting the Nation from Foreign Terrorist Entry into the United States" (hereinafter "Seven Country Ban"), was signed on January 27. The first, EO 13767 "Border Enforcement Order," includes measures that would curtail due process and expand problematic detention and enforcement practices. The AIC (2017a) asserts that this order "will likely result in asylum seekers, families, children, and others being turned away and denied access to humanitarian protection guaranteed for decades under U.S. and international law." The second, EO 13768 "Interior Enforcement Order," introduced a massive expansion of immigration enforcement in the interior. The AIC (2017b) asserts that this order "defines enforcement priorities so broadly as to place all unauthorized individuals at risk of deportation, including families, long-time residents, and 'Dreamers.'" This order prioritizes all undocumented immigrants for removal, rather than convicted criminals or those who recently crossed the border

(as was practice under the Obama administration). The order also encourages abusive and discriminatory practices by local law enforcement as well as additional criminal prosecutions for illegal entry into the U.S. The third, EO 13769 “Seven Country Ban,” imposed a suspension of the U.S. Refugee Admissions Program (USRAP), a ban on Syrian refugees, and a ban on entry of nationals from Muslim-majority countries -- thus functionally imposing a “Muslim ban.” This ban is perhaps the most explicit in its racialization of immigration policy.

While these EOs do not name TPS recipients explicitly, they do place them in the crosshairs of the Trump administration’s discriminatory immigration enforcement policies. These measures place a new emphasis on enforcement in the interior and as such are of particular concern to TPS populations losing their legal status in the U.S. These orders represent the manifestation of President Trump’s anti-immigrant and anti-refugee rhetoric into actual U.S. policy and law. While the legality of these EOs continue to be challenged in court, their articulation of the suspension of humanitarian protections and racialized animus towards immigrants remains well-established. I argue that President Trump’s immigration policy -- as articulated in the annulment of TPS and these orders -- represents a return to the restrictive U.S. immigration laws of the 1920s and 1950s. This will be further discussed in the qualitative findings of my interview series.

These are the legal and geopolitical conditions in which I have explored this research.

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CHAPTER 4: Temporary Protected Status and Its Annulment

This project explores Temporary Protected Status (TPS) because it became immediately apparent that many asylum seekers crossing from the U.S. into Canada were doing so in the fear of losing their TPS in the U.S. under Donald Trump's presidency. This is particularly true in the case of Haitians. Over the course of this research, the DHS under the Trump administration came to terminate not only Haiti's TPS designation but also that of Sudan, Nicaragua, and El Salvador.⁶ This chapter will provide an overview of the program, the factors that necessitate such a program, and the implications of its annulment.

I. Overview of the Program

U.S. law offers two primary vehicles for noncitizens already within the U.S. who do not qualify for refugee or asylum status but who could face violence or hardship if returned home due to their conditions of displacement. The first is TPS for persons from states (or regions within states) that the DHS designates for protection. The second is the exercise of an executive decision not to pursue removal, either in the normal course of enforcement of the law or in the form of special programs for individuals in particular groups (Kerwin, 2014). This chapter will explore the evolving nature of TPS because of the way in which it intersects with the irregular border crossing of asylum seekers fleeing the U.S.

TPS is a form of humanitarian protection specific to the U.S. This program applies to foreign nationals already present in the U.S. who may otherwise face removal (deportation) due to their lack of legal status in the U.S. TPS grants temporary immigration status and work

⁶ Immediately following the conclusion of this project in April 2018, the DHS also announced the termination of TPS status for both Nepal and Honduras (DHS [Press Release], 2018a; DHS [Press Release], 2018b). Collectively, the termination of all six countries' TPS designations represents annulment of 98 percent of the program's capacity for protection under the Trump administration. This affects a total of 428,261 individuals formerly protected by TPS. This statistic is current as of May 11, 2018.

authorization to eligible nationals (or stateless habitual residents) of a country designated for TPS under section 244 of the INA. While TPS recipients can lawfully work in the U.S. and must pay all taxes associated with employment and residence, they are not eligible for most public benefits because they are *not* considered to be present in the U.S. under color of law (Messick & Bergeron, 2017). Under the INA, the Secretary of Homeland Security “may designate” a foreign state (or part of a foreign state) for TPS upon the finding that:

- “there is an ongoing armed conflict within the state and due to such conflict,” the return of its nationals “would pose a serious threat to their personal safety”;
- **“there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected [emphasis added]”;**
- the state is “unable, temporarily, to handle adequately the return” of its nationals, and the state has “officially” requested TPS; OR
- “There exist extraordinary and temporary conditions” in the state that prevent its nationals from safely returning, unless allowing them to stay would be “contrary to the national interest of the United States.”
 - [INA § 244 (b)(1)]

During the TPS designation period, TPS beneficiaries are eligible to remain in the United States, may not be removed (deported), and are authorized to work and obtain Employment Authorization Documents (EADs) so long as they continue to meet the requirements of TPS. To be eligible for TPS, nationals (and stateless habitual residents) of designated states must: (1) satisfy continuous presence (from the date of designation or re-designation of their state) and continuous residence requirements; (2) register and re-register for TPS at periodic intervals; (3) pay registration fees; and (4) be otherwise admissible as an immigrant [INA § 244 (c)].

TPS is a form of blanket relief from removal. The term “blanket relief” refers to protection from removal that is administered to a group of individuals based on their ties to a foreign country. It is premised on generalized conditions of turmoil or deprivation in the country of origin. This stands in contrast to asylum, which is protection administered on a case-by-case

basis to individuals on terms of personal persecution (Seghetti, Ester & Wasem, 2015). While TPS is explicitly temporary in nature, the program has been routinely extended by all previous administrations since its formalization in 1990. Prior to the creation of TPS, the Executive Branch used ad hoc practices to provide similar relief for decades.

While terminations of TPS designations overall are not rare (as the conditions of previously designated states have sufficiently improved), terminations “for beneficiaries who have lived in the [U.S.] for prolonged periods of time – groups that happen to constitute the vast majority of current TPS holders” (Chishti, Bolter & Pierce, 2017) are relatively unprecedented. This refers to the terminations of Sudan, Nicaragua, Haiti and El Salvador between 2017 and 2018 as well as the likely termination of Honduras in May 2018. Past administrations, both Democrat and Republican, have continually renewed TPS designations for these long-term programs based wholly on the lack of improvement in the conditions of these countries and the inherent need for the continued protection of these populations. The Trump administration’s near complete annulment of the program represents an unprecedented departure from this norm because the conditions within each of these states has arguably not improved since the last renewal of their status (between 6 to 18 months prior). This paper will focus primarily on TPS granted in the aftermath of environmental disaster because it accounts for 98 percent of the program’s per capita protection passed from the Obama administration to the Trump administration in 2017. This chapter will explore the factors that necessitate a TPS program in the U.S. as well as the implications of the annulment of this type of protection.

Environmentally Induced Displacement and Temporary Protected Status

Per capita, the vast majority of TPS blanket relief has been granted in response to environmental disasters and their aftermath. In 2017, TPS beneficiaries from El Salvador, Honduras, Haiti,

Nepal and Nicaragua accounted for 98 percent of all TPS beneficiaries. TPS designation for all five of these countries was based on environmental disasters and their aftermath (USCIS, 2018). In granting TPS to these populations, the U.S. recognized their need for protection despite their lack of eligibility for refugee status as defined under either the Convention or the INA.

As noted, the Trump administration has announced the termination of TPS status for three of these five states, effectively curtailing the program's capacity for protection by 75 percent over the course of this research.⁷ I predict that the DHS will announce the termination of Nepal and Honduras' designations in the upcoming weeks between April and May 2018.⁸ This would represent termination of TPS status for 98 percent of beneficiaries and an unprecedented transformation of the program. Four of these five states retained their designation for prolonged periods, as noted in Table 1, due to the conditions within each of these countries that prevent the safe return of their nationals.

This chapter discusses environmentally induced displacement (EID) because it is the root cause of displacement for 98 percent of TPS beneficiaries passed from the Obama administration to the Trump administration. The conditions of displacement and deprivation inherent in EID does not itself qualify these individuals for refugee protection under international law. This reflects the necessity of this particular humanitarian program. Such a void in international standards of protection led the U.S. to go beyond their international obligations and create TPS within its own body of national law. However, upon the terminations of these programs, the majority of these formerly-protected populations are rendered undocumented immigrants –

⁷ As noted, immediately following the conclusion of this project in April 2018, the DHS also announced the termination of TPS status for both Nepal and Honduras (DHS [Press Release], 2018a; DHS [Press Release], 2018b). Collectively, the termination of all six countries' TPS designation represents annulment of 98 percent of the program's capacity for protection as of May 11, 2018.

⁸ Secretary Nielsen announced the termination of TPS status for Nepal on April 25, 2018 and the termination of Honduras on May 4, 2018 (DHS [Press Release], 2018a; DHS [Press Release], 2018b).

subject to removal – as they are left without rights to protection under either U.S. or international law.

Table 1. Countries designated for Temporary Protected Status, 2017

Country	Original Designation Year	Reason for Designation	Continuous Physical Presence Required Since	Deadline for Decision on Extension	Expiration Date	Number of Beneficiaries
El Salvador	2001	Aftermath of earthquakes	3/9/2001	1/8/2018	3/9/2018	262,528
Honduras	1999	Aftermath of Hurricane Mitch	1/5/1999	5/6/2018	7/5/2018	86,031
Haiti	2010	Aftermath of earthquake	7/23/2011	N/A	7/22/2019	58,557
Nepal	2015	Aftermath of earthquake	6/24/2015	4/25/2018	6/24/2018	14,791
Syria	2012	Civil conflict	10/1/2016	1/30/2018	3/31/2018	6,916
Nicaragua	1999	Aftermath of Hurricane Mitch	1/5/1999	N/A	1/5/2019	5,306
Yemen	2015	Civil conflict	3/4/2017	7/5/2018	9/3/2018	1,116
Sudan	1997	Civil conflict	5/3/2013	N/A	11/2/2018	1,048
Somalia	2012	Civil conflict	9/18/2012	7/19/2018	9/17/2018	499
South Sudan	2011	Civil conflict	5/3/2016	3/3/2019	5/2/2019	77
Total						436,869

Sources: U.S. Citizenship and Immigration Services, "Temporary Protected Status," accessed November 19, 2017, available online; Jill Wilson, *Temporary Protected Status: Overview and Current Issues* (Washington, DC: Congressional Research Service, 2017), available online.

Note. Reprinted from "Tens of Thousands in United States Face Uncertain Future, as Temporary Protected Status Deadlines Loom" by Chisti et al., (2017, December 1). Retrieved from <https://www.migrationpolicy.org/article/tens-thousands-united-states-face-uncertain-future-temporary-protected-status-deadlines-loom>

This table represents TPS as it was passed from the Obama administration to the Trump administration in 2017. TPS for the highlighted countries was terminated over the course of this research. The three largest programs terminated were designated on the basis of EID.

Updated May 11, 2018: Immediately following the conclusion of this project, TPS was also terminated for Honduras and Nepal. Both of these countries were also designated on the basis of EID.

Safe Haven in Temporary Protected Status

TPS is the statutory embodiment of safe haven for foreign nationals who may not meet the legal definition of ‘refugee’ but are nonetheless fleeing – or unwilling or unable to return to – conditions of peril or turmoil in their country of origin. The concept of “safe haven” embraces humanitarian migrants as it covers those who may not meet the legal definition of a Convention refugee but are nonetheless fleeing situations in which their life may be at risk. In the U.S., safe haven has been granted through TPS primarily to those affected by EID. Safe haven assumes that the host country (in this case the U.S.) is the first country in which the forced migrant arrives safely *or* is the country in which the migrant is temporarily residing when the crisis occurs. Safe haven is implicitly temporary in nature because it is given prior to any decision on the long-term resolution of the migrant’s status (Seghetti et al., 2015). In the case of TPS and its annulment, there is an absence of long-term resolution of these populations’ status. This will be discussed under subsection II of this chapter.

Safe haven in TPS “expands the protection of forced migrants who cannot satisfy the criteria [of refugee or asylum status] ... it promises group-based protection when the determination of an individual’s status proves impossible” (Fitzpatrick, 2000, p. 280 qtd in Menjívar, 2017, p. 1). This refers to the necessity of the program. In other words, this means that TPS fills the void in protection for vulnerable populations when the case-by-case determination of refugee status fails to meet the needs of these displaced persons. Hence the group, rather than individual, determination of TPS. However, while the program is intended to serve “as a short-term strategy to secure the immediate physical safety of [humanitarian migrants]” (Fitzpatrick, 2000, p. 280), TPS designations have been routinely extended for up to two decades by all previous administrations since its formalization in 1990. This is due to the ongoing conditions of

peril or turmoil that would put these populations at risk of death or deprivation should they be returned to their countries of origin. It is also important to note that TPS is only granted if the measure is consistent with U.S. national interests (Segerblom, 2007 qtd in Menjívar, 2017, p. 1; Seghetti et al., 2015). The current annulment of TPS under the Trump administration represents the temporal end of safe haven for the humanitarian migrants it protected for the past ten to twenty years. This chapter explores the need for safe haven in TPS as a result of EID and the limitations of the Convention definition of a ‘refugee.’

Environmentally Induced Displacement and the Definition of a ‘Refugee’

As discussed in Chapter 3, the Convention defines a ‘refugee’ as a displaced person who is “unwilling” or “unable” to return to his country of nationality or habitual residence because of a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion” (UNHCR, 1951). The basis of the definition of a “Convention refugee” rests on the protection of displaced persons from political or identity-based persecution. This often includes conditions of war or violence and, “except in contexts of conflicts and persecution, there is no lead UN agency that has at its core the protection of people forced to flee owing to disasters, including those triggered by climate change” (UN News, 2014). EID produces vast numbers of displaced persons who are “not protected by international law or eligible to receive many types of aid” (UNHCR, 2018). Thus, because the legal definition of a refugee requires that a displaced person claiming refugee protections must experience a form of persecution, persons displaced by EID are some of the most vulnerable populations in the world.

This includes those affected by the earthquakes in El Salvador, Haiti and Nepal as well as the hurricanes in Honduras and Nicaragua that led to the designation of these populations for

TPS. Such narrow delineations in the definition of a Convention refugee necessitates additional programs of protection -- such as TPS -- for forcibly displaced populations that do not meet these particular legal qualifications. Until the current annulment of the program, TPS provided vital protection for these populations displaced by EID. In global context, EID is a growing concern in regard to forced displacement around the world.

Environmentally Induced Displacement in Global Context

Climate change and its related processes are a critical concern for expanding global displacement. Millions of people have already been forcibly uprooted by worsening environmental conditions (UNHCR, 2018b). It is estimated that there has been an average of 25.4 million new displacements associated with environmental disasters each year since 2008. This is more than twice as many displacements caused by conflict and violence (Internal Displacement Monitoring Centre [IDMC], 2015). In 2010, an estimated 42 million people worldwide were displaced from their homes as the result of immediate and long-term changes in the physical environment (Yonetani & IDMC, 2011). This estimate is roughly equal to the number of people displaced by war and persecution during the same period (Omeziri and Gore, 2014). The UNHCR (2015) warns that “increasing incidence and changing intensity of extreme weather events due to climate change will lead directly to the risk of increased levels of displacement.” Such extreme weather events that render a place uninhabitable and cause large-scale forced displacement include those experienced by El Salvador, Honduras, Haiti, Nepal, and Nicaragua.

While the term “environmental refugee” is first attributed to Essam El-Hinnawi, a United Nations Environment Programme researcher in 1985, this term is misleading because international law (as articulated in the Convention) defines a “refugee” as a person who is (1)

fleeing persecution, and (2) has crossed an international border. El-Hinnawi describes an environmental refugee as “those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption [...] that jeopardized their existence and/or seriously affected their quality of life” (El-Hinnawi, 1985 qtd in Bose & Lunstrum, 2014, p. 6). This definition, however, is criticized for being “so wide as to render the concept virtually meaningless” (Suhrke & Visentin qtd in Bose & Lunstrum, 2014, p. 6). The legal application of the term and phenomenon of “environmental refugees” has sparked considerable debate. For example, Bose & Lunstrum (2014) explain that the UNHCR “has serious reservations with respect to the terminology and notion of environmental or climate refugees” (p. 6). The UNHCR has itself noted:

“[T]he terminology and notion of environmental or climate refugees ... have no basis in international law ... UNHCR is actually of the opinion that use of such terminology could potentially undermine the international legal regime for the protection of refugees whose rights and obligations are quite clearly defined and understood ... UNHCR considers that any initiative to modify this definition would risk a renegotiation of the 1951 Refugee Convention, *which could not be justified by actual needs* [emphasis added]” (UNHCR qtd in Bose & Lunstrum, 2014, p. 6).

This leaves those displaced by EID ‘out in the cold’ as they lack legal recognition under the international standards of protection that govern the asylum systems of both the U.S. and Canada as well as the global refugee determination regime at large. While TPS provided indispensable safe haven for those affected by EID from El Salvador, Haiti, and Nicaragua, the termination of this program renders these vulnerable populations without the right to protection under either U.S. or international law. This will be discussed further in subsection II of this chapter.

Designation of Haiti for Temporary Protected Status

Haiti was designated for TPS by the Obama administration following the 7.1 magnitude earthquake (USCIS, 2018a) that caused catastrophic damage to the country in 2010. While the

grant of TPS was explicitly temporary in nature, the events surrounding the aftermath of the earthquake have significantly impeded the country's recovery. This includes most notably "the largest cholera epidemic in the world" introduced by UN Peacekeepers immediately following the earthquake (Frerichs, Keim, Barraix & Piarroux, 2012) and the devastation of Hurricane Matthew -- "the most powerful storm in a decade" -- in October 2016 (BBC, 2016). In review of the current conditions as coupled with ongoing political instability -- much of which is tied to foreign political interests (including Canada's) -- the President of Haiti formally requested that Haiti's TPS designation be extended in November 2017 (Edmonds, 2017). This official request meets the qualifications for the designation or re-designation of a state for TPS by the Secretary of Homeland Security per section 244 of the INA. Nonetheless, this was immediately followed by Secretary Duke's decision to terminate TPS status for Haiti on November 20, 2017 ("Termination of Haiti," 2018). Thus, over the course of this project, the fears that generated the initial surge of asylum-seeking Haitians across the Canadian border have been realized as nearly 60,000 Haitians now face an impending order of removal upon the July 2019 expiry of their protected status.

Yet, what many Haitian TPS recipients in the U.S. do not realize is that Canada suspended its own temporary protection program for Haitians back in 2014⁹ (Malcolm, 2017; Harris, 2017; Immigration, Refugees and Citizenship Canada [IRCC], 2016a). Also introduced in the wake of the 2010 earthquake, Canada offered similar protection against deportation in a Temporary Suspension of Removals (TSR) program and a special visa for those who qualified on humanitarian and compassionate (H&C) grounds. The Government of Canada released a public notice stating that these protections would be lifted on December 1, 2014 and the program

⁹ Whether or not the prior lifting of Canada's TSR program will impact Haitians seeking asylum in Canada today is unclear and will be investigated in the interview series portion of this research.

was formally terminated in August 2016 under Prime Minister Trudeau (IRCC, 2016a). However, unlike TPS in the U.S. (which offers *no path* to permanent residence), Haitians protected by TSR in Canada were eligible to apply for permanent residence under H&C grounds upon the termination of TSR without risk of removal from Canada (IRCC, 2016a). Thus the termination of Haiti's TPS designation in the U.S. functions to produce populations in need of protection in a way that the suspension of Canada's TSR program did not. Upon the retraction of their TPS status, Haitian beneficiaries are not presented with attainable options for remaining in the U.S.

II. Production of Populations In Need of Protection

To understand the production of refugees, displaced persons, and asylum seekers today, we must first look towards the formation of the nation-state to understand the creation of these vulnerable groups. The production of such populations comes as a consequence of the formation of modern independent nation-states, as defined and first realized by the Westphalian model in Europe. This modern system of states was formally established as the dominant world order framework by way of the Peace of Westphalia in 1648 (Falk, 1998). This framework defined the sovereignty of states within their own territorial boundaries. Sassen (2000) identifies the intimate connection between the formation of these independent nation-states and the creation of the refugee, the displaced person, and the asylum seeker. The formation of the modern state "contributed to the production of the refugee through [the] aspiration to administrate sovereignty, particularly in their assertion of the right to determine entitlement to citizenship" (Sassen, 2000). Within the production of populations in need of protection inherent in the ongoing annulment of TPS, it is specifically the lack of citizenship -- or the availability of a path thereto -- that renders those formerly protected by TPS vulnerable to becoming asylum seekers.

Citizenship

As citizenship historically developed within the framework of state building, “in an ideal world, the political and cultural boundaries of a people would neatly correspond with divisions drawn between independent political units” (Aleinikoff, 2000). Thus, while ideally all members of a nation would share the same status as citizens, contemporary international migration and forced displacement locates many within the territorial boundaries of states in which they cannot access citizenship. This is the case of noncitizen populations in the U.S. who are granted TPS. It is the lack of access to U.S. citizenship for these populations residing in the U.S. that necessitates the program upon the inability of these groups to return to their country of origin in the event of a crisis and its aftermath; and, which now produces populations in need of protection upon its annulment.

Aleinikoff (2000) defines three main features that characterize modern citizenship. First, citizenship is a juridical status granting civil, political, and social rights and duties to the individual members of a state. Second, citizenship refers to a specific set of social roles (voter and so on) performed by citizens and “through which they express choices with regard to the management of public affairs and, hence, participate in government” and gain access to the political system. Third, citizenship also refers to a set of “moral qualities thought to be crucial for the existence of a good citizen” (Aleinikoff, 2000). Thus while citizens have the ability to use their status in order to defend their interests in the political arena, noncitizens lack this fundamental privilege of self-representation and self-defense without the ability to participate in the government of the state in which they reside.

As noncitizens, TPS populations -- though full participants of the civil and social duties of members of a state -- lack the civil, political, and social rights granted in citizenship. As such,

these noncitizens fulfill such duties through the payment of taxes but lack the right to access the federal benefits funded by these taxes. Noncitizens must adhere to both federal and state law, but they are denied the right to vote on the legislation that structures this law. Noncitizens are denied the ability to express choices in the management of public affairs and, hence, the ability to participate in the government that governs their status. Thus, while TPS populations are demographically and statistically represented as ‘good citizens’ (high labor force participation, English-speaking, education-seeking, and low criminal activity) (Warren & Kerwin, 2017), they lack the actual membership to defend their status within the state and are thus vulnerable to the retraction of their legal status and the resulting risk of detention and deportation.

A prime example of the paradox of noncitizenship for TPS populations is evident in the fact that, because that they are authorized to work, they must pay taxes. They are not, however, eligible to access the federal safety-net benefits (SNAP food benefits, Medicaid, etc.) funded by such taxes (U.S. Department of Agriculture [USDA], 2010; Department of Transitional Assistance [DTA], 2004). The irony of this becomes clear when, as TPS populations are expected to leave the U.S., they will be “taking their production with them, taking their output with them; taking their work with them” which results in “a total net loss” with “no kind of savings on the taxpayer side” (Nowrasteh qtd in Noguchi, 2017). It is estimated that the loss of contributions from TPS populations will result in a \$6.9 billion reduction to Social Security and Medicare contributions over a decade (Baran & Magana-Salgado, 2017, p. 1). Here, while the true burden of noncitizenship falls to these TPS populations, there is also an inherent cost for U.S. citizens in the departure of these noncitizen populations.

Temporality of Temporary Protected Status

While TPS is explicitly temporary in nature, high percentages of TPS beneficiaries have lived in the U.S. for 20 years or more, arrived as children, and have U.S. citizen children (Warren & Kerwin, 2017). This reveals the intrinsic rootedness of TPS populations to the U.S. and their vested interest in remaining in the U.S. (or North America) -- with or without legal status. TPS beneficiaries from El Salvador, Honduras, and Haiti accounted for more than 90 percent of all TPS beneficiaries in 2017. Of these, 51 percent of Salvadorans, 63 percent of Hondurans, and 16 percent of Haitians have lived in the U.S. for 20 years or more (Warren & Kerwin, 2017). As noted, with the termination of these TPS programs comes the retraction of TPS beneficiaries' legal status in the U.S. and the impending risk of detention and deportation.

While TPS beneficiaries have an estimated 273,000 U.S. citizen children (born in the U.S.) and high percentages have resided in the U.S. for twenty years or more (Warren & Kerwin, 2017), TPS does not offer a path to naturalization nor the option to adjust to legal permanent residence (LPR). Residency under TPS does not, in itself, lead to any resolution of status or other durable solution for these populations (Kerwin, 2014). This leaves TPS recipients with three prospects upon the termination of their program: they may self-deport to their country of origin, they may remain in the U.S. as undocumented immigrants, or they may flee across the border in the hopes of receiving asylum in Canada.

'Should I Stay or Should I Go?'

Evaluating the options of TPS populations upon expiry

Because TPS does not confer any form of citizenship, permanent residency, or any right to ongoing immigration status, these populations revert to their prior immigration status upon the expiry of their program (Messick & Bergeron, 2017). Herein is the production of populations in

need of protection noted earlier in this chapter. While these former TPS recipients have a vested interest in continuing their lives in the U.S., the impending risk of detention or deportation is acting to motivate these populations to flee the U.S. in the hopes of finding protection in Canada. This is in part because life in Canada may retain some degree of normalcy for these former beneficiaries and their children when compared to the alternative of return to a perilous and resource-constrained country of origin -- either through self-deportation or the enforcement of removal by U.S. Immigration and Customs Enforcement (ICE).

Voluntary repatriation is presented by U.S. Citizenship and Immigration Services (USCIS) under the U.S. Department of Homeland Security (DHS) and the Secretaries of Homeland Security themselves as the natural next step for former beneficiaries upon termination of their TPS status. This proposal, however, is impractical for a number of reasons. Perhaps most notable, in consideration of pragmatic decision-making on the part of these former beneficiaries, is the nature of their strong personal, familial, and economic ties to the U.S. The high proportion of TPS beneficiaries who have lived in the U.S. for over 20 years -- as well as those who arrived as children themselves -- are inherently embedded in their relationship to the U.S. This is presumably more so than to their countries of origin because these individuals have spent the better part of their lives establishing social and familial ties in the U.S.

The statistical and demographic profile of TPS beneficiaries reveals a hard-working population who are deeply embedded within the U.S. (Warren & Kerwin, 2017; Menjívar, 2017). In addition to social and familial links, TPS beneficiaries have substantial economic ties and obligations in the U.S. The labor force participation rate for TPS populations ranges from 81-88 percent (well above the rate for the total U.S. population [63 percent] and the foreign-born population [66 percent]). About 27,100 of those in the labor force are self-employed and have

created jobs for both themselves and others. TPS recipients live in over 206,000 households, almost one-half of which have mortgages. In addition, more than one-half of TPS beneficiaries have health insurance in the U.S. (Warren & Kerwin, 2017). Families and individuals who have built lives for themselves in the U.S. over the past ten to twenty years are simply not likely to return themselves to a resource-constrained state in which their life and livelihood are put at considerable risk. This is especially valid in consideration of the high proportion of TPS recipients who are the parents of U.S. citizen children. A return to their country of origin would almost certainly represent the splitting of tens of thousands of families as these children have evidently better prospects for education and employment should they remain in the U.S.

While TPS termination notices from the DHS delay the effective date of expiry to “provide time for individuals with TPS to arrange for their departure or to seek an alternative lawful immigration status in the United States, if eligible” (DHS, 2018b), the latter proves very difficult for beneficiaries of TPS (Chishti et al., 2017). As TPS itself is a provisional protection against deportation, many TPS beneficiaries entered the U.S. illegally. This fact limits all legal avenues towards an alternative legal status and negates most options for adjustment of immigration status (Chishti et al., 2017). This issue was taken to court in February 2018 when the AIC, NIRP, and several TPS holders filed a class action lawsuit against officials at the DHS and USCIS challenging “the government’s unlawful practice of depriving [TPS beneficiaries] ... from becoming lawful permanent residents” (AIC, 2018; *Moreno v. Nielsen* 2018). For the majority of TPS recipients who entered the U.S. unlawfully, the ineligibility to seek an alternative lawful immigration status in the U.S. leaves few options available. For many, migrating to a third country is a more feasible option than either remaining in the U.S. illegally or returning to their country of origin (Chishti et al., 2017). Herein is the push factor driving

these populations across the border in search of protection. Fleeing to Canada in search of asylum proves a more feasible option than remaining in the U.S. given the limited legal avenues to attain any resolution of resolution of status or protection.

Remaining in the U.S. as an undocumented immigrant is a high risk option for three key reasons. First, TPS recipients' work authorization has been revoked through well-publicized TPS termination announcements; second, arrest, detention and deportation of undocumented immigrants in the interior of the U.S. is rising under the Trump administration (Sacchetti, 2017); and third, TPS recipients are registered with USCIS, meaning that their personal information could easily be used for purposes of tracking and arrest.

President Trump campaigned on a platform prioritizing a legislative crackdown on illegal immigration. While the Trump administration's stated chief goal is to deport criminals, it is arresting and deporting significant numbers of people who never committed any crimes beyond entering the U.S. without the proper documentation for a legal arrival. From January to September 2017, ICE deported a total of 142,818 immigrants from the border and the U.S. interior, including 59,564 of these noncriminal noncitizens (Sacchetti, 2017). When asked about the deportation of these undocumented but otherwise law-abiding immigrants, Thomas Homan, President Trump's nominee for director of ICE made his position clear in the following statement: "I get asked a lot why we arrest somebody that's not a criminal, [but] those who do enter the country illegally ... violate the law. That is a criminal act" (Bendix, 2017). While levels of deportation rose under the Obama administration, this enforcement targeted criminals convicted of what the DHS defines as "serious crimes" and the deportation of unauthorized border crossers who had recently entered the U.S. (Chishti, Pierce & Bolter, 2017b). Now, however, the enforcement policies of the Trump administration focus instead on the interior,

putting former TPS recipients at high risk of arrest, detention and deportation upon the expiry of their status.

While this social and political environment puts any and all undocumented immigrants at increased risk of enforcement, former-TPS beneficiaries are at an critically heightened risk because the DHS and its component agencies have their extensive personal data on-file. As such, these populations will be very easy to track and target for purposes of arrest, detention and deportation at the whim of the current administration. Coupled with the politically charged and well-publicized nature of TPS terminations, attempting to maintain residence and employment in the U.S. as an undocumented immigrant is a high-risk option. This incentivizes migration to a third country in the effort to retain protection under asylum. In consideration of geographic and socioeconomic limits, Canada is the only safe third country accessible to these populations.

Legal Challenges to the Annulment of Temporary Protected Status

In Spring 2018, four major lawsuits were filed in response to the patterns of discrimination in the rescindments of TPS status and the lack of availability for adjustment of legal status for TPS beneficiaries upon the expiry of their protection (*NAACP v. DHS*, 2018; *Moreno v. Nielsen*, 2018; *Ramos v. Nielsen*, 2018; *Saget v. Trump*, 2018). Four of these suits are based upon the discriminatory agenda and racial animus exhibited by President Trump and administration officials, particularly towards Haitians.

On January 24, 2018 the NAACP filed a lawsuit against Duke and Nielsen in their official capacities as Secretaries of Homeland Defense. The lawsuit attests that the DHS's November 2017 decision to terminate TPS for Haitian immigrants reflects an egregious departure from the TPS statute's requirements and an intent to discriminate on the basis of race and/or ethnicity (*NAACP v. DHS*, 2018). On February 22, 2017 a class action lawsuit was filed

by the American Immigration Council (AIC), the Northwest Immigrant Rights Project (NWIPR), and several TPS beneficiaries against officials at the DHS and USCIS. This lawsuit argues that the U.S. government acted unlawfully in depriving certain TPS holders with close family relationships or employment in the U.S. from becoming lawful permanent residents. Specifically, the lawsuit attests that USCIS is acting unlawfully by denying the adjustment applications of TPS holders who have been effectively “inspected and admitted” (*Moreno v. Nielsen*, 2018) and thus eligible for adjustment of status in accord with the INA .

On March 12, 2018 the American Civil Liberties Union (ACLU) filed a class action complaint against the DHS and its Acting Secretaries. The plaintiffs in this case are U.S. citizen children and their noncitizen parents who face termination of their TPS. The complaint asserts that the DHS acted unlawfully in “adopting a new, novel interpretation of the TPS statute that eschews consideration of any intervening country conditions” (*Ramos v. Nielsen*, 2018). This case also argues that this annulment of TPS violates the Fifth Amendment in its race- and national-based animus. Three days later, on March 15, 2018 the National Immigration Project of the National Lawyers Guild (NIPNGL) filed a class action suit alleging violations of law and the Constitution by Trump administration officials in “seeking to operationalize the President’s racial animus toward Haitians” (*Saget v. Trump*, 2018) and asserts that the termination of Haiti’s TPS status will endanger the lives of the nearly 60,000 recipients and their 27,000 U.S. citizen children.

Collectively, these four lawsuits articulate the critical legal concerns that accompany the annulment of TPS as discussed both in this chapter and Chapter 3. Thus not only is the Trump administration’s annulment of TPS entirely unprecedented, the very legality of these measures is in question. This reaffirms the analysis herein regarding danger of such production of

populations in need of protection. It also reveals the acute targeting of TPS populations -- particularly Haitians -- by the Trump administration that acts as an additional push factor motivating these populations to cross the border in the hopes of finding protection in Canada. These lawsuits are in their preliminary stages upon the conclusion of this project in April 2018.

Closing Thoughts: Industry Impact ‘Case Study’

TPS recipients’ involvement in the labor force is so significant that the construction industry has lobbied the U.S. government in the effort to protect and retain their TPS workers (Noguchi, 2017). An estimated 51,000 TPS recipients are employed in the construction industry, primarily concentrated in California, Texas, and Florida (Warren & Kerwin, 2017). These states are each in the midst of rebuilding efforts following devastating environmental disasters in the past year. The 2017 California wildfire season was the most destructive one on record (California Dept. of Forestry and Fire Protection, 2017) while, in Texas, Hurricane Harvey is tied with Hurricane Katrina as the costliest tropical cyclone on record (National Hurricane Center, 2018) and, in Florida, Hurricane Irma was the most intense hurricane to strike the continental U.S. since Hurricane Katrina. The combination of losses from Hurricane Harvey and Hurricane Irma are projected to make 2017 the most costly hurricane season for the U.S. on record (BBC, 2017a). While each storm cannot be directly attributed to climate change, the increasing incidence and intensity of such events is triggered by our warming climate (Stott et al., 2015).

With over 50,000 TPS recipients working in the construction industry in states that are struggling to rebuild in the wake of crippling environmental disasters, the prospect of losing this workforce puts an incredible strain on areas where labor shortages in construction are already especially acute (Noguchi, 2017). The business community, including the Chamber of Commerce and the National Association of Home Builders, among other groups, has come out in

opposition of the Trump administration's termination of TPS designations. Those lobbying emphasize the significant role TPS workers are playing in recovery efforts following hurricanes Harvey and Irma as well as the California wildfires. The policy director for the AIC reports that this level of industry support for a humanitarian immigration program is unprecedented.

Construction companies involved in the lobbying efforts argue that stripping TPS workers of their legal status and employment authorization will strain their preexisting labor shortages and thus impede U.S. rebuilding efforts (Noguchi, 2017). This is especially interesting as the increasing incidence and intensity of extreme weather events related to climate change comes full circle. The impact of such events that first necessitated the protection of these displaced populations now employs these same populations and necessitates their labor in the U.S..

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CHAPTER 5: Claiming Asylum Across the International Boundary

This chapter will explore and discuss the legal terms by which individuals may leave the U.S. and make an asylum claim on Canadian soil. This activity is governed by Canada's own body of national law as well as its obligations to uphold international standards of protection.

Specifically, the Canadian asylum system is governed by the constitutional Canadian Charter of Rights and Freedoms (the "Charter"), the *Immigration and Refugee Protection Act* (IRPA) (S.C. 2001, c. 27), and the Canada-U.S. Safe Third Country Agreement (the "Agreement" or STCA).

These documents incorporate the standards of protection contained within the Convention and its Protocol, and the Torture Convention. From these, Canada draws the definition of a Convention refugee and a 'person in need of protection.' This chapter will place a particular focus on the STCA and the legal controversy that surrounds it, specifically in regard to the deficiencies of the U.S. asylum system and refugee determination regime. These deficiencies act to deter and discourage asylum seeking on U.S. soil and thus act as a push factor in motivating this migration movement to Canada. Herein, it is the terms of the STCA that serve as the legal mechanism by which asylum seeking through irregular border crossing is codified and incentivized. While this chapter does not discuss TPS populations by name, the legal terms examined pertain specifically to this demographic because they are inherently crossing from U.S. to Canadian soil should they seek to claim asylum in Canada.

Introduction to the Claim

Under Canadian law, asylum claims are referred to as "claims for refugee protection" and asylum seekers are referred to as "refugee claimants." Individuals may make a claim for refugee protection on Canadian soil at an official port of entry, a Canada Border Services Agency (CBSA) office or an Immigration, Refugees and Citizenship Canada (IRCC) inland office. The

IRPA (S.C. 2001, c. 27) requires that every person seeking to enter Canada must appear for examination at a port of entry so that Canadian government officials can determine whether that person has a right to enter Canada, or may become authorized to enter and remain in Canada. However, per section 133 of the IRPA as described in Article 31 of the Convention, no enforcement actions are taken against persons who cross irregularly (illegally) into Canada without prior authorization or proper documentation *if they are seeking asylum* (IRCC, 2018a). These protections recognize that asylum seekers may need to enter a country without official documents or authorization in order to make their claim of refugee protection, per UNHCR standards (UNHCR Canada, 2018). This is the legal mechanism by which asylum seekers are functionally allowed to enter Canada through irregular border crossing.

Under the legislation of the bilateral STCA, persons seeking entry to Canada from the U.S. are *ineligible* to make a claim for refugee protection in Canada at official land border ports of entry. The STCA, however, *does not apply* to border crossing *in between* official ports of entry. Thus, the terms of the STCA incentivize irregular (illegal) border crossing from the U.S. into Canada for purposes of seeking asylum. Upon this irregular border crossing, individuals either turn themselves over to or are intercepted by the Royal Canadian Mounted Police (RCMP). The RCMP takes these persons into custody in order to bring them to a CBSA designated port of entry or inland office. They are then examined so that CBSA can determine whether that person may become authorized to remain in Canada and file their claim for refugee protection.

It is at this point that persons seeking refugee protection may make their claim at a CBSA designated port of entry or inland office and thus begin the application process from within Canada. CBSA or IRCC officials will determine if an individual's claim is eligible to referral to

the IRB. Grounds of ineligibility include, but are not limited to: entry through an official land border port of entry (per the STCA), criminal activity or human rights violations, rejection of a previous claim by the IRB, or an active removal order. If the immigration officer determines that the refugee claim is not eligible to be heard, the claimant may file for judicial review in the Canadian Federal Court or, in certain cases, file for a Pre-Removal Risk Assessment. If the claim is determined to be eligible to be heard, it will be referred to the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada (IRB) for a hearing. The IRB is an independent tribunal responsible, through its RPD, for deciding refugee protection claims in Canada (IRB, 2015).

While a refugee claimant waits for their case to be heard by the RPD -- a process that can take months to complete -- the claimant is permitted to remain in Canada with certain rights and access to refugee services. Here is where the asylum system of Canada differs perhaps most tangibly from that of the U.S. While asylum seekers in the U.S. are not authorized to work and are often subject to detention, those seeking asylum in Canada can obtain work permits and are usually allowed to move freely. Their children are allowed to attend school and they are provided temporary coverage of healthcare benefits while they await their hearing. Canada provides refugee claimants with access to rights and refugee services that, in the U.S., are reserved exclusively for resettled refugees, if offered at all. These rights and services are withheld from asylum seekers in the U.S. Such deficiencies of the U.S. asylum system will be discussed later in this chapter. It is important to keep such a juxtaposition between U.S. and Canadian asylum systems in mind when considering the pragmatic decision making on the part of potential asylum seekers in the U.S. evaluating whether to make their claim on U.S. or Canadian soil

The RPD's decision on a claim rests upon the definition of a Convention refugee (as defined in Chapter 3) or a 'person in need of protection' per the UDHR and the Torture Convention. The definition of a Convention refugee has been incorporated into Canadian law under section 96 of the IRPA (S.C. 2001, c. 27). A 'person in need of protection' is an individual within Canada who cannot return to their country of origin safely due to either danger of torture, risk to life, or risk of cruel and unusual treatment or punishment. This is incorporated under 97 of the IRPA (S.C. 2001, c. 27). To return such a person to these conditions would violate the principle of non-refoulement. This reflects Canada's obligations to uphold to the Convention and the Protocol as well as the Torture Convention as incorporated into national law (Canadian Civil Liberties Association [CCLA], 2018). As such, claims for refugee protection are governed in part by the international treaties to which Canada is party as well as Canada's own national body of law and refugee determination regime.

Canadian Refugee Determination Regime

While Canada has a proud history of welcoming refugees and those in need of protection, the Canadian refugee determination regime was fundamentally altered in 2012 under Bill C-31 *Protecting Canada's Immigration System Act* (PCISA) (S.C. 2012, c. 17). This bill amended the IRPA (S.C. 2001, c. 27), the *Balanced Refugee Reform Act* (S.C. 2010, c. 8), and the *Department of Citizenship and Immigration Act* (S.C. 1994, c. 31). This legislation imposes disproportionately harsh treatment on refugee claimants seeking asylum in Canada (Huot, Bobadilla, Bailiard & Rudman, 2015; Atak, Hudson & Nakache, 2018). This functions through measures including: expedited refugee claim hearings, reduced procedural guarantees and reviews, growing use of socioeconomic deterrents, and increased immigration detention. These policy changes reflect similar contemporary shifts in other Western countries, including the U.S.

(Huot et al., 2015). I concur with the argument made this year by Atak et al. (2018) that there is a correlation between these legislative measures in Canada and the increase in irregular migration to Canada.

Research on the implications of these new measures has revealed violations of refugee claimants' human rights under international standards of protection. It is argued that the government utilized language of security to rationalize these measures (Atak et al., 2018) through "problematizing asylum seekers as posing multiple threats to Canadian society" (Huot et al., 2015). Such language includes, but is not limited to, representation of asylum seekers as posing threats to the economy, the integrity of the refugee system, and national security. This language draws upon discursively constructed subjectivities including queue jumpers, uninvited guests, threats to public security, and drains on public resources (Grove & Zwi, 2006). These mechanisms position refugee claimants as 'the Other' -- particularly in opposition to refugees resettled from abroad. While Convention refugees are referred for resettlement through the UNHCR (a process that often takes several years to complete), refugee claimants present themselves directly to the government of the country in which they hope to receive protection. Whether or not refugee claimants may be equally deserving of protection often becomes lost in the discourses of securitization that surround their presence in a state.

This use of discursive mechanisms and the 'Othering' of refugee claimants in Canada -- particularly those who come through irregular border crossing -- within the legislation of the PCISA as produced by the Government of Canada "creates a constructed binary between 'Other' [refugee claimants] and 'legitimate' refugees who are resettled from abroad" (Huot et al. 2015). Such dominant discourse influences and constructs understanding of "problems" and their proposed "solutions" as written into policy (Bauder, 2008; Grove & Zwi, 2006). This

discursive dichotomization between “deserving” refugees and “undeserving” asylum seekers (Sales, 2006) follows similar trends in contemporary immigration and refugee policy in both Europe and the U.S.

The UNHCR (qtd in Ahmad, 2016) has noted that while Canada was “previously featured among the top-10 recipient countries a few years ago” the country has “registered significantly lower numbers of asylum seekers in recent years.” In analysis of these trends, the UNHCR asserts that this “can potentially be the result of reforms of law and asylum policies” (qtd in Ahmad, 2016) discussed in this section. Despite these dramatic changes to the Canadian refugee determination regime, this chapter will discuss the deficiencies of the inferior U.S. asylum system in consideration of whether or not Canada’s designation of the U.S. as a ‘safe third country’ violates refugee claimants’ rights under Canada’s obligations to uphold international law as well as Canada’s own Charter of Rights and Freedoms.

The Canada-U.S. Safe Third Country Agreement

The Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries (the “Agreement” or “STCA”)

Selected excerpts from the Introduction to the Final Text of the Agreement [emphasis added]:

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

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

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

AWARE that such sharing of responsibility must ensure in practice that persons in need of international protection are **identified** and that the possibility of indirect breaches of the fundamental principle of non-refoulement are avoided, and therefore determined to safeguard for each refugee status claimant eligible to pursue a refugee status claim who comes within their jurisdiction, **access to a full and fair refugee status determination procedure as a means to guarantee that the protections of the Convention, the Protocol, and the Torture Convention are effectively afforded** (IRCC [Final Text of the STCA], 2002).

I. Overview of the Agreement

Section 102 of the IRPA permits the designation of safe third countries for the purpose of sharing the responsibility for refugee claims. The criteria for the designation of a safe third country is outlined in subsection 102(2) of the IRPA. A safe third country is defined as “a country where an individual, passing through that country, could have made a claim for refugee protection” (IRCC, 2016b). As such, the premise of the Agreement is that each country recognizes the other as a safe country for refugees. This assertion has been contested and legally challenged by advocates for the protection of refugee rights for the past 13 years, since before the STCA came into force in December 2004 (Canadian Council for Refugees [CCR], 2018). To date, the U.S. is the only country that is designated by Canada to be a safe third country under Canada’s IRPA (S.C. 2001, c. 27).

As such the STCA applies only to refugee claimants who are seeking entry to Canada from the U.S.. The Agreement is in effect at official Canada-U.S. land border crossings and border crossings by train. The STCA is in effect at airports *only if* the person seeking refugee protection in Canada has been refused refugee status in the U.S. and is in transit through Canada after being deported from the U.S.. The Agreement does not apply to U.S. citizens or habitual

residents of the U.S. who are not citizens of any country (“stateless persons”). There are four narrow exceptions to the agreement that “consider the importance of family unity, the best interests of children and the public interest” (IRCC, 2016b). These exceptions allow for certain family member reunification, eligibility of unaccompanied minors, document holders, and public interest exceptions under specific conditions (IRCC, 2002). This project will not further delve into these exceptions because of their narrow delineations and limited impact on this particular migration event.

II. Application of the Agreement

Application of the STCA requires refugee claimants to request refugee protection in the first safe country in which they arrive and set foot (either the U.S. or Canada), unless they qualify for one of the four narrow exceptions to the Agreement. This means that an individual who first arrives in the U.S. must make their claim on U.S. soil and an individual who first arrives in Canada must make their claim on Canadian soil. As such, an individual is ineligible to make a refugee claim at the Canada-U.S. land border because that person has implicitly already touched either U.S. or Canadian soil. The Agreement states that the “receiving country” may return a refugee claimant to the “country of last presence” (either the U.S. or Canada) upon an ineligible claim of asylum at an official land border point of entry (IRCC, 2002). Thus, the STCA permits Canada to return to the U.S. asylum seekers who are attempting to enter Canada from the U.S. at an official land border port of entry, and vice versa, *without substantively reviewing the merits of the claim*.

However, because the STCA was designed to apply *only* at official land ports of entry, it does *not* apply to refugee claimants who cross *in between* ports of entry, i.e., those who cross unauthorized -- without prior approval or examination at designated ports of entry -- between the U.S. and Canada. This is the legal mechanism by which asylum seekers may leave the U.S. and

become eligible to make an asylum claim on Canadian soil. As such, application of the STCA incentivizes irregular (illegal) border crossings away from and in between official land ports of entry. These irregular entries enable otherwise ineligible asylum seekers to leave the U.S. and make a claim of asylum on Canadian soil.

III. Background on the Agreement

The STCA is a bilateral agreement between the Governments of Canada and the U.S.. Both countries signed the STCA on December 5, 2002 and the final agreement came into effect on December 29, 2004. The STCA is part of the U.S.-Canada Smart Border Action Plan and is intended to “to better manage the flow of refugee claimants at the shared land border” (Canada Border Services Agency [CBSA], 2009) as well as “help both governments better manage access to the refugee system in each country for people crossing the Canada-U.S. land border” (IRCC, 2016b). Canada advocated for such an agreement with the U.S. since the 1990s largely because, prior to the STCA, approximately one-third of Canada’s yearly refugee claimants passed through the U.S. before applying for asylum in Canada (Harvard Immigration and Refugee Clinical Program [HIRC] et al, 2006, p. 10). This is predominantly due to Canada’s geographic inaccessibility and “the simple fact that many asylum seekers who wish to claim protection in Canada must first travel through the United States” (Arbel, 2014, p. 248). As such, while the Agreement was designed as a “burden sharing” mechanism, the STCA functions to keep large numbers of asylum seekers *out* of Canada and *in* the U.S. (Arbel & Brenner, 2013, p. 7).

While Canada first proposed a safe third country treaty in the 1990s, an agreement was not produced until negotiations were resumed in the aftermath of the September 11 attacks on the U.S. These renewed discussions were “fueled in large part by a growing concern with national security” (Arbel, 2014, p. 246). The Smart Border Declaration and Action Plan was issued by the

two states within three months of the attacks. The Declaration and Action Plan was designed to enhance security along the U.S.-Canada border and, while the STCA does not explicitly address the overarching concern with national security, Audrey Macklin explains:

The subtext is security, and the unstated argument goes as follows: the integrity of asylum is weakened through its abuse by terrorists; the Canadian system is more lax and vulnerable to abuse than the U.S. system; public support for refugees on both sides of the border is eroding because admission of asylum seekers is perceived to (or does) constitute a menace to security; *ergo*, deflecting asylum seekers into the allegedly more vigilant U.S. system enhances security (Macklin, 2003, p. 17 qtd in Arbel, 2014, p. 247).

Arbel clarifies, “that none of the perpetrators of the 11 September 2001 attacks entered the United States as asylum seekers or through Canada proved immaterial. The need to fortify the border in the aftermath of the attacks ‘acquired the status of conventional wisdom’ (Macklin, 2003, p 17) that fed upon and was justified through broader societal anxieties about refugees as markers of risk” (Côte-Boucher, 2008, p. 151 qtd in Arbel, 2014, p 248). Yet, while the U.S. was motivated by concerns for national security, Canada instead sought to implement the STCA to “‘limit the significant irregular northbound movement of people from the United States who wished to access the Canadian refugee determination system’” according to a U.S. Customs and Border Protection (USCBP), CBSA, and RCMP report dated July 2010 (U.S. Customs and Border Protection [USCBP], CBSA, RCMP, 2010, p. 12 qtd in Arbel, 2014, p. 248). As such, Canada’s “primary goal in implementing the STCA was to deter asylum seekers from making refugee claims in Canada” (Arbel, 2014, p. 248). This explicitly identifies Canada’s objective to reduce the number of asylum seekers eligible to seek protection in Canada under the Canadian refugee determination regime through application of the STCA.

IV. Review of the Designation of the U.S. as a Safe Third Country

Canada’s IRPA requires the “continual review” of all countries designated as safe third countries under subsection 102(3) in order to ensure that “the conditions that led to the designation

continue to be met” and subsection 102(2) of the IRPA outlines the criteria for designating a state as a safe third country (IRCC, 2016b). Specifically, the legislation requires that the review of a designated country is based on four factors:

1. whether it is party to the 1951 Refugee Convention and the 1984 Convention Against Torture;
2. its policies and practices with respect to claims under the 1951 Refugee Convention, and its obligations under the 1984 Convention Against Torture;
3. its human rights record; and
4. whether it is party to an agreement with the Government of Canada for the purpose of sharing responsibility with respect to claims for refugee protection (IRCC, 2016b).

Of the review process, the IRCC (2016b) attests that “reviews incorporate information obtained from a number of sources, including United Nations organizations, international human rights organizations, government agency reports, statistical records and policy announcements, relevant academic research, and media reports.” For the designation of the U.S., the Canadian Minister of Immigration, Refugees and Citizenship (“Minister of Immigration”) monitors, on a continual basis, the four factors described above. Should circumstances warrant, the Minister of Immigration will report to the Governor in Council if the conditions that led to the designation fail to be met (IRCC, 2016b). Upon the conclusion of this research in April 2018, the most recent commentary from the Minister of Immigration states that he maintains that the U.S. continues to meet the above criteria for the designation of a safe third country (IRCC, 2018b; Rose, 2017; Lindsay, 2017). Whether or not this will change over the coming months has yet to be seen.

However, despite these prescribed review measures, the Agreement is widely criticized because actual formal review of the STCA and designation of the U.S. is limited. While a clear need for continual oversight is identified, the STCA does not actually require regular ongoing reviews; and, although the STCA provides for UNHCR monitoring, “UNHCR’s review is narrowly focused on whether the STCA is being correctly applied, not on whether the STCA when correctly applied, endangers asylum seekers or promotes illegal border crossings” (HIRC,

2006, p. 8). In addition, it is difficult for NGOs to monitor the effects of the STCA simply because it is nearly impossible to communicate with asylum seekers who are returned to the U.S. and thus impossible to determine or evaluate what actually happens to the individuals who are barred from making their asylum claim in Canada (HIRC, 2006, p. 8). In 2007, the Justice Phelan decision found that it is unreasonable to conclude that the U.S. complies with its non-refoulement obligations under the Convention as well as the Torture Convention and, as such, the application of the STCA violates refugees' Charter rights to life, liberty and security of the person (section 7) and to non-discrimination (section 15). The Court also found that "the federal Cabinet failed to comply with its obligation under the law to ensure continuing review of the status of the U.S. as a safe third country" (CCR, 2018).

Nevertheless, upon the conclusion of this project, the Government of Canada states that "the United States continues to meet the requirements for designation as a safe third country" (IRCC, 2018b). According to the IRCC (2018b), the U.S. continues to meet the four factors listed above upon review of the following conditions:

Factor 1: Whether the United States is party to the 1951 Refugee Convention and the 1984 Convention Against Torture

- The United States is signatory of two international treaties that provide protection to people fearing persecution or at risk of torture in their countries of origin: the 1951 Refugee Convention and its 1967 Protocol, and the 1984 Convention Against Torture.

Factor 2: Policies and practices with respect to claims under the 1951 Refugee Convention and obligations under the 1984 Convention Against Torture

- I. There exists in the United States an extensive administrative system, subject to judicial checks and balances, for assessing refugee protection applications. The refugee status determination system offers a high degree of protection to refugee protection claimants.

Factor 3: Human rights record of the United States

- The United States meets a high standard with respect to the protection of human rights. It is an open democracy with independent courts, separation of powers and constitutional guarantees of essential human rights and fundamental freedoms.

Factor 4: Whether the United States is party to an agreement with Canada for the purpose of sharing responsibility with respect to claims for refugee protection

- The Safe Third Country Agreement between Canada and the United States was signed on December 5, 2002, came into force on December 29, 2004, and remains in force.

V. Contesting of the Designation of the U.S. as a Safe Third Country

Despite these assurances on the part of the Canadian Government, advocates for the protection of refugee rights on both sides of the border have contested the designation of the U.S. as a safe third country since before the Agreement took effect over 13 years ago. These critiques and legal challenges continue to this day and have substantially intensified since the inauguration of President Trump and the transition to the Trump administration (AI Canada & CRC, 2017; HIRC, 2017). In light of these numerous reports and critiques, there is significant and compelling documentary evidence that the continual review of the designation of the U.S. as a safe third country by the Government of Canada has failed in adequately reviewing the four factors listed under subsections 102(2) and (3) of the IRPA.

Before the implementation of the Agreement, nearly 100 non-governmental organizations from both the U.S. and Canada submitted an open letter to U.S. and Canadian government officials opposing the signing of the STCA. In 2002, this letter foresaw the incentivization and resulting increase in irregular border crossing in the effort to seek asylum (CCR et al., 2002) that we now witness today. The CCR, AI Canada, and Canadian Council of Churches (CCC) contested the designation of the U.S. as a safe third country in 2005 before the Federal Court of Canada soon after the Agreement came into force (*Canadian Council for Refugees v. Canada* [CCR v. Canada], 2007). The CCR also presented submissions to the Government of Canada and parliamentary committees in 2006 and 2007 outlining the deficiencies of the U.S. asylum system and issues in considering the U.S. a “safe country” for asylum seekers (AI Canada & CRC, 2017, p. 6).

The most recent comprehensive reports contesting the designation of the U.S. as a safe third come from AI Canada and the CRC as well as the HIRC. Following the inaugural months of the Trump administration, AI Canada and CRC submitted a 52-page brief to the Government of Canada in May 2017 and HIRC released a report in conjunction with a letter to Prime Minister Trudeau and the Minister of Immigration in February 2017. Both reports address the systemic failings of the U.S. asylum system and refugee determination regime as well as the exacerbation of these deficiencies under the Trump administration. Due to the lack of governmental action in response to the AI Canada/CRC brief, these two organizations again came together with the CCC and an anonymous asylum seeker to challenge the legal legitimacy of the U.S. designation before the Federal Court of Canada in July 2017. These court proceedings are currently underway as this project concludes in April 2018.

VI. Deficiencies of the U.S. Asylum System

There is extensive scholarly critique of the U.S. asylum system (particularly related to criminalization and detention) and, while this paper will discuss the deficiencies herein, a comprehensive discussion is outside the scope of this project. Primarily, reports identify how the U.S. asylum system deviates from international protection standards in relation to: detention of asylum seekers; expedited removal; withholding of removal; risk of refoulement; and statutory bars to asylum (HIRC, 2006, p. 11-15; Arbel & Brenner, 2013, p. 67-86). Because of clear deficiencies in the U.S. asylum system, Canada jeopardizes asylum seekers' ability to obtain their fundamental legal protections by returning them to the U.S. per the STCA protocol (Arbel & Brenner, 2013, p. 8). This is because the STCA operates so that Canada obligates a refugee who first sets foot on U.S. soil must make their asylum claim under U.S. law and the U.S. refugee status determination system -- a determination regime that fails to adequately meet

international standards of protection as well as Canada's own legal obligations to refugee protection.

These and other critiques of the U.S. asylum system attest that several key aspects of U.S. asylum law and policy fall below international standards and fail to ensure adequate protection. Prior to the implementation of the STCA, "deserving asylum seekers denied asylum or barred from asylum in the United States successfully obtained protection in Canada" (Arbel & Brenner, 2013, p. 9) and as such, application of the STCA largely closes this important safety valve and functionally bars genuine refugee claimants from obtaining their fundamental legal protections.

In the Federal Court of Canada in 2007, Justice Phelan's findings noted the following deficiencies in the U.S. asylum system as it pertains to Canada's designation of the U.S. as a safe third country:

. . . there are a series of issues, which individually, and more importantly, collectively, undermine the reasonableness of the GIC's conclusion of U.S. compliance [with international conventions]. These include: the rigid application of the one-year bar to refugee claims; the provisions governing security issues and terrorism based on a lower standard, resulting in a broader sweep of those caught up as alleged security threats/terrorists; and the absence of the defence of duress and coercion. Lastly, there are the vagaries of U.S. law which put women, particularly those subject to domestic violence, at real risk of return to their home country (*CCR v. Canada*, 2007).

Because the operational legitimacy of the STCA hinges on the assumption that the U.S. and Canada are equally 'safe' countries for refugees (Arbel, 2014, p. 47), these deficiencies undermine the legal legitimacy of the STCA and thus open constitutional challenges to the STCA in the Federal Court of Canada.

VII. Constitutional Challenges to the Agreement in the Federal Court of Canada

The argument that the U.S. should not be designated as a safe third country because of the deficiencies of the U.S. asylum system is central to legal challenges and criticisms of the STCA.

The first challenge to the constitutional legitimacy of the STCA was a judicial review brought before the Federal Court of Canada soon after the STCA went into force in 2004. A coalition comprising the CCR, AI Canada, the CCC, and a plaintiff identified as John Doe (a Colombian asylum seeker in the U.S.) challenged the validity of the Agreement in seeking “a declaration that the designation of the United States as a ‘safe third country’ and the resulting ineligibility triggered by the STCA were invalid and unlawful” (Arbel, 2014, p. 243). Specifically, the applicants sought a declaration that the Agreement was a breach of the Canadian Charter for Rights and Freedoms (the “Charter”) and international human rights and refugee law, including the Convention and the Protocol.

Justice Phelan found the STCA unconstitutional in the Federal Court of Canada in November 2007 and, as such, declared the STCA to have no force and effect (*CCR v. Canada*, 2007 [338]). Justice Phelan ruled that “the United States human rights and refugee protection record at that time did not meet the requirements of Canadian law and overturned the designation on administrative and Charter grounds” (AI Canada & CRC, 2017, p. 8). Justice Phelan listed a series of issues that “individually and collectively undermined the claim that the United States complied with its *non-refoulement* obligations as outlined in Article 33” of the Convention (*CCR v. Canada*, 2007 [239-240]) and he concluded that the U.S.’ “non-compliance with Article 33 are sufficiently serious and fundamental to its refugee protection that it was unreasonable for the [Governor-in-Council] to conclude that the U.S. is a ‘safe country’” (*CCR v. Canada*, 2007 [240]). In assessing the STCA’s constitutionality, Justice Phelan also emphasized the treatment of gender-related asylum claims under the U.S. regime and found that, in part, the STCA could not be determined constitutional because “[w]omen and certain nationals are affected more

harshly than other refugee claimants covered by the STCA” (*CCR v. Canada*, 2007 [323]) in facing return to the inadequate protection standards of the U.S..

Justice Phelan’s decision was overturned by the Federal Court of Appeal in June 2008. The Court of Appeal decision restored the STCA’s validity (*Canada v. Canadian Council for Refugees et al.* [*Canada v CCR*], 2008) through focusing “largely on the discretionary authority of Canada’s Governor-in-Council, and overturned Justice Phelan’s findings on these grounds” (Arbel, 2014, p. 244). That is to say, the Phelan decision was overturned on technicality rather than review of whether or not the U.S. meets the criteria for designation as a safe third country. Upon restoring the validity of the STCA, the Court decision did not, in fact, find that the U.S. is a safe country for refugees (CCR, 2018). The Supreme Court of Canada denied leave to appeal and as such the STCA remains in operation (*CCR et al. v Canada*, 2009 qtd in Arbel, 2014, p. 245).

The same three organizations announced on July 5, 2017 the launch of a new legal challenge to the designation of the U.S. as a safe third country for refugees. CCR, AI Canada, and CCC joined an individual litigant who is asking the Canadian Federal Court to strike down the STCA and allow her to make a refugee claim in Canada. The litigant is a Salvadoran woman whose gang-related persecution would not likely be recognized in the U.S. and, as such, has little chance of protection if she were forced to make a claim of asylum in the U.S., rather than Canada (AI Canada, 2017). In December 2017, CCR, AI Canada, and CCC affirmed that they believe that Canada’s designation of the U.S. as a safe third country violates refugee rights under international law and the Canadian Charter of Rights and Freedoms. This argument is based upon the following findings (AI Canada & CCR, 2017, p. 1-2):

1. The U.S. does not fully comply with its refugee obligations and therefore is not safe for all refugees:

- a. The one-year bar to asylum (most individuals cannot make a claim if in the U.S. for more than one year);
 - b. Expedited removal (allows for removal from the U.S. without due process);
 - c. Detainment of Asylum Seekers (arbitrary, with limited or no access to legal counsel);
 - d. Operation Streamline (“zero-tolerance” fast-track prosecution and criminalization of unauthorized border crossing);
 - e. Prosecution of asylum seekers (contrary to international law, asylum seekers face prosecution for illegal entry);
 - f. Push-backs at the southern border (illegal refusal of entry to asylum seekers at ports of entry);
 - g. Inconsistent recognition of gender-based asylum claims in the U.S.;
 - h. Inconsistent adjudication of claims and “asylum-free zones” (rates of acceptance of similar claims vary drastically between different regions in the U.S.).
2. The U.S. is becoming even less safe for asylum seekers under the Trump administration.
 3. The Federal Court of Canada already ruled that the U.S. is not safe for refugees and the STCA violates refugees’ rights.

On December 11, 2017 the Federal Court granted CRC, AI Canada, and CCC standing as public interest litigants (CCR, 2018). The case is still in the preliminary stages upon the conclusion of this project in April 2018.

VIII. Documentary Findings on the Deficiencies of the U.S. Asylum System

Extensive research has been done on the deficiencies of the U.S. asylum system. My analysis draws from the documentary findings of the following four key sources:

1. *Bordering on Failure: The U.S.-Canada Safe Third Country Agreement Fifteen Months After Implementation* (HIRC, 2006)
2. *Bordering on Failure: Canada-U.S. Border Policy and the Politics of Refugee Exclusion* (Arbel & Brenner, 2013)
3. *The Impact of President Trump’s Executive Orders on Asylum Seekers* (HIRC, 2017)
4. *Contesting the Designation of the U.S. as a Safe Third Country* (AI Canada & CRC, 2017)

A Harvard report released in 2006, titled *Bordering on Failure: The U.S.-Canada Safe Third Country Agreement Fifteen Months After Implementation*, concluded that at that time, the STCA

“not only fails to accomplish its stated goal of securing the border, but indeed makes the border less secure, endangering the lives of refugee claimants and threatening the security of the United States and Canada” (HIRC, 2006, p. 2). The report questions the claims of both the U.S. and Canadian governments to offer “generous systems of refugee protection” and argues that “several aspects of the U.S. asylum system violate international legal standards” as well as that “the STCA is jeopardizing the ability of refugee claimants to receive fundamental protections” (HIRC, 2006, p. 2). The report raises key issues with the U.S. asylum system and refugee determination regime that continue to this day, for example: “asylum applicants in the United States cannot receive employment authorization, benefits, or government-sponsored legal representation while awaiting determination of their claim. Further, individuals are wary of entering what is too often a dysfunctional and arbitrary U.S. asylum system” (HIRC, 2006, p. 3).

The fact-finding investigation reached the following four major conclusions (HIRC, 2006, p. 2-4):

1. The STCA endangers refugee applicants by denying them access to fundamental protections.

“Statistics collected from NGOs along the United States-Canada border demonstrate that the STCA has caused a significant decline in the number of refugee claimants legally crossing from the United States to Canada, disproportionately affecting the Columbian refugee community. Although the U.S. and Canadian governments both claim to offer generous systems of refugee protection, several aspects of the U.S. asylum system violate international legal standards” (HIRC, 2006, p. 2).

2. The STCA makes the border more hazardous for refugee claimants by threatening the existence of NGOs along the U.S.-Canada border.

“Prior to STCA implementation, NGOs along the border worked jointly with immigration officers to move applicants through the inspection and application process. As the number of refugee claimants being processed and sheltered by the NGOs has decreased since the STCA went into effect ... if NGOs close their doors, the border will become increasingly dangerous for refugees who will have fewer and fewer places to turn for information, food, and shelter” (HIRC, 2006, p. 3).

3. The STCA encourages individuals who would normally have entered Canada's refugee determination system to [instead] illegally cross the border or remain without status in the United States.

“Refugee claimants who are stranded in the United States frequently are statutorily barred from applying for asylum ... For those who seek legal refugee protections, often the only option is to enter Canada and file an asylum claim there” (HIRC, 2006, p. 3).

4. The STCA contributes to a rapidly deteriorating refugee protection regime in North America.

While citing that Canada served for decades as a “model whose example raised the standards of refugee protection worldwide” the report argues that Canada's adoption of the STCA contributes to the deterioration of refugee protection in North America, asserting that “other, earlier reports have described in detail that the United States is not a ‘safe country’ for many refugees” which thus challenges the underlying legitimacy and supposed rationale of the STCA (HIRC, 2006, p. 3-4).

Seven years after the first *Bordering on Failure* report, the HIRC released *Bordering on Failure: Canada-U.S. Border Policy and the Politics of Refugee Exclusion* in November 2013. This report examines the STCA and border measures implemented under the rubric of the Multiple Borders Strategy (MBS) and analyzes their effects on asylum seekers. The report concludes that, through the STCA and MBS, “Canada is systematically closing its borders to asylum seekers, and circumventing its refugee protection obligations under domestic and international law” (Arbel & Brenner, 2013, p. 1). In arguing that these measures “deter, deflect, and block asylum seekers from lawfully making refugee claims in Canada in arbitrary and unprincipled ways”, the report finds that:

1. Canada is systematically closing its borders to asylum seekers and avoiding its refugee protection obligations under domestic and international law;
2. Through the STCA, Canada jeopardizes asylum seekers' ability to obtain fundamental legal protections by returning them to the U.S. despite clear deficiencies in the U.S. asylum system;
3. The STCA has prompted a rise in human smuggling across the Canada-U.S. border, making the border more dangerous and disorderly, and raising concerns for Canada and the U.S. (Arbel & Brenner, 2013, p. 1-14).

IX. The U.S. Asylum System Under the Trump Administration

There are two primary documents released in response to the further erosion of the U.S. asylum system under the Trump administration. The first, released in February 2017 by HIRC, addresses the effect of the President Trump's Executive Orders on people seeking asylum protection in the U.S. and, in view of these findings, argues that Canada reconsider application of the STCA. The HIRC report urges Canada to halt enforcement of the STCA on the grounds that it must do so to live up to its legal obligations to refugee protection. In conjunction with the report, the Director of HIRC and her colleagues sent a letter to Prime Minister Trudeau and the Minister of Immigration urging this immediate action (HIRC, 2017). The second document, released in May 2017 by AI Canada and CCR, is a 52-page brief presented to the Minister of Immigration and the Minister of Public Safety. This brief calls on the Government of Canada to rescind its designation of the U.S. as a safe country under the STCA. AI Canada and CCR draw upon both evidence of the systemic failings of the U.S. asylum system as well as the actions taken by President Trump that will further exacerbate these deficiencies (AI Canada & CRC, 2017).

1. *The Impact of President Trump's Executive Orders on Asylum Seekers (HIRC, 2017)*

This report specifically addresses the impact of President Trump's Executive Orders on asylum seekers. The report analyzes the effects of the three Executive Orders issued by President Trump during his first week in office. The first two orders, "Enhancing Public Safety in the Interior of the United States" (hereinafter "Interior Enforcement Order") and "Border Security and Immigration Enforcement Improvements" (hereinafter "Border Enforcement Order"), were signed on January 25. The third order, "Protecting the Nation from Foreign Terrorist Entry into the United States" (hereinafter "Seven Country Ban"), was signed on January 27.

The report lists the following deficiencies of the U.S. asylum system in conjunction with the policies of the Trump administration that will most detrimentally impact asylum seekers (HIRC, 2017, p. 1-12):

- Large-scale detention of asylum seekers
- Parole
- Discrimination against asylum seekers on the basis of religion and/or national origin
- Expedited deportation of asylum seekers, possibly without a right of appeal
- Sending asylum seekers entering the U.S. through Mexico back to their countries of origin: *Refoulement*
- Denial of family reunification
- Delays in adjudication
- Unfounded increase in the criminal prosecution of asylum seekers
- Gender-based asylum cases

In view of the report's findings, HIRC attests that “the United States is not a safe country of asylum’ for those fleeing persecution and violence” (HIRC, 2017, p.1).

2. Contesting the Designation of the U.S. as a Safe Third Country (AI Canada & CRC, 2017)

The brief calls on the Government of Canada to “rescind its designation of the U.S. as a ‘safe country’ in light of the ample documentary evidence on systemic failings of the asylum system and widespread human rights abuses against asylum seekers” (AI Canada & CRC, 2017, p. 3) including exposure to the risk of refoulement (p. 51). While the findings note that “the U.S. asylum system has long suffered from significant failings” the brief argues that “these deficiencies have been exacerbated under the Trump administration” and goes on to list actions taken by President Trump to implement a number of policies that are “likely to significantly erode already deficient protections for asylum seekers” (AI Canada & CRC, 2017, p. 3). In particular, the brief lists the following deficiencies of the U.S. asylum system as evidence of the U.S.’ failure to fulfill their obligations under the Convention, the Torture Convention, and international standards of human rights protection (AI Canada & CRC, 2017, p. 3-5):

- The One-Year Bar to Asylum
- Expedited Removal
- Detainment of Asylum Seekers
- Operation Streamline and the Prosecution of Asylum Seekers
- Turning back Asylum-Seekers at the Southern Border and Extraterritorial Processing of Applications
- Inconsistent Recognition of Gender-Based Asylum Claims
- Inconsistent Adjudication of Claims and “Asylum-Free Zones”

This report documents the failings of the required continual review under subsections 102(2) and (3) of the IRPA in adequately reviewing the human rights record of the U.S. as well as the “policies and practices with respect to claims under the Refugee Convention and with respect to obligations under the Convention Against Torture” and attests that “the continued application of the [STCA] poses a significant threat to refugees in North America” due to the failings of the U.S. asylum system and refugee determination regime as exacerbated under the Trump administration (AI Canada & CRC, 2017, p. 3). The Government of Canada did not rescind its designation of the U.S. as a safe third country as called upon thus leading AI Canada, CRC, and CCC to launch the new legal challenge of the STCA in the Federal Court of Canada in July 2017.

X. Closing Thoughts: Status of the Agreement

Upon the conclusion of this project in April 2017, the Minister of Immigration continues to maintain that “[there is] absolutely no need to tinker with [the] Safe Third Country Agreement” as well as that “analysis continuously shows that the domestic U.S. asylum system is the way it was prior to the incoming administration” (Rose, 2017; Lindsay, 2017) despite the substantial documentary evidence that discredits this claim as discussed in this chapter. In consideration of this extensive professional research and analysis, I concur with the argument made by the HIRC, AI Canada and CCR. The preexisting deficiencies of the U.S. asylum system have, in fact, been empirically exacerbated under the policy and practice of the Trump administration. This

particularly affects former TPS populations under the Executive Orders issued by President Trump in January 2017, as discussed in Chapter 3. At large, these conditions act as a critical push factor motivating desperate asylum seekers out of the U.S. and into Canada. In addition, the ongoing application of the STCA coupled with the transformation of the Canadian refugee status determination system under the PCISA continue to incentivize and increase trends in irregular border crossing.

The most recent case posing a constitutional challenge to the STCA in the Federal Court of Canada is still in the preliminary stages upon the conclusion of this project. Some analysts suggest that, despite several calls for Canada to suspend its designation of the U.S. as a safe third country, the Government of Canada will not act take action on the STCA at this time due to fear of compromising their bargaining position with the U.S. during the ongoing renegotiation of NAFTA (CCIRC & Singer, 2017a). There is potential for future research on the legal standing of the STCA, its role in the ongoing irregular migration of asylum seekers across the International Boundary, and the deficiencies of the U.S. asylum system under the Trump administration. I hope to return to this study in the future.

Organizations calling for a suspension of the Canada-U.S. Safe Third Country Agreement

(CCR, 2018; Ontario Council of Agencies Serving Immigrants, 2018):

1. Amnesty International (AI)
2. Amnesty International Canada (AI Canada)
3. British Columbia Civil Liberties Association (BCCLA)
4. Canadian Association of Refugee Lawyers (CARL)
5. Canadian Civil Liberties Association (CCLA)
6. Canadian Council for Refugees (CCR)
7. Canadian Council of Churches (CCC)
8. Canadian Paediatric Society (CPS)
9. Canadian Union of Public Employees (CUPE)
10. The Canadian Bar Association (CBA)
11. Harvard Immigration and Refugee Clinic (HIRC)

12. Ontario Council of Agencies Serving Immigrants (OCASI) in partnership with 231 member agencies
13. 100+ U.S. and Canadian non-governmental organizations in a open letter to U.S. and Canadian government officials (2002)
14. 200+ Canadian Law professors in open letters to the Minister of Immigration, Refugees and Citizenship and Prime Minister Trudeau (2017)
15. 845 Canadian Law students in a report presented to the Government of Canada (2017)

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CHAPTER 6: Findings and Discussion

I. QUANTITATIVE

This chapter will discuss quantitative findings on the acute increase in irregular border crossing and asylum seeking across the International Boundary between late 2016 and early 2018. This section has been updated with the most recent data available as of April 16, 2018. I evaluate this data with TPS populations in mind but such analysis is not authoritative and should be read with discretion as these statistics do *not* record or reflect asylum claimants in consideration of TPS status or lack thereof.

When I began this project in September 2017, the CBSA reported that they had processed 13,211 asylum seekers between January and August 2017. The majority of these asylum seekers voluntarily reported themselves to the RCMP. At this time, hundreds of asylum seekers were crossing the border each day; most through rural back roads in upstate New York en route to Montreal, Quebec (BBC, 2017b; IRCC, 2017b). By the end of the year, this number climbed to nearly 21,000 (IRCC, 2017 qtd in CCIRC & Singer, 2018b). Of these, 18,836 individuals were intercepted by the RCMP in Quebec. 96 percent of all RCMP interceptions were carried out in Lacolle, a municipality in southern Quebec near Roxham Road (Government of Canada [GC] & IRCC, 2018).

The RCMP continues to be stationed at Roxham Road full time in April 2018 (UNHCR Canada, 2018). These asylum seekers are defined as “irregular border crossers” (individuals who enter Canada between official ports of entry) by the Immigration and Refugee Board of Canada (IRB, 2018b) and referred to as “irregular claims” by UNHCR Canada (UNHCR Canada, 2018). This chapter will chronologically explore these trends in irregular border crossing and asylum seeking between late 2016 to present day.

Chronological Findings on Quantitative Data

Calendar Year 2016

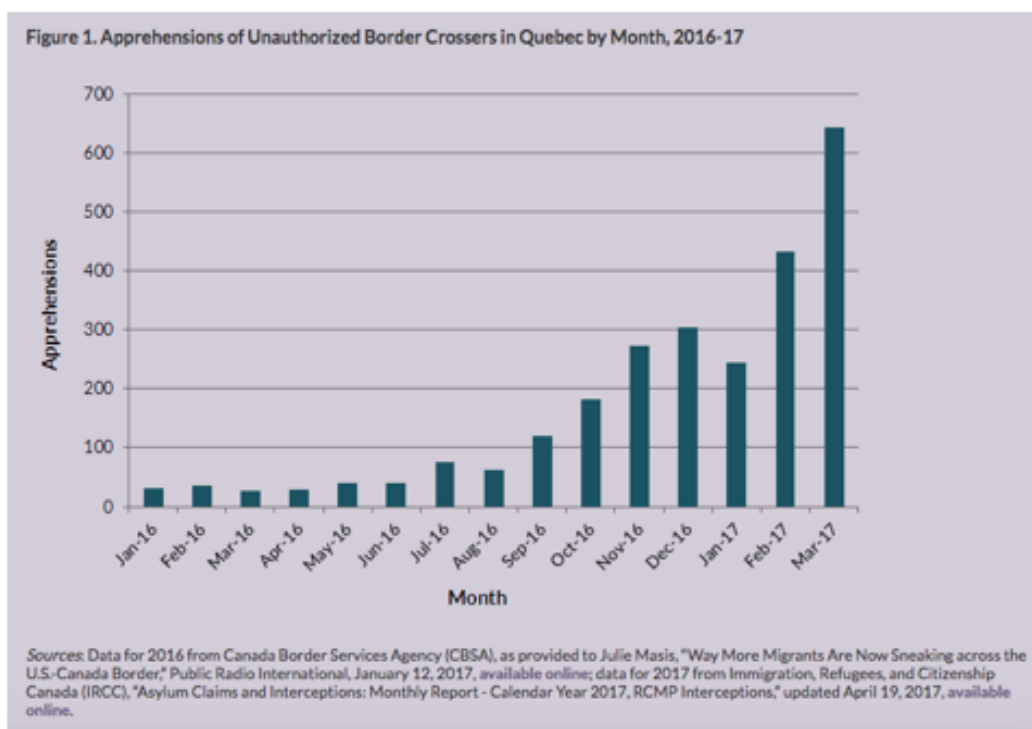
The IRB (2018b) notes that it is unable to report on asylum claims made through irregular border crossing until February 2017 when the implementation of system changes provided the capacity to capture data on this population. While only around 2,000 irregular border crossers were intercepted by the RCMP in all of 2016 (IRCC, 2017b), most reports and key informants refer to the start of this migration event in 2016. This may be partially due to the fact that the rumors surrounding the irregular border crossings of asylum seekers began to circulate in 2016. As displayed in Figure 1, there is a marked increase in the number of RCMP interceptions of irregular border crossers in Quebec between September to December 2016. While this data does not reflect how many of these individuals went on to file a claim for refugee protection, an analysis of these trends in irregular border crossing and the media that covered such activity indicate that it is likely the majority of these individuals migrated to Canada for the purposes of making a claim.

I first became aware of such rumors in November 2016 through my internship with the Vermont Refugee Resettlement Program. These rumors remained hearsay, however, through the increase between January to February 2017 and were not verified with statistical data until the IRB's system changes took effect in February 2017. Even so, the IRB notes that only partial data is available through March 2017 (IRB, 2018b) and as such these statistics should be read with discretion. The latter half of 2016 marks the peak of Donald Trump's presidential campaign and his election and therefore can be associated with increased anxiety in immigrant communities within the U.S.

January - February 2017

Data released by CBSA reveals that the RCMP intercepted 1,134 irregular border crossers in the first two months of 2017. This accounts for over half of all the interceptions in the full 2016 calendar year. Nearly 60 percent of these interceptions occurred in Quebec (IRCC, 2017b). This rapid increase may be linked to President Trump's inauguration, held on January 20, as well as President Trump's first set of Executive Orders (EOs) on immigration, released on January 25 and 27 (as discussed in Chapter 3).

Figure 1. Apprehensions of Unauthorized Border Crossers in Quebec by Month 2016-17

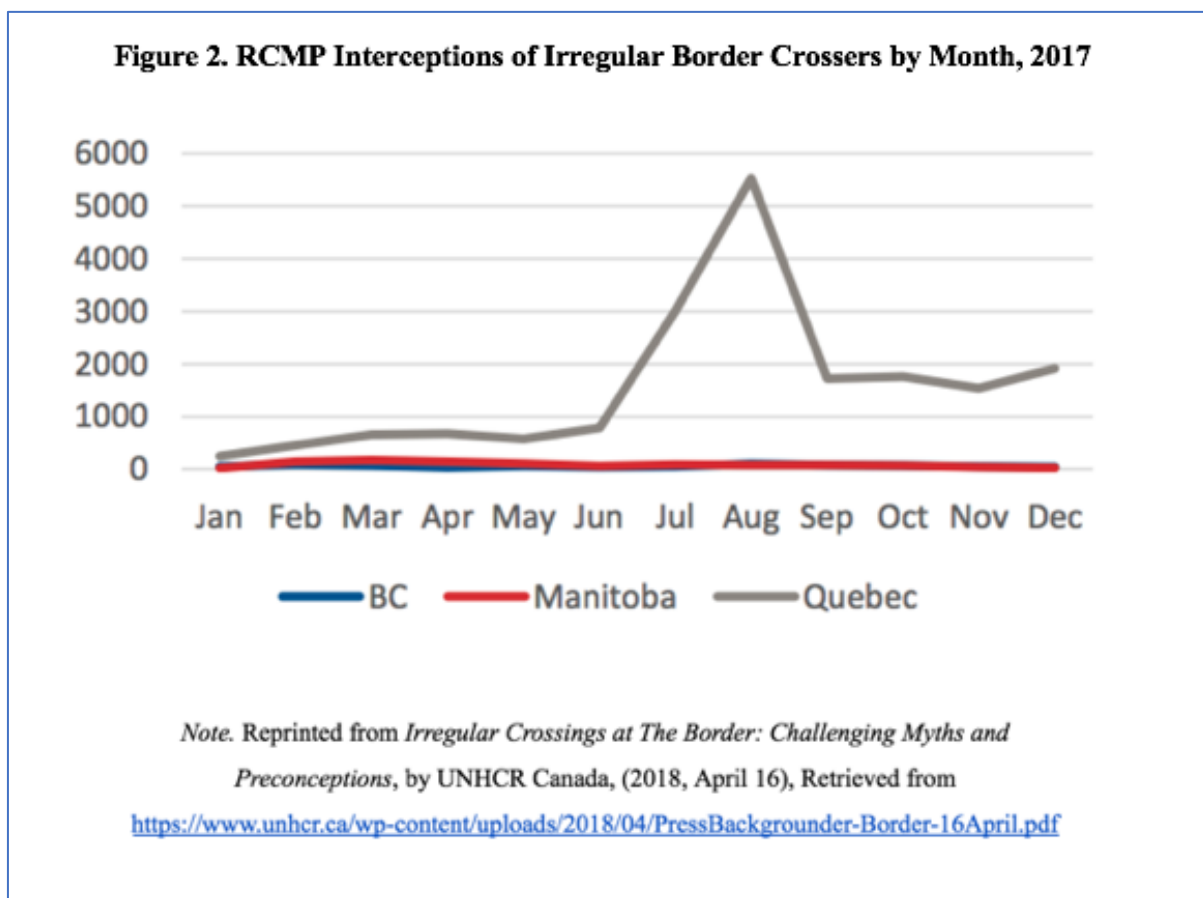


Note. Reprinted from *Uptick in Northern Border Crossings Places Canada-U.S. Safe Third Country Agreement under Pressure*, by Cowger, S. (2017, April 26). Retrieved from

<https://www.migrationpolicy.org/article/uptick-northern-border-crossings-places-canada-us-safe-third-country-agreement-under>

Summer 2017

The irregular border crossing of refugee claimants peaked between June to September 2017, illustrated in Figure 2. This may be partially due to the warm weather and the increased ease and safety of irregular crossing without snow, freezing temperatures, or winter storms. In the summer, numbers of irregular crossings peaked around 300 per day during July and August, with the vast majority crossing at Roxham Road near the Lacolle border in Quebec (CCIRC & Singer, 2017a). Between July and September, the RCMP intercepted approximately 11,000 irregular border crossers, including several thousand Haitians (Chishti et al., 2017). A number of temporary shelters were set up during this time, including the well-publicized use of Montreal's Olympic Stadium.



October - November 2017

In early October, the IRB was scheduled to hear 8,000 refugee claims against a growing backlog of 40,000. The IRB reported an annual processing capacity of 24,000 in 2017 and announced that these trends were expected to continue into 2018. At this time, the wait-time for a hearing was 16 months and officials noted that they expected this to increase over the coming months (CCIRC & Singer, 2017a; IRB, 2018b). Of the asylum claims from irregular border crossers, IRB officials reported that approximately 50 percent of the claims heard had been rejected (CCIRC & Singer, 2017a). These numbers were widely reported in both U.S. and Canadian news media (e.g., Levitz, 2017; Levin, 2017b). This likely served, in some capacity, to reduce interest in irregular border crossing.

In late October, however, Reuters reported that “asylum seekers who illegally crossed the U.S. border into Canada this year are obtaining refugee status at higher rates, new data shows, as authorities accept claims from people who say they feared being deported by U.S. President Donald Trump’s administration” citing newly released IRB figures (Paperny, 2017). Between March and September, 592 claims from irregular border crossers were finalized and 69 percent were accepted; this figure represents a higher acceptance rate than that of all refugee claims made in 2016 (IRB, 2017 qtd in Paperny, 2017; IRB, 2017 qtd in CCIRC & Singer, 2017b). This represents only a fraction, however, of the more than 15,000 asylum seekers had made an irregular crossing. Reuters conducted a series of interviews and many asylum seekers reported being in the U.S. legally but “said they might have stayed were it not for an immigration crackdown” (Paperny, 2017). This likely includes TPS populations.

By November 2017, the IRB (2018a) reported that 44 percent of all irregular claimants were of Haitian origin; and, at this same time, the CBSA reported that 742 Haitians were subject

to removal and listed for deportation (CBSA, 2017 qtd in Harris, 2017). While these two figures were widely reported together, in association, most news reports failed to note that none of the Haitians listed for deportation were, in fact, irregular border crossers seeking asylum. These Haitians set for removal would have been those who overstayed their TSR protection in Canada and either failed to apply or were rejected for permanent residence on Humanitarian and Compassionate (H&C) grounds.

Unless individuals failed to be found eligible by the CBSA for referral to the IRB (due to criminality, etc.), the vast majority would have had their claims pending by the IRB during this time due to the substantial backlog. As such, they would not be listed for deportation. They may be subject to removal should their claim be rejected, but most of the Haitians set for removal at this time would not have been irregular claimants coming from the U.S. While the evidence that Canada was deporting such a large number of Haitians may serve to represent that the Government of Canada considered the conditions of Haiti safe for return, it fails to account for the fact that asylum claims are evaluated entirely on a case-by-case basis and many Haitians fled the country due to political persecution throughout the same period as the ongoing environmental crises.

End of Year, 2017

By the end of the 2017 calendar year, 20,593 refugee protection claims made by irregular border crossers had been referred to the RPD. This represents 41 percent of *all* claims received by Canada, with a grand total of 50,380. This is a record peak compared to the past two decades, but near the figure of 44,640 in 2001 (UNHCR Canada, 2018). These statistics are represented in Figure 3.

Figure 3. Canada's 2017 Irregular Claims in Context



Note. Reprinted from *Irregular Crossings at The Border: Challenging Myths and Preconceptions*, by UNHCR Canada, (2018, April 16). Retrieved from <https://www.unhcr.ca/wp-content/uploads/2018/04/PressBackgrounder-Border-16April.pdf>

As discussed in Chapter 5, claims are **referred** to the IRB's Refugee Protection Division (RPD) if individuals are determined to be eligible by the CBSA (on grounds of criminality, etc.). The IRB notes that this process for irregular border crossers follows the same protocol as for any other refugee claimant, regardless of means of entry. The RPD hears all claims for refugee protection and makes the following determinations:

- **Finalized:**
 - **Accepted:** The RPD has determined that the claimant is either a Convention refugee or a person in need of protection;
 - **Rejected:** The RPD has determined that the claimant is not a Convention refugee or a person in need of protection;
 - **Abandoned:** The RPD has declared that the claim has been abandoned because, for example, the completed Basis of Claim Form was not provided on time, etc.;
 - **Withdrawn & Other:** "Withdrawn" describes cases in which the claimant does not continue with their claim;
 - **Total:** Total of all claims accepted, rejected, abandoned, withdrawn & other (claims finalized in the time period indicated may have been referred to the RPD in a previous time period);
- **Pending:** All claims that have not been finalized by the end of the identified time period;

- **Country of Alleged Persecution:** The first listed country of alleged persecution as entered into the IRB case management system by the officer from CBSA or IRCC when the claim was made and referred to the RPD (IRB, 2018b).

In January 2018, the IRB released the following trends in refugee protection claims made by irregular border crossers in 2017. Table 2 represents claims from the top ten countries of alleged persecution between February to December 2017. These claims represent approximately 80 percent of all irregular border crosser refugee claims referred to the IRB during this time (IRB, 2018a). In total, these statistics account for 18,149 claimants were determined to be eligible by CBSA and referred to the IRB for a hearing. Of these, the vast majority (15,597) were still pending as of December 31, 2017. These statistics have not been updated upon the conclusion of this project. Of the 2,552 claims finalized, 1,360 were accepted and 806 were rejected. In addition, 386 were either abandoned or withdrawn & other. This confirms the substantial backlog discussed earlier. By country of alleged persecution, those claiming prosecution in Haiti constitute by far the largest group with 6,869 individuals. It is impossible to determine how many of these individuals lived in the U.S. under TPS as this information has not been recorded.

Of those claims finalized, UNHCR Canada reported the statistics on the national acceptance rates by top 10 source countries. These trends indicate that the national acceptance rate of asylum claims is 63.12 percent while the national acceptance rate of *irregular* asylum claims is 10 percent lower, at 53.29 percent. These statistics are posted with the reminder that “refugee status must be determined on a case-by-case basis” (UNHCR Canada, 2018). These statistics are especially interesting in consideration of the claims made listing Haiti as the source country. While, as mentioned, data regarding the TPS status of refugee claimants has not been recorded, one can assume that irregular claims made by those listing Haiti as source country *may* have likely come from TPS populations. Similarly, one can infer that some of the claims listing

other TPS designated states – Syria, Yemen and Sudan – may represent TPS populations. In addition, some irregular claims listing the U.S. as the country of alleged persecution *may* have come from TPS populations residing in the U.S.

Table 2. Refugee Protection Claims made by Irregular Border Crossers, Top 10 Countries of Alleged Persecution, February to December 2017

	Referred	Finalized				Total	Pending (as of 2017/12/31)
		Accepted	Rejected	Abandoned	Withdrawn & Other		
Total ¹	18,149	1,360	806	207	179	2,552	15,597
Haiti	6,869	43	278	131	66	518	6,351
Nigeria	3,641	101	104	15	8	228	3,413
Turkey	751	252	5	6	9	272	479
Syria	611	151	7	3	7	168	443
Eritrea	583	167	4	2	1	174	409
Yemen	489	84	3	1	1	89	400
United States of America	408	0	31	13	6	50	358
Sudan	342	56	12	4	1	73	269
Djibouti	315	45	8	0	1	54	261
Pakistan	303	4	7	0	2	13	290

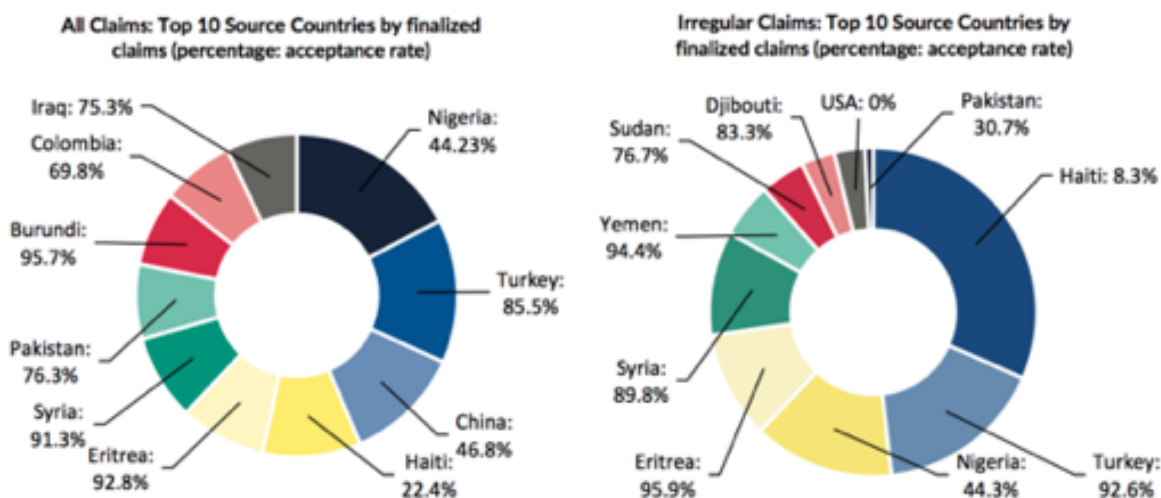
¹ Partial data for February and March 2017.

Note. Reprinted from *Refugee Protection Claims Made by Irregular Border Crossers, Top 10 Countries of Alleged Persecution*, by Canada's IRB, (2018, January 17), Retrieved from <http://www.irb-cisr.gc.ca/Eng/res/stat/Pages/irregular-border-crossers-countries.aspx>

In regard to all claims made listing Haiti, the acceptance rate was 22.4 percent. While approximately one third of irregular claims list Haiti as source country, only 8.3 percent of these claims were accepted. This can be read to signify that Haitian TPS populations seeking asylum through irregular border crossing might have a substantially lower acceptance rate than those who come more directly from Haiti through regular claims. This might be because those who come more recently from Haiti, rather than those who have resided in the U.S., have a more

direct link to political persecution and the evidence by which to prove this claim in court. It would be difficult for those who have resided in the U.S. for a number of years to prove ongoing political persecution in Haiti if they had not experienced such persecution in a number of years.

Figure 4. Trends in Finalized Asylum Claims by Top 10 Source Countries, 2017



Note. Reprinted from *Irregular Crossings at The Border: Challenging Myths and Preconceptions*, by UNHCR Canada, (2018, April 16), Retrieved from <https://www.unhcr.ca/wp-content/uploads/2018/04/PressBackgrounder-Border-16April.pdf>

January - March 2018

As this project comes to a close in April 2018, the IRCC has only reported on RCMP interceptions and claims of asylum processed by the CBSA in January and February 2018. A total of 3,082 asylum seekers were intercepted by the RCMP during this time with a nearly equal distribution between the two months. 95.5 percent of these interceptions occurred in Quebec. These figures are near those of January and February of 2017, but much lower than the peaks seen in July and August. The temperature in Quebec between January to February 2018 ranged

between an average low of -18°C and an average high of -5°C (AccuWeather, 2018) which likely deterred irregular border crossing. The CCIRC (2018c) reports that Canadian authorities are preparing for another potential surge this summer, with numbers peaking during in the warm weather as they did last year.

On April 9, 2018, the CCIRC (2018c) reported that this latest influx consisted of mostly Nigerian nationals without any legal status in the U.S. This suggests these populations represent “pass-throughs” rather than a group that resided in the U.S. for any length of time. This is reported to have caught Canadian officials off-guard as their information campaign has focused on TPS populations (specifically Central and South American communities) in the U.S. This displays the Government of Canada’s continued concern with the ongoing annulment of TPS as well as an increase in the patterns and phases of pass-throughs. There is need for additional research in this area.

...

II. QUALITATIVE

Semi-Structured Interview Series

These findings draw from a series of six semi-structured interviews from which I gathered qualitative data based upon six emergent themes. I have organized this data into three sections, one of which includes three related subsections and another that includes one subsection. These are as follows:

- I. The annulment of Temporary Protected Status in the U.S.
 - A. Production of undocumented populations in need of protection
 - B. Spread of misinformation within populations in the U.S.
 - C. Push factors motivating irregular border crossing
- II. Deficiencies of the U.S. asylum system and impact of the Trump administration
 - A. Return to the restrictive U.S. immigration laws of the 1920s and 1950s
 - B. Historic phases and patterns of “pass-throughs” in the U.S.
- III. Ongoing application of the Canada-U.S. Safe Third Country Agreement

In presenting these qualitative findings I have selected the data that enables me to respond to my primary research questions. This follows a parallel course to the evolved trajectory of my research. Throughout, these findings and quotes from key informants reference Haitians specifically.

I. The annulment of Temporary Protected Status in the U.S.

A. Production of undocumented populations in need of protection

The greatest concern expressed by key informants regarding the annulment of TPS is the way in which it spontaneously produces vulnerable undocumented populations upon the end-date of each program. In comparing the annulment of TPS to the efforts to repeal DACA (Deferred Action for Childhood Arrivals), a key informant identifies the similarities and differences between these two vulnerable immigrant populations in the U.S.

It's a bit like the 'Dreamers' and DACA. That was also a concern in that the government has their data. But here, this is very different in the sense that they have all their data but

now a legal protection has ended and that means you're clearly not here with legal protection. And so if you remain, then you are so-called illegal. That is very worrying. I could see this being used, they are cracking down on this (Researcher, personal communication, February 28, 2018).

There is a high degree of uncertainty regarding how this will manifest in the future. Pablo Bose, Ph.D., illustrates the paradox within:

This is the big question. Many people are saying that all you're going to do is swell the ranks of the undocumented. Because what we're really talking about when [the Trump administration decides] to end TPS or DACA is that people are just going to, en mass, "self-deport." That is something that people have talked about for ages but the reality is that people have built lives here. They have families. They have kids who might be American citizens. What do you do about that? Are people going to abandon their families? I find that highly unlikely, but it then sets up this situation where there's all sorts of people [subject to removal] – I mean are you going to set up a big police force to deport everyone? It's very, very unclear (Bose, personal communication, January 7, 2018).

Key informants warned that “there are rumblings that they simply want to close down TPS altogether, which would not be surprising” (Bose, personal communication, January 7, 2018). As discussed in Chapter 4, if the DHS decides to announce the termination of the designation of Nepal and Honduras, this would represent termination of 98 percent of TPS’ capacity for humanitarian protection. Based on analysis of the ongoing annulment of TPS within this research, it is highly probable that both countries’ TPS status will be terminated in the upcoming weeks.¹⁰

In regard to this production of undocumented populations in need of protection, a professional researcher working on issues related to the rights of refugees and asylum seekers explains the shortcomings of the refugee determination regime in accounting for forcibly displaced groups such as these. This applies most specifically to those affected by EID –

¹⁰ As noted, the DHS also announced the termination of TPS status for both Nepal and Honduras (DHS [Press Release], 2018a; DHS [Press Release], 2018b) immediately following the conclusion of this project.

Salvadorans, Hondurans, Haitians, Nepalis, and Nicaraguans in the U.S. under TPS – as discussed in Chapter 4.

In terms of international human rights treaties and standards, they are covered as a migrant but they are not covered as a refugee [...] And so what we have is a whole class of people who are fleeing for their lives but at this point the refugee definition doesn't cover them. There will have to be a new form of protection developed to help them or existing frameworks will have to bend to accommodate them (Researcher, personal communication, February 28, 2018).

In addition, this means that the principle of non-refoulement does not apply to these groups and, as such, they can be legally returned to unsafe conditions in their countries of origin. This is because the principle of non-refoulement also follows the basis of individual persecution. Thus vulnerable populations can be deported from either the U.S. or Canada and returned to conditions of gang violence, economic instability, and environmental catastrophe – as long as these conditions represent *generalized* risk rather than *personal* persecution. These conditions represent those of all TPS designations prematurely terminated under the Trump administration. This also means that many formerly protected by TPS may not meet the requirements for refugee protection in Canada. This is a particular issue in light of the misinformation spread within TPS communities in the U.S. regarding the “guarantee” of receiving asylum in Canada.

B. Spread of misinformation within populations in the U.S.

Key informants stressed that this spread of misinformation has particularly impacted Haitian communities. In reference to the phenomenon described above, Bose asserts that this creates a dangerous situation in which these populations may flee across the border in the hope of avoiding deportation from the U.S., but eventually be deported from Canada as their asylum claims are rejected. This has happened before, in phases and patterns consistent with the annual cycles of renewal for TPS (Bose, personal communication, January 7, 2018). This evidences

historical context to the intersection between TPS and the migration of asylum seekers fleeing to Canada through irregular border crossing.

[Of Haitians] looking at the border crossings, there have been issues in the past. At different times when TPS was about to come up for renewal, we had movements of people across the border. About five years ago we had warnings [from USCIS] that there were fraudulent claims being made in places like Miami where people were being encouraged to come up to Vermont and northern New York to cross the border there. [This misinformation] suggested that there was a sympathetic government in Canada, that there was a Haitian community in Montreal, these kinds of things (Bose, personal communication, January 7, 2018).

One of the big problems with the misinformation is that while TPS is up for termination in the U.S., in the case of Haitians, it was actually removed in 2014 by Canada and that is something that people didn't know, so the people who actually went up to Canada ended up being deported (Bose, personal communication, January 7, 2018).

As discussed in the public communications from the IRCC, the Government of Canada has signified concern with the extent of this misinformation and its implications in irregular border crossing. The Government of Canada has been proactive in attempting to combat this spread of misinformation. In conversation with a Canadian official this spring, he spoke of the communications and relations between the Government of Canada and the Haitian diaspora in the U.S.

For instance there's Haitian television stations in the Greater Boston area where [...] our senior officials did a public service program speaking about Canada and our immigration policies, our high level refugee policies and what the legal processes are [...] Canada is reaching out to various communities and different organizations within those communities to provide proper information to try to dissuade people from getting caught up in misinformation (Canadian official, personal communication, February 28, 2018).

While the dissemination of valid information regarding the immigration policies of Canada is, of course, a self-evident benefit to anyone hoping to immigrate, such a proactive stance also reveals

the Government of Canada's trepidation regarding the influx of asylum seekers entering through irregular border crossing.

... as the U.S. goes through and cancels TPS, after TPS, after TPS, you see a very clear sense of anxiety that Canada doesn't want 200,000 Salvadorans. They don't want people continually streaming across the border. So there's been a quiet but very consistent pushback. I think that Canadian politicians sort of ... they aren't trying to dissuade, but they aren't welcoming people with the same kind of open arms (Bose, personal communication, January 7, 2018).

C. Push factors motivating irregular border crossing

There is a heightened degree of anxiety regarding the potential deportation of these populations because of the fact that they are individually registered with the U.S. government in order to receive protection under TPS. As such, all of their personal data and information was passed to the Trump administration. This puts former-TPS beneficiaries at significant risk of deportation because of the ease by which the DHS can track and monitor these populations.

Based on this administration's intent to so-call 'secure the borders,' and knowing that these populations are at the end of their status and they know where they live – they are documented through TPS – I would be very concerned if I were them. Because they will be easy to identify (Researcher, personal communication, February 28, 2018).

Key informants stressed that these populations are under significant fear of detention and deportation under the anti-immigrant and anti-refugee policy and practice of the Trump administration. This fear is a tangible push factor motivating these asylum seeking populations to cross the border into Canada.

I think there's a direct correlation – and I think causation – that people who are here who are undocumented, or have some form of relief – like TPS – or are in the asylum system, they are fearful that they will be rounded up and deported without due process. [This is why] they are going to Canada. I don't think that they think in terms of due process, but that they will be targeted because of how they look and they will be detained and deported (Researcher, personal communication, February 28, 2018).

While rates of deportation were high under the Obama administration, the priorities of enforcement policy were very different than those of the current administration. Obama-era policies focused on the deportation of criminals convicted of what the DHS defines as “serious crimes” and the deportation of unauthorized border crossers who had recently entered the U.S. (Chishti et al., 2017). Current policy under the Trump administration instead prioritizes the arrest and deportation of undocumented immigrants in the interior of the U.S. President Trump’s Executive Order 13768 (“Interior Enforcement Order”) targets “all removable aliens” in the interior and asserts that many noncitizens who illegally enter the U.S., overstay, or otherwise violate the terms of their entry present a “significant threat” to national security and public safety (Interior Enforcement Order qtd in Pierce & Capps, 2017). A key informant translates how this change in policy produces the fear described above.

The Obama administration did prioritize enforcement of the laws and this administration, first of all, this is very clear – the Executive Orders said that as well as press releases, policy memoranda – ‘everybody is subject to deportation’ even if you have not been convicted of something. So there is no priority and what they want are numbers. Numbers sound good, they feed the political base. There’s also the immigrant detention complex. You need to keep the beds and there’s a lot of money there. So I would like to think, but I cannot think, that there would be any compassion or discretion here. And that scares me (Researcher, personal communication, February 28, 2018).

Key informants also identified the racialization of immigrant populations within this policy. This puts TPS populations in the crosshairs of President Trump’s deportation targets.

An analysis of these trends “suggest[s] that there are often arrests and deportations on the interior that are based on some form of racial profiling” (Researcher, personal communication, February 28, 2018).

II. Deficiencies of the U.S. asylum system and impact of the Trump administration

A. Return to the restrictive U.S. immigration laws of the 1920s and 1950s

As discussed in Chapter 3, the immigration policy and practice of the Trump administration represents a return to the restrictive immigration laws of the 1920s and 1950s. This is particularly evident in President Trump's first three Executive Orders issued in January 2017. This also includes a fundamental annulment of the U.S. asylum system. Two key informants articulated this phenomenon:

This is not the first time there's been a backlash against immigration. It is disheartening that we are talking about things that seem to fit more with the 1920s than the 2020s (Bose, personal communication, January 7, 2018).

The Executive Orders of January 25, 2017 laid out the blueprint for what we see the administration is trying to implement now, which very clearly is an attempt to undermine and in some ways shutter the asylum system as we know it. That is through casting what is a sound and secure system as an incentive for what would be so-called illegal immigration as well as national security concerns or criminal safety concerns – by calling certain procedures “legal loopholes” – this is in my analysis. I trained as a historian in my first iteration of a career and this is an attempt to return us to the restrictive immigration laws of the 1920s and 1950s. In some ways the 1952 Immigration Act and particularly the 1920 Immigration Act (Researcher, personal communication, February 28, 2018).

These measures and the dominant rhetoric that surrounds them are prime examples of the discursively constructed subjectivities in the problematizing of asylum seekers discussed in Chapter 5. What is missing from this discourse, however, is the way in which asylum itself has been written into U.S. law as representative of fundamental American values. A key informant illustrates the paradox herein:

By demonizing foreigners, casting this in a lens of ‘people are gaming the system’ and ‘bringing insecurity with them,’ ‘bringing crime,’ or that our policies are ‘just a magnet’ instead of offering protection – they’re trying to reframe the argument...

... What they're missing, what is totally lost, is that the U.S. believes so strongly in the protections for refugees and asylum seekers that it took international law and made it U.S. law in the 1980 Refugee Act. They amended the Immigration and Nationality Act. The right to seek asylum is INA Section 240. That's the missing part of this conversation. How many times has the U.S. taken international human rights treaties, standards, law, principles – however you want to frame it -- and made it U.S. law? But Congress did that, [the U.S. government] did that, the president signed it, and it is U.S. law (Researcher, personal communication, February 28, 2018).

B. Historic phases and patterns of “pass-throughs” in the U.S.

Upon embarking on this research, I hoped to look into the historical context to the flow of asylum seekers crossing from the U.S. into Canada. Though I did find reference to such a pattern, I was not able to initially identify a body of scholarly research or discussion on the topic. The phenomenon of “pass-throughs,” however, proved an emergent theme in my interview series. “Pass-throughs” refer to the pattern in migration of asylum seeking groups transiting through the U.S. by land with the hope of crossing the International Boundary and making their claim on Canadian soil. As discussed in Chapter 5, the Government of Canada advocated for a safe third country agreement with the U.S. in the 1990s largely because one-third of their yearly refugee claimants passed through the U.S. en route to Canada (HIRC, 2006, p. 10). This speaks to the long-standing deficiencies of the U.S. asylum system, also as discussed in Chapter 5. Even so, only four key informants were familiar with this particular trend. They described this pattern in the following ways:

... there's a long history of asylum seekers coming to Canada, including those transiting through the U.S. [...] what's interesting is that for me, growing up and living in Toronto, there's a whole series of Central American communities in Ontario that were all about coming up through Detroit and going through Windsor [to reach Canada]. There's a Salvadoran community, there's a Nicaraguan community ... So there's always been this sense, for Central Americans, that the U.S. was never going to give you asylum; that you [needed] to go up to Canada (Bose, personal communication, January 7, 2018).

In reference to the Reagan era, during which the U.S. Government buttressed the repressive governments of Guatemala, a local immigration expert reflects on her personal experience working in relation to these particular pass-throughs:

[I was] introduced to these Guatemalan farmworkers -- they were fleeing over land from Guatemala. They didn't stop in the U.S. because less than 5% of the asylum claims were being granted here [...] so they were coming through Vermont to go to Canada (Local immigration expert, personal communication, January 2018).

The same key informant also has personal experience with the pass-throughs of Haitians through Vermont:

In 2007, I helped over 700 Haitians access Canada successfully. These were people who really didn't know about the STCA and they also didn't know that, despite their immigration background in the U.S., they could still go to Canada [to seek asylum] ... It was very organized ... All these people were underground or had lost their asylum case [in the U.S.], for some reason (Local immigration expert, personal communication, January 2018).

Marjorie Villefranche, the Director General of La Maison d'Haiti in Montreal (a large organization that supports asylum seekers) explains that this pattern continues to this day:

We do not receive only Haitians living in the U.S. under TPS, we also see Haitians living in the U.S. and Haitians who are just crossing through the U.S. [...] You have people who had TPS, but you also have other Haitian people who crossed the border because they were trying, in the U.S., to be accepted as an asylee. As they found that it was not possible, they crossed the border...

... Haitians are leaving Haiti trying to find security and a place to live. So they try the U.S. and some of them tried Brazil, they tried Chili, and then some migrate through the border. They hope that in the U.S. it will be better for them. Then they see that they could be deported, so they cross the border and arrive in Canada (Villefranche, personal communication, February 12, 2018).

A Canadian official also indicated that, although they do not have the figures to prove it, the Government of Canada believes that those crossing through New England en route to Quebec are

“not necessarily originating from this region, they transit through” (Canadian official, personal communication, February 28, 2018).

The evidence of this pattern of pass-throughs does not detract from the current intersection between the annulment of TPS and the irregular border crossings of asylum seekers but rather situates it within a broader context of asylum seeking in North America. Specifically, it illustrates the juxtaposition between the respective asylum systems of the U.S. and Canada.

III. Ongoing application of the Canada-U.S. Safe Third Country Agreement

As discussed in Chapter 5, there is a substantial body of research on the deficiencies of the U.S. asylum system in relation to Canada’s own application of the STCA. There are also current publications on the impact of the Trump presidency, yet the Minister of Immigration maintains that “the domestic U.S. asylum system is the way it was prior to the incoming administration” (Rose, 2017; Lindsay, 2017). When questioned about the Minister’s statement, a key informant shared the following:

I am of the opinion that there have been significant changes to U.S. asylum system as a whole subsequent to President Trump’s coming into office (Canadian law professor, personal communication, March 29, 2018).

This reflects the findings of reports such as that released by the HIRC, discussed in Chapter 5.

This key informant also offered insight into the divergence between the respective asylum systems of the U.S. and Canada. While both states incorporate the UN definition of a Convention refugee, she explains that:

Canada and the U.S. interpret the elements of that definition in profoundly different ways – certain elements of the definition at least. The U.S. approach to asylum determinations has been heavily criticized and, in my view, does not comply with basic standards of international refugee protection such that the U.S. refugee determination regime – in several key respects – falls below international standards of refugee protection. The Canadian refugee status determination system, while not without its problems, has produced a body of law that more effectively responds to international refugee

protections standards and interprets the definition in a way that mirrors those standards more closely than the U.S. regime does (Canadian law professor, personal communication, March 29, 2018).

This key informant also emphasized that the irregular border crossings of asylum seekers across the International Boundary is not actually a “loophole” in the STCA (as it is often colloquially referred to) but actually written into the terms of the Agreement itself.

The Safe Third Country Agreement was designed to apply only at ports of entry. Asylum seekers who cross in between ports of entry and set foot on Canadian soil are entitled to the protections that Canadian law entitles every individual on Canadian soil irrespective of legal status (Canadian law professor, personal communication, March 29, 2018).

However, speaking on this means of irregular entry by asylum seekers, a Canadian official seemed to suggest that such allowance to the protections of Canadian law is not lawful or permissible. Speaking on the work of his office in combating the spread of misinformation, he explains:

Our work here is related to reaching out to communities within [the region] who may be tempted to cross the border illegally, to help them know and understand the facts and the implications of crossing illegally [...] it could significantly put in jeopardy their current status or their future status, not only in Canada, but also in the U.S. ...

[this public service program is intended] to really discourage people from attempting to enter Canada illegally and really encourage them to follow proper legal processes. That would be an example of the type of work that goes on (Canadian official, February 28, 2018).

As discussed in Chapter 5, enforcement actions are not taken against asylum seekers who cross the border irregularly. This is because international standards of protection, as incorporated into Canadian law, recognize that asylum seekers may often lack the proper documentation or authorization to cross international borders in order to make their claim for asylum. When asked about the statements of the Canadian official, above, another key informant noted that claims for refugee protection “are not impacted in any way as the result of their mode of entry into Canada”

(Canadian law professor, personal communication, March 29, 2018). Thus, this may evidence a degree of misunderstanding related to the application of the STCA on the part of this particular Canadian official. If this quote is representative of flaws in the understanding of this official and his office, this statement is problematic in consideration of the role of this official and his office in combating the spread of misinformation.

My reading of this quote is situated the CCR's contention that the Government of Canada was sending an 'obviously false' message to would-be asylum seekers in the midst of their public relations campaigns targeting misinformation. In August 2017, Member of Parliament Emmanuel Dubourg was sent to Miami to discourage Haitians from crossing irregularly to seek asylum. Dubourg argued that "there is no advantage" to coming to the Canada through irregular entry. Prime Minister Trudeau also contended that this "is one of the myths that we are having to dispel... There are no advantages in terms of the immigration system to arrive irregularly versus arriving regularly" (Raj, 2017). The obvious advantage to irregular crossing, per the terms of the terms of the STCA, is of course that it is the only way these individuals would be eligible to make a claim in Canada. Whether the flaws within the information of the Canadian government's own anti-misinformation campaign are either intentional or accidental is unclear, but this is an emergent and problematic trend.

**Findings on the intersection between the annulment of TPS and influx of irregular claims:
Public communications from the Government of Canada (GC), Immigration, Refugees and
Citizenship Canada (IRCC), and UNHCR Canada**

Ad Hoc Intergovernmental Task Force on Irregular Migration

I analyze the official News Releases of this Task Force in consideration of the intersection between the annulment of TPS in the U.S. and the influx of asylum seekers entering Canada through irregular border crossing. These documents are the primary form of ongoing, direct public communication released by Government of Canada and IRCC regarding this migration event. Specifically, I chronologically evaluate and discuss the evolving response of the Task Force -- as it represents the interests of the Government of Canada -- in anticipating and negotiating the effects of the annulment of TPS.

The creation of this Task Force was announced on August 17, 2017. The stated purpose of the Task Force is to work on “issues related to the recent and sustained increase in asylum seekers entering Canada from the United States” through collaboration between six federal ministers (GC, IRCC, 2017a). Prime Minister Justin Trudeau joined the first meeting, suggesting the priority of the Task Force for the Government of Canada. The first meeting included the stated goals of “find[ing] suitable temporary accommodations for asylum seekers until their claims have been fully processed” and “collaborat[ing] efforts to provide for the basic needs of asylum claimants” (GC, IRCC, 2017a). This suggests prioritization of the immediate needs of those seeking asylum as well as the expectation that the influx would continue over the coming months.

By the Task Force’s third meeting on September 1, 2017, Member of Parliament, Emmanuel Dubourg, visited Miami in his official capacity to meet with Haitian community

leaders and Haitian-based media to “dispel the myths on social media channels, such as WhatsApp, which had suggested that Canada gives asylum seekers a free pass into Canada” (GC, IRCC, 2017b). This reveals the Government of Canada’s specific concern regarding the misinformation disseminated within Haitian communities in the U.S. By the fourth meeting on September 28, 2017, Member of Parliament, Pablo Rodriguez, was able to update the Task Force on his “successful” visit to Los Angeles. The News Release notes that “the initial focus was on organizations that interact directly with citizens of the Central American countries that will be affected by TPS expiry later this year” (GC, IRCC, 2017c). This refers to TPS populations from El Salvador, Honduras and Nicaragua -- *terminations for these countries had not yet been announced at this time* and as such this reveals foresight on the part of the Government of Canada in predicting and preparing for the annulment of TPS under the Trump administration *before* it was actually underway. Again, this visit revolved around misinformation within TPS communities, which Mr. Rodriguez “advocated strongly to correct” (GC, IRCC, 2017c). These outreach efforts in the U.S. center on the correction of misinformation specifically within communities affected by the annulment of TPS. This reveals the Government of Canada’s primary and specific concern with the continued influx of TPS populations seeking asylum through irregular border crossing.

At this fourth meeting of the Task Force, Minister of Immigration, Ahmed Hussen, noted that “this is a global issue and that many countries, not just Canada, are facing similar challenges” thus situating the current influx of irregular border crossings and asylum claims within the context of the global displacement crisis (GC, IRCC, 2017c). There is not, however, any mention of the new administration in the U.S. or the political and social climate surrounding the annulment of TPS. This is despite the numerous reports, including my own interview series,

that many asylum seekers *cite exact fears* of targeting or deportation under the Trump administration as the *primary force* driving their migration across the border.

The News Release following the meeting of the Task Force on October 16, 2017 states that outreach efforts in the U.S. to correct misinformation among “groups of potential migrants” continues (GC, IRCC, 2017d). Similarly, this News Release refers to the “influx of irregular migrants” rather than the “influx of asylum seekers” (GC, IRCC, 2017d) that appeared to be the prior norm within these releases. While the semantics of the News Release may be incidental and one should be cautious to assume any motivations behind such a change of phrase, the shift in discourse may evidence one of two things. This could represent the Government of Canada coming to realize that many of those seeking asylum may not meet the requirements of either of a Convention refugee or a ‘person in need of protection;’ or, this language may be read as the problematizing of asylum seekers discussed in Chapter 5. These trends in discourse and language of securitization continue in the following news releases.

Of the Task Force meeting on November 24, 2017, the News Release notes that “given the potential for an increase in irregular migrants following the recent U.S. decision to terminate the [TPS] of Nicaraguans and Haitians, Minister Goodale stressed that we cannot afford to become complacent and that we must be ready for every possible scenario” (GC, IRCC, 2017e). This apprehension regarding the annulment of TPS produced the development of a national strategic plan between CBSA, the RCMP, Public Safety, IRCC, and the Public Health Agency of Canada. Here, the “National Plan” acts to provide “high-level guidance to enable regional planning for a potential increase” ((GC, IRCC, 2017e). This type of national-scale response protocol for an expected surge of asylum seekers as a direct result of the *anticipation* of an ongoing annulment of TPS again evidences the direct linkage between these events. These terms

of caution and forewarning regarding the annulment of TPS display the trepidation of the Government of Canada in preparing for the effects of such actions.

At this time in November 2017, the IRB created a special response team to process these claims for refugee protection. Of the claims finalized to date, the News Release notes that acceptance rates “reflect the diversity of claimants’ countries of origin” -- for example, the acceptance rate for Haitians was 10 percent while the acceptance rate for Nigerians was approximately 46 percent (GC, IRCC, 2017e). This is particularly interesting because asylum claims are evaluated entirely on a case-by-case basis without regard to country of origin. When asked about acceptance rates of claims as they pertained to nationality or country of origin, all key informants stressed this fact and asserted that analysis on such a group basis was unproductive. As such, it is interesting that such evaluation is presented here. Nevertheless, these trends reflect conditions in these source countries.

Following the first Task Force meeting of 2018 on January 9, the News Release notes that Mr. Rodriguez will be returning to Los Angeles “in light of the recent U.S. decision to end the [TPS] of Salvadorans” (GC, IRCC, 2018a). Then Acting-DHS Secretary Nielsen announced the decision to terminate the TPS designation of El Salvador only one day prior, on January 8 (“Termination of El Salvador,” 2018). Such a rapid response of the Task Force reveals the continued and specific concern with the irregular border crossing and asylum seeking of TPS populations. This news release also announces IRCC’s launch of a “targeting advertising campaign to reach key populations in the U.S.” and notes specifically the emphasis that “crossing the border illegally [for purposes of claiming asylum] is not a free ticket to Canada” (GC, IRCC, 2018a). This use of language -- “illegal” instead of the usual “irregular” and reference to a “free ticket” -- might be analyzed in consideration of the discursively constructed

subjectivities of asylum seekers referenced in Chapter 5. While it is true that not all persons crossing irregularly in the hopes of gaining asylum in Canada may actually meet the requirements for such protection, it remains the legal obligation of the Government of Canada to consider each claim fairly and independently from all others. As discussed in Chapter 5, the problematizing of asylum seekers evident here is concerning in light of the way in which such discourse influences and constructs the understanding of “problems” and their proposed “solutions” as written into policy.

Such policy might manifest in the “[adapted] contingency planning to adequately address future irregular movement” (referenced directly after the above quote) as well as well as the note that “significant work was completed in response to the irregular migration movement” most notably, the reduction of the backlog of claimants waiting for an eligibility interview from “a peak of about 6,000 in August to 238 in mid-December” (GC, IRCC, 2018a). While the expedited processing of eligibility interviews may represent the priority of efficiency within the bureaucracy, such a rapid decrease in backlog raises concerns for the fair and attentive treatment of each asylum claimant. To uphold their obligations to international standards of protection, the Government of Canada must ensure the capacity to process and hear each claim for refugee protection lawfully and impartially. This must be done to afford all claimants due process under Canadian and international law.

Upon the conclusion of this project, the most recent release on the Task Force is dated March 16, 2018. It is noted that “flows of irregular migrants crossing the border in Lacolle, Quebec have remained steady in 2018 with an average of 50 interceptions per day in January” as well as that the IRCC “continues to examine volumes to identify any possible changing patterns with irregular migrants especially for those nationalities for which [TPS] in the [U.S.] will soon

expire” (GC, IRCC, 2018b). This displays the Government of Canada’s ongoing and specific interest in deflecting would-be refugee claimants within TPS populations. This also reveals the expectation that the annulment of TPS will continue into the coming year and the anticipation that these populations will hold onto the hope of seeking asylum in Canada. I argue that the precise intersection between the annulment of TPS and the ongoing influx of asylum seekers through irregular border crossing is evident throughout these public communications from IRCC and the Government of Canada’s strategy and action referenced herein.

Final Notes on IRCC Public Communications

Upon the conclusion of this project, the official IRCC website displays an ‘Irregular border crossings and asylum in Canada’ link at the top of its ‘Refugees and asylum’ webpage. This link directs visitors to a two minute video titled ‘Claiming Refugee Status in Canada: What You Need to Know.’ This video is available in three languages: English, Kreyòl, and Spanish. This suggests that the target audience of the video is Haitians and Latin Americans. As noted, these populations account for the vast majority of those affected by the annulment of TPS. The video was published by CIC on December 18, 2017. Text next to the video notes the following:

There are specific requirements to be considered a refugee. Not having or losing **Temporary Protected Status** in the U.S. is not grounds for a refugee claim. And Canada does not have any special programs for people with **Temporary Protected Status**. Learn the facts about Canada’s refugee system before you put the life you built at risk [emphasis added] (IRCC, 2018c).

The narrator of the video explains that “making a refugee claim is not a free ticket into Canada” and that “the refugee system is not for those seeking a better economic life” (IRCC, 2018c). He goes on to assert that “crossing the U.S. border into Canada between ports of entry is against the law and you will be arrested” (IRCC, 2018c). While it is true that asylum seekers who enter through irregular border crossing will be intercepted and taken into custody by the RCMP, it is

not technically true that this is against the law as section 133 of the IRPA states that no enforcement actions will be taken against persons who cross irregularly (discussed in Chapter 5).

The narrator specifically addresses TPS twice in the video. He states that “not having Temporary Protected Status in the U.S., or losing that status, is not grounds for a refugee claim” as well as that “Canada does not have any special program for people with Temporary Protected Status” (IRCC, 2018c). In conclusion, the narrator advises, “if your refugee claim is rejected, you may not be able to return to the United States, and most importantly, you will most likely be sent to your country of origin” (IRCC, 2018c). This video serves to dissuade and deter TPS populations from irregular border crossing in the hopes of making a claim for asylum in Canada. IRCC addresses these populations specifically, by name, in explicitly directing this video towards these communities. This video warns potential irregular border crossers and asylum seekers that they will likely be deported from Canada, to their country of origin, should they attempt to immigrate to Canada through these means.

This webpage also includes an audio clip with the title ‘Listen to a message about claiming asylum in Canada’ (IRCC, 2018c). This audio clip is also available in English, Kreyòl, and Spanish and also speaks directly to TPS populations. The recording opens stating that it is “an important message from the Government of Canada” and goes on to warn viewers of the misinformation surrounding asylum in Canada and TPS:

Beware of misleading or false information about claiming asylum in Canada. The Government of Canada has no special programs to grant refugee status to individuals in the United States currently under **Temporary Protected Status** or otherwise [emphasis added] (IRCC, 2018c).

The video concludes with the warning that, should individuals fail to meet the eligibility requirements for asylum, they will be “asked to leave or be removed” (IRCC, 2018c). The webpage does not state when this audio clip was published, but the page itself was last modified

on February 2, 2018 (IRCC, 2018c), suggesting that both the video and the associated audio clip are currently relevant in April 2018. The video and the audio clip reveal that the Government of Canada is actively working to advise TPS populations against irregular border crossing and asylum seeking. Specifically, these measures warn against the risk of deportation to a country of origin -- the very thing these populations are trying to avoid in uprooting their life in the U.S. to seek asylum in Canada.

Snapshot of UNHCR Canada Response (April 2018)

On April 16, 2018, UNHCR Canada published a four-page Press Backgrounder titled “Irregular crossings at The Border: Challenging Myths and Preconceptions” (UNHCR Canada, 2018). This briefing includes statistics comparing 2017 trends in asylum claims to those of the past ten years, “regular” asylum claims compared to “irregular claims,” and acceptance rates of “all claims” to that of “irregular claims.” Most notably, the release asserts that “*most* asylum seekers are recognized as fleeing violence and persecution [emphasis added]” (UNHCR Canada, 2018). This explicitly validates the claims of irregular border crossers as deserving asylum in equal measure to those who enter Canada legally. Headings of the briefing also assure that “Canada’s border remains secure” and “Canada’s asylum system is not broken” (UNHCR Canada, 2018). In conclusion, the release notes that UNHCR Canada is working to produce and disseminate accessible infographics, charts, and factsheets to asylum seekers in the effort to combat the spread of misinformation within potential asylum seeking communities. In regard to TPS populations specifically, the briefing refers to TPS once (at the top of the second page), noting that:

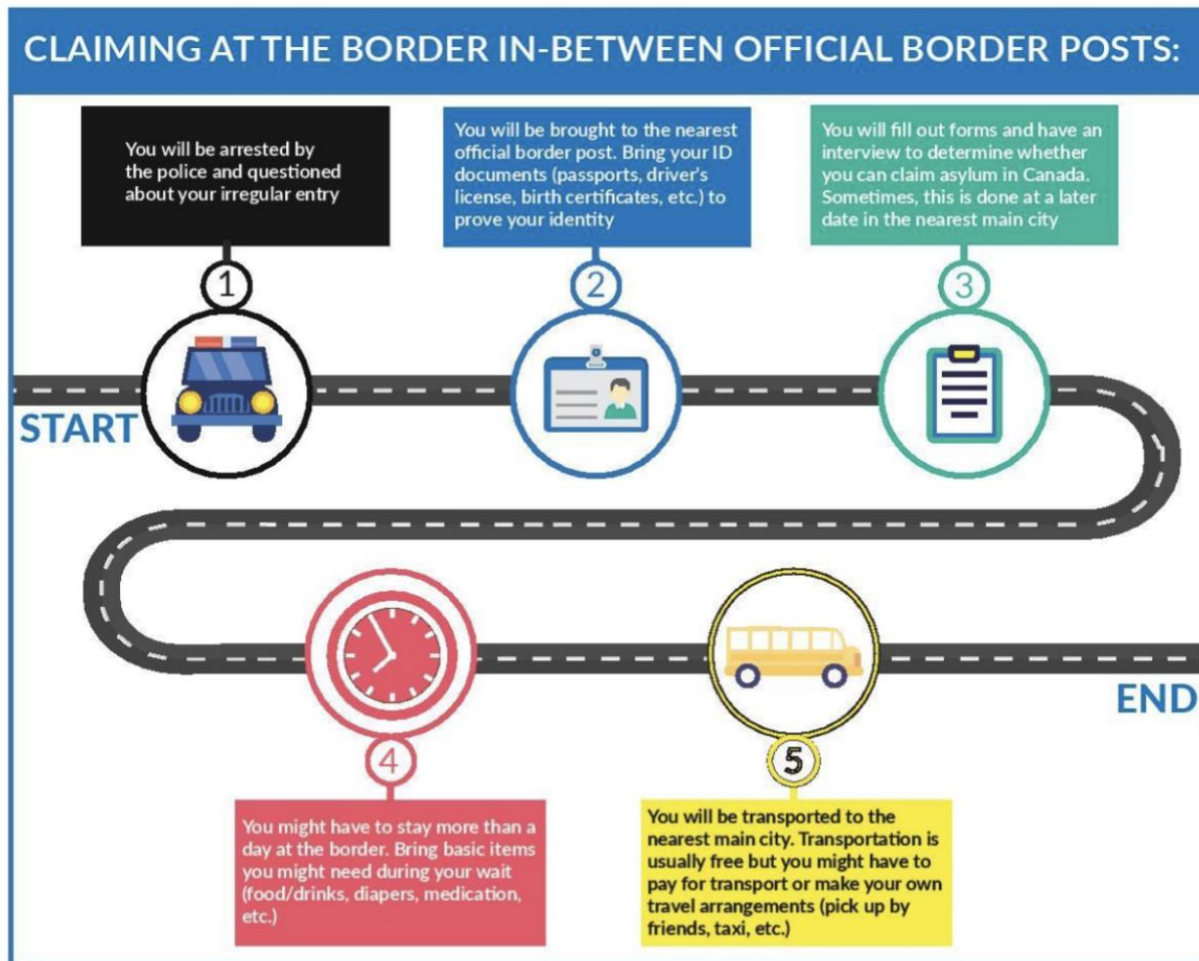
Since the U.S. administration’s decision to stop renewing **TPS** designations for Salvadorans and Hondurans, and DACA status holders (mainly Mexicans), there has

been speculations of spikes in their asylum claims to Canada. However, there has been no increase in *claims made at the border* by persons originally from such countries [emphasis added] (UNHCR Canada, 2018).

In this reference to the annulment of TPS in the U.S., the briefing seems to be “challenging the myths and preconceptions” regarding the “speculations” of TPS populations seeking asylum in Canada. However, this statement only refers to “claims made at the border” which implicitly excludes claims made through irregular border crossing. Through this research, it seems clear that many TPS populations are aware of the “loophole” within the STCA that prohibits claims “made at the border” but allows claims made through irregular border crossing. Thus this statement seems misleading because, to be eligible to make a claim for asylum, TPS populations *cannot* “ma[ke] a claim at the border” because they are inherently already in the U.S. and as such are barred from such a claim under the terms of the STCA.

At the same time, this statement explicitly only refers to Salvadorans and Hondurans and notably does not pertain to Haitians. It also only refers to finalized 2017 trends in asylum claims (of which Haitians are the largest group). Again, this suggests that such a statement that may be read as intended to “challenge the myths and preconceptions” regarding the intersection of the annulment of TPS and these trends in asylum; and again, this seems to mislead readers. The DHS announcement for the termination of El Salvador’s TPS designation was released on January 18, 2018 (“Termination of El Salvador,” 2018) and the decision for Honduras will not be announced until next month, in May 2018. The lack of Salvadorans and Hondurans in these statistics may either be a result of the limited timeframe of the statistics or may well be a result of the Government of Canada and UNHCR Canada’s public information campaigns targeting TPS communities over the course of the past year. As of April 2018, statistics including the countries of origin for asylum claims made through irregular border crossing have not yet been released

for 2018, so it is as yet impossible to gauge how many Salvadorans or Hondurans are seeking asylum through irregular border crossing in 2018.



Note. Reprinted from *Irregular crossings at The Border: Challenging Myths and Preconceptions*, by UNHCR Canada, (2018, April 16), Retrieved from

<https://www.unhcr.ca/wp-content/uploads/2018/04/PressBackgrounder-Border-16April.pdf>

Perhaps the most interesting aspect of this briefing is the “UNHCR 1-Pager Sample” included in the Appendix at the end of the document. This a clear example of the “accessible infographics” for asylum seekers mentioned earlier. Titled, “What happens when you claim asylum at the border?” the factsheet first outlines claiming asylum at an official border post and provides a link

to another document advising eligibility of claims under the STCA. The second half of the page outlines claiming asylum in between official border posts. As pictured above, this is a five-step process from ‘Start’ to ‘Finish.’ The graphic advises potential asylum seekers on the protocol for irregular border crossing. This includes recommending that potential claimants have their identification documents on hand when irregularly entering Canada as well as that they may have to spend more than a day at the RCMP’s workstation (assuming they cross at Roxham Road near the Lacolle border, where most irregular border crossings take place). This suggests a ‘regularizing’ of the trends in irregular border crossing. UNHCR Canada is effectively providing potential asylum claimants in the U.S. with the information needed to navigate the legal terms of the STCA and seek asylum through irregular border crossing. This suggests first, UNHCR Canada expects these trends to continue into the foreseeable future; and second, the clear objective to equip potential claimants in the U.S. with the advice and instruction necessary to retain the right to seek asylum in Canada.

...

CONCLUSIONS AND FUTURE STUDY

In consideration of these findings and discussion, I expect the irregular border crossing of asylum seekers to continue over the course of the next year. Specifically, I anticipate rates in irregular claims to follow similar seasonal trends to that of 2017. While I argue that the intersection between the annulment of TPS and the surge in irregular claims can be distinctly identified within this research, particularly in the case of Haitians, I anticipate that the migration of TPS populations seeking asylum in Canada will continue to plateau. I postulate that this is largely a result of the Canadian government's far-reaching public relations campaigns in the U.S. Through proactively targeting TPS communities, the Government of Canada is effectively discouraging potential asylum seeking populations from pursuing irregular border crossing. This can be read in two ways. First, the Government of Canada may be reducing the number of individuals who do *not* meet the legal requirements of asylum from uprooting their lives only to be deported once their claim is rejected. Second, the Government of Canada may be dissuading genuine refugees from accessing their rights to protection on Canadian soil. There is an immediate need for future research in this area.

In regard to the annulment of TPS itself, I argue that the Trump administration has already evidenced a radical departure from the program's intended terms. As the programs' capacity for protection has already been curtailed by 75 percent, the evolution of TPS over the course of the past year represents an unprecedented transformation of the program. I contend that this spontaneously produces populations in need of protection. As these populations face the impending expiry dates of their programs, they face a high risk of detention and/or deportation as their registration with the DHS facilitates targeting of these populations for purposes of immigration enforcement actions. It is unknown how many former beneficiaries will either

attempt to remain in the U.S. undocumented, flee to Canada, or return to their countries of origin. I anticipate that many will prioritize the unity of their families and as such will first attempt to remain in North America and retain some semblance of normalcy in their lives. In particular, I believe that the considerable proportion with U.S. citizen children will avoid the separation of their families at all costs and will thus first attempt to remain in the U.S., undocumented. I cannot postulate how many will cling to their lives in the U.S. or uproot themselves in the hope of finding security in Canada, but I do not expect these TPS populations to self-deport en mass.

I expect the annulment of TPS under the Trump administration to continue and I anticipate that TPS status for Nepal and Honduras will be terminated over the coming weeks. As this is an active and ongoing migration event, there remains a high degree of uncertainty regarding the future of these vulnerable populations, both those who still remain in the U.S. and those waiting for their cases to be heard in Canada. There is an immediate need for advocacy on behalf of these populations and an urgent need for future research on the conditions that structure and produce this migration event.

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ADDENDUM

Since the defense of this thesis on April 25, 2018, U.S. Secretary of Homeland Security Kirstjen M. Nielsen has announced the decision to terminate TPS for both Nepal and Honduras. The determination for Nepal was released on April 25th, the morning of the defense, and the decision on Honduras was announced nine days later, on May 4th (DHS [Press Release], 2018a; DHS [Press Release], 2018b). This illustrates the immediate and ongoing urgency of this research as the consequences of these terminations will come into full effect over the coming year. While this project came to predict these terminations, it is no less unnerving to witness the near completion of the annulment of this humanitarian protection over the eight-month course of this research. Upon the final submission of this thesis on May 11, 2018, the DHS under the Trump administration has effectively diminished this program's capacity for protection by a full 98 percent. As discussed, this represents a radical departure from the established norm and the intended terms of this program. Prior to the current administration, TPS historically received constant bipartisan support. This speaks to the way in which the annulment of the program is not an issue of immigration politics but rather a question of basic humanitarian protection. While the responsibility for nearly 437,000 individuals protected by TPS was passed to the incoming administration, less than 9,000 retain their protection after only sixteen months into the Trump presidency. The rumors that circulated during the first months of this research have indeed been realized as TPS has been nearly entirely dissolved. This annulment of TPS has produced a population of over 425,000 vulnerable individuals with an urgent and immediate need for protection.

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