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# Bordering on Failure: Canada-U.S. Border Policy and the Politics of Refugee Exclusion

Efrat Arbel

*Allard School of Law at the University of British Columbia, arbel@allard.ubc.ca*

Alletta Brenner

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# BORDERING ON FAILURE

Canada-U.S. Border Policy and the Politics of  
Refugee Exclusion



Efrat Arbel

Alletta Brenner

Harvard Immigration and Refugee Law Clinical Program

Harvard Law School

November 2013

## **Harvard Immigration and Refugee Law Clinical Program**

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**BORDERING ON FAILURE**  
**Canada-U.S. Border Policy and the Politics of Refugee**  
**Exclusion**

**Efrat Arbel**  
**Alletta Brenner**

**Harvard Immigration and Refugee Law Clinical Program**

**Harvard Law School**

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The Canada-U.S. border dividing Stanstead Québec and Derby Line, Vermont, lined with flowers. Sept 2012. © Efrat Arbel

## ACKNOWLEDGMENTS

### **Authors**

Efrat Arbel  
Alletta Brenner

### **Principal Investigators**

Efrat Arbel  
Alletta Brenner

### **Contributing Researchers**

Afton Cissell  
Sarah Kalin  
Brian Koh  
Benjamin Lau  
Aurora Sánchez Palacio  
Jean Tanis

### **Contributing Reviewers**

Eleanor Acer  
Deborah E. Anker  
Andrew Brouwer  
Catherine Dauvergne  
Janet Dench  
Audrey Macklin  
Alex Neve  
Peter Showler

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## GLOSSARY OF ABBREVIATIONS

BIA:	Board of Immigration Appeals (United States)
CBSA:	Canada Border Services Agency (Canada)
CBP:	Customs and Border Protection (United States)
CIC:	Citizenship and Immigration Canada (Canada)
DCO:	Designated Country of Origin (Canada)
DHS:	Department of Homeland Security (United States)
EOIR:	Executive Office for Immigration Review (United States)
ICE:	Immigration and Customs Enforcement (United States)
INA:	Immigration and Nationality Act (United States)
IRB:	Immigration and Refugee Board (Canada)
IRPA:	Immigration and Refugee Protection Act (Canada)
IBET:	Integrated Border Enforcement Team (Canada-United States)
MBS:	Multiple Borders Strategy (Canada)
RAD:	Refugee Appeal Division (Canada)
RCMP:	Royal Canadian Mounted Police (Canada)
SMU:	Statement of Mutual Understanding (Canada-United States)
STCA:	Safe Third Country Agreement (Canada-United States)
UNHCR:	United Nations High Commissioner for Refugees (International)
USCIS:	U.S. Citizenship and Immigration Services (United States)
USCIRF:	U.S. Commission on International Religious Freedom (United States)

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## EXECUTIVE SUMMARY

In June 2012, the Canadian government ushered in sweeping reforms to Canada's refugee system. These reforms brought debates about Canadian refugee protection to the forefront of legal and political discourse. In advancing these reforms, the Canadian government has asserted that Canada's refugee system is among the most generous and compassionate in the world. Canada's doors, the Canadian government has stated, remain open to legitimate refugees.

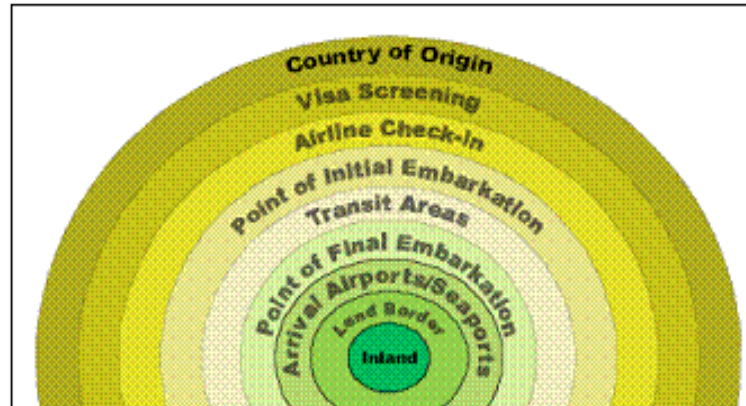
This report evaluates these claims by examining the U.S.-Canada Safe Third Country Agreement and border measures implemented under the rubric of the Multiple Borders Strategy, and analyzing their effects on asylum seekers. A detailed examination of these measures is necessary to evaluate the generosity of Canada's refugee system, and to accurately frame debates about Canadian refugee protection.

This report concludes that through the Safe Third Country Agreement and the Multiple Borders Strategy, Canada is systematically closing its borders to asylum seekers, and circumventing its refugee protection obligations under domestic and international law. While Canada has a valid interest in regulating its borders to ensure refugee protection is reserved only for genuine refugees, neither the Safe Third Country Agreement nor the Multiple Borders Strategy effectively serve this interest. Instead, these measures deter, deflect, and block asylum seekers from lawfully making refugee claims in Canada in arbitrary and unprincipled ways, and do not effectively serve the goal of protecting the integrity of the Canada-U.S. border. Examining these measures, this report finds:

- 1. Canada is systematically closing its borders to asylum seekers and avoiding its refugee protection obligations under domestic and international law;**
- 2. Through the Safe Third Country Agreement, Canada jeopardizes asylum seekers' ability to obtain fundamental legal protections by returning them to the United States despite clear deficiencies in the U.S. asylum system;**
- 3. The Safe Third Country Agreement has prompted a rise in human smuggling across the Canada-U.S. border, making the border more dangerous and disorderly, and raising security concerns for Canada and the United States.**

The Multiple Borders Strategy is a broad strategy that re-charts Canada's borders for the purposes of enhanced migration regulation. Its stated goal is to "push the border out" – outside the edge of Canadian territory – to facilitate Canada's ability to intercept improperly documented persons as far away from Canada's territorial borders as possible. The Canada Border Services Agency charts the Multiple Borders Strategy as follows:

### Multiple Border Strategy



Canada enacts measures that deter and deflect the arrival of asylum seekers at each of the external borderlines marked by the Multiple Borders Strategy: countries of origin; visa screening points; airline check-in points; points of initial embarkation; transit areas; points of final embarkation; and points of final arrival. These measures include offshore screening, visa restrictions, carrier sanctions, and other interdiction measures discussed in detail below. Canada has relied on these measures for decades, but had intensified and expanded their use in recent years. Together, these measures systematically close Canada's borders to asylum seekers, making it harder for asylum seekers to lawfully reach Canada's territorial frontiers by air, water, or land.

The Multiple Borders Strategy measures erect significant legal barriers for asylum seekers. Under domestic and international law, Canada is obligated to extend certain legal protections to asylum seekers present at or within its territorial borders. Canada's legal obligations towards asylum seekers outside its territorial borders, however, are ill defined. By "pushing the border out" and subjecting asylum seekers to border inspection offshore, Canada seeks to avoid its legal obligations, and in so doing, weakens the legal protections available to asylum seekers under domestic and international legal instruments.

The measures enacted under the rubric of the Multiple Borders Strategy work in tandem with the Safe Third Country Agreement, a bilateral Agreement between Canada and the United States in effect since December 2004. The Safe Third Country Agreement forces asylum seekers to advance refugee claims in the first country they reach: either Canada or the United States. It prohibits asylum seekers who are in the United States, or traveling through the United States, from making refugee claims in Canada at the land border (and vice versa). Canada recognizes four exceptions to this Agreement, permitting entry to asylum seekers who: have the necessary documentation to enter Canada, can show they have a family member in Canada, arrive as unaccompanied minors, or are subject to the death penalty. Since it came into effect, the Safe Third Country Agreement has triggered a sharp decline in the number of asylum claims made at the Canadian border.

This report examines the Safe Third Country Agreement and Multiple Borders Strategy measures through legal analysis, data collection, and fact-finding investigations conducted along the Canada-U.S. border. Given the bilateral nature of the measures examined, this report focuses equally on Canadian and U.S. law. The researchers examined materials in both jurisdictions, including: relevant international agreements, their enabling legislation and associated regulations; domestic law; cases and petitions; legal scholarship and commentary; and data obtained pursuant to Freedom of Information requests from government agencies in Canada and the United States. This analysis established the legal framework against which the research undertaken at the Canada-U.S. border was evaluated.

The researchers also interviewed representatives from non-governmental organizations, faith group workers, practitioners, and attorneys at four ports of entry along the Canada-U.S. border and adjacent city centers: Buffalo, New York - Fort Erie, Ontario; Champlain, New York - Lacolle, Québec; Detroit, Michigan-Windsor, Ontario; and Blaine, Washington-White Rock, British Columbia. The researchers requested interviews with representatives from the Canada Border Services Agency and Citizenship and Immigration Canada. Both agencies provided all requested data and statistics and complied with all Freedom of Information requests, but declined to participate in an interview.

This report arrives at the following conclusions:

## **1. Canada is systematically closing its borders to asylum seekers and avoiding its refugee protection obligations under domestic and international law**

- **Under the rubric of the Multiple Borders Strategy, Canada has expanded and intensified its use of offshore interdiction, inspection, and deflection measures.** These measures work in concert to block and deter asylum seekers from reaching Canada's territorial frontiers, making it harder for asylum seekers to lawfully seek refugee protection in Canada.
- **For example, Canada positions Liaison Officers in strategic offshore locations and tasks them with blocking and intercepting improperly documented persons, including asylum seekers, before they board Canada-bound boats or planes.** Canada has relied on the Liaison Officer Program (formerly the Migration Integrity Officer Program) for decades, but has intensified its use in recent years. Canada currently positions sixty-three officers in forty-nine strategic locations around the world. Liaison Officers train and work with airlines, local immigration authorities, and local law enforcement agencies to identify improperly document persons, including some asylum seekers, and block them from boarding Canada-bound boats or planes. Since asylum seekers are, by definition, individuals who have a well-founded fear of being persecuted in or by their countries of origin, it is often impossible or too dangerous for them to flee these countries using proper identity documents. It is for this reason that the United Nations Refugee Convention prohibits signatory states like Canada from imposing sanctions on asylum seekers who arrive at their territory using false documents or no documents to escape persecution. This principle is also incorporated into Canadian law via section 133 of the Immigration and Refugee Protection Act. By positioning Liaison Officers offshore, and by training and working with surrogate screeners, Canada subjects asylum seekers to inspection *before* they reach Canada's territorial border and formally trigger these protections. However, delegating authority to surrogate screeners does not absolve Canada of its refugee protection obligations under domestic or international law. Moreover, the general law of state responsibility, as well as international refugee and human rights law, make clear that activities taking place outside state territory must still comply with basic principles of refugee protection.

- **Canada's Liaison Officer Program blocks thousands of people from reaching Canada annually without ensuring adequate protection for asylum seekers.** Between 2001 and late 2012, Liaison Officers intercepted over 73,000 people in offshore locations, or roughly 4,300-8,700 people each year. Since Liaison Officers are not required to consider the specific circumstances of intercepted individuals, or to differentiate between those who are fleeing persecution and those who are not, it is impossible to know how many of these individuals are genuine refugees. Furthermore, Liaison Officers intercept individuals when they are extremely vulnerable. Egregious consequences can occur when Liaison Officers intercept asylum seekers in countries that are not signatories to the Refugee Convention without referring them to an office of the UNHCR. When this occurs, asylum seekers may be arrested, detained, or returned to countries where they face persecution, torture, or death.
- **Canada also enlists private carriers to act as informal proxies for Canadian border enforcement, thereby indirectly blocking asylum flows.** Canada imposes sanctions on third party carriers like airlines, railways, and shipping companies when they bring foreign nationals who lack proper documentation into Canada. The threat of sanctions creates serious incentives for private carriers to err on the side of caution and block travelers who *appear* to lack proper identification from boarding Canada-bound planes or boats, without considering the possibility that they may be genuine refugees. It is widely recognized that carrier sanctions prevent asylum seekers from making refugee claims in Canada.
- **Private carriers sometimes engage in improper conduct to avoid incurring sanctions, including throwing asylum seekers overboard on the high seas to meet their death. These activities occur outside the purview of Canadian law.** Because Canada does not regularly monitor private carriers, it is difficult to speculate how frequently such conduct occurs. The few reported cases involving such conduct highlight the grave human toll associated with these policies. For example, in 1997, the Supreme Court of Nova Scotia heard a case involving seven officers of the Taiwanese vessel Maersk Dubai, who discovered three Romanian men stowed away aboard a Halifax-bound ship. The officers were accused of throwing the men overboard on the high seas to avoid incurring carrier sanctions upon their arrival in Canada. Despite finding sufficient evidence to warrant a trial for second-degree murder and

manslaughter, the Court found insufficient jurisdiction to issue a warrant of committal and discharged the officers. In the United States, the U.S. District Court heard a case in 2007 involving a Chinese ship crew who discovered five asylum seekers aboard a Texas-bound ship. To avoid incurring sanctions upon arrival in the United States, the ship captain promised the crewmembers bonuses if the ship arrived “stowaway free”. When the crew discovered the men, they threw two of the men overboard, and left three on a raft in the ocean. The men in the raft were saved by another vessel. The shark eaten bodies of the two other men were found sometime later. When the surviving men and their families filed suit against the companies that owned and operated the ship in U.S. District Court, their case was dismissed for lack of personal jurisdiction over the defendants. These cases show that policies that “push the border out” can create gaps in jurisdictional authority and place improper conduct outside the reach of Canadian and U.S. law.

- **Canada imposes visa restrictions on refugee producing countries when refugee arrivals from that country increase, primarily to block asylum seekers.** Canada has a long history of imposing visa requirements on refugee source countries when refugee arrivals from that country increase. Because Canada does not issue visas for the purposes of seeking asylum, visa restrictions often operate to stem asylum flows. Imposing visa requirements on countries that generate refugees often results in substantial drops in asylum claims. In July 2009, for example, the Canadian government imposed visa requirements on Mexico and the Czech Republic, and was candid in its position that imposing such requirements would help stem refugee flows from these source countries. These 2009 visa requirements triggered a sharp decline in the number of asylum claims made from Mexico and the Czech Republic, so much so that Canada dropped in UNHCR’s ranking of top refugee receiving countries. These restrictions work in tandem with offshore inspections and carrier sanctions to deny many asylum seekers the opportunity to lawfully enter Canada to seek refugee protection.
- **Canada blocks and deters thousands of asylum seekers from making refugee claims at the Canada-U.S. border through the Safe Third Country Agreement.** As noted above, the Safe Third Country Agreement prevents asylum seekers who are in the United States, or traveling through the United States, from making asylum claims in Canada (and vice versa) subject to certain exceptions. Since the Agreement came into effect in December 2004, Canada has blocked several-hundred asylum seekers at the border each year.

These numbers, however, only tell part of the story. Since the Agreement not only turns asylum seekers away at the border, but also deters asylum seekers from presenting themselves at the border, its effects are more significant than these numbers reveal. Statistics obtained from the Canada Border Services Agency show that before the Agreement came into effect, between 6,000 and 14,000 asylum claims were made at the Canadian border each year. After the Agreement came into effect – and then again after Canada removed an exception that permitted entry to claimants from “moratorium countries” in 2009 – the claims made at the border dropped to roughly 4,000 per year. This number reached a low point in 2011, with only 2,563 asylum claims made at the Canadian border that year.

- **Since it came into effect, the Safe Third Country Agreement has kept large numbers of asylum seekers out of Canada and in the United States.** While the Agreement was designed as a “burden sharing” mechanism, its effects have been felt unevenly on either side of the border. Indeed, Canada and the United States were driven by different motivations in entering the Safe Third Country Agreement. While the United States entered the Agreement primarily to fortify the border, Canada entered into the Agreement primarily to deter asylum seekers from making refugee claims in Canada. In a 2010 report released by U.S. Custom and Border Protection, the Canada Border Services Agency, and the Royal Canadian Mounted Police, the agencies explain: “[w]hile the primary focus for the United States was security, Canada sought to limit the significant irregular northbound movement of people from the United States who wished to access the Canadian refugee determination system.”
- **The Safe Third Country Agreement’s exceptions are applied inflexibly and inconsistently, suggesting that some asylum seekers who should be admitted into Canada are being turned away for arbitrary and unprincipled reasons.** Of the four exceptions identified in the Safe Third Country Agreement, the family member exception is the most frequently used. Refugee practitioners on both sides of the border described significant inconsistencies in evaluating the Agreement’s family member exception, including inflexible evaluation standards. To trigger this exception, an asylum seeker must satisfy a Canadian border services officer that he or she has a family member in Canada. While the burden of proof is on the claimant, officers are required to make reasonable efforts to confirm family relationships. When the Agreement was first implemented, Canadian

officials stated they would take a generous and liberal approach to the family member exception. However, data collected for this report indicates that due to the application of rigid evaluation standards, asylum seekers who should be granted entry into Canada are being turned away.

- **Practitioners on both sides of the border also pointed to a growing culture of disbelief at the Canadian border, and described a prevailing attitude of suspicion and hostility, wherein asylum seekers are regularly demeaned and dismissed.** Practitioners pointed to a “huge shift” in the prevailing attitude at the Canadian border after the Safe Third Country Agreement came into effect, and noted that since then, asylum seekers are increasingly being “treated as if they’re criminals before they’re found guilty.” This raises further concerns that given the prevailing culture of disbelief, asylum seekers are being denied entry into Canada for arbitrary or unprincipled reasons.

## **2. Through the Safe Third Country Agreement, Canada jeopardizes asylum seekers’ ability to obtain fundamental legal protections by returning them to the United States despite clear deficiencies in the U.S. asylum system**

- **The operational legitimacy of the Safe Third Country Agreement hinges on the assertion that the United States and Canada are equally “safe” countries for refugees. They are not. Several key aspects of U.S. asylum law and policy fall below international standards and fail to ensure fundamental protection for asylum seekers.** For example, unlike other states parties to the Refugee Convention, the United States imposes a higher standard of proof for withholding of removal, a more limited form of protection which provides only *basic non-refoulement* protection without the associated entitlements that come with a granting of asylum. U.S. law also imposes a one-year filing deadline on asylum seekers, creating tremendous and unfair burdens on genuine refugees. The one-year filing deadline does not comply with international standards prescribing that asylum requests should not be excluded from consideration based on failure to fulfill formal requirements. It has been widely criticized for undermining the efficiency of the asylum adjudication system, for leaving asylum seekers in legal limbo, for diverting limited time and resources in ineffective ways, and for having a particularly detrimental impact on women fleeing gender-related



persecution. U.S. law further bars from asylum and withholding any person who has provided “material support” to terrorist organizations or activities. These provisions jeopardize asylum seekers, and have been heavily criticized for being overbroad, and for straying from international standards that require individual responsibility to justify exclusion of an individual from refugee protection. Before the Safe Third Country Agreement came into effect, deserving asylum seekers denied asylum or barred from asylum in the United States successfully obtained protection in Canada. With the implementation of the Agreement, this important safety valve has been largely closed.

- **The Safe Third Country Agreement endangers asylum seekers by placing them at risk of detention in the United States.** Data collected for this report indicates that asylum seekers who are returned to the United States pursuant to the Safe Third Country Agreement are often subject to detention. Returned asylum seekers are held in dedicated immigration detention, jails, or dual-purpose facilities doubling both as jails and immigration detention centers. Given the relative absence of female-dedicated detention facilities along the Canada-U.S. border, women asylum seekers returned to the United States under the Agreement are more likely to be detained in jails in penal conditions of confinement.
- **The U.S. immigration detention system has come under increasing critical scrutiny in recent years, given core problems at the level of law, policy, and practice.** For example, in a report released in 2013, the non-partisan United States Commission on International Religious Freedom (USCIRF) concluded that despite stated commitments by the Department of Homeland Security and Immigrations and Customs Enforcement to overhaul the immigration detention system, longstanding concerns about asylum seekers held in detention remain unaddressed. The mistreatment of asylum seekers and other immigrant detainees in U.S. detention facilities is also substantially documented, and includes inadequate medical care, discrimination, penal conditions of confinement, as well as physical and sexual violence. In a number of facilities, detainees are subject to humiliating strip searches, inmate “counts”, physical restraints, or solitary confinement. Studies also show that some detainees are subject to greater incidents of mistreatment, for example women and LGBTQI detainees.

- **The U.S. immigration detention regime falls far below international law requirements.** UNHCR has long made clear that in principle, asylum seekers should not be detained, and that detaining asylum seekers for anything but a brief period of time is contrary to international law norms and should be avoided. The U.S. immigration detention system fails to comply with these standards, as asylum seekers are detained for lengthy periods of time. In addition, many detained asylum seekers do not have access to prompt court review of their detention. This is inconsistent with UNHCR's 2012 Guidelines on Detention, which emphasize that detained asylum seekers should be granted the right to prompt review before a judicial or other independent authority. The United Nations Special Rapporteur on the Human Rights of Migrants' 2012 Report similarly emphasizes the need for automatic, regular and judicial review of detention in each individual case. The U.S. immigration detention system violates these internationally recognized standards. U.S. law also does not require detention decisions to be made on an individual basis, but rather, permits detention to be applied automatically for broad categories of non-citizens. This approach, precluding individualized, case-by-case assessments, results in the detention of asylum seekers without any consideration of their specific circumstances, medical needs, trauma, past trauma, or language comprehension. For example, the United States mandatorily detains asylum seekers subject to expedited removal, a process discussed in detail below.
- **Once detained, asylum seekers face significant barriers to advancing successful asylum claims.** Data collected for this report suggests that detained asylum seekers encounter obstacles in securing legal assistance, and that in some detention facilities asylum seekers have little access to legal counsel and legal aid organizations. Practitioners interviewed for this report further explained that some asylum seekers held in detention end up withdrawing their claims because they simply cannot bear to stay in detention. In its 2013 report, USCIRF similarly emphasized that penal detention conditions risk re-traumatizing asylum seekers, and may lead some to prematurely terminate their claim.
- **The Safe Third Country Agreement further endangers asylum seekers by placing them at risk of expedited removal upon return to the United States.** Data collected for this report indicates that in at least some cases, asylum seekers returned to the United States pursuant to the Safe Third Country Agreement are placed in expedited removal proceedings. Expedited removal

- is a process by which the United States removes persons classified as “arriving aliens” attempting entry at the U.S. border or who are apprehended within 100 miles of it, who have no documents or whose documents are deemed false or inconsistent with visa status, except in the case of some asylum seekers. Practitioners noted that at some border crossing points, asylum seekers were put in expedited removal proceedings automatically upon their return to the United States, while at others only sporadically. The rates varied by location and by officer. This finding is alarming given that U.S. legal directives prohibit the use of expedited removal for asylum seekers returned to the United States pursuant to the Safe Third Country Agreement.
- **The U.S. expedited removal process is riddled with problems, such that *bona fide* asylum seekers often pass through the process unrecognized and unprotected.** The deficiencies in the expedited removal process have been well documented. In a study released in 2005, the non-partisan USCIRF identified serious flaws in the treatment of refugees and asylum seekers in the expedited removal process, including failure to provide applicants with crucial information, failure to ask mandatory questions, failure to refer cases to an asylum officer where credible fear is expressed, applicants signing sworn statements allowing for their removal without reviewing the statements, and officers completing forms containing incorrect details, or otherwise lacking crucial information. In response to the reactions generated by this criticism, the Department of Homeland Security stated that it would take measures to improve the expedited removal process. However, in its 2007 and 2009 follow up evaluations, USCIRF continued to criticize the Department of Homeland Security for failing to take specific action with respect to some of the most serious flaws in the expedited removal process, and reiterated its concern that the expedited removal process can deny *bona fide* asylum seekers fundamental protection and put them at risk of being returned to countries where they face persecution.
  - **The Safe Third Country Agreement also endangers asylum seekers by diminishing their rights entitlements in Canada.** Canada’s new refugee determination system precludes asylum seekers who lawfully enter Canada under one of the Agreement’s exceptions from appealing a negative decision to the Refugee Appeal Division. This policy imposes an arbitrary distinction on Safe Third Country Agreement claimants and weakens the legal protections available to them for no principled reason.

### **3. The Safe Third Country Agreement has prompted a rise in human smuggling across the Canada-U.S. border, making the border more dangerous and disorderly, and raising security concerns for Canada and the United States.**

- **Since the Safe Third Country Agreement came into effect, more asylum seekers are making unauthorized border crossings into Canada.** Data collected for this report indicates that since the Agreement was implemented in 2004, unauthorized border crossings and human smuggling attempts across the Canada-U.S. border have increased. Findings made by Canadian and U.S. government agencies further support this claim. For example, a 2012 report issued by the Integrated Border Enforcement Team indicates that Canada-bound human smuggling attempts between ports of entry increased by 58 percent in 2011 as compared with the previous year. A 2010 Study by the Canada Border Services Agency similarly indicates a rise in irregular entries into Canada between ports of entry by individuals seeking to avoid the Safe Third Country Agreement. Before the Safe Third Country Agreement came into effect, critics cautioned that its implementation would encourage unauthorized border crossings, make the border less secure, and leave asylum seekers more vulnerable to violence and exploitation. And indeed, away from official ports of entry, the border is now more disorderly and more dangerous. This not only threatens the lives and safety of asylum seekers, but also raises serious security concerns for both Canada and the United States.
- **In some cases, attempts to cross the Canada-U.S. border without inspection have turned tragic, resulting in needless suffering and even death.** With the tightening of the U.S.-Canada border, asylum seekers have resorted to dangerous measures to seek refuge in Canada, sometimes risking their lives doing so. Some have drowned while attempting to enter Canada by swimming the Niagara River. Others have lost life or limb by crossing into Canada by way of railway bridges. Uniformly, practitioners on both sides of the border interpreted these attempts as signs of extreme desperation. These stories show the human toll that comes with preventing persecuted people from lawfully seeking asylum in destination states like Canada.

- **Canada's border measures have a disruptive impact on refugee shelters and centers along the Canada-U.S. border.** As the number of asylum seekers being processed and aided by non-governmental organizations, faith groups, and refugee shelters along the Canada-U.S. border has decreased, some have been forced to consider alternative functions for their shelters. These groups offer life-saving services like housing, security, legal assistance, and emotional support. If these groups close their doors, the border will become even more dangerous for asylum seekers.

## CONCLUSIONS

For decades, Canada's refugee system was regarded as one of the fairest in the world, and the Canadian people recognized for their generosity in matters of asylum. Canada's commitment to refugee protection is aptly captured by several decisions of the Supreme Court of Canada. In its landmark 1985 decision in *Singh v. Canada*, for example, the Court held it would be "unthinkable" to deny asylum seekers basic legal rights. The Court also stressed that refugees who do not have safe haven elsewhere are entitled to rely on Canada's willingness to live up to the obligations it has undertaken as a signatory to the Refugee Convention. In its 1993 decision in *Canada v. Ward*, the Court reiterated Canada's commitment to refugee protection, and further underscored the importance of not "render[ing] illusory Canada's provision of a haven for refugees." Most recently, in its 2013 decision in *Ezokola v. Canada*, the Court emphasized the international community's "profound concern for refugees" and its commitment "to assure refugees the widest possible exercise of . . . fundamental rights and freedoms."

An analysis of the Multiple Borders Strategy and the Safe Third Country Agreement shows a clear gap between the promise of refugee rights protection as outlined in these decisions, and the record of their enforcement in Canadian border policy as it stands today. Under the rubric of the Multiple Borders Strategy and pursuant to the Safe Third Country Agreement, Canada is increasingly taking deliberate measures to close its borders to asylum seekers without due regard for its refugee protection obligations as outlined in domestic and international law. These measures result in the effective denial of rights to which asylum seekers are entitled under domestic and international law.

The Multiple Borders Strategy and Safe Third Country Agreement undermine Canada's proud history of refugee protection, as well its global leadership in asylum matters. By implementing and intensifying these measures, Canada sets a poor example for other countries, and contributes to the deterioration of refugee protection around the world.



The Canada-U.S. border dividing Stanstead, Québec and Derby Line, Vermont, July 2012. ©Efrat Arbel

## INTRODUCTION

In June 2012, the Canadian government passed the *Protecting Canada's Immigration System Act*,<sup>1</sup> ushering in sweeping reforms designed to make Canada's refugee system faster and fairer, to deter abuse, and to enhance the safety and security of Canadians.<sup>2</sup> In justifying these reforms, the Canadian government has repeatedly asserted that Canada's refugee system is among the most generous and compassionate in the world,<sup>3</sup> and that Canada's doors remain open to legitimate refugees.<sup>4</sup> This report evaluates these claims by examining border measures implemented under the rubric of the Multiple Borders Strategy (MBS),<sup>5</sup> and the U.S.-Canada Safe Third Country Agreement (STCA).<sup>6</sup>

<sup>1</sup> *Protecting Canada's Immigration System Act*, 2012 S.C., ch.17 (Can.).

<sup>2</sup> Citizenship and Immigration Canada News Release, *Harper Government Introduces the Protecting Canada's Immigration System Act* (Feb. 16, 2012) available at <http://www.cic.gc.ca/english/department/media/releases/2012/2012-02-16.asp> (last visited Oct. 23, 2013) (announcing new legislation "to protect the integrity of Canada's immigration system", and noting that the proposed measures "include further reforms to the asylum system to make it faster and fairer" as well as measures that address human smuggling, and make the provision of biometric data mandatory in certain circumstances. The news release further states that the reforms are aimed to deter "abuse of Canada's generous immigration and refugee system", and protect the integrity of Canada's immigration programs as well as the safety and security of Canadians).

<sup>3</sup> *Id.* (noting that "Canadians take pride in the generosity and compassion of immigration and refugee programs"). See also e.g. "Citizenship and Immigration Canada, *Speaking Notes for the Honourable Jason Kenney, P.C., M.P., Minister of Citizenship, Immigration, and Multiculturalism* (Feb. 16, 2012) available at: <http://www.cic.gc.ca/english/department/media/speeches/2012/2012-02-16.asp> (last visited Oct. 23, 2013) (stating "Our refugee system is amongst the most generous in the world. It is internationally recognized for its fairness"); Debra Black, *Canada's Immigration System Lacks Heart, Critics Say* TORONTO STAR (Jun. 28, 2013) available at: [http://www.thestar.com/news/immigration/2013/06/28/canadas\\_immigration\\_system\\_lacks\\_heart\\_critics\\_say.html](http://www.thestar.com/news/immigration/2013/06/28/canadas_immigration_system_lacks_heart_critics_say.html) (last visited Oct. 23, 2013) (citing Minister of Citizenship and Immigration Canada responding to allegations that Canada's refugee system has lost its heart by saying "In every respect, we are a model of generosity . . . Find me one other country that is more generous with respect to immigration and refugees"); Annie Bergeron-Oliver, *Feds and medical community disagree on impact of refugee health cuts* IPOLITICS (Aug 19, 2013) available at <http://www.ipolitics.ca/2013/08/19/feds-and-medical-community-disagree-on-impact-of-refugee-health-cuts/> (last visited Oct. 23, 2013) (citing Health Minister Rona Ambrose stating that "When it came to the cuts in refugee health, let's be clear, Canadians are very compassionate people and our refugee system is something that matters greatly to all of us").

<sup>4</sup> Citizenship and Immigration Canada News Release, *supra* note 2 (stating "Our Government is sending a clear message that our doors are open to those who play by the rules, including legitimate refugees. However, we will crack down on those who endanger human lives and threaten the integrity of our borders").

<sup>5</sup> See e.g. CANADA BORDER SERVICES AGENCY CBSA STRATEGY AND COORDINATION BRANCH, *ADMISSIBILITY SCREENING AND SUPPORTING INTELLIGENCE ACTIVITIES: EVALUATION STUDY* (2009), available at <http://cbsa->

This report follows up on a Harvard report released in 2006, titled *Bordering on Failure: The U.S.-Canada Safe Third Country Agreement Fifteen Months After Implementation*.<sup>7</sup> The 2006 report concluded that at that time, the Safe Third Country Agreement was endangering asylum seekers, denying asylum seekers access to legal protections, making the border less secure, and contributing to the deterioration of refugee protection in North America.

Revisiting the 2006 report, this report finds that the problems identified in 2006 persist, and are made worse by the continued expansion of Canada's border technologies under the rubric of the Multiple Borders Strategy. The Multiple Borders Strategy and the Safe Third Country Agreement deter, deflect, and block asylum seekers from lawfully making refugee claims in Canada. Their effect is to weaken the legal protection afforded to asylum seekers under domestic and international law. Moreover, these measures do not effectively serve the goal of protecting the integrity of the Canada-U.S. border. Instead, they have prompted a rise in human smuggling and unauthorized border crossings, endangering the lives of asylum seekers, making the border more dangerous and disorderly, and raising security concerns for both Canada and the United States.

This report is comprised of five parts. Part One explains the methodology adopted in conducting research for this report. Part Two charts an overview of key principles in Canadian refugee law, and outlines the legal framework and operation of the Multiple Borders Strategy and the Safe Third Country Agreement.

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[asfc.gc.ca/agency-agence/reports-rapports/ae-ve/2009/assia-aeasr-eng.html](http://asfc.gc.ca/agency-agence/reports-rapports/ae-ve/2009/assia-aeasr-eng.html) (hereinafter CBSA Admissibility Study) (describing the Multiple Borders Strategy); CITIZENSHIP AND IMMIGRATION CANADA, STATEMENT OF MUTUAL UNDERSTANDING ON INFORMATION SHARING, Preamble, at para.3 (2003), *available at* <http://www.cic.gc.ca/english/department/laws-policy/smu/smu-ins-dos.asp> (last visited Oct. 23, 2013) (hereinafter SMU) (same).

<sup>6</sup> Agreement between the Government of Canada and the Government of the United States for Cooperation in the Examination of Refugee Status Claims From Nationals of Third Countries, Dec. 5, 2002 (entered into force Dec. 29, 2004), *available at* CITIZENSHIP AND IMMIGRATION CANADA, FINAL TEXT OF THE SAFE THIRD COUNTRY AGREEMENT (last modified Dec. 5, 2002), <http://www.cic.gc.ca/english/department/laws-policy/safe-third.asp> (last visited Oct. 23, 2013) (hereinafter STCA).

<sup>7</sup> See e.g., HARVARD LAW STUDENT ADVOCATES FOR HUMAN RIGHTS, THE INTERNATIONAL HUMAN RIGHTS CLINIC, HUMAN RIGHTS PROGRAM, HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM, BORDERING ON FAILURE: THE U.S.-CANADA SAFE THIRD COUNTRY AGREEMENT FIFTEEN MONTHS AFTER IMPLEMENTATION (2006) *available at* <http://www.ilw.com/articles/2006,0518-anker.pdf> (last visited Oct. 29, 2013) (hereinafter BORDERING ON FAILURE 1 (2006)).



Part Three charts an overview of key interdiction policies implemented by Canada at the external borderlines established by the Multiple Borders Strategy. Part Three also surveys associated interdiction measures implemented by the United States. Part Four analyzes the effects of the Safe Third Country Agreement on asylum seekers, and documents central findings.

Part Five concludes that the Multiple Borders Strategy and the Safe Third Country Agreement systematically close Canada's borders to asylum seekers, contravene Canada's refugee protection obligations under domestic and international law, make the Canada-U.S. border more dangerous and disorderly, and undermine Canada's proud history of refugee protection.



The Canada-U.S. border dividing Stanstead, Québec and Derby Line, Vermont. July 2012. ©Efrat Arbel

## PART ONE: METHODOLOGY

The material presented in this report is based on comprehensive legal research, data collection, fact-finding, and analysis. Trained in Canadian and U.S. law, the researchers examined materials in both jurisdictions, including: relevant international agreements, their enabling legislation and associated regulations; cases and petitions; and legal scholarship and commentary. The researchers also analyzed statistical data obtained pursuant to Freedom of Information requests from government agencies in Canada and the United States. This analysis established the legal framework against which the activities and actions undertaken at the Canada-U.S. border were evaluated.

The researchers conducted fact-finding investigations at four ports of entry along the Canada-U.S. border and adjacent city centers: Buffalo, New York - Fort Erie, Ontario; Champlain, New York - Lacolle, Québec; Detroit, Michigan-Windsor, Ontario; and Blaine, Washington-White Rock, British Columbia. The researchers interviewed representatives from non-governmental organizations, practitioners, faith workers, and attorneys on both sides of the border.

The researchers followed established ethics protocols when carrying out data collection, documentation, and reporting.<sup>8</sup> They applied informed consent guidelines to all interviews. Where consent was given, interviews were recorded and transcribed. Information was collected and stored to maximize privacy and security. The researchers were guided by core human rights fact-finding principles of accuracy, confidentiality, sensitivity, impartiality, independence, integrity, and professionalism.<sup>9</sup> Interviews were conducted between May and

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<sup>8</sup> Research was conducted in accordance with ethics criteria established by the University of British Columbia Office of Research Services, Behavioral Research Ethics Board. See Ethics Approval Certificate H11-01275 (Jul. 2011). Research ethics review is a process of initial and ongoing review and monitoring of research involving human participants. The process requires the independent evaluation of all proposed research by an independent committee that examines the research study from the perspective of prospective participants. The committee's assessment of a proposed study's ethical acceptability is guided by the core principles of research ethics: respect for persons, concern for welfare, and justice. The underlying value of research ethics review is respect for human dignity. The review process ensures that research involving humans is sensitive to the inherent worth of all human beings and the respect and consideration they are due. For more information, see: <http://www.rise.ubc.ca/content/human-ethics> (last visited Nov. 12, 2013).

<sup>9</sup> See e.g., Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council, U.N.H.R.C. Res. 5/2 (Jun. 17, 2007) (guided by the aims and principles of international human rights documents and recognizing their ensuing obligations); U.N. Office of the High Commissioner for Human Rights Training Manual on Human Rights Monitoring, U.N. Doc. HR/P/PT/7 (2001), available at

September 2012. All of the interviews were conducted in English with English speakers.

The researchers prepared a uniform interview guide and applied it to interviews through a semi-structured interview format. The researchers sought information about many issues relating to border security and border crossing, focusing primarily on the application and effects of the Safe Third Country Agreement. The interviewers ensured that asylum seekers were not identified by name or other identifying criteria in the course of data collection.

In the United States, the researchers interviewed representatives at Vive La Casa (Buffalo, New York), Vermont Immigration and Asylum Advocates (Burlington, Vermont), Freedom House (Detroit, Michigan), and Northwest Immigrant Rights Project (Tacoma, Washington). The interviewers also met with attorneys in New York, New York and Bellingham, Washington. Interviews were conducted in-person and by telephone.

In Canada, the researchers interviewed representatives at Peace Bridge Newcomer Center (Fort Erie, Ontario), Casa El Norte Refugee Assistance Program (Fort Erie, Ontario), South Asian Women's Community Centre (Montréal, Québec), Centre Scalibrini (Montréal, Québec), the Canadian Council for Refugees (Montréal, Québec), Matthew House (Windsor, Ontario), Inland Refugee Society (Vancouver, British Columbia) and MOSAIC B.C. (Vancouver, British Columbia). The interviewers also met with attorneys in Vancouver, British Columbia. Interviews were conducted in-person and by telephone.

Interviews were requested with various Canadian government officials, including representatives from the Canada Border Services Agency and Citizenship and Immigration Canada. Both agencies provided all requested data and statistics and complied with all Freedom of Information requests, but declined to participate in an interview.

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<http://www.ohchr.org/Documents/Publications/training7Introen.pdf> (last visited Nov. 12, 2013) (outlining a methodology for effective human rights monitoring).

## PART TWO: BACKGROUND, CONTEXT, LAW

### 1. Canada's Commitment to Refugee Protection

*“[A] Convention refugee who does not have a safe haven elsewhere is entitled to rely on this country's willingness to live up to the obligations it has undertaken as a signatory to the United Nations Convention Relating to the Status of Refugees.”<sup>10</sup>*

Canada is signatory to the United Nations 1951 Convention Relating to the Status of Refugees, as amended by the 1967 Protocol Relating to the Status of Refugees.<sup>11</sup> As a signatory to the Refugee Convention, Canada assumes responsibility to extend certain legal protections to asylum seekers who arrive within its territorial borders seeking protection. More specifically, Canada assumes responsibility not to return refugees to a country where they face a well-founded fear of persecution. Article 33 of the Refugee Convention prohibits signatory states from expelling or returning refugees “in any manner whatsoever” to face persecution.<sup>12</sup> This principle is known as *non-refoulement*, and is incorporated into Canadian law via section 115 of the Immigration and Refugee Protection Act.<sup>13</sup>

In its 1985 decision in *Singh v. Canada*,<sup>14</sup> the Supreme Court of Canada gave clear expression to Canada's refugee protection commitments. The Court held that asylum seekers who are present at or within Canada's borders are entitled to basic constitutional protection under section 7 of the Canadian Charter of Rights

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<sup>10</sup> *Singh v. Canada* (Minister of Employment and Immigration), [1985] 1 S.C.R. 177 (Can.), at para. 20.

<sup>11</sup> Convention Relating to the Status of Refugees, Jul. 28, 1951, 189 U.N.T.S. 2545, as amended by the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 8791 (hereinafter Refugee Convention).

<sup>12</sup> *Id.* art. 33.

<sup>13</sup> Immigration and Refugee Protection Act, S.C. ch. 27 (2001) (Can.) (hereinafter IRPA). Section 115(1) provides: “A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.”

<sup>14</sup> *Singh v. Canada*, [1985] 1 S.C.R. 177 (Can.).

and Freedoms.<sup>15</sup> It reasoned that it would be “unthinkable that the *Charter* would not apply to entitle [asylum seekers] to fundamental justice in the adjudication of their status.”<sup>16</sup> The Court explained that “a Convention refugee who does not have a safe haven elsewhere is entitled to rely on this country’s willingness to live up to the obligations it has undertaken as a signatory to the United Nations Convention Relating to the Status of Refugees.”<sup>17</sup>

In its 1993 decision in *Canada v. Ward*,<sup>18</sup> the Court again reiterated Canada’s commitment to refugee protection. The Court explained that the regime established by the Refugee Convention was “formulated to serve as a back-up to the protection one expects from the state of which an individual is a national”, and is designed to extend “surrogate or substitute protection” to persecuted persons.<sup>19</sup> The Court further underscored the importance of not “render[ing] illusory Canada’s provision of a haven for refugees.”<sup>20</sup> The provision of refuge, the Court explained, aligns with the underlying purpose of refugee law, namely, “the international community’s commitment to the assurance of basic human rights without discrimination.”<sup>21</sup> Most recently, in its 2013 decision in *Ezokola v.*

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<sup>15</sup> *Id.* The Court held at that “every human being who is physically present in Canada and by virtue of such presence amenable to Canadian law,” including asylum seekers, is protected by section 7 of the *Canadian Charter of Rights and Freedoms*, which provides that “everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” *Singh*, 1 S.C.R. 177, at para. 35. See also Catherine Dauvergne, *How the Charter Has Failed Non-Citizens in Canada: Reviewing Thirty Years of Supreme Court of Canada Jurisprudence*, 58(3) MCGILL LAW JOURNAL 663, 665-669 (2013) (noting that in extending these protections to asylum seekers present at or within Canada’s borders, the Court “explicitly rejected a distinction that would have hinged *Charter* protection to citizenship and similarly rejected a distinction, based on US law, between those present in the country and those seeking entry”, and further analyzing how despite *Singh*’s early promise, the *Charter* has been disappointing to non-citizens in Canada, in “jarring contrast to the reputation that Canada has sought for itself as an immigrant-welcoming international human rights leader”).

<sup>16</sup> *Id.* at para. 52.

<sup>17</sup> *Id.* at para. 20.

<sup>18</sup> *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 (Can.).

<sup>19</sup> *Id.* at 709.

<sup>20</sup> *Id.* at 726.

<sup>21</sup> *Id.* at 733. This decision has been credited with anchoring the refugee analysis within a human rights paradigm. See e.g. Deborah E. Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15 HARV. HUM. RTS J. 133 (2002) (explaining that “the Supreme Court of Canada signaled in *Ward* [that] refugee law increasingly refers to, and more explicitly acknowledges its foundation in, an international human rights paradigm”); Linda E. Tranter, *A Step Forward in Protecting Human Rights: Canada v. Ward*, 14 REFUGEE 16, 16 (1993) (noting that *Ward* affirmed that the “protection of those at risk of serious human rights violations is the lens through which refugee law must be focused”).

*Canada*,<sup>22</sup> the Court again emphasized the international community's "profound concern for refugees", and its commitment "to assure refugees the widest possible exercise of . . . fundamental rights and freedoms".<sup>23</sup>

Canada's commitment to refugee protection may also be gleaned from the goals identified in the Immigration and Refugee Protection Act (IRPA).<sup>24</sup> The IRPA proclaims that Canada's refugee regime "is in the first instance about saving lives and offering protection to the displaced and the persecuted."<sup>25</sup> It emphasizes Canada's commitment "to offer safe haven to persons with a well-founded fear of persecution,"<sup>26</sup> and to "establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings."<sup>27</sup> The pledge to offer "fair consideration to those who come to Canada claiming persecution" is proudly displayed in the IRPA as a "fundamental expression of Canada's humanitarian ideals."<sup>28</sup>

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<sup>22</sup> *Ezokola v. Canada* (Citizenship and Immigration, 2013 SCC 40 (Can.)) (clarifying Canada's interpretation of the refugee exclusion provisions under Art. 1F(a) of Refugee Convention, rejecting a guilt-by-association approach and requiring proof that the claimant made a significant contribution to the crime or criminal purpose of a group for that claimant to be excluded from refugee protection).

<sup>23</sup> *Id.* at para. 32.

<sup>24</sup> IRPA, S.C. ch. 27 (2001) (Can.), *supra* note 13.

<sup>25</sup> *Id.* at § 3(2)(a).

<sup>26</sup> *Id.* at § 3(2)(d).

<sup>27</sup> *Id.* at § 3(2)(e).

<sup>28</sup> *Id.* at § 3(2)(c).

## 2. Canadian Border Policy: An Overview

*“[S]ince asylum seekers’ entitlement to claim refugee status is triggered by reaching the frontier of the asylum state, if the border is no longer the border, the state can deny responsibility for entertaining the refugee claim.”<sup>29</sup>*

Notwithstanding Canada’s stated commitment to refugee protection, Canada has long relied on interdiction tactics to block or deter asylum seekers from seeking refugee protection in Canada.<sup>30</sup> Interdiction is not a new phenomenon; the Canadian government has engaged in interdiction for decades.<sup>31</sup> Canada has, in fact, been labeled as “something of a pioneer in instruments of interdiction.”<sup>32</sup>

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<sup>29</sup> Audrey Macklin, *Disappearing Refugees: Reflections on the Canada-U.S. Safe Third Country Agreement*, 36 COLUM HUM RTS L. REV. 365, 369 (2005) (critiquing the Safe Third Country Agreement).

<sup>30</sup> The United Nations High Commissioner for Refugees defines interdiction as “one of the measures employed by States to: i) prevent embarkation of persons on an international journey; ii) prevent further onward international travel by persons who have commenced their journey; or iii) assert control of vessels where there are reasonable grounds to believe the vessel is transporting persons contrary to international or national maritime law.” See UN HIGH COMMISSIONER FOR REFUGEES (UNHCR), EXECUTIVE COMM. FOR THE HIGH COMMISSIONER, PROTECTION SAFEGUARDS IN INTERCEPTION MEASURES, CONCLUSION No. 97, October 10, 2003, UN Doc Nos. A/AC.96/987, 12A (A/58/12/Add.1), available at <http://www.unhcr.org/refworld/docid/3f93b2894.html> (last visited Oct. 23, 2013). Interdiction tactics often overlap with interception tactics, which similarly disrupt the movement of asylum seekers across borders, and prevent them from physically reaching a country’s territorial borders. The United Nations High Commissioner for Refugees has stated that while an internationally accepted definition of interception does not exist, the term’s meaning can be derived from past and current state practice. UNHCR defines interception as “encompassing all measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination.” See UNHCR, EXCOM, *Interception of Asylum Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach*, ¶ 10, U.N. Doc. EC/50/SC/CRP/17 (Jun. 9, 2000), available at <http://www.refworld.org/docid/49997afa1a.html> (last visited Oct. 23, 2013).

<sup>31</sup> For example, in a report dated 1998, Canada’s Senate Standing Committee on Citizenship and Immigration concluded that “the interdiction abroad of people who are inadmissible to Canada is the most efficient manner of reducing the need for costly, lengthy removal process”, and increased the implementation of interdiction abroad measures shortly thereafter. See REP. OF THE STANDING COMM. ON CITIZENSHIP AND IMMIGRATION, 36 PARLIAMENT, 1<sup>ST</sup> SESSION, REPORT 1: IMMIGRATION DETENTION AND REMOVAL—NOT JUST NUMBERS: COMPLIANCE: BUILDING CONFIDENCE IN THE SYSTEM Ch. 8, Recommendation 18 (1998), cited in Ayelet Shachar, *The Shifting Border of Immigration Regulation*, 30 MICH. J. INT’L L. 809, 829 (2009).

<sup>32</sup> Macklin, *supra* note 29 at 378-379. See also Janet Dench, *Controlling the Borders: C-31 and Interdiction*, 19(4) REFUGE 34, 37 (2001) (noting that Citizenship and Immigration Canada boasts of its

In the last decade, Canada has expanded and intensified its use of interdiction tactics under the rubric of the Multiple Borders Strategy. These measures are examined in detail below.

(i) The Multiple Borders Strategy

Canada monitors and regulates its borders through a complex matrix of legal measures and agreements. Principal among these is the 2001 Smart Border Declaration and Action Plan,<sup>33</sup> a bilateral agreement between Canada and the United States designed to enhance border security and border control.<sup>34</sup> The Action Plan provides for common standards of biometric information collection, extensive sharing of information on high-risk travelers, increased visa coordination, programs to facilitate the movement of low-risk people and goods across the Canada-U.S. border, and restrictions on asylum, among other things.<sup>35</sup> In February 2003, Canada and the United States reached a Statement of Mutual Understanding designed to further enhance information sharing in relation to

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status as “world leader in developing interdiction strategies against illegal migration”, citing Citizenship and Immigration Canada, 1997-1998 Estimates, Part III, at 23).

<sup>33</sup> PUBLIC SAFETY CANADA, SMART BORDER DECLARATION AND ACTION PLAN (2001), *available at* <http://www.legislationline.org/documents/id/7543> (last visited Oct. 23, 2013). The Smart Border Declaration also official mandated the Integrated Border Enforcement Team Initiative, a partnership between the Royal Canadian Mounted Police, Canada Border Services Agency, U.S. Customs and Border Protection/Office of Border Patrol, U.S. Immigration and Customs Enforcement, and U.S. Coast Guard, which works to “enhance border integrity and security along the shared Canada/U.S. border, between designated ports of entry, by identifying, investigating and interdicting persons, organizations and goods that threaten the national security of one or both countries or that are involved in organized criminal activity”. See Royal Canadian Mounted Police, *Integrated Border Enforcement Teams (IBETs)*, *available at* <http://www.rcmp-grc.gc.ca/ibet-eipf/index-eng.htm> (last visited Oct. 23, 2013) (describing the Integrated Border Enforcement Team).

<sup>34</sup> See Canada Border Services Agency, North American Partnerships: Working with the United States, (Jan. 12, 2007), *available at* <http://www.cbsa-asfc.gc.ca/agency-agence/partner-partenaire-eng.html> (last visited Oct. 23, 2013) (explaining that the Smart Border Declaration and Action Plan were put into effect in the wake of the September 11, 2001 attacks to improve security and services on the Canada-U.S. border). While the September 11, 2011 attacks have been identified as a catalyst for Canada’s expansion of its border technologies, as François Crépeau and Delphine Nakache explain, the “securitization agenda” that underpins many of these technologies emerged long before the attacks. See François Crépeau and Delphine Nakache, *Controlling Irregular Migration in Canada: Reconciling Security Concerns with Human Rights Protection*, 12(1) IMMIGR. AND REFUGEE POL’Y CHOICES 13 (2006) (noting that the September 11, 2011 attacks nonetheless “gave authorities more incentive to radically change migration policies and make them harsher toward unwanted migrants”).

<sup>35</sup> The Action Plan is based on four pillars: secure flow of people; secure flow of goods; investing in secure infrastructure; and coordination and information sharing in the enforcement of these objectives. See SMART BORDER DECLARATION, *id.* (explaining the four principles).



border security and border management.<sup>36</sup> In August 2003, the parties signed an Asylum Annex to facilitate information sharing in asylum matters.<sup>37</sup>

These measures are premised on a strategy known as the Multiple Borders Strategy (MBS), described as follows in the preamble to the Statement of Mutual Understanding:

Recognizing that moving the focus of control of the movement of people away from our shared land border to overseas, where potential violators of citizenship or immigration laws are interdicted prior to their arrival in the United States and Canada, enables Canada and the United States to manage more effectively their movement into and within North America. Canada and the United States are pursuing a regional approach to migration based on the *Multiple Borders Strategy* . . . At every checkpoint along the travel continuum — visa screening; airport check-in; points of embarkation; transit points; international airports and seaports; and the Canada-United States border — there is an opportunity for the Participants to link the person and the document and any known intelligence.<sup>38</sup>

The MBS effectively re-charts Canada's borders. Its stated purpose is to "push the border out"<sup>39</sup> — beyond the formal edge of Canadian territory — to allow Canada to "identify and intercept illegal and undesirable travellers as far away from North America as possible", while keeping the border "open to legitimate travellers and goods."<sup>40</sup>

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<sup>36</sup> SMU, *supra* note 5 at paras. 1-3 of Preamble. The SMU consists of sixteen articles that establish a variety of information sharing arrangements.

<sup>37</sup> Annex Regarding the Sharing of Information on Asylum and Refugee Status Claims to the Statement of Mutual Understanding on Information Sharing, U.S.-Can., Sep. 18, 2003, *available at* <http://www.cic.gc.ca/english/department/laws-policy/smu/smu-ins-annex1.asp> (last visited Oct. 23, 2013) (outlining terms for information sharing and detailing agreed-upon data sharing mechanisms).

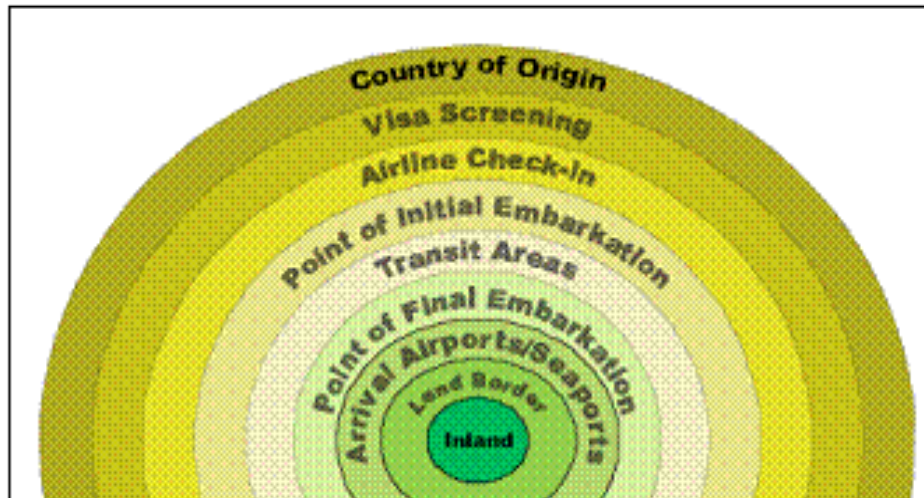
<sup>38</sup> SMU, *supra* note 5.

<sup>39</sup> CBSA ADMISSIBILITY STUDY *supra* note 5 (stating "A key element of the CBSA's approach to combat irregular migration is its "multiple borders strategy" (Exhibit 3). The strategy strives to "push the border out" so that people posing a risk to Canada's security and prosperity are identified as far away from the actual border as possible, ideally before a person departs their country of origin.")

<sup>40</sup> OFFICE OF THE AUDITOR GENERAL OF CAN., REPORT OF THE AUDITOR GENERAL OF CANADA TO THE HOUSE OF COMMONS, CHAPTER 5: CITIZENSHIP AND IMMIGRATION CANADA — CONTROL AND ENFORCEMENT 8 (2003), *available at* <http://www.oag-bvg.gc.ca/internet/docs/20030405ce.pdf> (last visited Oct. 23, 2013) (hereinafter OAG 2003 Report).

The CBSA charts the MBS as follows:

**Exhibit 3: Multiple Border Strategy**<sup>41</sup>



To advance the goal of “pushing the border out”, the MBS “defines a border for immigration purposes as any point at which the identity of a traveller can be verified.”<sup>42</sup> As the CBSA explains, the strategy “views the border not as a geopolitical line but rather a continuum of checkpoints along a route of travel from the country of origin to Canada or the United States.”<sup>43</sup>

Identified by the Canadian government as a “key element of the CBSA’s approach to combat irregular migration,”<sup>44</sup> the MBS entrenches a policy of enhanced interdiction into Canadian migration policy. By “pushing the border out”, the Multiple Borders Strategy expands state power outside Canada’s territorial frontiers, and permits the screening of travelers at various external, offshore locations. This is one of the MBS’s stated goals, namely, to screen and intercept individuals “as far away from the actual border as possible, ideally before a person departs their country of origin,”<sup>45</sup> and to shift the locus of border control away from Canada’s territorial borders “to the many, more effective, ‘borders’ that a traveller will pass through before reaching North America.”<sup>46</sup>

<sup>41</sup> CBSA ADMISSIBILITY STUDY, *supra* note 5 at Overview.

<sup>42</sup> OAG 2003 Report, at 8.

<sup>43</sup> SMU, *supra* note 5 at Preamble, para.3.

<sup>44</sup> CBSA ADMISSIBILITY STUDY, *supra* note 5 at Overview.

<sup>45</sup> *Id.*

<sup>46</sup> OAG 2003, *supra* note 40 at 8.

Indeed, under the rubric of the MBS, Canada has intensified its use of interdiction and interception measures at each of the external borderlines marked in the above diagram: countries of origin, points of departure and arrival, points of transit, and points of initial and final embarkation. These measures impact asylum seekers in detrimental ways, either directly by preventing them from reaching Canada, or indirectly by closing avenues by which they would otherwise travel to Canada. These measures are analyzed in Part Three.

#### (ii) The Safe Third Country Agreement

While the measures implemented under the rubric of the MBS make it difficult for asylum seekers to enter Canada by air or water, the Safe Third Country Agreement, or STCA, makes it difficult for asylum seekers to enter Canada by land.<sup>47</sup> The STCA is a bilateral agreement between Canada and the United States, in effect since 2004, designed to regulate asylum claims across the Canada-U.S. border.<sup>48</sup>

The STCA prohibits foreign nationals who first set foot in the United States from making refugee claims in Canada, and vice versa. Article 4(1) of the STCA empowers Canada and the United States to summarily turn back foreign

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<sup>47</sup> STCA, *supra* note 6. Canada first introduced a safe third country clause in the 1988 amendments to the Immigration Act, S.C., ch. 52 (1976) (Can.), to enable the designation of another country as a “safe third country” for refugees. See An Act to amend the Immigration Act, 1976 and the Criminal Code in consequence thereof, S.C. ch. 36 (1988) (Can.). Canada and the United States negotiated towards a mutual designation soon after that point, but these initial negotiations were not fruitful. Negotiations resumed in the aftermath of the September 11, 2001 attacks on the United States. The parties signed the final text of STCA on December 5, 2002. See *Canadian Council for Refugees v. Canada*, [2007] F.C. 1262 (Can.), at para. 8 (describing the mutual designation process).

<sup>48</sup> Canadian law requires three factors to be considered in designating a country as “safe”: whether the country is a party to the Refugee Convention and the Convention Against Torture; its policies and practices with respect to claims made under these conventions; and its human rights record. See IRPA, S.C. ch. 27 (2001), *supra* note 13 at § 102(1)(a) (prescribing that a country designated as “safe” must comply with Art. 33 of the Refugee Convention, and Art. 3 of the Convention Against Torture, which prohibit signatory states from returning a claimant to a country where he or she faces torture or persecution). See also IRPA § 102(2) (prescribing that in designating a country as “safe,” the Governor-in-Council is required to also consider its policies and practices with respect to claims under the Refugee Convention and the Convention Against Torture, as well as its human rights record). To date, the United States is the only country designated as a safe third country by Canada. See Citizenship and Immigration Canada (CIC), Canada-U.S. Safe Third Country Agreement (last modified Jul. 23, 2009), <http://www.cic.gc.ca/english/department/laws-policy/menu-safethird.asp> (noting that the United States is the only country designates as a “safe third country”).

nationals who arrive by land from the other country.<sup>49</sup> This clause is subject to four exceptions: the family member exception, the unaccompanied minors exception, the document holder exception, and the public interest exception.<sup>50</sup> The STCA only applies to asylum seekers who make refugee claims at the Canada-U.S. border; it does not apply to claimants who arrive by water or air, or who make “inland” claims from within Canadian or U.S. territory.<sup>51</sup>

The STCA came into effect on December 29, 2004.<sup>52</sup> Since then, it has triggered a precipitous drop in the number of asylum claims made at the Canadian border each year.<sup>53</sup> The effects of the STCA are examined in detail in Part Four.

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<sup>49</sup> Art. 4(1) of the STCA provides: “the Party of the country of last presence shall examine, in accordance with its refugee status determination system, the refugee status claim of any person who arrives at a land border port-of-entry on or after the effective date of this Agreement and makes a refugee status claim.” STCA, *supra* note 6, art. 4(1).

<sup>50</sup> See Canada Border Services Agency (CBSA), Canada-U.S. Safe Third Country Agreement – Exceptions to the Agreement (Jul. 7, 2009), available at <http://www.cbsa-asfc.gc.ca/agency-agence/stca-etps-eng.html#exception> (last visited Oct. 29, 2013) (describing the STCA’s exceptions). The family member exception allows an asylum seeker to make a refugee claim in the receiving country if she or he has at least one “family member” – defined in §1(b) to include spouses, children, parents, legal guardians, siblings, grandparents, grandchildren, aunts, uncles, nieces, and nephews – who has been accepted as a refugee or has lawful residence status in the receiving country. See STCA, *supra* note 6 at §§ 4(2)(a), 4(2)(b). The unaccompanied minors exception creates an exception for asylum seekers under eighteen without a spouse or common law-partner, who do not have a parent or guardian in Canada or the United States. *Id.* at §4(2)(c). The document holder exception creates an exception for asylum seekers who arrive in the receiving country with a valid visa (other than a transit visa) or who do not require a visa to enter the receiving country but would require one to reenter the country of departure. *Id.* at §4(2)(d). The public interest exception provides either party the discretion to hear refugee claims otherwise barred by the agreement “where it determines that it is in the public interest to do so.” *Id.* at §6. In Canada, the public interest exception applies to asylum seekers facing the death penalty. See Immigration and Refugee Protection Regulations, SOR/2002-227, § 159.6 (Can.) (hereinafter IRPR). In the United States, the public interest exception can apply where “the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.” See INA § 208(a)(2)(A), 8 U.S.C. § 1158(a)(2)(A).

<sup>51</sup> STCA, *supra* note 6 at Art. 4. The STCA can apply at airports, but only if “a person seeking refugee protection in Canada who has been determined not to be a refugee in the United States, has been ordered deported from the United States and is in transit through Canada for removal from the United States”. See Canada Border Services Agency, Canada-U.S. Safe Third Country Agreement (last modified Jul. 23, 2009) available at <http://www.cbsa-asfc.gc.ca/agency-agence/stca-etps-eng.html#where> (last visited Oct. 29, 2013). See also *CCR v. Canada* [2007] F.C. 1262, at para. 29 (stating “A feature of the STCA regime is that, in accordance with the Regulations, it only operates at land ports of entry. The STCA regime does not apply to travellers arriving in Canada by air or water from the United States.”).

<sup>52</sup> See News Release, Citizenship and Immigration Canada, Safe Third Country Agreement Comes Into Force Today (Dec. 29, 2004), available at <http://www.cic.gc.ca/english/department/media/releases/2004/0420-pre.asp> (last visited Oct. 29, 2013) (announcing the coming into force of the STCA).

## PART THREE: THE MULTIPLE BORDERS STRATEGY

This section charts an overview of key interdiction and interception measures implemented by Canada at each of the external borderlines marked by the Multiple Borders Strategy (MBS) namely: countries of origin; visa screening points; airline check-in points; points of initial embarkation; transit areas; points of final embarkation; and points of final arrival. Given the bilateral nature of the MBS, this section also surveys associated interdiction and interception measures implemented by the United States. This analysis is essential for understanding the effects of the MBS measures on asylum seekers.

### 1. Countries of Origin

*“Canada maintains that it respects its international obligations toward the protection of refugees, but nothing in the Canadian government’s interception and interdiction policies provides for an effective means of allowing migrants in real need of protection to come to Canada.”<sup>54</sup>*

#### (i) Canada

Since 1998, Canada has positioned Liaison Officers (formerly Migration Integrity Officers) in strategic offshore locations.<sup>55</sup> In 2011, the CBSA significantly expanded the scope of its Liaison Officer network to deliver “the full spectrum of the Agency’s mandate” overseas.<sup>56</sup> Liaison Officers are tasked with protecting the integrity of the Canadian border abroad, which involves, *inter alia*, identifying, collecting information about, and intercepting so-called “irregular”

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<sup>53</sup> The STCA has also been criticized as resulting in the effective denial of protections to which refugees are entitled under international law, and for contributing to the deterioration of asylum protection in North America. See *e.g.*, BORDERING ON FAILURE 1 (2006), *supra* note 7 at 2-4.

<sup>54</sup> Crépeau & Nakache, *supra* note 34 at 13.

<sup>55</sup> CBSA, FACT SHEET: CBSA INTERNATIONAL NETWORK para.2 (JUNE 2012), available at <http://www.cbsa-asfc.gc.ca/media/facts-faits/113-eng.html> (last visited Oct. 23, 2013) (hereinafter CBSA FACT SHEET) (stating that with the expansion of the CBSA international network’s profile in 2011 “migration integrity officers (MIOs) were renamed CBSA liaison officers”).

<sup>56</sup> *Id.* (stating that in “spring 2011, the CBSA began to expand the scope of its international network to better reflect the full spectrum of the Agency’s mandate”).

migrants before they depart for Canada.<sup>57</sup>

Canada currently positions sixty-three Liaison Officers in forty-nine strategic locations around the world.<sup>58</sup> The Liaison Officer Program is wide in scope, and encompasses “intelligence gathering, analysis and reporting related to visa or immigration application fraud, organized crime, irregular migration, public security and terrorism, and war crimes and crimes against humanity.”<sup>59</sup> One of its stated objectives is to facilitate the CBSA’s ability to “combat irregular migration.”<sup>60</sup> The program advances this goal through a multi-layer approach, which consists of identifying and intercepting people in offshore locations, and also, training and working with airlines, local immigration authorities, and local law enforcement agencies to do the same. As the CBSA explains, Liaison Officers work “with local, regional, national and international partners to screen people and goods along the travel continuum at the earliest opportunity overseas, during transit, and upon arrival at the Canadian border.”<sup>61</sup> According to CBSA,

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<sup>57</sup> *Id.* (stating that Liaison Officers “focus on liaison, risk assessment, interdiction, information collection and training to deliver on the full spectrum of the Agency’s mandate” and listing specific activities undertaken by Liaison Officers to “protect the integrity of the Canadian border”). See also CBSA, 2005-2006 DEPARTMENTAL PERFORMANCE REPORT 20 (2006), available at [http://www.collectionscanada.gc.ca/webarchives/20071126140658/http://www.tbs-sct.gc.ca/dpr-rmr/0506/bsa-asf/bsa-asf\\_e.pdf](http://www.collectionscanada.gc.ca/webarchives/20071126140658/http://www.tbs-sct.gc.ca/dpr-rmr/0506/bsa-asf/bsa-asf_e.pdf) (last visited Oct. 30, 2013) (explaining that “In accordance with our ‘Multiple Borders Strategy,’ the CBSA currently has 45 Migration Integrity Officers located in 39 key locations abroad. The implementation of the strategy, which included the overseas deployment of Migration Integrity Officers and Intelligence Liaison Officers, has strengthened the CBSA’s capacity to interdict irregular migrants overseas”). While Canada and the United States were the first countries to place liaison officers at international locations, Australia and other countries later adopted this model. See ANDREAS SCHLOENHARDT, MIGRANT SMUGGLING: ILLEGAL MIGRATION AND ORGANIZED CRIME IN AUSTRALIA AND THE ASIA PACIFIC REGION (2003) at 297.

<sup>58</sup> Canada also deploys temporary duty officers as needed “to provide support during emergencies or to assist in strategic operations related to issues such as human smuggling prevention activities”. See CBSA FACT SHEET, *supra* note 55 at para. 8. For an overview of Liaison Officers located abroad see CBSA, GUIDE FOR TRANSPORTERS: OBLIGATIONS UNDER THE IMMIGRATION AND REFUGEE PROTECTION ACT 57-61 (Jan. 2012) available at <http://www.cbsa-asfc.gc.ca/publications/pub/bsf5023-eng.pdf> (last visited Oct. 23, 2013) (listing locations and operations of Liaison Officers located abroad).

<sup>59</sup> CBSA, 2006-2007 ESTIMATES, PART III - REPORT PLANS AND PRIORITIES 18-19 (2007), available at <http://www.tbs-sct.gc.ca/rpp/2006-2007/BSA-ASF/bsa-asf-eng.pdf> (last visited Oct. 23, 2013).

<sup>60</sup> CBSA, 2006-2007 DEPARTMENTAL PERFORMANCE REPORT 20-21 (2007), available at <http://www.tbs-sct.gc.ca/dpr-rmr/2006-2007/inst/bsf/bsf-eng.pdf> (last visited Oct. 23, 2013) (hereinafter DPR 2006-2007) (explaining that the “CBSA employs a multi-layered approach in accordance with its ‘multiple borders strategy’ to combat irregular migration . . . The deployment of MIOs has strengthened the CBSA’s capacity to interdict irregular migrants overseas”).

<sup>61</sup> See CBSA, 2004-2005 DEPARTMENTAL PERFORMANCE REPORT 19 (Mar. 2005), available at [http://www.collectionscanada.gc.ca/webarchives/20060120065612/http://www.tbs-sct.gc.ca/rma/dpr1/04-05/bsa-asf/bsa-asfd45\\_e.pdf](http://www.collectionscanada.gc.ca/webarchives/20060120065612/http://www.tbs-sct.gc.ca/rma/dpr1/04-05/bsa-asf/bsa-asfd45_e.pdf) (last visited Oct. 23, 2013) (explaining that Officers “work closely with airlines, security companies, foreign partners and Canadian agencies in

the program has “strengthened the CBSA’s capacity to interdict irregular migrants overseas.”<sup>62</sup>

Principally concerned with preventing “improperly documented” persons from reaching Canada, the Liaison Officer Program does not ensure adequate refugee protection safeguards. Asylum seekers are, by definition, individuals who have a well-founded fear of being persecuted in or by their home states.<sup>63</sup> For this reason, it is often impossible or too dangerous for them to flee their countries of origin using proper identity documents. As one refugee practitioner interviewed for this report explained, when fleeing persecution, “the last thing that would come to your mind would be to bring your documentation . . . The thing that comes to your mind is protection and safety and that’s it, nothing else.”<sup>64</sup> UNHCR explains as follows:

Due to the circumstances in which they are sometimes forced to leave their home country, refugees are perhaps more likely than other aliens to find themselves without identity documents. Moreover, while other aliens can turn to the authorities of their country of origin for help in obtaining documents, refugees do not have this option and are therefore dependent upon the authorities of their country of refuge or upon UNHCR for assistance in this regard.<sup>65</sup>

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order to disrupt human smuggling and trafficking schemes, deter the misuse or abuse of travel documents, prevent the travel to North America of criminals or those who may pose a threat to national security and investigate fraudulent applications of immigration to Canada”).

<sup>62</sup> DPR 2006-2007, *supra* note 60 at 21.

<sup>63</sup> Art. 1(A)(2) of the Refugee Convention, *supra* note 11, defines a refugee as a person “who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.” Canadian law incorporates this definition almost verbatim into the IRPA, S.C. ch.27 (2001), *supra* note 13 at §96 which provides: “A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, (a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or (b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.”

<sup>64</sup> Interview with Saleem Spindari (Community Outreach Program Coordinator), MOSAIC British Columbia (May 16, 2012), para.75.

<sup>65</sup> United Nations High Commissioner for Refugees (UNHCR), *Identity Documents for Refugees*, ¶ 3 U.N. Doc. EC/SCP/33 (Jul. 20, 1984), available at

It is for this reason that the United Nations Refugee Convention prohibits signatory states like Canada from imposing sanctions on asylum seekers who use false documents or no documents to escape persecution.<sup>66</sup>

This principle is incorporated into domestic law via section 133 of Canada's Immigration and Refugee Protection Act (IRPA), which prevents Canada from punishing asylum seekers for using false documents.<sup>67</sup> In its 2013 decision in *R. v. Appulonappa*,<sup>68</sup> the British Columbia Supreme Court explicitly recognized that Canadian law prohibits penalizing asylum seekers for using false documents or no documents to flee persecution. The Court held:

Canada, and the international community generally, while not encouraging refugees to make their way to our shores, exempts them from criminal liability for whatever illegal actions they may have taken in order to successfully arrive here. Such illegal actions invariably include arriving here with forged, or completely without, the documentation required for entry.<sup>69</sup>

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<http://www.unhcr.org/excom/EXCOM/3ae68cce4.html> (last visited Oct. 30, 2013) (explaining international protection standards relating to refugee identity document requirements).

<sup>66</sup> Art. 31(1) of the Refugee Convention, *supra* note 11, provides as follows: "1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

<sup>67</sup> IRPA S.C. ch. 27 (2001), *supra* note 13 at § 133 (stating: "A person who has claimed refugee protection, and who came to Canada directly or indirectly from the country in respect of which the claim is made, may not be charged with an offence under section 122, paragraph 124(1)(a) or section 127 of this Act or under section 57, paragraph 340(c) or section 354, 366, 368, 374 or 403 of the *Criminal Code*, in relation to the coming into Canada of the person, pending disposition of their claim for refugee protection or if refugee protection is conferred"). Section 122 outlines offences related to documents, and provides: "122. (1) No person shall, in order to contravene this Act, (a) possess a passport, visa or other document, of Canadian or foreign origin, that purports to establish or that could be used to establish a person's identity; (b) use such a document, including for the purpose of entering or remaining in Canada; or (c) import, export or deal in such a document. *Id.* at § 122.

<sup>68</sup> *R. v. Appulonappa*, 2013 BCSC 31 (Can.) (evaluating the legality of §117 of the IRPA, S.C. ch.27 (2001), known as the "human smuggling provision", and finding the provision unconstitutional). At the time of writing, this decision was under appeal before the Court of Appeal of British Columbia.

<sup>69</sup> *Id.* at para. 59. For an example of how this provision has been treated by U.S. courts, see *e.g.* *U.S. v. Malenge*, 294 Fed. Appx. 642, 645 (2nd Cir. 2008), in which the U.S. Court of Appeals of the Second Circuit noted that refugees who flee political violence may be unable to seek asylum using proper identity documents, and emphasized that "a petitioner's use of false travel documents to escape



The Court explained that section 133 of the IRPA “is an attempt to implement Canada’s international obligations with respect to Article 31 of the Convention”, and that the provision “defers, or prohibits, prosecution for the act of arriving at a port of entry to Canada and making a legitimate refugee claim without a visa or documentation.”<sup>70</sup> The Court further stated that the “arrival of a legitimate refugee at a port of entry without the required documentation does not attract criminal liability.”<sup>71</sup>

By “pushing the border out” and subjecting asylum seekers to document inspection offshore, Canada seeks to block and deflect asylum seekers before they present at a territorial border and definitively trigger the legal protections set out in section 133 of the IRPA and Article 31 of the Refugee Convention. However, neither the general law of state responsibility nor international refugee and human rights law support the assertion that activities taking place outside state territory do not engage international refugee protection obligations.<sup>72</sup> Moreover, delegating authority to surrogate screeners does not

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persecution is fully consistent with an asylum claim and should not be used as a basis to deny asylum” (citing *Lin v. Gonzales*, 445 F.3d 127, 133 (2nd Cir. 2006)).

<sup>70</sup> *R. v. Appulonappa*, 2013 BCSC 31, at paras. 61-63 (explaining that: “Article 31 of the Refugee Convention to which Canada is a signatory, specifically accounts for this reality, and prohibits signatories from imposing penalties for illegal entry. . . Section 133 of IRPA is an attempt to implement Canada’s international obligations with respect to Article 31 of the Convention”).

<sup>71</sup> *Id.* at para. 144.

<sup>72</sup> See Andrew Brouwer & Judith Kumin, *Interception and Asylum: When Migration Control and Human Rights Collide*, 21(4) REFUGE 6, 13-14 (2003) (noting that “at international law, no distinction is made for actions taken outside of state territory, nor for actions taken by those acting for or under the director or control of the state when it comes to attribution of responsibility. While the law is clear on this point, it is worth observing that, from a human rights perspective, to hold otherwise would be to render the international refugee protection regime ineffective. States would be able to avoid their international obligations, creating a human rights vacuum for intercepted refugees and asylum seekers”). See also François Crépeau, Delphine Nakache & Idil Atak, *International Migration, Security Concerns, and Human Rights Standards*, 44 (3) TRANSCULTURAL PSYCHIATRY 311, 325-326 (2007) (explaining that states use extraterritorial deflections mechanisms to “pretend that they are free of international and national legal constraints and scrutiny they face when migrants arrive on their territory”, and noting further that states “are not, however, beyond the bounds of responsibility. The International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts (2001), which were developed over the course of 30 years by the International Law Commission, provide that responsibility ultimately hinges on whether the relevant conduct can be attributed to that state and not whether it occurs within the territory of the state or outside it. The extraterritorial applicability of human rights law is further underlined by the jurisprudence of the UN Human Rights Committee and regional human rights systems especially the Inter-American Commission on Human Rights and the European Court of Human Rights”).

absolve Canada of its refugee protection obligations.<sup>73</sup>

Materials obtained further to a Freedom of Information request show that the CBSA Liaison Officer Program prevents thousands of people from reaching Canada each year. Between 2001 and late 2012, Canadian Liaison Officers intercepted over 73,000 persons, divided by year as follows:<sup>74</sup>

Year	Number of intercepts
2001	8790
2002	7159
2003	7306
2004	6115
2005	5653
2006	5149
2007	5277
2008	4561
2009	5755
2010	7020
2011	6022
2012 <sup>75</sup>	4342

Since the Liaison Officer Program does not establish clear criteria for assessing whether intercepted individuals intend to seek asylum, much less have valid asylum claims, it is impossible to speculate how many of these individuals are genuine refugees.

Materials obtained further to a Freedom of Information request indicate that the CBSA does not sufficiently emphasize Canada's refugee protection obligations in

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<sup>73</sup> Indeed, when a state signatory to the Refugee Convention contracts out or otherwise entrusts its functions to non-state agents, those agents act on behalf of the state and thus can be held to the same refugee protection standards as the state. See Brouwer & Kumin, *id.* at 14 (stating that the "fact that it is airline staff who are checking documents and denying passage does not absolve states of responsibility, as the airline is simply acting on the basis of carrier liability legislation imposed by the state, or even, in some cases, direct advice from an Immigration Liaison Officer", and explaining further that the Articles on State Responsibility "do not allow for such distinctions between a state organ and a person, group, or entity acting for or under the direction or control of, the state").

<sup>74</sup> Freedom of Information Request File A-2012-07128, filed with the Canada Border Services Agency under the Access to Information Act, R.S.C. ch. A-1 (1985) (Can.) (completed Oct. 26, 2012).

<sup>75</sup> Data current to October 9, 2012, obtained per Freedom of Information Request File A-2012-07128, *id.*

the training materials delivered by Liaison Officers.<sup>76</sup> The program does not explicitly require officers to consider the individual circumstances of intercepted individuals, or to assist persons who are fleeing persecution. The Liaison Officer Program also does not explicitly require officers to ensure intercepted individuals are not *refouled* to face persecution.<sup>77</sup> While senior Canadian officials have indicated that Canadian practice is to refer intercepted asylum seekers to UNHCR where interception takes place in countries that are not signatories to the Refugee Convention, there is no clear data to corroborate this claim.<sup>78</sup> Moreover, in some cases, asylum seekers who have been intercepted in countries that are not signatories to the Refugee Convention have faced serious risks to their lives and safety. Consider, for example, the case of Mr. K., a reform journalist from Iran. Mr. K. feared persecution by Iranian authorities and fled Iran to seek asylum in Canada using false documentation. This is his story:

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<sup>76</sup> Freedom of Information Request File A-2012-07125, filed with the Canada Border Services Agency under the Access to Information Act, R.S.C. ch. A-1 (1985) (Can.) (completed Dec. 4, 2012). These materials explain that asylum seekers may use fraudulent documents to cross international borders and claim asylum, but do not explain Canada's protection obligations under domestic or international law. Notably as well, the International Air Transport Association (IATA) has prepared a Code of Conduct for Immigration Liaison Officers designed to "promote consistency of approach and co-operation between Immigration Liaison Officers deployed by Member States overseas". Dated October 2002, the Code of Conduct provides that where Liaison Officers deployed by member states receive requests for asylum, they should direct applicants to a UNHCR office, to the appropriate diplomatic mission, or to an appropriate local non-governmental organization. See Freedom of Information Request File A-2012-07127, filed with the Canada Border Services Agency under the Access to Information Act, R.S.C. ch. A-1 (1985) (Can.) (completed Oct. 2, 2012) (providing a copies of the International Air Transport Association Code of Conduct for Immigration Liaison Officers dated October, 2002). While the IATA guidelines serve as a set of best practice principles, they do not have the status of international law and are not enforceable. For further discussion, see SCHLOENHARDT, *supra* note 57 at 297 (explaining that the IATA guidelines do not have the status of international law).

<sup>77</sup> For a discussion of how Liaison Officer interdiction practices fail to ensure refugee protection, see Andrew Brouwer, *Attack of the Migration Integrity Specialists! Interdiction and the Threat to Asylum*, CANADIAN COUNCIL FOR REFUGEES (May 29, 2003), available at <http://ccrweb.ca/interdictionab.htm> (last visited Oct. 23, 2013) (providing details about offshore interdiction, noting that liaison officers seldom differentiate between those who need protection and those who do not, and explaining how interdiction violates international law). See also Crépeau & Nakache, *supra* note 34 at 13 (noting that Canada's interception policies do not provide an effective means of allowing migrants in need of protection to come to Canada).

<sup>78</sup> See Brouwer & Kumin, *supra* note 72 at 10 and FN 42 (citing statements made by the Director General of Citizenship and Immigration Canada Intelligence Branch in a panel discussion on interception held by the Canadian Council for Refugees on November 22, 2002, and noting the limitations of these assertions, given that there is no information about how many persons "reportedly intercepted by or with the assistance of Canadian immigration control officers were given an opportunity to indicate their need for asylum, if any, or what procedures were followed", and further that "there is no information on how many were referred to UNHCR, how many were referred to local asylum authorities, how many were simply turned back, or what happened to them").

[Mr. K] travelled by air, via Moscow and Havana, hoping to reach Canada, where his brother is a citizen. However, at the airport in Havana, while transferring to the final leg of his journey, one of Canada's "migration integrity specialists" discovered his fraudulent documents and prevented him from boarding his flight to Canada. Since Cuba is not a party to the 1951 Convention relating to the Status of Refugees, Mr. K could not claim asylum there. Before being deported to Moscow, Mr. K. was able to telephone his brother in Canada, who in turn called the Ottawa office of the United Nations High Commissioner for Refugees (UNHCR) to explain his brother's plight. UNHCR contacted their colleagues in Moscow, to make sure that Mr. K. was not sent back to Tehran where they feared he would be persecuted, and was given a chance to seek asylum in Russia, which is officially a party to the 1951 Convention (albeit with significant shortcomings). Despite numerous requests, however, UNHCR staff in Moscow were denied access to Mr. K. He was briefly detained at Moscow's International Airport and then was deported back to Tehran. He was arrested on arrival in Iran.<sup>79</sup>

As Andrew Brouwer explains, Mr. K's story is "hardly unique".<sup>80</sup> This case shows that by intercepting improperly documented persons without due consideration of their asylum claims, Liaison Officers risk condemning them to continued persecution.

#### (ii) United States

The United States similarly deploys Customs and Border Protection (CBP) agents at overseas airports to assist carriers with passenger screening. Under the rubric of the Immigration Advisory Program, the United States positions CBP agents at designated airports to help review passenger documents and make no-board recommendations for "high risk" or inadequately documented passengers.<sup>81</sup> The

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<sup>79</sup> Brouwer, *supra* note 77 at para. 4. See also Brouwer & Kumin, *supra* note 72 at 7 (discussing the case of Mr. K and additional case studies).

<sup>80</sup> *Id.* at para. 5 (noting that Canada and other states have been interdicting "improperly documented" travelers abroad for years).

<sup>81</sup> This program of pre-inspection at foreign airports was first established and authorized in 1996 under revisions to the INA §235A(a). See U.S. CUSTOMS AND BORDER PROTECTION, IMMIGRATION ADVISORY PROGRAM (IAP) (Dec. 3, 2009), available at

program is identified as “a component of CBP’s layered border strategy.”<sup>82</sup> Since first implemented in 2005, the Department of Homeland Security (DHS) has deemed this program to be highly successful at preventing persons who lack documents, or who are considered a security threat, from reaching the United States.<sup>83</sup> By 2010, the Immigration Advisory Program had expanded from its original two locations to ten locations in eight countries.<sup>84</sup> By 2012, the program was operating at eleven airports in nine countries, with plans to expand further.<sup>85</sup> In 2013, DHS announced that the Immigration Advisory Program and Pre-Departure vetting “experienced a 156 percent increase in the number of no-board recommendations since 2010.”<sup>86</sup> With the growth of these programs, asylum seekers are likely to find it increasingly difficult to reach the physical borders of either the United States or Canada to seek protection.

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[http://www.cbp.gov/xp/cgov/travel/inspections\\_carriers\\_facilities/immig\\_advisor\\_program/immigration\\_advisory\\_prog.xml](http://www.cbp.gov/xp/cgov/travel/inspections_carriers_facilities/immig_advisor_program/immigration_advisory_prog.xml) (last visited Oct. 30, 2013) (describing program); U.S. CUSTOMS AND BORDER PROTECTION, FACT SHEET: IMMIGRATION ADVISORY PROGRAM (IAP) (May, 2013), *available at* [http://www.cbp.gov/linkhandler/cgov/travel/inspections\\_carriers\\_facilities/immig\\_advisor\\_program/immig\\_advis\\_prog.ctt/immig\\_advis\\_prog.pdf](http://www.cbp.gov/linkhandler/cgov/travel/inspections_carriers_facilities/immig_advisor_program/immig_advis_prog.ctt/immig_advis_prog.pdf) (last visited Oct. 23, 2013) (explaining the Immigration Advisory Program and emphasizing that officers hold no authority while working in the host country).

<sup>82</sup> See U.S. CUSTOMS AND BORDER PROTECTION, PERFORMANCE AND ACCOUNTABILITY REPORT, FISCAL YEAR 2012, 34 (2013) *available at* [http://www.cbp.gov/linkhandler/cgov/newsroom/publications/admin/perform\\_account\\_rpt\\_2013.ctt/perform\\_account\\_rpt\\_2013.pdf](http://www.cbp.gov/linkhandler/cgov/newsroom/publications/admin/perform_account_rpt_2013.ctt/perform_account_rpt_2013.pdf) (last visited Oct. 23, 2013).

<sup>83</sup> See U.S. CUSTOMS AND BORDER PROTECTION, PERFORMANCE AND ACCOUNTABILITY REPORT, FISCAL YEAR 2008, (2008). *See also id.* at 35 (reporting 2,505 “No Board” recommendations in FY 2012); U.S. CUSTOMS AND BORDER PROTECTION, PERFORMANCE AND ACCOUNTABILITY REPORT, FISCAL YEAR 2011 16 (2012), *available at* <http://www.cbp.gov/xp/cgov/newsroom/publications/admin/> (last visited Oct. 23, 2013) (reporting 2,889 “No Board” recommendations in FY 2011).

<sup>84</sup> See Press Release, Department of Homeland Security (DHS), United States and France Establish Arrangement to Interdict High-Risk Travelers, Customs and Border Protection (Jun. 3, 2010), *available at* [http://www.dhs.gov/ynews/releases/pr\\_1275593319840.shtm](http://www.dhs.gov/ynews/releases/pr_1275593319840.shtm) (last visited Oct. 23, 2013).

<sup>85</sup> See Eleven Years Later: Preventing Terrorists from Coming to America, Subcommittee on Border and Mar. Sec. of the H. Comm. on Homeland Sec., 113th Cong. (Sep. 11, 2012) (written testimony of Kevin McAleenan, Assistant Commissioner, U.S. Customs and Border Protection Office of Field Operations), *available at* <http://www.dhs.gov/news/2012/09/11/written-testimony-us-customs-and-border-protection-house-homeland-security> (last visited Oct. 23, 2013); S. Rep. 112-74, at 30 (2011) (recommending an additional appropriation of \$7,499,000 for DHS to expand the Immigration Advisory Program to four additional overseas locations).

<sup>86</sup> See Subcommittee on Homeland Security hearing on DHS’ Fiscal Year 2014 Budget Request, (written Testimony of Department of Homeland Security Secretary Janet Napolitano) (Apr. 11, 2013) *available at* <http://www.dhs.gov/news/2013/04/11/written-testimony-dhs-secretary-janet-napolitano-house-committee-appropriations> (last visited Oct. 23, 2013) (noting that through the Immigration Advisory Program and Pre-Departure Vetting CBP identifies high risk travelers who are likely inadmissible to the United States and makes “no-board” recommendations to commercial carriers).

## 2. Visa Screening Points

*“The imposition of visa restrictions on all countries that generate refugees is the most explicit blocking mechanism for asylum flows and it denies most refugees the opportunity for legal migration.”<sup>87</sup>*

### (i) Canada

Offshore inspection works in tandem with visa and immigration controls to prevent asylum seekers from reaching Canada.<sup>88</sup> Because Canada does not issue visas for the purposes of seeking asylum, visa restrictions operate as de facto blocking mechanisms.<sup>89</sup> As critics have long recognized, visa restrictions serve as crucial mechanisms for stemming asylum flows, and are often utilized as the “‘first line of defense’ against the entry of undesirables.”<sup>90</sup> James Hathaway, for example, explains that imposing visa restrictions on nationals of refugee-producing countries is a “classic mechanism of *non-entrée*.”<sup>91</sup>

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<sup>87</sup> John Morrison and Beth Crosland, *The Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy?* 28 UNHCR WORKING PAPER NO. 39 (Apr. 2001), available at <http://www.unhcr.org/3af66c9b4.pdf> (last visited Oct. 30, 2013).

<sup>88</sup> See Brouwer & Kumin, *supra* note 72 at 8 (noting that industrialized countries frequently impose a myriad of migration controls, including visa restrictions, on countries known for producing refugees in an effort to stem asylum flows). See also Ninette Kelley, *International Refugee Protection Challenges and Opportunities*, 19(3) INT’L J. REFUGEE L. 401, 421 (2007) (explaining the risk posed by visa restrictions, combined with offshore interdiction and document inspection programs, to asylum seekers in need of international protection).

<sup>89</sup> See James C. Hathaway and R. Alexander Neve, *Fundamental Justice and the Deflection of Refugees from Canada*, 34(2) OSGOODE HALL L.J. 213, 223 (1996) (stating that since “a Canadian visa will not be issued for the purposes of seeking asylum in Canada, refugee claimants who are honest about their intentions will be denied the documentation necessary to come to Canada legally”).

<sup>90</sup> John Torpey, *Coming and Going: On the State Monopolization of the Legitimate “Means of Entry”*, 16(3) SOCIOLOGICAL THEORY 239, 252 (1998) (explaining the operation of visa restrictions and passport requirements). See also Morrison & Crosland, *supra* note 87 at 28 (explaining how the imposition of visa restrictions can deny refugees opportunities for legal migration); Rachel Settlege, *Affirmatively Denied: The Detrimental Effects of a Reduced Grant Rate for Affirmative Asylum Seekers*, 27 B.U. INT’L L.J. 61, 66-69 (2009) (noting that states signatory to the Refugee Convention are increasingly implementing border and immigration measures, including visa restrictions, that make it “more difficult than ever” for asylum seekers to apply for protection); Eric Neumayer, *Unequal Access to Foreign Spaces: How States Use Visa Restrictions to Regulate Mobility in a Globalized World* 31(1) TRANSACTIONS OF THE INSTITUTE OF BRITISH GEOGRAPHERS 239 (2006) (explaining how many Western European countries imposed common policies of visa restrictions and carrier sanctions in the 1990s in response to the rising flow of asylum applications).

<sup>91</sup> JAMES HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW*, 291 (2005) (noting that “Canada, for example, has long required the nationals of countries likely to produce refugees to obtain a visa

In order to obtain a Canadian travel visa, foreign nationals, including asylum seekers, must meet certain criteria like providing proof of a valid passport.<sup>92</sup> These criteria can pose serious barriers for asylum seekers who flee persecution. Asylum seekers persecuted in or by their home state are often unable to apply for passports for fear that such an application would expose them to danger.<sup>93</sup> Some may be fleeing a state whose government institutions have collapsed and is unable to issue passports. Others may lack the financial means, resources, or ability to go through the lengthy and expensive process of obtaining a passport. Obtaining a Canadian visa can also involve direct coordination and information sharing between a Canadian consular post and the applicant's home government. This creates a risk that an asylum seeker's home government will become aware of his or her activities, which could expose him or her to further violence and possibly also retaliation.

Like many Western countries, Canada has long relied on visa restrictions as instruments of interdiction through which to block asylum flows.<sup>94</sup> In fact, Canada has a long history of imposing visa requirements on refugee producing countries when refugee arrivals from that country increase substantially.<sup>95</sup>

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before boarding a plane or otherwise coming to Canada"). The term "non-entrée" describes the array of legalized policies adopted by states to stymie access to refugees to their territories. See generally James Hathaway, *The Emerging Politics of "Non-Entrée"* 91 REFUGEES 40 (1992).

<sup>92</sup> See e.g., Citizenship and Immigration Canada (CIC), Visit Canada (last modified Dec. 7, 2012) available at <http://www.cic.gc.ca/english/visit/> (last visited Oct. 31, 2103) (explaining the procedure for obtaining a visa for entry into Canada, and outlining additional requirements satisfying immigration officers that they do not intend to stay in Canada after their visit). Canada imposes visa requirements on over 150 states and jurisdictions for a variety of reasons. See Citizenship and Immigration Canada (CIC), Find Out If You Need a Visa to Enter Canada as a Visitor (last modified May 17, 2013) available at <http://www.cic.gc.ca/english/visit/visas.asp> (last visited Oct. 31, 2103) (listing countries and territories whose citizens need visas to travel to Canada).

<sup>93</sup> For further discussion see Brouwer & Kumin, *supra* note 72 at 8 (noting that it is often "impossible, or too dangerous, for a refugee to obtain the necessary travel documents from the authorities").

<sup>94</sup> See CANADIAN COUNCIL FOR REFUGEES (CCR), INTERDICTING REFUGEES (May 1998), available at <http://ccrweb.ca/files/interd.pdf> (last visited Oct. 31, 2013) (offering a historical overview of Canada's visa imposition policies in the context of asylum). See also Sharryn Aiken, *Racism and Canadian Refugee Policy: Diverse Perspectives on Refugee Issues*, 18(4) REFUGE 1, 6 (1999) (noting that with the "imposition of visa requirements and carrier sanctions to the stationing of immigration officers abroad, vast numbers of *bona fide* refugees are being caught up in the web of immigration control with devastating results").

<sup>95</sup> See Hathaway & Neve, *supra* note 89 at 223; Brouwer & Kumin, *supra* note 72 at 8; HATHAWAY, *supra* note 91 at 291-292.

Statements issued by Citizenship and Immigration Canada (CIC) suggest this is a central motivating factor in deciding when to impose visa requirements.<sup>96</sup>

Imposing visa requirements on countries that generate refugees often results in substantial drops in asylum claims. In July 2009, for example, the Canadian government imposed visa requirements on Mexico and the Czech Republic,<sup>97</sup> and was candid in its position that imposing such requirements would help stem refugee flows from these source countries.<sup>98</sup> This move was widely criticized as

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<sup>96</sup> See e.g. Statements of Joan Atkinson, Assistant Deputy Minister of Citizenship and Immigration Canada, noting: "It's not surprising that the number of visitor visa holders who claim refugee status is small, because of the nature of the visitor visa screen. We put the visitor visa screen in place as a basic control mechanism to deal with irregular immigration, and we do, as you all have been noting, try to do a very careful screen of individuals who come forward to use asking for visitor visas, to try to make that determination on whether or not they're likely to come back." *Standing Committee on Citizenship and Immigration – Evidence*, 37th Parl. 1st sess. Meeting No. 9 1005 (2001), available at <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1040661&Language=E&Mode=1&Parl=37&Ses=1> (last visited Oct. 13, 2013). See also Statements of Elinor Caplan, Minister of Citizenship and Immigration *Citizenship and Immigration Committee of the Parliament of Canada*, CIMM 37<sup>th</sup> Parl., 1<sup>st</sup> sess. Meeting No. 33 1715 (Oct. 25, 2001), available at <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1041056&Language=E&Mode=1&Parl=37&Ses=1> (last visited Oct. 13, 2013) (stating: "We look at visa imposition when we think there's a country that should not be a refugee-producing country and we have people coming and making refugee claims. We review that all the time. We have ongoing discussions with the Americans, particularly as we look at our regional approach"). See also CIC, BACKGROUNDER: THE VISA REQUIREMENT ON MEXICO, available at <http://www.cic.gc.ca/english/department/media/backgrounders/2009/2009-07-13.asp> (last visited Oct. 30, 2013) (explaining the procedure for obtaining a visa, and outlining the imposition of visa requirements on Mexico making explicit reference to the rise in refugee flows); CIC, Backgrounder: The Visa Requirement for the Czech Republic, available at <http://www.cic.gc.ca/english/department/media/backgrounders/2009/2009-07-13a.asp> (last visited Oct. 30, 2013) (same with respect to visas for nationals from the Czech Republic).

<sup>97</sup> Press Release, Citizenship and Immigration Canada, *Canada Imposes a Visa on Czech Republic* (Jul. 13, 2009) available at <http://www.cic.gc.ca/english/department/media/releases/2009/2009-07-13a.asp> (last visited Oct. 31, 2013); Press Release, Citizenship and Immigration Canada, *Canada Imposes a Visa on Mexico* (Jul. 13, 2009), available at <http://www.cic.gc.ca/english/department/media/releases/2009/2009-07-13.asp> (last visited Oct. 31, 2013).

<sup>98</sup> See e.g., CIC News Release Mexico, *id* (citing Minister of Citizenship, Immigration and Multiculturalism Jason Kenney stating: "The visa requirement I am announcing will give us a greater ability to manage the flow of people into Canada and verify *bona fides*. By taking this important step towards reducing the burden on our refugee system, we will be better equipped to process genuine refugee claims faster.") See also CIC Press Release, Czech Republic, *id*. More recently, Canada's Foreign Affairs Minister John Baird was cited as saying "The decision to put a visa on Mexican travelers was not one that was taken lightly, and frankly, in many respects, has little to do with Mexico or Mexicans and everything to do with the refugee determination system that we had", cited in Daniel Proussalidis, *Canadian Government Working to Get Rid of Visa Requirements for Mexican Visitors* SUN NEWS NETWORK (Jul. 25, 2013) available at



an attempt to create “obstacles in the path of people who genuinely have a fear of persecution in their country of origin.”<sup>99</sup> Canada’s imposition of visa requirements on the Czech Republic was also criticized as an attempt to dissuade Roma peoples of Czech nationality from seeking asylum in Canada, despite evidence of anti-Roma persecution in the Czech Republic.<sup>100</sup>

These 2009 visa requirements triggered a sharp decline in the number of asylum claims made from Mexico and the Czech Republic, so much so that Canada dropped in UNHCR’s ranking of top refugee receiving countries.<sup>101</sup> Statistics obtained from the Canada Border Services Agency show as follows:

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<http://www.sunnewsnetwork.ca/sunnews/politics/archives/2013/07/20130725-172838.html> (last visited Oct. 30, 2013)

<sup>99</sup> Sergio Carrera, Elpeth Guild & Massimo Merlino, *The Canada-Czech Republic Dispute Two Years On* 4 (Center for European Policy Studies, Working Paper on Liberty and Security in Eur., Oct. 3, 2011), available at <http://www.ceps.be/book/canada-czech-republic-visa-dispute-two-years> (last visited Oct. 31, 2013). See also Canadian Council for Refugees Media Release, *Visas on Mexico and Czech Republic Close the Door on Refugees* (Jul. 14, 2009), available at <http://ccrweb.ca/en/bulletin/09/07/14> (last visited Oct. 31, 2013) (criticizing imposition of visa requirements on Mexico and Czech Republic as “closing the door on refugees”).

<sup>100</sup> See Jack Greenberg, *Roma Victimization, From Now To Antiquity*, 41 COLUM. HUM. RTS. L. REV. 1, 2 (2009-2010) (criticizing Canada’s imposition of visa requirements on the Czech Republic as an attempt to dissuade Roma peoples of Czech nationality from seeking asylum in Canada); Gerald Kernerman, *Refugee Interdiction Before Heaven’s Gate*, 43(2) GOV’T AND OPPOSITION 230 (2008) (examining the interdiction effect of Canada’s imposition of visa requirements on Roma peoples arriving from the Czech Republic and Hungary between 1997 and 2001).

<sup>101</sup> According to figures released by UNHCR in March 21, 2013 Canada dropped in the UNHCR rankings of top refugee receivers out of 44 industrialized countries. In 2008 and 2009, Canada was ranked second and third highest destination country among these 44 countries. In 2012, Canada was ranked the seventh highest destination country among these same 44 countries, behind Switzerland, the United Kingdom, Sweden, France, Germany, and the United States. UNHCR attributed this drop in the ranking in part to Canada’s imposition of visa requirements on the Czech Republic. See UNHCR, *UNHCR ASYLUM TRENDS 2012: LEVELS AND TRENDS IN INDUSTRIALIZED COUNTRIES 11* (MAR. 2013) available at [http://unhcr.org/asylumtrends/UNHCR%20ASYLUM%20TRENDS%202012\\_WEB.pdf](http://unhcr.org/asylumtrends/UNHCR%20ASYLUM%20TRENDS%202012_WEB.pdf) (last visited Oct. 23, 2013) (stating that the “relatively high number of Czech asylum applications during [2008 and 2009] partly contributed Canada’s high ranking. In the second half of 2009, Canada introduced visa requirements for Czech citizens. As a result, the number of asylum-seekers from the Czech Republic dropped from more than 2,000 in 2009, to almost zero in subsequent years. Canada’s ranking subsequently dropped”).

	<b>Mexico</b>	<b>Czech Republic</b> <sup>102</sup>
2007	7162	109
2008	9471	847
2009	7594	2085

	<b>Mexico</b>	<b>Czech Republic</b> <sup>103</sup>
2010	1202	30
2011	651	25
2012	321	28

Canada’s Prime Minister indicated in 2012 that the Canadian government imposed visa restrictions on Mexico with the specific goal of deterring asylum seekers. After a meeting with Mexican President Enrique Peña Nieto in November 2012, Prime Minister Stephen Harper was cited to have stated: “We have a visa requirement in place because of the massive increase we had in bogus refugee claims coming from Mexico.”<sup>104</sup> The Canadian government has since engaged in talks with Mexico to eliminate the visa requirement.<sup>105</sup>

<sup>102</sup> Data obtained from the Canada Border Services Agency. Source: CIC Data Warehouse. Date: May 8, 2012 (hereinafter CBSA 2012 data) (data provided upon request). The data obtained from the Canada Border Services provides statistics on refugee claims made by nationals of the Czech Republic and Slovakia. However, for the years 2007, 2008, 2009 the statistics also include refugee claims made by nationals of Czechoslovakia. The figures are: 6 claims in 2007; 20 claims in 2008; and 107 claims in 2009. It is unclear whether these claims were counted twice, or whether this is a classification error.

<sup>103</sup> *Id.*

<sup>104</sup> Tobi Cohen & Jason Fekete, *Canada and Mexico Working to Eliminate Visa Requirements for Mexican Visitors*, VANCOUVER SUN (Nov. 28, 2012), available at <http://o.canada.com/2012/11/28/canada-and-mexico-working-to-eliminate-visa-requirement-for-mexican-visitors/> (last visited Oct. 23, 2013).

<sup>105</sup> *Id.* (citing Prime Minister Stephen Harper’s statement that Canada “would ultimately like to see visa-free travel with Mexico”). In September 2013, CBC News reported that the Mexican Ambassador to Canada criticized the Canadian government for its continued imposition of a visa on Mexico. See *The Canadian Press, Mexico ‘Really Mad’ at Canada for Imposing Travel Visas*, CBC News (Sept. 15, 2013), available at <http://www.cbc.ca/news/politics/mexico-really-mad-at-canada-for-imposing-travel-visas-1.1855280> (last visited Oct. 9, 2013) (citing Mexican Ambassador to Canada Francisco Suarez’s statement that Mexico is “now really mad. Canada has the most stringent visa system for Mexicans of any country in the world”). Notably as well, in October 2013, Canada and the European Union reached an agreement in principle on a comprehensive trade agreement designed to boost trade and investment ties between the two partners. See Office of the Prime Minister of Canada, *Canada Reaches Historic Trade Agreement with the European Union* (Oct. 18, 2013) available at <http://pm.gc.ca/eng/news/2013/10/18/canada-reaches-historic-trade-agreement-european-union> (last visited Oct. 23, 2013) (announcing trade agreement and outlining its terms). As part of the

On December 15, 2012, the Canadian government brought the Designated Country of Origin (DCO) policy into effect,<sup>106</sup> a restrictive measure applicable to asylum seekers from thirty-seven different countries, including both Mexico and the Czech republic.<sup>107</sup> Critics speculate that Canada implemented this policy, in part, to remove existing visa requirements and facilitate travel and trade while still keeping asylum seekers at bay.<sup>108</sup> The DCO policy empowers Canada's Minister of Citizenship and Immigration to declare certain countries as "Designated Countries of Origin" or so-called "safe" countries for refugees.<sup>109</sup>

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negotiations, the Canadian government is reported to have made a commitment to remove visa requirements for citizens from the Czech Republic. See e.g. Bruce Campion-Smith, *Canada, Europe trade deal still two years from taking effect*, THE TORONTO STAR (Oct. 18, 2013) available at [http://www.thestar.com/news/canada/2013/10/18/canada\\_europe\\_trade\\_deal\\_still\\_two\\_years\\_from\\_taking\\_effect.html](http://www.thestar.com/news/canada/2013/10/18/canada_europe_trade_deal_still_two_years_from_taking_effect.html) (last visited Oct. 23, 2013) (reporting that the Canadian Prime Minister "confirmed that Ottawa would immediately lift visa requirements for citizens from the Czech Republic"); Tobi Cohen, *Canada Expected to Lift Travel Visa for Czech Visitors Amid Reports that Trade Deal Near*, CANADA.COM (Oct. 16, 2013) available at <http://o.canada.com/business/canada-expected-to-lift-travel-visas-for-czech-visitors-amid-reports-that-trade-deal-near/> (last visited Oct. 23, 2013) (citing Canada's Citizenship and Immigration Minister Chris Alexander's statements that the expected removal of the visa requirements is "an important step forward in relations with the Czech Republic").

<sup>106</sup> See Citizenship and Immigration Canada, Designated Countries of Origin (last modified Jun. 17, 2013) available at <http://www.cic.gc.ca/english/refugees/reform-safe.asp> (last visited Oct. 23, 2013) (explaining the designated country of origin policy, and noting that a designated country of origin list will include "countries that do not normally produce refugees, but do respect human rights and offer state protection"). See also IRPA S.C. ch. 27 (2001) (Can.), *supra* note 13, §§ 100 (4.1); 109.1; 111.1(1)(b) and (2) and IRPR SOR/2002-227, *supra*, note 50 at § 159.9.

<sup>107</sup> At the time of writing, the Designated Country of Origin list included: Australia; Austria; Belgium; Chile; Croatia; Cyprus; Czech Republic; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Iceland; Ireland; Israel (excluding Gaza and the West Bank); Italy; Japan; Latvia; Lithuania; Luxembourg; Malta; Mexico; Netherlands; New Zealand; Norway; Poland; Portugal; Slovak Republic; Slovenia; South Korea; Spain; Sweden; Switzerland; United Kingdom; United States of America. See Citizenship and Immigration Canada, Designated Countries of Origin, available at <http://www.cic.gc.ca/english/refugees/reform-safe.asp> (last visited Oct. 31, 2013).

<sup>108</sup> See e.g. Tobi Cohen, *Canada declared Mexico, Israel 'safe', listing limits recourse for failed refugee claimants*, VANCOUVER SUN (Feb. 15, 2013), available at <http://www.canada.com/Canada+declares+Mexico+Israel+safe+listing+limits+recourse+failed+refugee+claimants/7972669/story.html#ixzz2WIYO76qb> (last visited Oct. 31, 2013) (noting that Canada was under pressure to remove the visa requirement in order to facilitate trade).

<sup>109</sup> The procedure for designating countries as "safe" has been heavily criticized by refugee rights groups as vague and arbitrary. In a press release issued by the Canadian Association of Refugee Lawyers, Association President Lorne Waldman stated: "The DCO scheme is unfair, and violates basic rights contained in the *Canadian Charter of Rights and Freedoms*. Unlike the requirements in its previous legislation, the Minister can designate countries as "safe" without consulting experts on human rights. Worse yet, the criteria for the designation are vague and arbitrary. They do not provide objective assurances that individual citizens can be adequately protected from persecution." See Press Release, Canadian Association of Refugee Lawyers, Designated Country of Origin Scheme is

Asylum seekers who arrive in Canada from DCO countries are required to advance their claim within shorter timelines, and are disallowed from appealing negative decisions to the Refugee Appeal Division.<sup>110</sup> Speaking specifically about the Czech Republic, Minister of Citizenship and Immigration Chris Alexander was cited as saying that as a result of these reforms, “[w]e have seen the number [of asylum applications] dramatically fall from the Czech Republic. That’s exceptionally good news.”<sup>111</sup> Rights groups like Amnesty International, the Canadian Council for Refugees, and the Canadian Association of Refugee Lawyers have criticized the DCO policy as arbitrary, unfair, and unconstitutional.<sup>112</sup>

### (ii) United States

The United States similarly imposes visa requirements on most countries.<sup>113</sup> In order to lawfully enter the United States, asylum seekers, like other migrants, must generally apply for visas and overcome a presumption of immigrant intent.<sup>114</sup> Consular Officers are wary of non-immigrant visa applicants who are

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Arbitrary, Unfair, and Unconstitutional (Dec. 14, 2012), *available at* <http://carl-acaadr.ca/articles/32> (last visited Oct. 31, 2013).

<sup>110</sup> See IRPR SOR/2002-227, *supra*, note 50 at § 159.9 (outlining time limits on asylum seekers from Designated Countries of Origin). See also Immigration and Refugee Board of Canada, *Refugee Appeal Division Changes Resulting from New Legislation* (2013) (last visited Oct. 23, 2013) (outlining changes resulting from new legislation, and noting that no appeal may be made with respect to negative Refugee Protection Division decisions involving asylum seekers from designated countries of origin).

<sup>111</sup> See Nicholas Keung, *Ottawa Not Expecting Czech Refugee Claims to Surge*, THE TORONTO STAR (Oct. 21, 2013), *available at* [http://www.thestar.com/news/investigations/2013/10/21/ottawa\\_not\\_expecting\\_czech\\_refugee\\_claims\\_to\\_surge.html](http://www.thestar.com/news/investigations/2013/10/21/ottawa_not_expecting_czech_refugee_claims_to_surge.html) (last visited Oct. 23, 2013) (reporting that Minister of Citizenship and Immigration Chris Alexander is confident Canada will not see a spike in refugee claims from the Czech Republic after it lifts its visa requirement).

<sup>112</sup> Press Release, Canadian Council for Refugees and Amnesty International Canada, *New Refugee System Does Not Treat Refugees Fairly or Protect Those Most at Risk* (Dec. 14, 2012), *available at* <http://ccrweb.ca/en/bulletin/12/12/14> (last visited Oct. 31, 2013); Canadian Association of Refugee Lawyers Press Release, *supra* note 109.

<sup>113</sup> See INA § 222, 8 U.S.C. § 1202 (providing procedural requirements for visa applicants). Notably, thirty-seven countries currently participate in the Visa Waiver Program, including: Andorra, Australia, Austria, Belgium, Brunei, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, Taiwan, and United Kingdom. For more on the Visa Waiver Program, see U.S. DEPT. OF STATE, VISA WAIVER PROGRAM (VWP), *available at* [http://travel.state.gov/visa/temp/without/without\\_1990.html](http://travel.state.gov/visa/temp/without/without_1990.html) (last visited Oct. 23, 2013).

<sup>114</sup> Applicants for temporary visas must demonstrate that they do not have intent to immigrate permanently, regardless of the reason and legality of their ability to do so upon arrival. See 22 C.F.R. § 41.11(a). See also INA § 101(a)(15)(B), 8 U.S.C. § 1101(a)(15)(B) (specifying that for purposes of visiting the United States temporarily for business or pleasure, an individual may be considered

likely not to return to their home country, and are trained to identify and deny such applications.<sup>115</sup> This requirement adversely impacts asylum seekers.<sup>116</sup> Obtaining visas may be very difficult for genuine refugees fleeing their home countries, and indeed, denial rates are high for applicants from key refugee source countries.<sup>117</sup> For example, in FY 2012, seven of the top ten refugee source countries had above-average visitor visa application refusal rates.<sup>118</sup>

In addition to their respective visa policies, Canada and the United States have adopted a harmonized approach to screening travelers seeking to enter either country, as part of the Beyond the Border Action Plan.<sup>119</sup> The Action Plan allows

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eligible for a non-immigrant visa if they can establish that they have a residence in a foreign country that they have no intention of abandoning). Persons cannot obtain permission to travel to the United States for the explicit purpose of making an asylum claim. See 8 C.F.R. § 214 (outlining categories of available visas). Rather, U.S. Department of State policy states that refugees who attempt to apply for visas in order to seek asylum in the United States should be referred directly to UNHCR. See HUMAN SMUGGLING AND TRAFFICKING CENTER (DHS OFFICE OF INTELLIGENCE ANALYSIS/DEPARTMENT OF STATE BUREAU OF CONSULAR AFFAIRS), A PRIMER ON VISAS AND VISA FRAUD 12-13 (2008) (hereinafter VISA FRAUD PRIMER), available at <http://www.ilw.com/immigrationdaily/news/2008,0708-visafraud.pdf> (last visited Oct. 23, 2013).

<sup>115</sup> See VISA FRAUD PRIMER, *id.* at 9-11, 17-18 (noting that the “most common reason for a consular officer to refuse a visa to a non-immigrant visa applicant is Section 214(b) of the Immigration and Nationality Act. This section of the law requires applicants to convince the consular officer that the purpose of their trip is permissible under U.S. visa regulations and that they are true non-immigrants with the intention to return home after a temporary visit to the United States”, and outlining means by which to detect non compliance with this provision).

<sup>116</sup> In addition, asylum seekers who lack financial means can be adversely impacted by INA § 212(a)(4)(A), 8 U.S.C. § 1182(a)(4)(A), which prescribes that a visa applicant’s likelihood of becoming a public charge is grounds for denial. See VISA FRAUD PRIMER, *supra* note 114 at 7 (discussing requirements).

<sup>117</sup> While the worldwide average refusal rate for temporary B-1/B-2 visas is consistently about 25 percent, the refusal rates for applicants from countries that are also top refugee source countries tend to be substantially higher. For example, according to statistics provided by the U.S. Department of State for FY 2012, 54 percent of Haitian applicants were refused temporary B-1/B-2 visas, and 61.7 percent of Somalian applicants were refused temporary B-1/B-2 visas. Other top asylum seeker source countries with high refusal rates included Nepal (49.4 percent of applicants refused), Ethiopia (39.7 percent of applicants refused), and Iran (37.6 percent of applicants refused). See DOS, NONIMMIGRANT VISA STATISTICS, MULTI-YEAR B VISA ADJUSTED REFUSAL RATES BY NATIONALITY (2006-2012), available at [http://www.travel.state.gov/visa/statistics/nivstats/nivstats\\_4582.html](http://www.travel.state.gov/visa/statistics/nivstats/nivstats_4582.html) (last visited Oct. 22, 2013) (outlining complete data on B-1/B-2 visa refusal rates). For annual statistics on refugees and asylees in the United States, see DHS OFFICE OF IMMIGRATION STATISTICS, 2011 YEARBOOK OF IMMIGRATION STATISTICS (2012) and DHS OFFICE OF IMMIGRATION STATISTICS, ANNUAL FLOW REPORT: REFUGEES AND ASYLEES 2012 (2013). Both reports available at <http://www.dhs.gov/files/statistics/immigration.shtm> (last visited Oct. 31, 2013).

<sup>118</sup> See *id.* (describing refusal rates for top asylum seeker sending countries).

<sup>119</sup> See FOREIGN AFFAIRS AND INTERNATIONAL TRADE CANADA, BEYOND THE BORDER: A SHARED VISION FOR PERIMETER SECURITY AND ECONOMIC COMPETITIVENESS (2011), available at <http://actionplan.gc.ca/en/page/bbg->

Canada and the United States to share information on visa holders, coordinate visa processing requirements, and implement biometric information sharing capabilities, and also makes allowances for the parties to “explore opportunities to broaden asylum cooperation.”<sup>120</sup> It remains to be seen how the Action Plan will impact asylum seekers.

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tpf/beyond-border-action-plan (last visited Oct. 31, 2013) (permitting Citizenship and Immigration Canada, Canada Border Services Agency, and Department of Homeland Security *inter alia* to review information provided to immigration and border-control decision makers, to monitor and report on match rates and the use of information obtained in refugee claim adjudications, and to track the results of bilateral biometric-based information sharing).

<sup>120</sup> *Id.* at 10.

### 3. Airline Check-in, Points of Embarkation, Points of Arrival

*“Rather than relying on physical interdiction, it is more common for states to seek to avoid the arrival of refugees by the adoption of relatively indivisible non-entrée policies. In essence, the goal of these mechanisms is to implement legal norms which have the effect of preventing refugees from even reaching the point of being able to present their case for protection to asylum state authorities.”<sup>121</sup>*

#### (i) Canada

Canada also imposes carrier sanctions on airlines, railways, and shipping companies when they bring foreign nationals who lack proper documentation into Canada.<sup>122</sup> It is well recognized that carrier sanctions work in concert with offshore screening and visa restrictions to prevent asylum seekers from making refugee claims in Canada.<sup>123</sup> By design, the threat of financial penalty creates clear incentives for carriers to err on the side of caution and prevent travelers who *appear* to lack proper identification from boarding Canada-bound planes or boats, irrespective of whether they are genuine refugees.

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<sup>121</sup> HATHAWAY, *supra* note 91 at 291.

<sup>122</sup> See IRPA S.C. ch. 27 (2001) (Can.), *supra* note 13 at § 148 (providing that: (1) A person who owns or operates a vehicle or a transportation facility, and an agent for such a person, must, in accordance with the regulations, (a) not carry to Canada a person who is prescribed or does not hold a prescribed document, or who an officer directs not be carried; (b) hold the prescribed documentation of a person whom it carries to Canada until an examination begins, present the person for examination and hold the person until the examination is completed; (c) arrange for a medical examination and medical treatment and observation of a person it carries to Canada; (d) provide prescribed information, including documentation and reports; (e) provide facilities for the holding and examination of persons being carried to Canada; (f) carry from Canada a person whom it has carried to or caused to enter Canada and who is prescribed or whom an officer directs to be carried; (g) pay for all prescribed costs and fees relating to paragraphs (a), (b), (c) and (f); and (h) provide security for compliance with its obligations under paragraphs (a) to (g)). While Canada has imposed such sanctions on carriers since the early 1980s, it has retooled their use as interdiction measures in recent years. See Crépeau & Nakache, *supra* note 34 at 13 (explaining how various Canadian migration mechanisms have been retooled as interdiction measures in ways that contribute to the “erosion of foreigners’ rights”).

<sup>123</sup> Hathaway & Neve, *supra* note 89 at 223 (noting that “visa controls imposed on refugee-producing countries, coupled with a system of carrier sanctions, can undeniably result in the exposure of genuine refugees to the risk of persecution”); Brouwer & Kumin, *supra* note 72 at 9-10 (examining how carrier sanctions operate as interdiction measures); Crépeau & Nakache, *supra* note 34 at 12-13 (same).

Carrier sanctions serve as another example of Canada's efforts to side step its refugee protection obligations. By delegating authority in this way, Canada effectively co-opts private carriers into acting as proxies for Canadian border enforcement to avoid its refugee protection obligations and circumvent operational policies and constitutional restrictions regarding its treatment of others. However, as noted above, this delegation of authority does not absolve Canada of its refugee protection obligations.<sup>124</sup>

Canadian law prohibits carriers "from carrying to Canada any person who does not hold the prescribed documents required for entry into Canada."<sup>125</sup> Failure to meet this requirement can result in the imposition of significant fees.<sup>126</sup> Carriers may be charged an administrative fee of up to \$3200 per foreign national as well as associated removal costs including expenses incurred for accommodation and transport, medical expenses, translation services, meals, and incidentals.<sup>127</sup> The Canada Border Services Agency has also established a program that allows airline carriers that comply with the CBSA's Memorandum of Understanding to incur reduced carrier sanctions.<sup>128</sup> As Citizenship and Immigration Canada explains, this program outlines a graduated system that grants airlines reduced fees

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<sup>124</sup> See Brouwer & Kumin, *supra* note 72 at 14 (noting that when third party screeners deny passage to migrants when acting on the basis of carrier liability legislation imposed by the state, this does not absolve the state of responsibility, and further that states cannot "deny responsibility for persons who have been brought aboard a private ship if the master of that ship was acting on instructions from the state in question").

<sup>125</sup> CBSA, GUIDE FOR TRANSPORTERS: OBLIGATIONS UNDER THE IMMIGRATION AND REFUGEE PROTECTION ACT (2012), available at <http://www.cbsa-asfc.gc.ca/publications/pub/bsf5023-eng.pdf> (last visited Nov. 1, 2013).

<sup>126</sup> The fee obligations are outlined in the Immigration and Refugee Protection Regulations, IRPR, SOR/2002-227, *supra* note 50 at §§ 278-280. For further discussion, see Brouwer & Kumin, *supra* note 72 at 12-13 (explaining the carrier sanctions program, the procedure for imposing fees, and the procedure for entering pre-inspection agreements to allow for payment of reduced fees).

<sup>127</sup> In accordance with IRPR SOR/2002-227, Section 278, carriers can be required to pay costs of removal, and attempted removal including: expenses incurred within or outside Canada with respect to the foreign national's accommodation and transport, including penalties for changes of date or routing; accommodation and travel expenses incurred by any escorts provided to accompany the foreign national; fees paid in obtaining passports, travel documents and visas for the foreign national and any escorts; the cost of meals, incidentals and other expenses as calculated in accordance with the rates set out in the *Travel Directive* published by the Treasury Board Secretariat, as amended from time to time; any wages paid to escorts and other personnel; and the costs or expenses incurred with respect to interpreters and medical and other personnel engaged for the removal. See IRPR SOR/2002-227, *supra* note 50 at § 278. IRPR Section 279 establishes the procedure by which an administrative fee is assessed and outlines exceptions. IRPR Section 280 outlines administrative fees to be imposed on carriers, in accordance with the Memorandum of Understanding, ranging from \$0 to \$3,200 depending on several criteria.

<sup>128</sup> See CBSA, GUIDE FOR TRANSPORTERS, COMMERCIAL AIRLINE MEMORANDA OF UNDERSTANDING (2012), available at <http://www.cbsa-asfc.gc.ca/publications/pub/bsf5023-eng.html> (last visited Nov. 1, 2013).



“depending on the level of interdiction success as measured against the assigned performance standards”, and is designed “as an incentive for [air] transporters to reduce the number of improperly documented persons arriving in Canada”.<sup>129</sup> In order to avoid fees, carriers are thus put in the position of having to screen passengers and evaluate the authenticity of their documentation prior to departure.<sup>130</sup> Canada’s carrier sanction policies have been heavily criticized for decades.<sup>131</sup>

Actions taken to avoid carrier sanctions can lead to tragic, and sometimes fatal results.<sup>132</sup> Moreover, asylum seekers subject to improper treatment at the hands of private carriers often lack recourse to effectively challenge that treatment, even when it is inhumane. The problems with this scenario are best

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<sup>129</sup> See CITIZENSHIP AND IMMIGRATION CANADA, ENFORCEMENT OPERATION MANUALS ENF 15: OBLIGATIONS OF TRANSPORTERS 9 (2009), available at <http://www.cic.gc.ca/english/resources/manuals/enf/enf15-eng.pdf> (last visited Nov. 1, 2013). Airlines who take part in the program are required to receive training and assistance from CBSA and to comply with the CBSA’s Memorandum of Understanding. See also Crépeau et al, *supra* note 72 at 324 (noting that most airlines flying regular routed into Canada have signed agreements with the CBSA to reinforce the liability of carriers); Crépeau & Nakache, *supra* note 34 at 13-14 (critiquing the effectiveness and legitimacy of these measures).

<sup>130</sup> See Crépeau et al., *id.* at 324 (noting that carrier sanctions transfer migration management to carriers who must make decisions on the possession and authenticity of documents presented by travelers to avoid substantial fines). See also Tally Kritzman-Amir, *Privatization and the Delegation of State Authority in Asylum Systems*, 5 LAW & ETHICS HUM. RTS. 193, 203-204 (2011) (analyzing and advocating against reliance on carrier sanctions as a form of privatization and delegation of state authority in asylum systems).

<sup>131</sup> See e.g., Crépeau et al., *id.*, Brouwer & Kumin, *supra* note 72; Dench, *supra* note 32; Macklin *supra* note 285. See also Letter by Howard P. Goldberg, Former Vice-President of the Air Transport Association of Canada to the Immigration Legislative Review Advisory Group (May 8, 1997) cited in CCR, INTERDICTING REFUGEES *supra* note 94 at 25 (stating “it seems that every day air carriers are being asked to do more to ensure that those seeking to come to Canada as refugees, no matter what their motivations, are kept out”); Constance MacIntosh, *Assessing Human Trafficking in Canada: Flawed Strategies and the Rhetoric of Human Rights*, 1 INTERCULTURAL HUM. RTS L. REV. 407, 433 (2006) (analyzing how carrier sanctions operate as interdiction measures and citing same).

<sup>132</sup> For further discussion see e.g. Morrison & Crosland, *supra* note 87 at 31 (noting that “in the case of commercial sea vessels such proactive action by ship’s crew to avoid carrier fines is known to sometimes have fatal consequences”). Notably, the International Maritime Organization Guidelines Relating to Stowaways prescribe that stowaway asylum seekers should be “treated in accordance with international protection principles,” but these guidelines are difficult to enforce. See International Maritime Organization, *Annex 1 - Revised Guidelines on the Prevention of Access by Stowaways and the Allocation of Responsibilities to Seek the Successful Resolution of Stowaway Cases*, IMO Assemb. Res. FAL 37/17 (Sept. 9, 2011), available at [http://www.imo.org/OurWork/Facilitation/Stowaways/Documents/Resolution%2011\(37\)\\_Revised%20guidelines%20on%20the%20prevention%20of%20access%20by%20stowaways%20and%20the%20allocation%20of%20responsibilities.pdf](http://www.imo.org/OurWork/Facilitation/Stowaways/Documents/Resolution%2011(37)_Revised%20guidelines%20on%20the%20prevention%20of%20access%20by%20stowaways%20and%20the%20allocation%20of%20responsibilities.pdf) (last visited Nov. 1, 2013).

exemplified by the case surrounding the Maersk Dubai incident.<sup>133</sup> In this case, seven officers of the Taiwanese vessel MV Maersk Dubai discovered three Romanian men stowed away on their vessel in two separate voyages to Canada.<sup>134</sup> The officers were accused of throwing the men overboard, ostensibly to avoid incurring carrier sanctions.<sup>135</sup> After receiving reports of the events from one crewmember, Canadian authorities arrested the officers while the ship was anchored in Halifax Harbor.<sup>136</sup> The matter was referred to the Supreme Court of Nova Scotia.<sup>137</sup> Despite finding enough evidence to warrant a trial for second-degree murder and manslaughter, the Court found insufficient jurisdiction to issue a warrant of committal, and discharged the officers.<sup>138</sup>

#### (ii) United States

The United States similarly imposes sanctions on certain carriers that bring improperly documented persons onto U.S. territory.<sup>139</sup> The Immigration and Nationality Act (INA) declares it unlawful for any carrier to bring into the United States “any alien who does not have a valid passport and an unexpired visa, if a visa was required.”<sup>140</sup> In the event that a carrier does so, the resulting sanctions are significant, and can cost \$3000 for each person brought, as well as the cost of the person’s return to their port of origin.<sup>141</sup> In the event such fines go unpaid, a carrier may be denied clearance to land in the United States.<sup>142</sup> Carriers may

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<sup>133</sup> For an account of this incident, see Hungdah Chiu, Sun Yun Chang, and Chih-Yu Wu, *Transfer to the Republic of China of the Detainees Involved in the Maersk Dubai Case in Canada*, 13 CHINESE TAIWAN Y.B. INT’L L. & AFF. 103 (1996).

<sup>134</sup> *Romania (State) v. Cheng* (1997), 158 N.S.R. (2d) 13 (Can.), at paras. 1-3.

<sup>135</sup> *Id.* at para. 1.

<sup>136</sup> *Id.* at para. 4.

<sup>137</sup> *Id.* at para. 7.

<sup>138</sup> *Id.* The state of Romania charged all seven officers with murder, and asked Canadian authorities to extradite them to Romania. The Republic of China (Taiwan) also expressed interest in prosecuting the officers. For subsequent judicial treatments see *Romania (State) v. Cheng* (1997), 147 D.L.R. (4<sup>th</sup>) 298 (Can.) and *Romania (State) v. Cheng* (1997), 162 N.S.R. (2d) 395 (Can.).

<sup>139</sup> See U.S. CUSTOMS AND BORDER PROTECTION, CARRIER INFORMATION GUIDE: UNITED STATES DOCUMENTARY REQUIREMENTS FOR TRAVEL (2011) available at [http://www.cbp.gov/linkhandler/cgov/travel/inspections\\_carriers\\_facilities/carrier\\_info\\_guide/carrier\\_info\\_guide.ctt/carrier\\_info\\_guide.pdf](http://www.cbp.gov/linkhandler/cgov/travel/inspections_carriers_facilities/carrier_info_guide/carrier_info_guide.ctt/carrier_info_guide.pdf) (last visited Nov. 1, 2013) (outlining document requirements for different classes of travelers and carrier responsibilities).

<sup>140</sup> INA § 273(a), 8 U.S.C. § 1323 (a).

<sup>141</sup> INA § 273(b), 8 U.S.C. § 1323(b).

<sup>142</sup> *Id.* See also Suspension of Privilege to Transport Aliens to the United States, 63 Fed. Reg. 56869 (Oct. 23, 1998) (stating that when the Attorney General finds a commercial airline has failed to comply with established regulations for the detection of fraudulent documents, the Attorney General may suspend the entry of non-citizens transported to the United States by the airline).

reduce their liability for violations of INA Section 273 by agreeing to follow particular steps and protocols for passenger screening, as articulated in a Memorandum of Understanding with the Department of Homeland Security.<sup>143</sup> This program was revised in 2010 to add additional passenger screening requirements and to further coordinate participating carriers' screening activities with Customs and Border Protection. This has been achieved, in part, through training provided by Customs and Border Protection and information sharing.<sup>144</sup>

As noted above, in the absence of external oversight, asylum seekers subject to improper treatment at the hands of private carriers sometimes have no recourse by which to challenge their treatment. The U.S. District Court case of *Olga de Leon et al. v. Shih Wei Navigation Co. Ltd* exemplifies this problem.<sup>145</sup> The plaintiffs in this case brought an action in tort for personal injuries suffered when they stowed away on the *Well Pescadores S.A.*, a Panama-flagged vessel departing the Dominican Republic for the United States, with a crew from China.<sup>146</sup> Five men boarded the ship undetected prior to departure, and halfway through the journey, one of the men became ill.<sup>147</sup> The men decided to make their presence known to the crew to seek medical care.<sup>148</sup> The ship captain had implemented a policy to give bonuses to crewmembers if the ship arrived in the United States "stowaway free" to avoid carrier sanctions.<sup>149</sup> In an effort to claim this bonus and avoid financial penalty, the crew threw two of the men overboard and left the other three men on a raft in the middle of the ocean. The men in the raft were saved by another vessel after several hours at sea. The shark eaten bodies of the two other men were found sometime later.<sup>150</sup>

When the surviving men and their families filed suit against the companies that owned and operated the ship in U.S. District Court, the Court dismissed the case. Despite expressing sympathy for the plaintiffs' plight, the Court found that it had

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<sup>143</sup> INA Section 273(e) allows for the reduction of such fines under the authority of the Attorney General. INA § 273(e), 8 U.S.C. § 1323(e). In practice, this is done when a carrier enters into a Memorandum of Understanding (MOU) with DHS (describing MOU process).

<sup>144</sup> See Mitigation of Carrier Fines for Transporting Aliens Without Proper Documents; Modification of Memorandum of Understanding and Recalculation of Performance Levels to Measure Carrier Performance; CBP Dec. 09-06, 75 Fed. Reg. 7616–7619 (Feb. 22, 2010) (amending 8 U.S.C. § 1323).

<sup>145</sup> *De Leon et al. v. Shih Wei Navigation Co. Ltd*, 2007 WL 2021738, *aff'd* 2008 U.S. App. LEXIS 5464 (5th Cir. Tex., Mar. 13, 2008).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

no legal basis on which to assert personal jurisdiction over the defendants and dismissed the case.<sup>151</sup> The fate suffered by the deceased men who boarded the *Well Pescadores S.A.*, like that suffered by the men who boarded the *MV Maersk Dubai*, is both tragic and alarming. These cases not only show the extreme human toll associated with these measures, but also demonstrate how policies that “push the border out” create gaps in jurisdictional authority that remove such activities from the ambit of Canadian and U.S. law.

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<sup>151</sup> *Id.*

## 4. Transit Areas

*“Interception operations, particularly those carried out on the high seas or in the territorial waters of other States, do not always include sufficient protection safeguards to ensure that the principle of non-refoulement is upheld. This raises concerns that refugees and other people in need of international protection may be returned to situations where they are at risk of persecution or other serious harm.”*<sup>152</sup>

### (i) Canada

States also block would-be asylum seekers from reaching their shores by intercepting vessels in transit areas. This practice is known as maritime interception, and occurs when states intercept and repatriate migrants, including some asylum seekers, on the high seas or in the territorial waters of other states.<sup>153</sup> While Canada has collaborated with the United States on joint interception activities in the past, it does not directly engage in maritime interception.<sup>154</sup>

### (ii) United States

The United States, by contrast, has long engaged in maritime interception. The United States has been heavily criticized for this practice, as it has effectively

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<sup>152</sup> UNHCR, RESCUE AT SEA, STOWAWAYS AND MARITIME INTERCEPTION: SELECTED REFERENCE MATERIAL (2<sup>nd</sup> ed.) (Dec 2011) available at <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=4ee1d32b9&query=maritime%20interception%20Operations> (last visited Nov. 1, 2013).

<sup>153</sup> For an analysis of maritime interception operations and the processing of international protection claims see UNHCR, PROTECTION POLICY PAPER: MARITIME INTERCEPTION OPERATIONS AND THE PROCESSING OF INTERNATIONAL PROTECTION CLAIMS: LEGAL STANDARDS AND POLICY CONSIDERATIONS WITH RESPECT TO EXTRATERRITORIAL PROCESSING (2010), available at <http://www.unhcr.org/refworld/pdfid/4cd12d3a2.pdf> (last visited Nov. 1, 2013).

<sup>154</sup> In 1998, Canadian and United States officials arranged for the interception by the Senegalese navy of a boat carrying 192 Tamils from Sri Lanka. See Brouwer & Kumin, *supra* note 72 at 12. For further discussion of this case see Sharryn Aiken, *Of Gods and Monsters: National Security and Canadian Refugee Policy*, 14.2 REV. QUÉ. DE DROIT INT’L (2001); Sharryn Aiken, *Manufacturing ‘Terrorists’: Refugees, National Security, and Canadian Law Part Two*, 19(4) REFUGEE 116, 123-24 (2001) (documenting the case and evaluating its implications). For a review of current interception practices, particularly as conducted by European Union member states, see Guy Goodwin-Gill, *The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement*, 23 INTR’L REFUGEE L. J. 433 (2011).

denied many genuine refugees the opportunity to be heard in their claim for protection.<sup>155</sup> Over the years, interception has had particularly adverse effects on migrants and asylum seekers of Haitian origin.<sup>156</sup>

The U.S. practice of intercepting migrants at sea first became a formal policy in 1981 with the signing of a bilateral agreement with Haiti, which granted the U.S. Coast Guard a right to approach, inspect, and screen passengers on Haitian vessels believed to be bound for the United States.<sup>157</sup> During this period, persons whom the Coast Guard identified as economic migrants were “screened

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<sup>155</sup> See e.g. Lori Nessel, *Externalized Borders and the Invisible Refugee*, 40 COLUM. HUM. RTS. REV. 625, 638-43 (2009) (analyzing the U.S. policy of intercepting and forcibly repatriating Haitian migrants, and describing inadequacy of procedures to determine asylum eligibility historically and in the present day); Lory Diana Rosenberg, *The Courts and Interception: The United States Interdiction Experience and its Impact on Refugees and Asylum Seekers*, 17 GEO. IMMIGR. L.J. 199, 203 (2003) (noting that in the “ten years since the *Sale* decision, the United States’ increasingly restrictive interdiction policy has undoubtedly reduced refugee claims made by Haitians and other refugees who may have warranted consideration and protection under United States refugee law”); Sonia Farber, *Forgotten at Guantanamo: The Boumediene Decision and its Implications for Refugees at the Base under the Obama Administration*, 98 CAL. L. REV. 989, 995 (2010) (describing process of conducting “credible fear interviews” at sea during the 1990s and noting the miniscule number of Haitians and Cubans found to have credible fear compared to the number interdicted). See also RUTH ELLEN WASEM, CONG. RESEARCH SERV., R41753, ASYLUM AND “CREDIBLE FEAR” ISSUES IN U.S. IMMIGRATION POLICY 9-10 (2011) (noting that many Haitian migrants do not appear among those who claim asylum in the United States).

<sup>156</sup> See *id.* See also David Kerwin, *The Faltering US Refugee Protection System: Legal and Policy Responses to Refugees, Asylum-Seekers, and Others in Need of Protection*, 31 REFUGEE SURVEY Q. 1 (2012) (discussing the impact of U.S. maritime interception practices on Haitian migrants and asylum seekers); See also Stephen H. Legomsky, *The USA and the Caribbean Interdiction Program*, 18 (3-4) INT’L J. REFUGEE L. 677, 678 (2006) (discussing interdiction tactics utilized by the United States and their effect on asylum seekers).

<sup>157</sup> Stating that “the ongoing migration of persons to the United States in violation of our laws is a serious national problem detrimental to the interests of the United States,” President Regan justified the Agreement and interdiction policy on the grounds that “the continuing illegal migration by sea of large numbers of undocumented aliens” was resulting in “severely strained law enforcement resources” and “threatened the welfare and safety of communities in that region.” See Proclamation No. 4865, 46 FR 48107, 3 CFR, 1981 Comp., 50 (Sept. 29, 1981), available at <http://www.archives.gov/federal-register/codification/proclamations/04865.html> (last visited Nov. 2, 2013). The Agreement explicitly recognized that the United States was bound to respect international law with regard to the protection of refugees and formally provided that intercepted migrants should be “screened” for possible asylum claims. Later in 1981, the United States suspended undocumented migrants from entering Florida and ordered the U.S. Coast Guard to intercept undocumented migrants from Haiti. See Executive Order 12,324 46 Fed. Reg. 48,107, 48,109 (1981). Notably, in addition to this agreement with Haiti, the United States has since also established migrant interdiction agreements with many more countries in the Caribbean region, including: Dominican Republic (2003), Bahamas (2004), Suriname, Netherlands, Antilles, Aruba and Ecuador (2006). See Efthymios Papastavridis, *Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law*, 36 SYRACUSE J. INT’L L. & COM. 145, 179-181 (2009) (describing agreements).

out” and repatriated, while a relatively small number of migrants who were able to make what was deemed to be a credible showing of refugee status were “screened in” and ultimately transported to the United States to file a formal application for asylum.<sup>158</sup> Between 1981 and 1991, the U.S. Coast Guard intercepted approximately 59,000 Haitians.<sup>159</sup> In May 1992, by way of Executive Order 12807, the United States government proclaimed that its international legal obligations under the Refugee Convention did not extend outside U.S. territorial waters, such that it was no longer necessary to screen migrants intercepted at sea.<sup>160</sup> The policy established by Executive Order 12807 remains in effect.<sup>161</sup>

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<sup>158</sup> This history is outlined in detail in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), at 162-163. Notably, the informal standard for determining whether the individual expressed “credible fear” of persecution was the precursor to the more formal “credible fear determination” now stipulated by statute as a screening mechanism for refugees in expedited removal proceedings. See Rosenberg, *supra* note 155 at 201-202 (discussing background, scope and implementation of U.S. high seas interception policies, as well as the deterring effect of U.S. expedited removal and detention policies).

<sup>159</sup> Between 1981 and late 1991, the U.S. Coast Guard intercepted approximately 25,000 Haitian migrants. In the wake of political upheaval in Haiti in September 1991, the United States Coast Guard suspended repatriations for several weeks, but resumed interdiction and forced repatriation by November 18, 1991, interdicting over 34,000 Haitian migrants over six months. The United States Department of Defense established temporary facilities at the United States Naval Base in Guantanamo Bay, Cuba, to accommodate interdicted Haitians during the screening process. On May 22, 1992, the United States Navy determined that no additional migrants could safely be accommodated at Guantanamo. See *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993) *id* at 162-163.

<sup>160</sup> See Executive Order 12807, 57 FR 23133 (1992), available at <http://www.presidency.ucsb.edu/ws/?pid=23627> (last visited Nov. 2, 2013) (stating that “the President has authority to suspend the entry of aliens coming by the sea without necessary documentation” and that “the international legal obligations of the United States under the United Nations Protocol Relating to the Status of Refugees... do not extend to persons located outside the territory of the United States”).

<sup>161</sup> See U.S. COAST GUARD, DEPARTMENT OF HOMELAND SECURITY, DISTRICT ELEVEN RESPONSE (DR) LAW ENFORCEMENT ALIEN MIGRANT INTERDICTION OPERATIONS available at <http://www.uscg.mil/d11/dr/MigrantInterdiction.asp> (last visited Oct. 23, 2013) (stating that “Under Executive Order 12807 (1992) and in support of USC Title 8, the USCG migrant interdiction policy is designed to interdict undocumented migrants prior to landfall in the United States. Based on these instructions, the USCG is authorized to stop and board vessels when there is reason to believe such vessels are engaged in: (a) the “irregular transport of persons”; (b) violations of U.S. immigration law; and/or (c) violation of the immigration laws of a foreign country with which the U.S. has an agreement. This mission consists of detection and monitoring of migrant smuggling vessels and apprehending, detaining, and assisting in the repatriation of migrants”).

The U.S. policy of maritime interception and repatriation was challenged before the United States Supreme Court in *Sale v. Haitian Centers Council, Inc.*<sup>162</sup> The Court ruled that the practice of interception and repatriation did not violate international refugee law, even though repatriated persons were being returned to countries where they faced possible risks of persecution, with no hearing on their asylum claim.<sup>163</sup> UNHCR was very critical of the *Sale* decision, stating it was a “setback to modern international law”, and that maritime interception violates the Refugee Convention.<sup>164</sup> The Inter-American Commission on Human Rights has since ruled that the United States’ treatment of interdicted migrants as outside the jurisdiction of the Refugee Convention is contrary to international law.<sup>165</sup>

The U.S. Coast Guard continues to monitor maritime transit routes to intercept boats outside U.S. territorial waters.<sup>166</sup> The goal of such interception is the removal and return of migrants, including persons who might seek asylum, to their countries of origin “without the costly processes required if they

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<sup>162</sup> See *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), *supra* note 158. Notably, this challenge was filed in March 1992, before the promulgation of Executive Order No. 12807.

<sup>163</sup> *Id.* at 188-189 (ruling that neither the Immigration and Nationality Act nor the United Nations Refugee Convention limits the United States government’s power to order the Coast Guard to repatriate undocumented migrants intercepted outside United States territory).

<sup>164</sup> See UNHCR, *UN High Commissioner for Refugees Responds to U.S. Supreme Court Decision in Sale v. Haitian Centers Council*, 32 I.L.M. 1215 (1993) (stating that the “obligation not to return refugees to persecution arises irrespective of whether governments are acting within or outside their borders”).

<sup>165</sup> See *Haitian Center for Human Rights v. United States*, Case 10.675, Inter-Am. C.H.R., Report No. 51/96, OEA/Ser.L/V/II.95, doc. 7 rev. P 156 (1997). See also Nessel, *supra* note 155 at 641-642 (noting that the decision was widely criticized both within the United States and the international community); Andrew I. Schoenholtz, *Refugee Protection in the United States Post-September 11*, 36 COLUM. HUM. RTS. L. REV. 323, 362 (2005) (noting that the decision “cleared the legal way for Presidents to mistreat Haitians by holding that direct return without any screening after interdiction on the high seas does not violate the U.S. obligation not to return refugees to countries of persecution”).

<sup>166</sup> This policy is outlined in the U.S. Coast Guard’s law enforcement manual. See U.S. COAST GUARD, MARITIME LAW ENFORCEMENT MANUAL (MLEM) (Chapter 6) 6-10, available at [http://www.uscg.mil/hq/cg5/cg531/AMIO/FOIA\\_Docs.pdf](http://www.uscg.mil/hq/cg5/cg531/AMIO/FOIA_Docs.pdf) (last visited Nov. 2, 2013). The Manual states: “Units shall interdict undocumented migrants, wherever located, who are attempting to reach the U.S., but have not yet entered the U.S. This includes migrants intending to transit through the territory of a third country before proceeding to the U.S.” (at Section C.1.B), and further: “National and Coast Guard policy is to interdict undocumented migrants prior to landfall in the U.S. as far at sea as possible” (at Section C.1.c.1). See also generally JOANNE VAN SELM & BETSY COOPER, MIGRATION POLICY INSTITUTE, THE NEW “BOAT PEOPLE”: ENSURING SAFETY AND DETERMINING STATUS 11 (2005) available at [http://www.migrationpolicy.org/pubs/boat\\_people\\_report.pdf](http://www.migrationpolicy.org/pubs/boat_people_report.pdf) (last visited Oct. 23, 2013) (noting that the U.S. Coast Guard monitors common transit routes on the high seas and intercepts boats “as far as possible from US shores”).



successfully enter the United States.”<sup>167</sup> After an earthquake devastated Haiti in January 2010, the United States government announced that it would continue to intercept and repatriate Haitians who might attempt to reach the United States by boat.<sup>168</sup> Although the policy continues, in recent years, the United States has engaged in fewer interceptions than it has in the past.<sup>169</sup>

<sup>167</sup> UNITED STATES COAST GUARD, ALIEN MIGRANT INTERDICTION, *available at* [www.uscg.mil/hq/cg5/cg531/AMIO/amio.asp](http://www.uscg.mil/hq/cg5/cg531/AMIO/amio.asp) (last visited Nov. 14, 2012) (hereinafter U.S. COAST GUARD).

<sup>168</sup> *See e.g.* News Release, Department of Homeland Security (May 17, 2011), Secretary Napolitano Announces the Extension of Temporary Protected Status for Haiti Beneficiaries *available at* <http://www.dhs.gov/news/2011/05/17/secretary-napolitano-announces-extension-temporary-protected-status-haiti> (last visited Oct. 25, 2013) (confirming that DHS “has been repatriating Haitians seeking to illegally enter the United States since the earthquake in 2010”, that the U.S. Coast Guard “has been intercepting Haitians at sea” and that CBP has been “removing inadmissible Haitians who have arrived at U.S. ports of entry”). *See also* News Release, U.S. Immigration and Customs Enforcement, Policy for Resumed Removals to Haiti (Apr. 1, 2011) *available at* <http://www.ice.gov/news/releases/1104/110401washingtondc2.htm> (last visited Oct. 24, 2013) (noting that while ICE temporarily ceased removing Haitian nationals following the January 12, 2010 earthquake, it was “resuming limited removal of convicted criminal Haitians with final orders of removals” as of January 2011, excluding Haitian nationals without criminal records, Haitians who have temporary application status, who have applications for temporary protection status, or who are otherwise present in the United States with lawful status); Spencer Hsu, *Officials Try to Prevent Haitian Earthquake Refugees from Coming to the U.S.*, WASH. POST (Jan. 18, 2010) *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/17/AR2010011701893.html> (last visited Nov. 3, 2013) (describing efforts to prevent Haitian migration in the aftermath of the earthquake). Rights groups like Human Rights First were heavily critical of the U.S. response to the 2010 earthquake, and in a letter to DHS Secretary Janet Napolitano dated March 12, 2010, urged that crucial steps be taken to assist displaced Haitians and prevent Haitians from risking their lives at sea, including rescinding the so-called “shout test”, a process by which Haitians intercepted at sea are returned to Haiti unless they express fear through physical resistance or shouting. *See* Human Rights First et al, *Haiti Sign ON Letter to DHS* (March 2010) *available at* [http://www.humanrightsfirst.org/wp-content/uploads/pdf/Haiti\\_Sign\\_On\\_Letter\\_to\\_DHS\\_march\\_2010.pdf](http://www.humanrightsfirst.org/wp-content/uploads/pdf/Haiti_Sign_On_Letter_to_DHS_march_2010.pdf) (last visited Nov. 3, 2013). Notably, DHS appropriated extra funds to prepare its facility at Guantanamo to receive Haitian nationals. In this particular case, only \$260,000 were appropriated to prepare the facilities at Guantanamo. For discussion, *see* Royce Bernstein Murray & Sarah Petrin Williamson, *Migration as a Tool for Disaster Recover: A Case Study on U.S. Policy Options for Post-Earthquake Haiti*, CGD WORKING PAPER 255 (2011), *available at* <http://www.cgdev.org/content/publications/detail/1425143> (last visited Nov. 2, 2013). Though the number has fluctuated, fewer interdicted migrants are housed at Guantanamo Bay today. In 2010 there were just one dozen migrants at the facility. *See* Farber, *supra* note 55 at 992-997 (2010) (describing historical trends and usage of Guantanamo as a holding facility for interdicted refugees).

<sup>169</sup> For example, the U.S. Coast Guard reported that between 1991 and 1995, an intense period of interdiction, it interdicted over 120,000 migrants from 23 countries. *See* U.S. COAST GUARD, *supra* note 167. In 2004, there was another peak of 10,899 interdictions, followed by a steady annual decrease in numbers. In FY 2010-2013, for example, the U.S. Coast Guard recorded approximately 2,000-3,000 interdictions per fiscal year. For an overview, *see* U.S. COAST GUARD, ALIEN MIGRANT INTERDICTION: TOTAL INTERDICTIONS- FISCAL YEAR 1982 TO PRESENT, *available at*

## 5. Land Border

*“The reality is we don’t have many refugees coming to Canada compared to Europe because you see not many people are being able to come here. It’s far; the only land crossing we have is with the United States.”<sup>170</sup>*

### (i) Canada

Over the last decade, Canada has intensified its regulation of the land border it shares with the United States, imposing significant restrictions on asylum seekers. Before the Safe Third Country Agreement came into effect, the Canadian government authorized the application of “direct back” procedures at the Canada-U.S. border, which allowed Canadian authorities to temporarily return foreign nationals arriving at the border to the United States, without assurances as to their capacity for return.<sup>171</sup> Although the “direct back” policy was not originally intended to apply to asylum seekers, Citizenship and Immigration Canada (CIC) issued administrative guidelines in 2001 authorizing officers to direct back asylum seekers in “exceptional circumstances.”<sup>172</sup> In January 2003, CIC issued new guidelines altering its policy so as not to require

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<http://www.uscg.mil/hq/cg5/cg531/AMIO/FlowStats/FY.asp> (last visited Nov. 2, 2013) (showing interdictions each fiscal year from 1982 to present by nationality, with Haiti, Dominican Republic, People’s Republic of China and Cuba identified as the top sending countries). It should also be noted that compared to other means of entry, only a small percentage of would-be asylum seekers attempt to reach the United States by boat. See e.g. VAN SELM & COOPER, *supra* note 166 at 1 (noting that just one percent of migrants attempting to enter the United States arrive by sea).

<sup>170</sup> Interview with Saleem Spindari (Community Outreach Coordinator), MOSAIC British Columbia (May 16, 2012), para. 40.

<sup>171</sup> Information about Canada’s use of direct back policies obtained through Freedom of Information Request File A-2012-01386/LIB, filed with the Canada Border Services Agency under the Access to Information Act, R.S.C. ch. A-1 (1985) (Can.) (completed Jun. 11, 2012) (requesting informational bulletins regarding the ‘direct back’ policy at the U.S.-Canada border, from 2003-2012). See also Petition from Deborah Anker and petitioners to Inter-Am. C.H.R. 2 (Mar. 31, 2004), available at <http://ccrweb.ca/IACHRpet.PDF>, at 2-4 (last visited Nov. 3, 2013) (hereinafter IACHR Petition) (explaining the administrative context and authorization for the direct back policy).

<sup>172</sup> See Citizenship and Immigration Canada, CIC Refugee Claimant Deferral and Temporary Return Policy (Oct. 11, 2001), quoted in IACHR Petition, *id.* at 3. The guidelines provided that “direct backs” were permissible in situations where the United States Immigration and Naturalization Service (which has since been dissolved, and its functions assumed by the U.S. Bureau of Citizenship and Immigration Services in the Department of Homeland Security) provided assurances that the refugee claimants who were directed back would be able to return to Canada on a specified interview date.

U.S. authorities to provide assurances that asylum seekers who were directed back could return to Canada for their scheduled interviews.<sup>173</sup>

In April 2004, a coalition comprised of Amnesty International Canada, Canadian Council for Refugees, Freedom House, Global Justice Center, Harvard Immigration and Refugee Clinical Program, Harvard Law School Advocates for Human Rights, and Vermont Refugee Assistance filed a complaint against the Canadian government with the Inter-American Commission on Human Rights, challenging the legality of the “direct backs” policy.<sup>174</sup> The Petition led to decision finding that Canada failed to abide by its refugee protection obligations under international law.<sup>175</sup> In 2006, UNHCR also expressed significant concern about Canada’s use of the “direct back” policy, and strongly recommend that Canada discontinue the practice.<sup>176</sup> Soon after, the Canadian government issued a policy guideline stating that direct backs will be phased out and used only in exceptional circumstances.<sup>177</sup> As the practitioners interviewed for this report confirmed, the “direct back” policy is now rarely if ever utilized, especially given the coming into force of the Safe Third Country Agreement.<sup>178</sup>

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<sup>173</sup> Citizenship and Immigration Canada, Instructions for Front-end Processing of Refugee Protection Claims (Jan. 27, 2003) cited in IACHR Petition, *id.* at 3.

<sup>174</sup> IACHR Petition, *id.* See also John Doe et al. v. Canada, Case 12.586, Inter-Am. Comm. H.R., Report No. 24/11, OEA/Ser.L/V/II.141, doc. 29 (2011), available at [http://ccrweb.ca/files/iachrdecision\\_johndoe.pdf](http://ccrweb.ca/files/iachrdecision_johndoe.pdf) (last visited Nov. 5, 2013).

<sup>175</sup> *Id.* (concluding that Canada had violated Arts. XXVII and XVIII of the American Declaration of the Rights and Duties of Man by failing to protect the right to seek asylum in a foreign territory, failing to conduct a basic, individualized assessment with respect to the risk of *refoulement*, and failing to provide effective access to judicial review of the application of the direct back policy).

<sup>176</sup> UNHCR, MONITORING REPORT: CANADA-U.S. “SAFE THIRD COUNTRY” AGREEMENT: 29 DEC. 2004 – 28 DEC. 2005 25 (June 2006) available at <http://www.unhcr.org/455b2cca4.html> (last visited Nov. 5, 2013) (hereinafter STCA MONITORING REPORT) (analyzing the “direct back” policy and noting that “UNHCR strongly recommends that CBSA find an alternative to direct backs, particularly for claimants who are without legal status in the U.S. and who therefore risk being detained upon return”).

<sup>177</sup> CITIZENSHIP AND IMMIGRATION CANADA, A PARTNERSHIP FOR PROTECTION: YEAR ONE REVIEW (Nov. 2006) available at <http://www.cic.gc.ca/english/department/laws-policy/partnership/chapter4.asp> (last visited Nov. 3, 2013) (noting that the “CBSA has decided to phase out the use of the direct back policy for refugee claimants arriving from the U.S. at the land border”, and further stating: “Since August 31, 2006, its use is limited to extraordinary situations, subject to oversight by CBSA National Headquarters in consultation with CIC”).

<sup>178</sup> See Interview with Rebecca Cohen (Senior Attorney) and Kelly Steffens AuBuchon (Staff Attorney), Freedom House (Jul. 27, 2012), paras.141-146; Interview with Martha Mason (Executive Director), Rod McDowell (Board President), and Ronald Gray (Board Vice-President), Fort Erie Multicultural Centre (Jul. 25, 2012), paras. 196-198; Interview with Peter Murrett (Attorney), Vive La Casa (Jul. 27, 2012), para. 106; Interview with Michele Jenness (Executive Director), Vermont Immigration and Asylum Advocates (Aug. 10, 2012) paras. 212-217; Interview with Betsy Tao (Directing Attorney), Northwest Immigrant Rights Project (Aug. 28, 2012) paras.61-62.

Another significant change in the regulation of the land border came with the creation of the Canada Border Services Agency (CBSA) in 2003, an integrated border management agency responsible for border, immigration, and customs services.<sup>179</sup> The CBSA's creation transferred the handling of port of entry asylum claims away from CIC, an agency whose mandate centers on facilitating integration and maintaining Canada's humanitarian tradition.<sup>180</sup> The CBSA, in contrast, falls under Canada's Public Safety mandate, and functions as an enforcement agency centering on national security and public safety.<sup>181</sup>

The creation of the CBSA had a profound effect on the climate of refugee assessments along the land border, and signaled a shift away from a culture of protection to a culture of enforcement and policing.<sup>182</sup> Indeed, the Canada-U.S. border is now regulated through a fusion of law enforcement and security goals, and an escalation of policing tactics and hardline rhetoric on restricting the flow of goods and people across the border.<sup>183</sup>

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<sup>179</sup> Press Release, The Canada Border Services Agency, Government of Canada Introduces Legislation to Establish the Canada Border Services Agency (Nov. 11, 2004), *available at* <http://www.cbsa-asfc.gc.ca/media/release-communique/2004/1123ottawa-eng.html> (last visited Aug. 4, 2013). The Agency's creation was introduced through Bill C-26, An Act to Establish the Canada Border Services Agency, which received Royal Assent Nov. 3, 2005. See Canada Border Services Agency Act, 38th Parl., 1st Sess., 2005, C-26, (Can.), *available at* <http://www.parl.gc.ca/legisinfo/BillDetails.aspx?billId=1481807&Language=E&Mode=1> (last visited Nov. 4, 2013). See also PARLIAMENT OF CANADA, BILL C-26: CANADA'S BORDER SERVICES AGENCY ACT (Dec. 1, 2004) *available at* [http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/Bills\\_Is.asp?ls=C26&Parl=38&Ses=1](http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/Bills_Is.asp?ls=C26&Parl=38&Ses=1) (last visited Nov. 4, 2013) (summarizing Bill C-26).

<sup>180</sup> CITIZENSHIP AND IMMIGRATION CANADA, OUR MANDATE (Oct. 19, 2012), *available at* <http://www.cic.gc.ca/english/department/mission.asp> (last visited Nov. 4, 2013) (explaining the CIC's mandate, mission, and vision). Notably, CIC is still responsible for handing asylum claims made inland.

<sup>181</sup> Press Release, Canada Border Services Agency, *supra* note 179.

<sup>182</sup> Interview with Janet Dench (Executive Director), Canadian Council for Refugees (Aug. 13, 2012). For a discussion of the creation of the CBSA's impact on refugee claims, see CANADIAN COUNCIL FOR REFUGEES, ANTI-TERRORISM AND THE SECURITY AGENDA: CONSEQUENCES ON CITIZENSHIP, IMMIGRATION, AND REFUGEE POLICIES IN CANADA (2004), *available at* <http://ccrweb.ca/en/anti-terrorism-and-security-agenda-consequences-citizenship-immigration-and-refugee-policies-canada> (last visited Nov. 5, 2013). See also Crépeau et al., *supra* note 72 at 325 (arguing that the regulation of the border is further reinforced by the enhanced training of border protection agents).

<sup>183</sup> For an overview of border security and law enforcement measures implemented along the Canada-U.S. border see DEP'T OF HOMELAND SECURITY (DHS), U.S.-CANADA BEYOND THE BORDER ACTION PLAN: A SHARED VISION FOR PERIMETER SECURITY AND ECONOMIC COMPETITIVENESS (2011), *available at* <http://www.dhs.gov/xlibrary/assets/wh/us-canada-btb-action-plan.pdf> (last visited Nov. 4, 2013) (hereinafter BEYOND THE BORDER). See also CARL EK & IAN F. FERGUSSON, CONG. RESEARCH SERV., R96-397, CANADA-U.S. RELATIONS 16 (2012), *available at* [www.fas.org/spp/crs/row/96-397.pdf](http://www.fas.org/spp/crs/row/96-397.pdf) (last visited Nov. 4,

(ii) United States

In recent years, border enforcement has become a centerpiece of United States migration policy.<sup>184</sup> Under a strategy of “prevention through deterrence,” successive governments have concentrated ever more resources at the northern and southern border in manpower and technology, and imposed increased penalties for illegal entry.<sup>185</sup>

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2013) (providing an overview of border infrastructure designed to enhance security along the Canada-U.S. border).

<sup>184</sup> See e.g. REY KOSLOWSKI, MIGRATION POLICY INSTITUTE, THE EVOLUTION OF BORDER CONTROLS AS A MECHANISM TO PREVENT ILLEGAL IMMIGRATION (2011), available at <http://www.migrationpolicy.org/pubs/bordercontrols-koslowski.pdf> (last visited Nov. 4, 2013) (documenting physical and virtual border systems and border technologies implemented by the United States in the aftermath of September 11, 2001, designed to screen passengers more effectively at official entry points and to prevent people from crossing the border clandestinely between entry points, focusing specifically on the U.S.-Mexico border).

<sup>185</sup> See MARC ROSENBLUM, CONG. RESEARCH SERV., R42138, BORDER SECURITY: IMMIGRATION ENFORCEMENT BETWEEN PORTS OF ENTRY 3-5 (2013), available at <http://www.fas.org/sgp/crs/homesecc/R42138.pdf> (last visited Nov. 5, 2013). While the United States has stepped up enforcement along both its northern and southern border, the differences between the U.S.-Mexico border and the Canada-U.S. border are extreme. Today, the U.S.-Mexico border is more difficult to cross than ever, and migrants who attempt to cross the border are frequently subject to grave rights violations. See e.g. AMERICAN CIVIL LIBERTIES UNION, HUMAN RIGHTS VIOLATIONS ON THE UNITED STATES-MEXICO BORDER (Oct. 5, 2013) available at [http://www.aclu.org/files/assets/121024\\_aclu\\_written\\_statement\\_ochcr\\_side\\_event\\_10\\_25\\_12\\_final\\_0.pdf](http://www.aclu.org/files/assets/121024_aclu_written_statement_ochcr_side_event_10_25_12_final_0.pdf) (last visited Oct. 9, 2013) (identifying serious human rights violations along the U.S.-Mexico border and urging the United Nations to call for the United States to transparently and thoroughly investigate these abuses); AMNESTY INTERNATIONAL, IN HOSTILE TERRAIN: HUMAN RIGHTS VIOLATIONS IN IMMIGRATION ENFORCEMENT IN THE U.S. SOUTHWEST (2012) available at <http://www.amnesty.org/en/library/asset/AMR51/018/2012/en/4905b8cd-8d5b-41b9-a301-3121fca2e1cd/amr510182012en.pdf> (last visited Nov. 9, 2013) (identifying a pattern of human rights violations along the U.S.-Mexico border). For an analysis of the prevalence of migrant deaths at the U.S.-Mexico border, see BINATIONAL MIGRATION INSTITUTE, A CONTINUED HUMANITARIAN CRISIS AT THE BORDER (June 2013) available at [http://bmi.arizona.edu/sites/default/files/border\\_deaths\\_final\\_web.pdf](http://bmi.arizona.edu/sites/default/files/border_deaths_final_web.pdf) (last visited Oct. 9, 2013) (reporting high numbers of undocumented border crosser deaths, as recorded by the Pima County Office of the Medical Examiner); MARIA JIMENEZ, ACLU, HUMANITARIAN CRISIS: MIGRANT DEATHS AT THE U.S.-MEXICO BORDER (2009), available at <http://www.aclu.org/pdfs/immigrants/humanitarianreport.pdf> (last visited Nov. 5, 2013) (documenting deaths along the U.S.-Mexico border region). See also Jennifer Chacon, *Tensions and Trade-offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1610–11 (2010) (describing prosecution for illegal entry along the U.S.-Mexico border and the legal and physical barriers erected through U.S. border enforcement). In some areas along the United States border, the increase in staffing and integration of the border patrol into other areas of law enforcement has been criticized as resulting in civil rights violations. See e.g. William Yardley, *In Far Northwest, a New Border Focus on Latinos*, NEW YORK TIMES, May 28, 2012, at A1 available at [http://www.nytimes.com/2012/05/29/us/hard-by-canada-border-fears-of-crackdown-on-latin-immigration.html?\\_r=0&adxnnl=1&pagewanted=all&adxnnlx=1374771648-YpuEXV4SxtSHdVnfONNeyg](http://www.nytimes.com/2012/05/29/us/hard-by-canada-border-fears-of-crackdown-on-latin-immigration.html?_r=0&adxnnl=1&pagewanted=all&adxnnlx=1374771648-YpuEXV4SxtSHdVnfONNeyg) (last visited Oct. 22, 2013). Recently, a lawsuit was filed on behalf of racial minorities in the Olympic Peninsula of Washington state alleging racial profiling by border patrol agents. *Sanchez v. U.S. Office of Border Patrol et al.*, U.S. Dist. Court. Western Dist. of WA (filed April

Despite the 2011 cancellation of the Secure Border Initiative Network (“SBInet”)<sup>186</sup>, which aimed to create a “virtual fence” comprised of a complex network of advanced surveillances equipment to secure the United States land borders, the U.S. government has substantially increased the militarization of the southern border regions, with the use of unmanned drones and the deployment of ever larger numbers of border agents and National Guard troops.<sup>187</sup> Coupled with the continuing restriction of legal means of entry, this tightening of the border is devastating to asylum seekers, many of whom must first reach the United States to make a claim for refugee protection.

While the United States has focused much of its attention on the southern border it shares with Mexico, it has also worked with Canada to enhance security

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26, 2012. A copy of the complaint is available from the Northwest Immigrants Rights Project at <http://nwirp.org/Documents/PressReleases/forkscomplaint.pdf> (last visited Nov. 5, 2013). A settlement was reached Sept 20, 2013, the details of which are *available at* <http://aclu-wa.org/sites/default/files/attachments/2013-09-23--Fully%20Executed%20Settlement%20Agreement.pdf> (last visited Oct. 9, 2013) (outlining, *inter alia*, agreement that all Border Patrol agents assigned to the Port Angeles Station are required to receive additional training in Fourth Amendment protections, including those related to vehicle stops; to provide plaintiff’s attorneys with reports for 18 months documenting all stops in the Olympic Peninsula; and to comply with judicial decisions setting limits on stops and interrogations).

<sup>186</sup> See DEPARTMENT OF HOMELAND SECURITY, SBINET PROGRAM: PROGRAM-SPECIFIC RECOVERY ACT PLAN (MAY 15, 2009) *available at* [http://www.dhs.gov/xlibrary/assets/recovery/CBP\\_SBINet\\_Program\\_Final\\_2009-05-15.pdf](http://www.dhs.gov/xlibrary/assets/recovery/CBP_SBINet_Program_Final_2009-05-15.pdf) (last visited Oct. 9, 2013) (providing overview of SBInet program, and noting that its goal is “to integrate new and existing border technology into a single, comprehensive border security system that will enable CBP agents and officers to more effectively detect, identify, classify, and respond to illegal activity at U.S. borders”). See also CNN Wire Staff, *Homeland Security Chief Cancels Costly Virtual Border Fence*, CNN U.S. (Jan. 14, 2011) *available at* <http://www.cnn.com/2011/US/01/14/border.virtual.fence/> (last visited Oct. 9, 2013) (reporting that Homeland Security Secretary Janet Napolitano announced the cancellation of the “controversial virtual fence along the U.S. border with Mexico, citing technical problems, cost overruns and schedule delays since its inception in 2005”).

<sup>187</sup> See After SBInet – The Future of Technology on the Border, Subcomm. on Border and Mar. Sec. of the H. Comm. on Homeland Sec., 112th Cong. (Mar. 15, 2011) (testimony of Mark Borkowski, Assistant Commissioner, Office of Technology, Innovation and Acquisition, U.S. Customs and Border Protection; Michael Fisher, Chief, U.S. Customs and Border Protection; and Michael Kostelnik, Assistant Commissioner, Office of Air and Marine, U.S. Customs and Border Protection), *available at* <http://www.dhs.gov/news/2011/03/15/written-testimony-cbp-house-homeland-security-subcommittee-border-and-maritime> (last visited Nov. 5, 2013) (describing cancellation of SBInet program and new border security initiatives to be implemented in its place). See also Jeremy Pelofsky, *Administration Giving up on Full ‘Virtual Fence’ on Border*, WASH. POST (Jan. 15, 2011) at A04, *available at* [http://www.washingtonpost.com/wp-dyn/content/article/2011/01/14/AR2011011406893\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2011/01/14/AR2011011406893_pf.html) (last visited Nov. 5, 2013) (describing cancellation of SBInet program).

along its northern border.<sup>188</sup> For example, the United States increased the number of CBP Officers along the northern border from 340 agents in 2001 to over 2,220 agents in 2012.<sup>189</sup> It has also increased the number of CBP officers stationed at ports of entry, from 2,721 officers in 2003 to approximately 3,700 officers in 2012, and also currently stations approximately 400 personnel in pre-screening and pre-inspection locations in Canada as well as at the U.S. Embassy in Ottawa and consulates across the country.<sup>190</sup>

The United States deploys additional technologies to monitor the northern border, including thermal camera systems, mobile surveillance systems, unmanned aircraft systems, an accompanying operations center, and national distress and command and control networks.<sup>191</sup> The DHS Domestic Nuclear Detection Office also deploys radiation portal monitors to all CBP northern border ports of entry.<sup>192</sup> Pursuant to the Beyond the Border Action Plan, the United States and Canada have further enhanced security along their shared border through, for example, integrated cross-border enforcement and cyber-security measures.<sup>193</sup>

In principle, restrictive border policies are designed to decrease and regulate border crossings, including by asylum seekers. However, attempts at denial of physical entry are not necessarily effective in preventing people in desperate circumstances from accessing destination states like the United States, or for that matter, Canada.<sup>194</sup> While the militarization of the U.S. borders has steadily

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<sup>188</sup> See generally US DEP'T OF HOMELAND SECURITY, NORTHERN BORDER STRATEGY (2012), <http://www.dhs.gov/xlibrary/assets/policy/dhs-northern-border-strategy.pdf> (last visited Nov. 6, 2013) (outlining unified DHS strategy to guide the policies and operations at the U.S.-Canada border).

<sup>189</sup> *Id.* at 4.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* At the time of writing, the United States Homeland Security Committee was reported to be considering implementing an in-ground perimeter defense cable sensor system along the Canada-U.S. border, to further boost security. See Kathleen Harris, *U.S. Eyes High-Tech Security Boost at Canadian Border*, CBC NEWS (Jul. 12, 2013) available at <http://www.cbc.ca/news/politics/story/2013/07/11/pol-border-security-hearing.html/> (last visited Nov. 6, 2013) (outlining proposals).

<sup>193</sup> GOVERNMENT OF CANADA, CANADA-UNITED-STATES BEYOND THE BORDER ACTION PLAN IMPLEMENTATION REPORT 12-15 (2012) (explaining, *inter alia*, that Canada and the United States are “pursuing more collaborative and integrated approaches to security the border that enhance our ability to interdict, investigate, and prosecute criminals”, and outlining infrastructure and cyber-security development).

<sup>194</sup> See e.g. Kathleen Newland, *Drop in Asylum Numbers Shows Changes in Demand and Supply*, MIGRATION POLICY INSTITUTE (Apr. 2005), <http://www.migrationinformation.org/Feature/display.cfm?ID=303> (last visited Nov. 6, 2013) (analyzing UNHCR compiled government reports on asylum applications in 50 industrialized countries compared against restrictive asylum policies adopted in these countries).

grown since 2001, statistical reports seem to indicate the number of asylum seekers claiming protection has been on the increase, especially over the past year.<sup>195</sup>

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<sup>195</sup> See DHS OFFICE OF IMMIGRATION STATISTICS, ANNUAL FLOW REPORT: REFUGEES AND ASYLEES 2012 (April 2013), available at [http://www.dhs.gov/sites/default/files/publications/ois\\_rfa\\_fr\\_2012.pdf](http://www.dhs.gov/sites/default/files/publications/ois_rfa_fr_2012.pdf) (last visited Oct. 22, 2013) (reporting refugee and asylee trends over 2010, 2011 and 2012). See also UNHCR, ASYLUM TRENDS 2012: LEVELS AND TRENDS IN INDUSTRIALIZED COUNTRIES 7 (2013) available at <http://www.unhcr.org/5149b81e9.html> (last visited Oct. 22, 2013) (showing worldwide increase in asylum claims filed in the industrialized countries since 2010).



## PART FOUR: SAFE THIRD COUNTRY AGREEMENT

Canada further tightened its border by implementing the Safe Third Country Agreement (STCA). As noted above, the STCA is a bilateral agreement between Canada and the United States that prohibits third country nationals who first set foot in the United States from making refugee claims in Canada at the land border, and vice versa, subject to certain exceptions. Since it came into effect on December 29, 2004, the STCA ushered in what one practitioner described as a “crisis on the border.”<sup>196</sup>

Refugee advocates on both sides of the border strenuously opposed the STCA when it was first introduced. In 2005, a coalition comprised of the Canadian Council for Refugees, Amnesty International Canada, the Canadian Council of Churches, and the claimant John Doe, challenged the STCA before the Federal Court of Canada.<sup>197</sup> The coalition argued that the United States failed to respect its *non-refoulement* obligations under the Refugee Convention and the Convention Against Torture, and thus could not be considered a “safe” third country for refugees.<sup>198</sup> In 2007, the Federal Court of Canada found that the United States failed to comply with its refugee protection obligations under international law, could not be properly classified as “safe”, and declared the STCA to be invalid.<sup>199</sup> In 2008, the Federal Court of Appeal overturned this decision and declared the STCA valid on other grounds.<sup>200</sup> The Supreme Court of Canada denied leave to appeal.<sup>201</sup>

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<sup>196</sup> Interview with Michele Jenness (Executive Director), Vermont Immigration and Asylum Advocates (Aug. 10, 2012) para. 18.

<sup>197</sup> See Canadian Council for Refugees Media Release, *Safe Third Country Agreement Shown to Violate Refugee Rights* (Mar. 29, 2006) available at <http://ccrweb.ca/releasesafe3March06.html> (last visited Oct. 23, 2013) (announcing the coalition’s filing of a legal suit challenging the legality of the Safe Third Country Agreement).

<sup>198</sup> Canadian Council for Refugees et al (2006) *Memorandum of Argument in Legal Challenge to Safe Third Country Agreement before the Federal Court of Canada*, Court File IMM-7818-05, available at: <http://ccrweb.ca/STCA%20Factum.pdf> (last visited Nov. 13, 2013), at paras. 23-26 and 32-33 (arguing that the designation of the United States as a “safe” third country for refugees “is an error”).

<sup>199</sup> Canadian Council for Refugees et al. v. Canada, [2007] FC 1262 (Can.) at paras. 239-240 (listing criteria that individually and collectively undermine the claim that the United States complies with its international *non-refoulement* obligations, and further concluding this evidence of U.S. “non-compliance with Article 33 are sufficiently serious and fundamental to refugee protection that it was unreasonable for the [Governor-in-Council] to conclude that the U.S. is a ‘safe country’”). The Court also found violations of sections 15 (equality) and 7 (life, liberty, and security of the person) of the *Canadian Charter of Rights and Freedoms*, and declared the STCA to have no force and effect.

<sup>200</sup> See *Canada v. Canadian Council for Refugees et al.*, [2008] FCA. 229 (Can.). Notably, the Court of Appeal restored the STCA’s validity, but did not disturb the Federal Court’s findings on the United

Since the STCA does not prescribe a mechanism for meaningful monitoring, there is little information available about its effects. The monitoring provisions mandated in the agreement focus narrowly on whether the STCA is being applied according to its terms, not on how the STCA, when correctly applied, impacts asylum seekers.<sup>202</sup> Our investigations reached the following conclusions:

First, due to deficiencies in the U.S. asylum regime, the STCA endangers asylum seekers and denies them access to fundamental protections to which they are entitled under international law. Second, the effects of the STCA have been felt unevenly on either side of the border, as the STCA has resulted in large numbers of asylum seekers being kept *in* the United States and *out* of Canada. Indeed, the STCA has drastically reduced the number asylum claims made at the Canadian border each year. Further, the exceptions to the STCA are applied inconsistently and inflexibly, raising concerns that asylum seekers who should be granted admission into Canada under the STCA are being turned away for arbitrary or unprincipled reasons. Third, the STCA has prompted rise in human smuggling, and likely also human trafficking, across the Canada-U.S. border. These activities make the border more dangerous, place asylum seekers at risk, and raise serious security concerns for both Canada and the United States.

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States' lack of compliance with refugee protection obligations under international law. For a critical discussion see Efrat Arbel, *Shifting Borders and the Boundaries of Rights: Examining the Safe Third Country Agreement between Canada and the U.S.*, 25 INT'L J. REFUGEE L. 65, 78 (2013) (arguing that the Court of Appeal decision leaves STCA claimants in an impossible legal bind).

<sup>201</sup> See Canadian Council for Refugees et al v. Canada, 2009 CanLII 4204 (SCC) (Can.). See also CANADIAN COUNCIL FOR REFUGEES, APPLICATION TO THE SUPREME COURT OF CANADA SEEKING LEAVE TO APPEAL (Sept. 2008) available at <http://ccrweb.ca/documents/STCA-SCC-leave.pdf> (last visited Oct. 29, 2013) (outlining coalition's argument seeking leave to appeal). The Canadian Council for Refugees criticized the Supreme Court of Canada's decision to deny leave to appeal. See CANADIAN COUNCIL FOR REFUGEES PRESS RELEASE, *Supreme Court Denial of Leave on Safe Third Regretted* (Feb 5, 2009) available at <http://ccrweb.ca/en/bulletin/09/02/05> (last visited Oct. 29, 2013).

<sup>202</sup> See STCA, *supra* note 6 at Art. 8 (outlining review provisions). See also CANADIAN COUNCIL FOR REFUGEES, CLOSING THE FRONT DOOR ON REFUGEES: REPORT ON THE FIRST YEAR OF THE SAFE THIRD COUNTRY AGREEMENT 31 (2005), available at <http://ccrweb.ca/closingdoordec05.pdf> (last visited Oct. 29, 2013) (hereinafter CCR, CLOSING THE FRONT DOOR) (analyzing STCA's monitoring provisions, and stating that the concerns with the STCA is that "when correctly applied, the Agreement will have devastating impacts on the lives of asylum seekers and promote irregular border crossings").

## 1. Denying Access to Fundamental Protections

*“We call it a safe country, but it is safe for whom?”<sup>203</sup>*

The STCA’s operational legitimacy hinges on the assumption that the United States and Canada are equally “safe” countries for refugees.<sup>204</sup> Although the United States has improved its asylum procedures in recent years, several key aspects of U.S. asylum law and policy fall below international standards and fail to ensure adequate protection standards.<sup>205</sup> By stranding in the United States asylum seekers who would have otherwise been able to seek refuge in Canada, the STCA weakens the legal safeguards available to them, and jeopardizes their ability to obtain fundamental protections.

While a comprehensive discussion of the U.S. asylum system is outside the scope of this report,<sup>206</sup> in the analysis that follows we identify how the U.S. asylum system deviates from international protection standards in relation to: immigration detention; expedited removal; withholding of removal; and statutory bars to asylum.<sup>207</sup>

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<sup>203</sup> Interview with Saleem Spindari (Community Outreach Program Coordinator), MOSAIC British Columbia (May 16, 2012), para. 4.

<sup>204</sup> As noted above, the “safe” designation attests to each country’s formal compliance with the Refugee Convention, the Convention Against Torture, and its general human rights record. *See supra* note 48.

<sup>205</sup> DEBORAH E. ANKER, *THE LAW OF ASYLUM IN THE UNITED STATES* (2013 ed.), at chapters 1 and 6 (hereinafter ANKER, *LAW OF ASYLUM*). *See also* Deborah Anker, *Legal Change from the Bottom Up: The Development of Gender Asylum Jurisprudence in the United States*, in Efrat Arbel, Catherine Dauvergne, and Jenni Millbank eds. *GENDER IN REFUGEE LAW: FROM THE MARGINS TO THE CENTRE* (forthcoming, 2014) (analyzing recent positive developments in gender asylum jurisprudence in the United States).

<sup>206</sup> *See generally* ANKER, *LAW OF ASYLUM*, *id.* For a critique of problems with the U.S. asylum regime and proposals for reform *see* HUMAN RIGHTS FIRST, *HOW TO REPAIR THE U.S. ASYLUM AND REFUGEE RESETTLEMENT SYSTEMS: BLUEPRINT FOR THE NEXT ADMINISTRATION* (Dec. 2012), *available at* [http://www.humanrightsfirst.org/wp-content/uploads/pdf/asylum\\_blueprint.pdf](http://www.humanrightsfirst.org/wp-content/uploads/pdf/asylum_blueprint.pdf) (last visited Oct. 29, 2013) (hereinafter HRF *ASYLUM BLUEPRINT*).

<sup>207</sup> Some of the practitioners interviewed for this report also noted that asylum seekers who are returned to the United States under the STCA are sometimes charged with misrepresentation or visa fraud. These reports are alarming given that, as noted above, Art. 3 of the Refugee Convention prohibits signatory states from penalizing asylum seekers for lacking proper travel documents. *See* Interview with Peter Murrett (Attorney), *Vive La Casa* (Jul. 27, 2012), paras. 56, 61-73; Interview with Rebecca Cohen (Senior Attorney) and Kelly Steffens AuBuchon (Staff Attorney), *Freedom House* (Jul. 27, 2012), paras. 71-72; Interview with Peter Murrett (Attorney), *Vive La Casa* (Jul. 27, 2012), paras. 56, 61-73. These practitioners further noted that given this possibility, they now regularly caution asylum seekers about the possibility that they may be accused of fraud. Given the unavailability of

(i) Detention

Data collected for this report indicates that asylum seekers who are returned to the United States pursuant to the STCA are often subject to detention.<sup>208</sup> Returned asylum seekers are held in dedicated immigration detention facilities with immigrant detainees, in jails with the general prison population, or in dual-purpose facilities doubling both as jails and immigration detention centers.<sup>209</sup> Given the relative absence of female-dedicated detention facilities along the Canada-U.S. border, women asylum seekers returned to the United States under the STCA are more likely to be detained in jails in penal conditions of confinement.<sup>210</sup>

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comprehensive information on the practice, it is difficult to comment on how common this practice is at Canada-U.S. border crossings. For a case example involving a Safe Third Country Agreement claimant being criminally prosecuted for fraud see *U.S. v. Malenge* 94 Fed. Appx. 642 (2nd Cir. 2008), *supra* note 69. This case involved an asylum seeker from the Democratic Republic of Congo who sought admission to the United States from Canada under the STCA's family member exception, and, upon entry into the United States, was criminally prosecuted for fraud. The Court's findings suggest the practice of prosecuting asylum seekers for fraud was so commonplace at certain border crossings at that time so as to be labeled a "blanket policy".

<sup>208</sup> Interview with Rebecca Cohen (Senior Attorney) and Kelly Steffens AuBuchon (Staff Attorney), Freedom House (Jul. 27, 2012), para. 38; Interview with Peter Murrett (Attorney), Vive La Casa (Jul. 27, 2012), para. 54; Interview with Michele Jenness (Executive Director), Vermont Immigration and Asylum Advocates (Aug. 10, 2012) para. 86-88.

<sup>209</sup> *Id.* As one practitioner described, speaking of the Clinton County Jail, a mixed purpose facility: "[returned asylum seekers] are intermingled with people facing criminal charges or doing short-term sentences. Everyone wears the standard black and white striped uniform. . . it has met the detention standards, but don't ask me how." See Interview with Michele Jenness (Executive Director), Vermont Immigration and Asylum Advocates (Aug. 10, 2012) para. 86. The U.S. immigration detention system has expanded dramatically in the last decade. The total number of migrants who passed through ICE detention per year rose from 204,459 individuals in 2001, to a record breaking 429,247 individuals in FY 2011. ICE's average daily detention capacity for FY 2013 is 34,000 beds. The average number of daily detention has nearly doubled from 2004, when it averaged 18,000 beds. See NATIONAL IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION: RUNAWAY COSTS DO NOT ADD UP TO SENSIBLE POLICIES 3-4 (Aug. 2013), available at <http://www.immigrationforum.org/images/uploads/mathofimmigrationdetention.pdf> (last visited Oct. 29, 2013). In FY 2012, the number of detainees would sometimes exceed the quota and rise up to 36,000 on some days. See Julia Preston, *Immigration Official Defends Release of Detainees*, NEW YORK TIMES (March 20, 2013), available at [http://www.nytimes.com/2013/03/20/us/immigration-official-defends-release-of-detainees.html?\\_r=0](http://www.nytimes.com/2013/03/20/us/immigration-official-defends-release-of-detainees.html?_r=0) (last visited Oct. 29, 2013) (citing statements by John T. Morton, director of Immigration and Customs Enforcement).

<sup>210</sup> See *e.g.* Interview with Peter Murrett (Attorney), Vive La Casa (Jul. 27, 2012), paras. 42-54 (stating that "the women are put in local county jails . . . with really questionable conditions, and they're put in with the general population: with the drug violators, with the violent criminals"); Interview with Michele Jenness (Executive Director), Vermont Immigration and Asylum Advocates (Aug. 10, 2012) paras. 86-88 (stating that women who are rejected at the border pursuant to the STCA and returned to the United States can be "sent to one or two far flung jails... mixed population, where nobody sees them again and they probably have a telephonic hearing with a judge in Buffalo"); Interview with

The U.S. immigration detention system has come under increasing critical scrutiny in recent years.<sup>211</sup> While DHS and ICE committed to overhaul the U.S. immigration detention system in 2009,<sup>212</sup> core problems persist at the level of

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Martha Mason (Executive Director), Rod McDowell (Board President), and Ronald Gray (Board Vice-President), Fort Erie Multicultural Centre (Jul. 25, 2012), paras. 32 and 216 (noting that some non-governmental groups along the border were considering renovating their long-term facilities to provide a shelter for women asylum seekers who are detained, due to the absence of female-dedicated facilities along the border, and concerns that female asylum seekers will be held in mixed facilities or in local jails).

<sup>211</sup> See generally HUMAN RIGHTS WATCH, TURNING MIGRANTS INTO CRIMINALS: THE HARMFUL IMPACT OF US BORDER PROSECUTIONS (May 2013) available at <http://www.hrw.org/reports/2013/05/22/turning-migrants-criminals> (last visited Oct. 9, 2013) (criticizing the U.S. immigration detention regime for its failure to uphold fundamental rights); USCIRF, ASSESSING THE U.S. GOVERNMENT'S DETENTION OF ASYLUM SEEKERS: FURTHER ACTION NEEDED TO FULLY IMPLEMENT REFORMS (2013), available at <http://www.uscirf.gov/images/ERS-detention%20reforms%20report%20April%202013.pdf> (last visited Nov. 1, 2013) (hereinafter USCIRF, ASSESSING DETENTION OF ASYLUM SEEKERS) (outlining problems with United States policies and practices respecting the detention of asylum seekers). See also HUMAN RIGHTS FIRST, JAILS AND JUMPSUITS: TRANSFORMING THE U.S. IMMIGRATION DETENTION SYSTEM: A TWO-YEAR REVIEW 4-6 (2011), available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf> (last visited Oct. 9, 2013) (detailing problems with U.S. detention policies and practices based on a review conducted in 2009-2011); HUMAN RIGHTS FIRST, U.S. DETENTION OF ASYLUM SEEKERS: SEEKING PROTECTION, FINDING PRISON 3-4 (2009), available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/090429-RP-hrf-asylum-detention-report.pdf> (last visited Nov. 1, 2013) (hereinafter HRF, SEEKING PROTECTION, FINDING PRISON) (describing and criticizing detention of asylum seekers in the United States). For a blueprint of how to repair the United States' Immigration Detention System, see HUMAN RIGHTS FIRST, HOW TO REPAIR THE U.S. IMMIGRATION DETENTION SYSTEM: BLUEPRINT FOR THE NEXT ADMINISTRATION (2012), available at [http://www.humanrightsfirst.org/wp-content/uploads/pdf/asylum\\_blueprint.pdf](http://www.humanrightsfirst.org/wp-content/uploads/pdf/asylum_blueprint.pdf) (last visited Nov. 1, 2013) (hereinafter HRF DETENTION BLUEPRINT) (outlining proposals for reform). See also Anil Kalhan, *Rethinking Immigration Detention*, 100 COLUM. L. REV. SIDEBAR 24 (2010) (analyzing how reforming immigration detention requires initiatives targeted at conditions of confinement as well as an examination of associated laws, policies, detention-related practices and surrounding discourses).

<sup>212</sup> See Immigration and Customs Enforcement (ICE), Fact Sheet: 2009 Immigration Detention Reforms (Oct. 6, 2009) available at <http://www.dhs.gov/news/2009/10/06/new-immigration-detention-reform-initiatives-announced> (last visited Nov. 1, 2013) (recognizing the need to implement reforms to "enhance the security and efficiency of ICE's nationwide detention system while prioritizing the health and safety of detainees"). As part of these reforms, ICE announced a revised parole policy for asylum seekers, permitting parole from detention for non-citizens arriving at United States ports of entry who establish their identities, pose neither a flight risk nor danger to the community, have a credible fear of persecution or torture, and have no additional factors that weight against their release. See Press Release, Immigration and Customs Enforcement, *Ice Issues New Procedures For Asylum Seekers As Part Of Ongoing Detention Reform Initiatives* (Dec. 16, 2009), available at <http://www.ice.gov/news/releases/0912/091216washington.htm> (last visited Nov. 1, 2013). See also HRF DETENTION BLUEPRINT, *id* (noting that while ICE has taken steps to address some problems in the existing system, as of December 2012, more needed to be done to move this transformation forward including individualized assessments of detention with prompt immigration court review; use of cost-effective alternatives to detention; a reduction in reliance on detention as the default tool for

law, policy, and practice.<sup>213</sup> In a report released in 2013, the non-partisan United States Commission on International Religious Freedom (USCIRF), for example, concluded that despite this commitment to overhaul the immigration detention system, longstanding concerns about asylum seekers held in detention remain unaddressed.<sup>214</sup>

The U.S. immigration detention regime falls far below international law requirements. UNHCR has long made clear that in principle, asylum seekers should not be detained, and that detaining asylum seekers for anything but a brief period of time is contrary to international law norms and should be avoided.<sup>215</sup> The U.S. immigration detention system fails to comply with these standards. As several studies have shown, the United States detains asylum seekers for lengthy periods of time, sometimes for several months and at times, years.<sup>216</sup>

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enforcement; the phasing out of jails and jail-like facilities; and the use of facilities with conditions appropriate for civil immigration detention when detention is used).

<sup>213</sup> Despite DHS and ICE's stated commitment to shift away from the reliance on jails and jail-like facilities, many asylum seekers and other detainees continue to be held in such places. For an account of persistent problems with the detention of asylum seekers in jails and jail-like facilities despite this public commitment, see USCIRF, *ASSESSING DETENTION OF ASYLUM SEEKERS*, *supra* note 211. See also Press Release, USCIRF, *Asylum Detention Needs Improvements* (Apr. 19, 2013) available at <http://www.uscirf.gov/news-room/whats-new-at-uscirf/3979-press-release-on-uscirf-report-asylum-detention-needs-improvements-april-19-2013.html> (last visited Nov. 1, 2013) (noting that while ICE has made progress toward implementing the 2009 reforms, "most asylum seekers continue to be detained in jail-like, not civil, facilities"); NATIONAL IMMIGRANT JUSTICE CENTER, *DETENTION WATCH NETWORK, ONE YEAR REPORT CARD: HUMAN RIGHTS AND THE OBAMA ADMINISTRATION'S IMMIGRATION DETENTION REFORMS* (2010), available at [www.immigrantjustice.org/icereportcard](http://www.immigrantjustice.org/icereportcard) (last visited Nov. 1, 2013) (arguing that despite a strong commitment from ICE leadership, there remain significant problems and a lack of implementation of new policies to prevent the widespread violation of the human rights of persons in immigration detention).

<sup>214</sup> See USCIRF, *ASSESSING DETENTION OF ASYLUM SEEKERS* *supra* note 211 at 4-10 (2013) (stating: "While USCIRF welcomes ICE's establishment of civil detention facilities to house asylum seekers and other low level immigrant detainees, the Commission remains concerned that some asylum seekers are still not being held in civil facilities. USCIRF urges that all asylum seekers who must be detained – whether before or after a credible fear determination – be held in civil facilities. In addition, USCIRF finds that further improvements are needed to expand detainees' access to legal information, representation, and in-person hearings").

<sup>215</sup> UNHCR, *REVISED GUIDELINES ON APPLICABLE CRITERIA AND STANDARDS RELATING TO THE DETENTION OF ASYLUM-SEEKERS* 1, 3 (1999) available at <http://www.unhcr.org/refworld/pdfid/3c2b3f844.pdf> (last visited Nov. 1, 2013) (stating that as a general principle, asylum seekers should not be detained and urges that exceptions this principle (protection of national security and public order, verification of identity, identification of basis of claim in a preliminary interview, destruction of documents/use of fraudulent documents to mislead) should be clearly prescribed by national law in conformity with principles of international law and should only be resorted to when absolutely necessary).

<sup>216</sup> See *SEEKING PROTECTION, FINDING PRISON*, *supra* note 211 at 38-40 (documenting results of

In addition, many detained asylum seekers do not have access to prompt court review of their detention.<sup>217</sup> This is inconsistent with UNHCR's 2012 Guidelines on Detention, which emphasize that detained asylum seekers should be granted the right to "be brought promptly before a judicial or other independent authority to have the detention decision reviewed" within 24 to 48 hours.<sup>218</sup> The United Nations Special Rapporteur on the Human Rights of Migrants' 2012 Report similarly emphasizes the need for "automatic, regular and judicial review of detention in each individual case."<sup>219</sup> The U.S. immigration detention system violates these internationally recognized standards.

U.S. law also does not require detention decisions to be made on an individual basis, but rather, permits detention to be applied automatically for broad

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comprehensive 2009 study on the detention of asylum seekers in the United States, and noting at least 48,000 asylum seekers were detained in United States jails and immigration detention centers between 2003 and 2009, with the number of asylum seekers detained increasing each year. The study found that a significant number of the asylum seekers were subject to detention of more than six months, and at times, years, and that obtaining release from detention was difficult, and sometimes beyond the reach of asylum seekers with limited means who are held under bond).

<sup>217</sup> See HRF DETENTION BLUEPRINT, *supra* note 211 at 6. Notably, in March 2012, the United States Department of Justice denied a petition requesting reform of regulations to provide arriving asylum seekers with immigration court custody hearings, a decision that was heavily criticized by rights groups. See e.g. Press Release, Human Rights First, Human Rights First Welcomes Revised UNHCR Guidance on Use of Immigration Detention (Sept. 21, 2012), available at <http://www.humanrightsfirst.org/2012/09/21/human-rights-firsts-welcomes-revised-unhcr-guidance-on-use-of-immigration-detention/> (last visited Nov. 1, 2013) (criticizing decision to deny the petition requesting reform of regulations to provide arriving asylum seekers with immigration court custody hearings, and urging compliance with the UNHCR 2012 Detention Guidelines).

<sup>218</sup> See e.g. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, DETENTION GUIDELINES: GUIDELINES ON THE APPLICABLE CRITERIA AND STANDARDS RELATING TO THE DETENTION OF ASYLUM-SEEKERS AND ALTERNATIVES TO DETENTION 27 (2012) (hereinafter UNHCR DETENTION GUIDELINES) available at <http://www.unhcr.org/505b10ee9.html> (last visited Nov. 1, 2013) (outlining the minimum procedural guarantees to which asylum should be entitled when faced with the prospect of being detained, or during detention, including the right to be informed of the reasons of their detention, the right to be informed of the right to legal counsel, the right to be brought promptly before a judicial or other independent authority, regular periodic review of detention, access to asylum procedures, contact with UNHCR). See also Inter-American Commission on Human Rights, *Report on U.S. Immigration Policy and Practices*, ¶¶ 139, 418, 431, 529, Doc. 78/10, (Dec. 30, 2010), available at <http://www.oas.org/en/iachr/migrants/docs/pdf/Migrants2011.pdf> (last visited Nov. 1, 2013) (urging the United States to ensure that immigration courts be allowed to review release decisions by immigration officers).

<sup>219</sup> See François Crépeau, UN General Assembly, *Report of the Special Rapporteur on the human rights of migrants*, UN Doc. A/HRC/20/24 18 (Apr. 2, 2012) available at <http://www.refworld.org/docid/502e0bb62.html> (last visited Nov. 1, 2013).

categories of non-citizens.<sup>220</sup> This approach, precluding individualized, case-by-case assessments, results in the detention of asylum seekers without any consideration of their specific circumstances, medical needs, trauma, past trauma, or language comprehension.<sup>221</sup> For example, the United States often automatically detains asylum seekers subject to expedited removal, a process discussed in detail below.<sup>222</sup>

The mistreatment of immigrant detainees in U.S. detention facilities is substantially documented, and includes inadequate medical care, discrimination, penal conditions of confinement, as well as physical and sexual violence.<sup>223</sup> In a number of facilities, asylum seekers are subject to oppressive conditions of confinement, including humiliating strip searches, inmate “counts”, and physical restraints.<sup>224</sup> Human Rights First describes these conditions as follows:

. . . the overwhelming majority of detained asylum seekers and other civil immigration law detainees are still held in jails or jail-like facilities. At these facilities, asylum seekers and other

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<sup>220</sup> See INA § 235(b)(1)(B)(iii)(IV).

<sup>221</sup> See HRF DETENTION BLUEPRINT *supra* note 211 at 11 (analyzing the need for individualized assessments in detention settings).

<sup>222</sup> See *e.g.*, INA §§ 235, 236 (listing classes of non-citizens, including those in expedited removal, who are subject to mandatory detention).

<sup>223</sup> See *e.g.*, HUMAN RIGHTS WATCH, WITHIN REACH: A ROADMAP FOR U.S. IMMIGRATION REFORM THAT RESPECTS THE RIGHTS OF ALL PEOPLE (2013) *available at* [http://www.hrw.org/sites/default/files/related\\_material/2013\\_US\\_WithinReachCorrected.pdf](http://www.hrw.org/sites/default/files/related_material/2013_US_WithinReachCorrected.pdf) (last visited Oct. 9, 2013) (outlining rights violations in the U.S. immigration detention system and recommending steps for reform). See also Hamilton, *Immigrant Detention Centers in the United States and International Human Rights Law*, 21 BERKELEY LA RAZA L.J. 93 (2011) (describing array of rights violations that can arise in the context of immigration detention in the United States); HUMAN RIGHTS WATCH, DETAINED AND AT RISK: SEXUAL ABUSE AND HARASSMENT IN UNITED STATES IMMIGRATION DETENTION (2010) *available at* [www.hrw.org/sites/default/files/reports/us0810webwcover.pdf](http://www.hrw.org/sites/default/files/reports/us0810webwcover.pdf) (last visited Oct. 29, 2013) (outlining a series of assaults, abuses, and episodes of harassment in U.S. immigration detention); Catherine Rentz, HOW MUCH SEXUAL ABUSE GETS 'LOST IN DETENTION'? (PBS Frontline, Oct. 19, 2011) (describing allegations of sexual abuse in immigration detention facilities); Elise Foley, *Immigrant Detainees Report Nearly 200 Instances of Sexual Abuse*, HUFFINGTON POST Oct. 21, 2011 (same). For a discussion of the barriers to immigrant detainees' ability to challenge detention conditions, see Michael Kaufman, *Note, Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113 (2008).

<sup>224</sup> See *generally*, KAREN TUMLIN, LINTON JOAQUIN & RANJANA NATARAJAN, A BROKEN SYSTEM: CONFIDENTIAL REPORTS REVEAL FAILURES IN U.S. IMMIGRANT DETENTION CENTERS vi, viii-x (2009) *available at* [www.nilc.org/document.html?id=9](http://www.nilc.org/document.html?id=9) (last visited Nov. 1, 2013) (describing in detail penal conditions found at immigration detention centers throughout the United States). See also USCIRF, ASSESSING DETENTION OF ASYLUM SEEKERS, *supra* note 211 at 4-6 (describing ongoing problems and continued use of penal detention for detained immigrants, including asylum seekers, even after announced reforms).



immigrants wear prison uniforms and are typically locked in one large room for up to 23 hours a day, they have limited or no outdoor access and typically visit with family through Plexiglas barriers. They are often handcuffed and/or shackled by U.S. immigration authorities when they arrive at U.S. airports or border entry points and when they are transported to detention facilities, to immigration court, or to the hospital.<sup>225</sup>

Studies also show that some immigrant detainees are subject to greater incidents of mistreatment, for example women<sup>226</sup> and LGBTQI detainees.<sup>227</sup>

Asylum seekers can also be subject to segregation and solitary confinement, a practice that has been shown to carry severe long-term adverse health consequences.<sup>228</sup> Notably, on September 4, 2013, ICE issued a new directive

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<sup>225</sup> HRF DETENTION BLUEPRINT, *supra* note 211 at 9 (detailing conditions of detention for asylum seekers and criticizing these conditions as inconsistent with U.S. commitments under the Refugee Convention).

<sup>226</sup> See e.g. HRW, *DETAINED AND AT RISK*, *supra* note 223 (describing sexual abuse and assault in immigration detention facilities); Rentz, *supra* note 223 (describing allegations of sexual abuse in immigration detention facilities); Foley, *supra* note 223 (same).

<sup>227</sup> Many LGBTQI asylum seekers who are detained are subject to solitary confinement, in clear violation of international human rights standards. See CROSBY BURNS, ET AL., CENTER FOR AMERICAN PROGRESS, *LIVING IN DUAL SHADOWS: LGBT UNDOCUMENTED IMMIGRANTS 18-21* (2013), available at <http://www.americanprogress.org/wp-content/uploads/2013/03/LGBTUndocumentedReport-5.pdf> (last visited Nov. 1, 2013) (describing systemic mistreatment of LGBTQI asylum seekers who are detained, including physical and sexual assault, denial of medical care and being kept in segregation). In recent years advocacy groups have filed lawsuits against the U.S. government challenging the systemic mistreatment of LGBTQI migrants. See e.g., National Immigrant Justice Center, *LGBT Clients Who Reported Gross Mistreatment in Immigration Custody Remain Detained* (Jul. 5, 2011), <http://www.immigrantjustice.org/staff/blog/lgbt-clients-who-reported-gross-mistreatment-immigration-custody-remain-detained> (last visited Nov. 1, 2013) (detailing suits filed and discussing subsequent attention drawn to problem of LGBTQI mistreatment in immigration detention).

<sup>228</sup> For an overview of the use of solitary and segregation in U.S. immigration detention see SARAH DAVILA-RUHAAK, STEVEN D. SCHWINN & THE JOHN MARSHALL LAW SCHOOL HUMAN RIGHTS PROJECT, *CONCERNING THE USE OF SOLITARY CONFINEMENT IN IMMIGRATION DETENTION FACILITIES IN THE UNITED STATES OF AMERICA* (2013) available at <http://repository.jmls.edu/cgi/viewcontent.cgi?article=1000&context=whitepapers> (last visited Nov. 1, 2013) (documenting widespread use of solitary confinement in immigration detention and violations of due process rights, minimum standards of humane treatment, and personal liberty); PHYSICIANS FOR HUMAN RIGHTS, *BURIED ALIVE: SOLITARY CONFINEMENT IN THE US DETENTION SYSTEM* (APRIL 2013) available at [https://s3.amazonaws.com/PHR\\_Reports/Solitary-Confinement-April-2013-full.pdf](https://s3.amazonaws.com/PHR_Reports/Solitary-Confinement-April-2013-full.pdf) (last visited Nov. 1, 2013) (noting that relatively short periods in solitary confinement can cause severe and lasting physiological and psychological harms, sometimes rising to the level of torture and unusual punishment, and advocating that solitary confinement not be used in immigration detention); PHYSICIANS FOR HUMAN RIGHTS AND NATIONAL IMMIGRANT JUSTICE CENTER, *INVISIBLE IN ISOLATION: THE USE OF SEGREGATION AND SOLITARY CONFINEMENT IN IMMIGRATION DETENTION* (2012) available at

calling for the regulation of the use of solitary confinement in immigration detention.<sup>229</sup> It still remains to be seen whether this new directive will be effectively enforced and create a robust system by which ICE can monitor the use of solitary confinement in immigration detention facilities.<sup>230</sup>

Once detained, asylum seekers face significant barriers to advancing successful asylum claims.<sup>231</sup> For example, in some detention facilities asylum seekers have little access to legal counsel and legal aid organizations.<sup>232</sup> Data collected for this

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[https://www.immigrantjustice.org/sites/immigrantjustice.org/files/Invisible%20in%20Isolation-The%20Use%20of%20Segregation%20and%20Solitary%20Confinement%20in%20Immigration%20Detention.September%202012\\_7.pdf](https://www.immigrantjustice.org/sites/immigrantjustice.org/files/Invisible%20in%20Isolation-The%20Use%20of%20Segregation%20and%20Solitary%20Confinement%20in%20Immigration%20Detention.September%202012_7.pdf) (last visited Nov. 1, 2013) (noting that solitary confinement in immigration detention can cause severe and permanent damage to detainees' health); PHYSICIANS FOR HUMAN RIGHTS, FROM PERSECUTION TO PRISONS: THE HEALTH CONSEQUENCES OF DETENTION FOR ASYLUM SEEKERS 55-57 (2003), available at [https://s3.amazonaws.com/PHR\\_Reports/persecution-to-prison-US-2003.pdf](https://s3.amazonaws.com/PHR_Reports/persecution-to-prison-US-2003.pdf) (last visited Nov. 1, 2013) (finding extremely high rates of anxiety, depression, and post-traumatic stress disorder symptoms among detained asylum seekers).

<sup>229</sup> See U.S. Immigration and Customs Enforcement, Review of the Use of Segregation for ICE Detainees (Sept. 4, 2013) available at [http://www.ice.gov/doclib/detention-reform/pdf/segregation\\_directive.pdf](http://www.ice.gov/doclib/detention-reform/pdf/segregation_directive.pdf) (last visited Nov. 1, 2013).

<sup>230</sup> For commentary on this directive see e.g. American Civil Liberties Union, *New Limits Announced on ICE's solitary confinement of Immigrants* (Sept. 6, 2013) available at <https://www.aclu.org/blog/immigrants-rights-prisoners-rights/new-limits-announced-ices-solitary-confinement-immigrants> (last visited Nov. 1, 2013) (noting that the new directive is a "welcome and much-needed step towards curtailing practice that is both inhumane and horrifyingly common").

<sup>231</sup> *Id.* at 43-44. Some of these barriers include: diminished access to legal aid and legal counsel; inability to participate in gathering evidence; inability or high cost of making telephone calls; and lack of facilities to meet with legal counsel. Asylum seekers detained in remote locations can be required to attend hearings with immigration judges and interviews with asylum officers by video-conference, which can impede their ability to demonstrate credibility. See *id.* at 3-4, 7-9, 55-56, 59-61. See also NAT'L IMMIGRANT JUSTICE CTR., ISOLATED IN DETENTION: LIMITED ACCESS TO LEGAL COUNSEL IN IMMIGRATION DETENTION FACILITIES JEOPARDIZES A FAIR DAY IN COURT (2010) (hereinafter ISOLATED IN DETENTION) (describing systemic barriers faced by detained immigrants in the United States); AMNESTY INT'L, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA (2009) available at <http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf> (last visited Nov. 1, 2013) (same); Hamilton, *supra* note 290 at 110-120 (same).

<sup>232</sup> See e.g. ISOLATED IN DETENTION, *id.* at 3 (finding that 80 percent of detainees were "held in facilities that were severely underserved by legal aid organizations"). Studies have shown more generally that detained asylum seekers face far greater difficulties both in obtaining legal assistance and that even when it is available, are less likely to succeed with their defense to removal. See e.g., Steering Committee of the New York Immigrant Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357 (2011). Asylum seekers who are detained are in general much less likely to obtain legal representation. See NINA SIULC ET AL., LEGAL ORIENTATION PROGRAM: EVALUATION AND PERFORMANCE AND OUTCOME MEASUREMENT REPORT, PHASE II 62 (2008), available at [http://www.vera.org/sites/default/files/resources/downloads/LOP\\_evaluation\\_updated\\_5-20-08.pdf](http://www.vera.org/sites/default/files/resources/downloads/LOP_evaluation_updated_5-20-08.pdf) (last visited Nov. 1, 2013).

report similarly suggests that detained asylum seekers encounter obstacles in securing legal assistance.<sup>233</sup> As one attorney interviewed for this report explained: “legal access is definitely a concern,” given the “small percentage of people being represented” and “attorneys already having trouble seeing their clients.”<sup>234</sup> In some situations, the trauma of detention can be severe, prompting asylum seekers to withdraw or abandon their claims.<sup>235</sup> Indeed, in its 2013 report, USCIRF emphasized that penal detention conditions risk re-traumatizing asylum seekers, and may lead some to prematurely terminate their asylum claim.<sup>236</sup> Similarly, practitioners interviewed for this report explained that some asylum seekers withdraw their claims because they simply “cannot bear to stay in detention”.<sup>237</sup>

### (ii) Expedited Removal

Expedited removal is a process by which “arriving aliens” attempting entry at the U.S. border or who are apprehended within 100 miles of it, who have no documents or whose documents are deemed false or inconsistent with visa status, can be removed from the United States with few if any legal protections, except in the case of some asylum seekers.<sup>238</sup> To trigger the asylum exception,

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<sup>233</sup> See e.g. Interview with Rebecca Cohen (Senior Attorney) and Kelly Steffens AuBuchon (Staff Attorney), Freedom House (Jul. 27, 2012), paras. 38-39 (noting a general access problem, and difficulties in locating and contacting detained individuals); Interview with Betsy Tao (Directing Attorney), Northwest Immigrant Rights Project (Aug. 28, 2012), para. 30 (noting more specific access problems, caused by detention facilities having insufficient attorney contact rooms and insufficient holding spaces in visitation areas, or expecting attorneys to wait for lengthy periods of time before seeing their clients, which can act as a disincentive to providing such services).

<sup>234</sup> Interview with Betsy Tao (Directing Attorney), Northwest Immigrant Rights Project (Aug. 28, 2012), para. 41.

<sup>235</sup> HRF, SEEKING PROTECTION, FINDING PRISON, *supra* note 211 at 7, 43-46.

<sup>236</sup> USCIRF, ASSESSING DETENTION OF ASYLUM SEEKERS, *supra* note 211 at 2.

<sup>237</sup> Michele Jenness (Executive Director), Vermont Immigration and Asylum Advocates (Aug. 10, 2012) para. 90.

<sup>238</sup> See INA § 235(b)(1)(A) (expedited removal provisions); 8 C.F.R. § 1.2 (defining “arriving alien”). Since it was first introduced in 1996, expedited removal has undergone a steady expansion, both in terms of the classes of individuals subject to the process and the geographic area where it is implemented. Even in its expanded form, expedited removal can be used when CBP officers determine that an individual is inadmissible for one, or a combination of, the following: fraud or misrepresentation (INA § 212(a)(6)(C)(i)); falsely claiming U.S. citizenship (INA § 212(a)(6)(C)(ii)); an intending immigrant who is not in possession of a valid unexpired immigrant visa or other suitable entry document (INA §212(a)(7)(A)(i)(I)); a nonimmigrant who is not in possession of a passport valid for a minimum of six months from the date of the expiration of the initial period of stay (INA §212(a)(7)(A)(i)(II)(i)); or a nonimmigrant who is not in possession of a valid nonimmigrant visa or border crossing card at the time of application for admission (INA §212(a)(7)(A)(i)(II)(ii)). Expedited removal also applies to aliens determined to be inadmissible under sections 212(a)(6)(C) or (7) of the

an asylum seeker must indicate fear of torture or persecution, after which he or she is granted a screening interview; only if he or she can demonstrate a “credible fear” of persecution or torture may a person in expedited removal seek asylum before an immigration judge.<sup>239</sup> During the credible fear determination process, asylum seekers are subject to mandatory detention, with detention practices varying depending upon circumstances and location.<sup>240</sup> Asylum seekers

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INA who are present in the U.S. without having been admitted or paroled following inspection by an immigration officer at a designated port-of-entry, who are encountered by an immigration officer within 100 miles of the U.S. border, and who have not established to the satisfaction of an immigration officer that they have been physically present in the U.S. continuously for the 14-day period immediately prior to the date of encounter. Individuals apprehended in the border region have made up increasingly large portions of the total number of people subject to expedited removal in recent years. See *e.g.*, DEPARTMENT OF HOMELAND SECURITY, USCIS ASYLUM OFFICE, CREDIBLE FEAR WORKLOAD REPORT SUMMARY FY 2012 INLAND CASELOAD (2012) (showing 1,547 cases received from inland apprehensions in first quarter of FY 2012) and DHS, USCIS ASYLUM OFFICE, CREDIBLE FEAR WORKLOAD REPORT SUMMARY FY 2012 PORT OF ENTRY (POE) CASELOAD (2012) (showing 561 cases received from border port-of-entry in same period), available at <http://www.uscis.gov/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2012/January%202012/CredibleFearandReasonableFearWorkload.pdf> (last visited Oct. 23, 2013). For further discussion, see ALISON SISKIN & RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL33109, IMMIGRATION POLICY ON EXPEDITED REMOVAL OF ALIENS (2008), available at <http://fpc.state.gov/documents/organization/54512.pdf> (last visited Nov. 1 2013). Expedited removal can also apply to non-citizens who arrive in the United States by sea and are not admitted or paroled. See CUSTOMS AND BORDER PROTECTION, CBP INSPECTOR’S FIELD MANUAL, section 17.15(a) (2006), available at <http://www.aila.org/content/fileviewer.aspx?docid=41867&linkid=253319>. See also DEPARTMENT OF JUSTICE, NOTICE DESIGNATING ALIENS SUBJECT TO EXPEDITED REMOVAL UNDER SECTION 235(b)(1)(A)(iii) OF THE IMMIGRATION AND NATIONALITY ACT, 67 F.R. 68924 (Nov. 13, 2002), available at <http://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-79324/0-0-0-79342/0-0-0-80383.html> (last visited Nov. 1, 2013).

<sup>239</sup> For an overview of the credible fear screening process see U.S. CITIZENSHIP AND IMMIGRATION SERVICES, QUESTIONS & ANSWERS: CREDIBLE FEAR SCREENING (last updated Jun. 18, 2013) available at <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-credible-fear-screening> (last visited Oct. 23, 2013); ALISON SISKIN & RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL33109, IMMIGRATION POLICY ON EXPEDITED REMOVAL OF ALIENS (2008) available at <http://fpc.state.gov/documents/organization/54512.pdf> (last visited Oct. 23, 2013) (outlining expedited removal process). See also 8 C.F.R. §§ 208.30(d) and (e) (setting out procedures and standard of proof for credible fear determinations); 8 C.F.R. § 208.30(f) (specifying that after a positive credible fear determination is made, the asylum officer is to issue a Notice to Appear for the asylum seeker to appear before an immigration judge for a consideration of their claim); 8 C.F.R. §§ 208.30(e)(2),(e)(4) (specifying that “In determining whether the alien has a credible fear of persecution, as defined in Section 235(b)(1)(B)(v) of the Act, or a credible fear of torture, the asylum officer shall consider whether the alien’s case presents novel or unique issues that merit consideration in a full hearing before an immigration judge”).

<sup>240</sup> See INA § 235(b)(1)(B)(ii), 8 U.S.C. §1225(b)(1)(B)(ii) (stating that if a person in expedited removal is found to have a credible fear of persecution or torture they should be detained for further review of their claim); INA §235(b)(1)(B)(iii)(IV), 8 U.S.C. §1225(b)(1)(B)(IV)(stating that any alien subject to the

who are not found to have demonstrated “credible fear” may have that order reviewed by an immigration judge, but if that holding is upheld have no opportunity to apply for asylum or withholding, are ordered removed, and have only limited avenues by which to review this determination.<sup>241</sup>

Data collected for this report indicates that in at least some cases, asylum seekers returned to the United States pursuant to the STCA are placed in expedited removal proceedings.<sup>242</sup> Practitioners noted that at some border crossing points, asylum seekers were put in expedited removal proceedings automatically upon their return to the United States, while at others only sporadically.<sup>243</sup> The rates varied by location and by officer.<sup>244</sup> This finding is alarming given that U.S. legal directives prohibit the use of expedited removal for asylum seekers returned to the United States pursuant to the STCA.<sup>245</sup> It is also

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procedure shall be detained pending final determination of credible fear of persecution). Notably, DHS has authority to release asylum seekers on parole, *see* INA § 212(b)(5)(A), 8 C.F.R. § 212.5(b).

<sup>241</sup> *See* INA § 235(b)(1)(C), 8 U.S.C. § 1225(b)(1)(C) (outlining limitations on administrative review); INA § 235(b)(1)(B), 8 U.S.C. § 1225(b)(1)(B) (outlining asylum interview and removal provisions).

<sup>242</sup> Interview with Rebecca Cohen (Senior Attorney) and Kelly Steffens AuBuchon (Staff Attorney), Freedom House (Jul. 27, 2012), paras. 45-55; Interview with Peter Murrett (Attorney), Vive La Casa (Jul. 27, 2012), para. 54; Interview with Michele Jenness (Executive Director), Vermont Immigration and Asylum Advocates (Aug. 10, 2012) paras. 96-118; Interview with Gregory Boos (Attorney), Canada-US Immigration Law Center (Aug. 3, 2012), para. 80.

<sup>243</sup> Interview with Rebecca Cohen (Senior Attorney) and Kelly Steffens AuBuchon (Staff Attorney), Freedom House (Jul. 27, 2012), para. 47; Interview with Michele Jenness (Executive Director), Vermont Immigration and Asylum Advocates (Aug. 10, 2012) paras. 112-116.

<sup>244</sup> Interview with Gregory Boos (Attorney), Canada-US Immigration Law Center (Aug. 3, 2012), para. 68. *See also* Interview with Lynn Hannigan (Director) and Sister Judith Carroll (Counselor), Casa El Norte (Aug. 3, 2012), para. 68 (stating “there are inconsistencies on both sides of the border. There’s a lot of decision making power in the officers”). These accounts speak to the significant discretionary authority vested in border officers.

<sup>245</sup> *See* USCIS, IMPLEMENTATION OF THE AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF CANADA REGARDING ASYLUM CLAIMS MADE IN TRANSIT AND AT THE LAND BORDER PORTS-OF-ENTRY [69 FR 69480] [FR 53-04] IV (Nov. 29, 2004) *available at* <http://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-94157/0-0-0-99728/0-0-0-101114.html> (last visited Oct. 23, 2013) (outlining process for asylum seekers returned from Canada under the STCA and stating that “individuals returned from Canada to the United States, with the rare exception noted below, will not be subject to expedited removal because they will not meet the definition of ‘arriving alien’”). USCIS further states that there may be a rare circumstance in which the expedited removal provisions of the Act would apply. For example, someone initially paroled into the United States may attempt to enter Canada and then be returned to the United States after his or her parole period expired. Such a person, as an individual whose parole period has expired, may be subject to expedited removal. 8 U.S.C. 1182(d)(5)(A), 1225(a)(1)-(b)(1)(A)(i); 8 CFR 1.1(q). USCIS further notes that it is “not possible, practical or advisable” to codify the process affecting those returned to the United States because existing regulations already govern how they will be treated by DHS. *See also* USCIS, IMPLEMENTATION OF THE AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF

alarming given that when the STCA was first tabled, UNHCR expressed concern that the STCA might expose asylum seekers to expedited removal upon their return to the United States.<sup>246</sup> Noting the deficiencies in the U.S. expedited removal procedures, and the failure to ensure that “*bona fide* refugees are not removed to a country of feared persecution”, UNHCR recommended that Canada “create an exception in the Regulations for asylum seekers who may be placed in expedited removal proceedings in the U.S.”<sup>247</sup>

The expedited removal process creates significant challenges for asylum seekers, especially for those who are unable to advocate for themselves sufficiently to obtain a credible fear interview.<sup>248</sup> The inquiry whether the asylum seeker should receive a credible fear screening is unmonitored, conducted quickly, and occurs in the absence of legal representation.<sup>249</sup> Some studies suggest that

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AMERICA AND THE GOVERNMENT OF CANADA REGARDING ASYLUM CLAIMS MADE IN TRANSIT AND AT THE LAND BORDER PORTS-OF-ENTRY [69 FR 10620] [FR 5-04] (Mar. 8, 2004) *available at* <http://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-94157/0-0-0-96328/0-0-0-97486.html> (last visited Oct. 23, 2013) (explaining that claimants returned to the United States under the STCA should not be classified as “arriving aliens” and subject to expedited removal given that the Board of Immigration Appeals has held that a non-citizen “who goes abroad but is returned to the United States after having been formally denied admission by the foreign country is not an applicant for admission, since, in contemplation of law, the alien did not leave the United States. Matter of T, 6 I&N Dec. 638 (1955). Those who entered the United States legally or illegally and are later denied admission by Canada are not arriving aliens and therefore not subject to expedited removal”). *See also* PARTNERSHIP FOR PROTECTION, *supra* note 177 (confirming that “Individuals returned from Canada placed [sic] are not placed in expedited removal proceedings”).

<sup>246</sup> *See* UNHCR COMMENTS ON THE PROPOSED REGULATIONS AMENDING THE IMMIGRATION AND REFUGEE PROTECTION REGULATIONS RELATING TO THE AGREEMENT BETWEEN THE GOVERNMENT OF CANADA AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA FOR COOPERATION IN THE EXAMINATION OF REFUGEE STATUS CLAIMS FROM NATIONALS OF THIRD COUNTRIES (Nov. 14, 2012), re-posted online by the Canadian Council for Refugees and *available at* [http://ccrweb.ca/regula\\_11.html](http://ccrweb.ca/regula_11.html) (last visited Oct. 30, 2013)

<sup>247</sup> *Id.*

<sup>248</sup> *See e.g.* Michele R. Pistone and John J. Hoeffner, *Rules Are Made To Be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 GEO. IMMIGR. L.J. 167, 177 (2006) (discussing challenges expedited removal poses for some asylum seekers, especially applicants who are unaware of their right to ask for protection from return, and the limitations of the protections designed to prevent *refoulement*); Amy Wingfield, *The Opulent or the Oppressed? Expedited Removal as a Violation of the American Ideal*, 30 J. NAT’L ASS’N ADMIN. L. JUDICIARY 767, 785–787 (2010) (outlining difficulties inherent in expedited removal proceedings, and describing intimidating conditions under which initial screening by CBP officers often occurs).

<sup>249</sup> U.S. COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL VOL. 1: FINDINGS AND RECOMMENDATIONS (2005) (hereinafter USCIRF REPORT VOL. 1) *available at* [http://www.uscirf.gov/images/stories/pdf/asylum\\_seekers/Volume\\_1.pdf](http://www.uscirf.gov/images/stories/pdf/asylum_seekers/Volume_1.pdf) (last visited Oct. 23, 2013) (describing inquiry into whether asylum seekers should receive credible fear screenings and identifying problems such as failure to refer asylum seekers for credible fear interviews and immigration officers exercising authority improperly under the expedited removal procedures).

*bona fide* asylum seekers pass through the expedited removal process unrecognized and unprotected.<sup>250</sup>

The deficiencies in the expedited removal process have been well documented. In a study released in 2005, the non-partisan USCIRF identified a substantial number of serious flaws in the treatment of asylum seekers and refugees in expedited removal.<sup>251</sup> The flaws documented by USCIRF include: failure to provide applicants with crucial information, failure to ask mandatory questions, failure to refer cases to an asylum officer where credible fear is expressed, applicants signing sworn statements allowing for their removal without reviewing the statements, and officers completing forms containing incorrect details, or otherwise lacking crucial information.<sup>252</sup> In response to the reactions generated by USCIRF's initial 2005 criticism, DHS stated that it was taking measures to improve the expedited removal process.<sup>253</sup> However, in its 2007 and 2009 follow up evaluations, USCIRF continued to criticize DHS for failing to take specific action with respect to some of the most serious flaws in the expedited removal process, and reiterated its concern that due to these flaws, asylum seekers subject to expedited removal continue to be "at the risk of being returned to countries where they face persecution."<sup>254</sup>

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<sup>250</sup> *Id.* See also Pistone & Hoeffner, *supra* note 248 at 196 (estimating in a study published in 2006 that thousands of genuine asylum seekers have been refused entry by the United States because of problems and deficiencies in the expedited removal law, policy, and practice).

<sup>251</sup> USCIRF REPORT VOL. 1, *supra* note 249 (documenting problems and deficiencies).

<sup>252</sup> *Id.* For USCIRF's complete findings, see also U.S. COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL VOL. 2: FINDINGS AND RECOMMENDATIONS (2005), available at [http://www.uscirf.gov/images/stories/pdf/asylum\\_seekers/ERS\\_RptVolII.pdf](http://www.uscirf.gov/images/stories/pdf/asylum_seekers/ERS_RptVolII.pdf) (last visited Oct. 23, 2013).

<sup>253</sup> In 2006, for example, DHS began reviewing all credible fear determinations to evaluate whether the law was applied correctly, see Memorandum from Joseph E. Langlois, Chief Asylum Division, USCIS, Revised Credible Fear Quality Assurance Review Categories and Procedures, 2-3 (Dec. 23, 2008), available at [http://www.uscis.gov/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/Archives%201998-2008/2008/cf\\_qa\\_review\\_catproc\\_23dec08.pdf](http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2008/cf_qa_review_catproc_23dec08.pdf) (last visited Oct. 23, 2013) (announcing new procedural requirements required for all credible fear determinations effective Dec. 23, 2008). In 2009, ICE set out new criteria for the granting of parole to asylum seekers who were subject to expedited removal, see *supra* note 212. In a press release issued Dec. 23, 2009, USCIRF stated that the new guidelines "are an important first step in overhauling the United States' deeply flawed detention system" but also noted that "more needs to be done both by the agency and in Congress". See Press Release, USCIRF, ICE Parole Guideline Is an Important First Step in Fix Flawed Treat of Asylum Seekers (Dec. 23, 2009), available at <http://www.uscirf.gov/news-room/press-releases/2891.html> (last visited Oct. 23, 2013).

<sup>254</sup> See USCIRF Press Release, USCIRF DISAPPOINTED THAT DHS ACTION ON EXPEDITED REMOVAL PROCESS FALLS SHORT (Jan. 9, 2009), available at <http://www.uscirf.gov/news-room/press-releases/2340.html> (last visited Oct. 28, 2013) (criticizing DHS for failing to take sufficient action to address the key problems

As noted above, asylum seekers subject to expedited removal are mandatorily detained.<sup>255</sup> Moreover, even after credible fear is found, individuals may continue to be detained while their applications are pending.<sup>256</sup> In its 2013 report USCIRF identified persistent problems with the detention of asylum seekers subject to expedited removal.<sup>257</sup>

Given these significant and systemic problems, the data collected for this report raises serious concerns that asylum seekers returned to the United States pursuant to the STCA are not only being subject to expedited removal contrary to stated directives, but also, are being denied fundamental protections and

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identified in the 2005 report). See also USCIRF, EXPEDITED REMOVAL STUDY REPORT CARD: 2 YEARS LATER (2007), available at <http://www.uscirf.gov/news-room/press-releases/284-february-6-2007-uscirf-expedited-removal-study-report-card-two-years-later.html> (last visited Oct. 28, 2013) (giving DHS a failing grade and criticizing its failure to implement the proposals outlined in its 2005 report). USCIRF, ANNUAL REPORT 2012 29-30 (2012) available at <http://www.aina.org/reports/uscirf2012.pdf> (last visited Nov. 6, 2013) (reiterating concerns raised in 2009 USCIRF press release).

<sup>255</sup> See e.g. HRF, SEEKING PROTECTION, FINDING PRISON, *supra* note 211 at 37 (describing cases where asylum applicants remained in detention for many months pending credible fear reviews). ICE contends, in response to ongoing criticism, that it is improving the timeliness of credible fear determinations. According to the USCIS Credible Fear Workload Report Summary for FY 09-12, over 90 percent of credible fear determinations are completed within 14 days, with steady improvement in timeliness between FY 2009 and 2012. USCIS reports that in FY 2012, over 97 percent of credible fear determinations were completed in 14 days or less. See USCIS ASYLUM OFFICE, CREDIBLE FEAR WORKLOAD REPORT SUMMARY FY 09-12 (2012), available at <http://www.uscis.gov/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2012/July%202012/CredibleFear-FY2009-2012.pdf> (last visited Oct. 22, 2013). Partial statistics for FY 2013 suggest there has been a substantial increase in credible fear claims and reviews since the middle of 2012, and that the percentage of reviews occurring within 14 days has dropped. From October 2012 to June 2013, 80.26 percent of credible fear determinations have been timely completed. See USCIS Asylum Division, Asylum Office Workload (March 2013) at 35-40. Posted Aug 13, 2013 on the American Immigration Lawyers Association (AILA) InfoNet (password protected), re-posted and publicly available at [www.cayerdyslaw.com/newsandlinks/images/081413%20Asylum%20Statistics.pdf](http://www.cayerdyslaw.com/newsandlinks/images/081413%20Asylum%20Statistics.pdf) (last visited Oct. 23, 2013). For the latest available statistics about the overall credible fear workload for FY 2013 to date see USCIS, Credible Fear Workload Report Summary (Preview) (July 20, 2013) available at <http://preview.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2013/July%202013/FY13-CFandRF-stats2013-06-30.pdf> (last visited Oct. 23, 2013).

<sup>256</sup> In its 2013 report, for example, USCIRF reported that while 80 percent of detained asylum seekers found to have credible fear are now released on parole, the 20 percent who remain in detention often do so for reasons such as failure to substantiate community ties or inability to pay bond. See USCIRF, ASSESSING DETENTION OF ASYLUM SEEKERS, *supra* note 211 at 9-10.

<sup>257</sup> USCIRF, ASSESSING DETENTION OF ASYLUM SEEKERS, *id.* at 9-10 (concluding that while ICE had made progress towards ensuring that asylum seekers found to have a credible fear are paroled rather than detained, more needed to be done to ensure that asylum seekers, when detained, are not held in jails or jail-like facilities, and have adequate access to legal information, representation, and in-person hearings).



placed at risk of return to countries where they face persecution.

(iii) Withholding of Removal

U.S. law provides two primary forms of protection for persons fleeing persecution: asylum and withholding of removal.<sup>258</sup> Asylum offers the most complete form of protection: it entitles the person to permanent residence in the United States, and eligibility for U.S. citizenship and a right to family reunification.<sup>259</sup> U.S. law also allows for a more limited form of protection known as withholding of removal, which provides only basic non-*refoulement* protection without the associated entitlements that come with a granting of asylum.<sup>260</sup> Withholding of removal protects a person from being returned to a country of persecution; it does not provide him or her with secure status in the United States.<sup>261</sup> Withholding protection is mandatory, although it is subject to fundamental limitations in scope.<sup>262</sup>

Unlike other states parties to the Refugee Convention, the United States imposes a higher standard of proof for withholding of removal, and requires an applicant to demonstrate that the threat to his or her life or freedom is “more likely than

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<sup>258</sup> U.S. law also provides alternative protection from removal under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987). In the United States, an asylum seeker eligible for protection under Art. 3 of the Convention Against Torture will be granted withholding of removal so long as he or she is not mandatorily barred from asylum. If barred from withholding but still eligible for protection, an asylum seeker will be granted deferral of removal, a less-secure form of protection. See 8 C.F.R. §§ 208.16, 208.17, 1208.16, 1208.17. See also ANKER, LAW OF ASYLUM, *supra* note 205 at § 2:1 and Ch. 7 (discussing the differences between protection under the Refugee Convention and the Convention Against Torture).

<sup>259</sup> Asylum is a form of protection granted to persons who are victims of past persecution or who can demonstrate a future fear of persecution for reasons of race, religion, nationality, membership in a particular social group, or political opinion, in keeping with the Refugee Convention, whose states are unable or unwilling to provide protection. See INA §§ 101(a)(42)(A), 208(b)(1), 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1) (incorporating Art. 1(A) of Refugee Convention into U.S. law). Under U.S. law, asylum is formally a discretionary remedy, though discretionary denials are not the norm in practice. INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A). The United States Supreme Court has described the general discretionary nature of asylum as consistent with the United Nations Refugee Convention. See *e.g.*, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440–41 (1987) (discussing discretion under the Refugee Convention). See also ANKER, LAW OF ASYLUM, *supra* note 205 at § 1:2 and § 6:42.

<sup>260</sup> INA § 241(b)(3), 8 U.S.C. § 1231(b)(3).

<sup>261</sup> See ANKER, LAW OF ASYLUM, *supra* note 205 at § 1:2 (outlining the protections afforded to asylum seekers granted withholding of removal status).

<sup>262</sup> *Id.*

not”.<sup>263</sup> Those who are denied asylum even pursuant to certain procedural bars, such as the one-year filing deadline discussed directly below, only have access to withholding of removal protection.

#### (iv) Bars to Asylum

U.S. law also imposes legal and procedural bars that deny asylum seekers access to full and fair consideration. We survey two of these bars here: the one-year filing deadline and the “material support” bar.<sup>264</sup>

The Immigration and Nationality Act (INA) imposes a one-year filing deadline on asylum seekers.<sup>265</sup> This filing deadline requires asylum seekers to file their claim within a year of arriving in the United States, unless they can meet one of several limited exceptions.<sup>266</sup> The one-year filing deadline does not comply with international standards prescribing that asylum requests should not be excluded from consideration based on failure to fulfill formal requirements. The European Court of Human Rights, for example, has held that imposing time limits on asylum applications does not accord with the principles outlined in the Refugee

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<sup>263</sup> *Id.* at §2:2; §2:26-§2:28 (distinguishing and explaining standards of proof in withholding or removal and asylum). The asylum standard has been identified as “more generous” than the withholding for removal standard. See *INS v. Cardoza Fonseca*, 480 U.S. 421, 430-33 (1987) (describing and comparing standards). See also James C. Hathaway & Anne K. Cusick, *Refugee Rights are not Negotiable*, 14 *Geo. Immigr. L.J.* 481, 508-509 (2000) (describing standards, and critiquing the U.S. asylum system for its “impoverished” understanding of international protection). Because withholding is subject to a higher standard, in principle, asylum seekers in the United States with a well-founded fear of persecution, if they are denied asylum as a matter of discretion, may nonetheless be returned to their country of origin if they fail to meet the higher withholding standard.

<sup>264</sup> U.S. law also bars claimants convicted of “aggravated felonies” and classifies as “aggravated” a range of offences that would not be similarly classified under Canadian and international law. See INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (defining “aggravated felony”); INA §208(b)(2)(B)(i), 8 U.S.C. § 1158(b)(2)(B)(i) (providing that individuals convicted of aggravated felonies will be considered to have been convicted of a particularly serious crime, rendering them ineligible to apply for asylum).

<sup>265</sup> INA § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B). Individuals barred from asylum as a result of the one-year filing deadline can still be eligible to apply for withholding of removal, which, as noted above, is subject to a higher standard of proof. See ANKER, *LAW OF ASYLUM*, *supra* note 205.

<sup>266</sup> See ANKER, *id.* at §§ 6.31, 6.35 (describing exceptions to the bar generally). Exceptions to the one-year filing deadline include: changed circumstances, serious illness or disability, legal disability or ineffective assistance of counsel. For more on DHS policies on the application of the rule, see U.S. DEP’T OF HOMELAND SEC., *ASYLUM OFFICER BASIC TRAINING COURSE: ONE-YEAR FILING DEADLINE 10-12, 23-24, 26-28, 30-31* (2009), available at <http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBT%20Lesson%20Plans/One-Year-Filing-Deadline-31aug10.pdf> (last visited Nov. 5, 2013).

Convention.<sup>267</sup> Similarly, UNHCR has stated that asylum seekers should not be denied consideration for failure to fulfill formal requirements, noting that “[w]hile asylum-seekers may be required to submit their asylum request within a certain time limit, failure to do so, or the non-fulfillment of other formal requirements, should not lead to an asylum request being excluded from consideration.”<sup>268</sup> UNHCR has criticized the United States for implementing the one-year filing deadline on grounds that it can result in *bona fide* refugees being removed from the United States to face persecution, and has urged the United States to review this policy.<sup>269</sup>

United States rules and practice surrounding the one-year filing deadline create tremendous and unfair burdens on genuine refugees.<sup>270</sup> The one-year filing

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<sup>267</sup> See *Jabari v. Turkey*, Appl. No. 40035/98, 2000-VIII, Eur. Ct. H.R. ¶40 (finding that the implementation of time limits on asylum application does not accord with the principles outlined in the Refugee Convention).

<sup>268</sup> See UNHCR Executive Committee, *Refugees Without an Asylum Country*, No. 15, ¶ (i), U.N. Doc. No. 12A (A/34/12/Add.1) (Oct. 16, 1979), available at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3ae68c960> (last visited Oct. 23, 2013).

<sup>269</sup> See e.g. UNHCR, *Submissions by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights Compilation Report Universal Periodic Review: United States of America* (Apr. 2010) available at <http://www.refworld.org/pdfid/4bcd741c2.pdf> (last visited Oct. 13, 2013) (stating that “some individuals prevented from applying for asylum by the one-year deadline could be removed despite having a valid asylum claim” and urging the United States “to undertake a comprehensive review of its asylum adjudication system.” In 2010, researchers at Georgetown University completed a comprehensive analysis on the impact of the one-year bar on affirmative asylum applications filed between October 1, 1996 (when the one-year rule was first implemented) and Jun. 8, 2009. During that period, one third of affirmative asylum applications were filed late and DHS denied more than 15,000 asylum applications on the basis of lateness alone. As a result, they concluded, more than 21,000 genuine refugees were denied asylum during the time frame studies solely because of the one-year filing deadline. See Philip Schrag, Andrew I. Schoenholtz, Jaya Ramji-Nogales & James P. Dombach, *Rejecting Refugees: Homeland Security’s Administration of the One-Year Bar to Asylum*, 52 WM. & MARY L. REV. 679, 688, 753–754 (2010) (hereinafter Schrag et al). The authors found substantial inconsistencies in how the one-year filing deadline was applied, with applicants from certain nationalities far more likely to be excused for lateness than others. For example, late Guatemalan applications were far more likely to be rejected than late Iraqi applications. *Id.* at 721–732, 739. See also Ashley Huebner and Karen Zwick, National Immigrant Justice Center (2013) *Rethink Immigration: Repeal the One-Year Asylum Deadline*, available at <http://www.immigrantjustice.org/staff/blog/rethink-immigration-repeal-one-year-asylum-deadline#.UmRu0WRDuos> (last visited Oct. 23, 2013) (identifying problems with the one-year filing deadline and advocating for its repeal); Karen Musalo and Marcelle Rice, *The Implementation of the One-Year Bar to Asylum*, 31 HASTINGS INT’L & COMP. L. REV. 693 (2008) (providing case studies that illustrate the negative impact of the one-year deadline).

<sup>270</sup> It is worth noting that the one-year filing deadline was not intended to prevent genuine asylum seekers from obtaining protection. This intent is reflected by the legislative history. On September 30, 1996, Senator Orin Hatch, one of the bill’s sponsors stated that: “the way in which the time limit

deadline has also been criticized for undermining the efficiency of the asylum adjudication system, for leaving asylum seekers in legal limbo, for diverting limited time and resources in ineffective ways,<sup>271</sup> and for having a particularly detrimental impact on women fleeing gender-related persecution.<sup>272</sup>

In June 2013, the United States Senate passed a Comprehensive Immigration Reform Bill that includes provisions to repeal the one-year filing deadline.<sup>273</sup> These reforms were proposed after the Department of Homeland Security concluded in 2011 that the filing deadline leads to genuine refugees being denied asylum, expends resources without helping uncover or deter fraud, and

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was rewritten in the conference report--with the two exceptions specified--was intended to provide adequate protections to those with legitimate claims of asylum." See 142 Cong. Rec. S11838-01 (Sept. 30, 1996) (statement of Sen. Orin Hatch).

<sup>271</sup> See generally, HUMAN RIGHTS FIRST, *THE ASYLUM FILING DEADLINE: DENYING PROTECTION TO THE PERSECUTED AND UNDERMINING GOVERNMENTAL EFFICIENCY* (2010), available at [http://www.humanrightsfirst.org/uploads/pdfs/filing\\_deadline\\_two\\_pager.pdf](http://www.humanrightsfirst.org/uploads/pdfs/filing_deadline_two_pager.pdf) (last visited Oct. 22, 2013) (noting that the one-year filing deadline denies protection to the persecuted and undermines government efficiency, and advocating for its elimination).

<sup>272</sup> See e.g., Elisa Massimino, *How the U.S. Asylum Deadline Hurts Women*, *The Daily Beast* (Jun. 14, 2013) available at <http://www.thedailybeast.com/witw/articles/2013/06/14/immigration-reform-abolish-the-asylum-deadline-that-hurts-women.html> (last visited Oct. 22, 2013) (noting that women asylum seekers are disproportionately impacted by the one-year filing deadline and outlining reasons as to why). See also Schrag et al, *supra* note 269 at 651, 702, 753–754 (noting that the filing deadline tended to have a disproportionately negative impact on female applicants, who were far more likely than male applicants to be late filers); LAWYERS COMMITTEE FOR HUMAN RIGHTS (NOW HUMAN RIGHTS FIRST), *REFUGEE WOMEN AT RISK: UNFAIR U.S. LAWS HURT ASYLUM SEEKERS* (2002) available at [http://www.humanrightsfirst.org/wp-content/uploads/pdf/refugee\\_women.pdf](http://www.humanrightsfirst.org/wp-content/uploads/pdf/refugee_women.pdf) (last visited Oct. 23, 2013) (arguing that women may be adversely affected by the one-year filing deadline because, for example, women who must care for children may lack the time and resources to seek legal help while caring for their families, women who have been subject to physical or sexual violence may suffer psychological and physical trauma, making it difficult for them to discuss their experiences within one year of arrival in the United States. Also, seeking legal representation may be difficult for women who come from countries where they could not approach government or legal authorities).

<sup>273</sup> S. 744 Border Security, Economic Opportunity, and Immigration Modernization Act, 113th Cong. (2013), available at <http://www.judiciary.senate.gov/legislation/immigration/MDM13735.pdf> (last visited Oct. 23, 2013) (hereinafter Comprehensive Immigration Reform Bill). See also Immigration Policy Center, American Immigration Council, *A Guide to s.744: Understanding the 2013 Senate Immigration Bill* (June, 2013), available at [http://www.immigrationpolicy.org/sites/default/files/docs/guide\\_to\\_s744\\_corker\\_hoeven\\_final\\_0.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/guide_to_s744_corker_hoeven_final_0.pdf) (last visited Oct. 22, 2013) (describing the main components of s.744 and the purposes behind them).

makes the asylum process more difficult.<sup>274</sup> The proposed legislation has not been enacted and the one-year filing deadline is still in effect.<sup>275</sup>

The United States further bars from asylum and withholding any person who has provided “material support” to terrorist organizations or activities.<sup>276</sup> The 2001 USA PATRIOT Act implements an expansive definition of “material support”, and also applies a very broad definition of the term “terrorist activities”.<sup>277</sup> The Act does not require proof that an individual provided support knowingly but rather, permits an individual to be barred from protection if he or she “reasonably should have known” they were affording material support to terrorists.<sup>278</sup> These provisions have been heavily criticized for being overbroad, and for straying from international standards that require individual responsibility to justify exclusion from refugee protection.<sup>279</sup> At the end of 2007, Congress amended the law to broaden the authority to grant exemption from the law’s over-breath.<sup>280</sup> These amendments effect only limited groups of individuals. Human rights and refugee rights groups have criticized the relevant government agencies for failing to establish workable procedures to implement this exemption effectively.<sup>281</sup>

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<sup>274</sup> See HRF ASYLUM BLUEPRINT, *supra* note 206, citing UNHCR WASHINGTON OFFICE, REAFFIRMING PROTECTION: STRENGTHENING ASYLUM IN THE UNITED STATES, COMMEMORATING THE 60TH ANNIVERSARY OF THE 1951 REFUGEE CONVENTION (SUMMARY REPORT) 18 (2011).

<sup>275</sup> S.744 as amended passed the Senate on June 27, 2013 by a vote of 68-32. See Immigration Policy Center, *A Guide to s.744*, *supra* note 273 at 4.

<sup>276</sup> 8 U.S.C. §1182(a)(3)(B)(iii)(VI).

<sup>277</sup> See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, § 411, 115 Stat. 272 (2001) (codified at 8 U.S.C. § 1182 (2001)).

<sup>278</sup> *Id.*

<sup>279</sup> See HUMAN RIGHTS FIRST, DENIAL AND DELAY: THE IMPACT OF THE IMMIGRATION LAW’S “TERRORISM BARS” ON ASYLUM SEEKERS AND REFUGEES IN THE UNITED STATES (2009), *available at*: <http://www.humanrightsfirst.org/wp-content/uploads/pdf/RPP-DenialandDelay-FULL-111009-web.pdf> (last visited Oct. 23, 2013) (noting that the bar results in legitimate refugees who pose no threat to the United States having their applications denied or delayed).

<sup>280</sup> See Consolidated Appropriations Act of 2008, Pub. L. 110-161, 121 Stat. 1844 (2007). Section 691 of Division J of the Act made amendments to the inadmissibility grounds of INA § 212(a)(3)(B) related to “terrorism,” and to the authority codified at Section 212(d)(3)(B)(i) of the INA that gives the Secretaries of State and Homeland Security (in consultation with the Attorney General) discretionary authority not to apply certain of these grounds in particular cases. Consolidated Appropriations Act, Div. J § 691 (codified at 8 U.S.C. § 1182(d)(3)(B)(i)). See also HUMAN RIGHTS FIRST, NEWLY ENACTED AMENDMENTS TO THE ‘TERRORISM BAR’ AND RELATED WAIVERS UNDER THE IMMIGRATION AND NATIONALITY ACT (Jan. 29, 2008) *available at* <http://www.humanrightsfirst.org/wp-content/uploads/pdf/08130-asy-new-amendments-ina.pdf> (last visited Oct. 23, 2013) (analyzing amendments).

<sup>281</sup> Human Rights First criticized this policy and called for a legislative solution that would *inter alia* focus the definition of “terrorist activity” on violence against civilians and non-combatants and ensure the administration’s swift implementation of the discretionary authority given to it by Congress. See

Before the STCA came into effect, *bona fide* asylum seekers who failed to meet the higher standard of proof required for withholding of removal, or who were statutorily barred from asylum in the United States, could seek asylum in Canada. Since the STCA's implementation, this safety valve has been essentially closed for asylum seekers who are not found to fit within the STCA's exceptions.

The STCA not only closes Canada's border to asylum seekers, it also serves another example of Canada's willingness to avoid its refugee protection obligations. As Audrey Macklin explains, since the STCA permits Canada to return asylum seekers to the United States despite evidence that they may be at risk of being returned to a country of feared persecution, it "allows Canada to do indirectly what it cannot do directly, namely deny refugees the rights to which they are entitled according to international and domestic law."<sup>282</sup> Contrary to the assurances outlined in its preamble, the STCA denies asylum seekers fundamental protections and exposes them to the risk of being returned to countries of feared persecution.

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*e.g.*, HRF ASYLUM BLUEPRINT, *supra* note 206 at 13-14. See also Anwen Hughes, *Immigration Law's "Terrorism Bars" at Odds with U.S. National Security, commitment to Refugees*, HUMAN RIGHTS FIRST BLOG (Feb. 6, 2013), <http://www.humanrightsfirst.org/2013/02/06/immigration-law%E2%80%99s-%E2%80%9Cterrorism-bars%E2%80%9D-at-odds-with-u-s-national-security-commitment-to-refugees/> (last visited Oct. 23, 2013) (criticizing law).

<sup>282</sup> Macklin, *supra* note 29 at 380.

## 2. Restricting Access to Asylum

*“They’re caught in no man’s land with nowhere to go. They’re trapped.”*<sup>283</sup>

### (i) Keeping Asylum Seekers Out of Canada

The STCA was designed to serve as a “burden-sharing” vehicle to promote and enhance cooperation in refugee status determinations between Canada and the United States.<sup>284</sup> It is well established that before the STCA came into effect, more asylum seekers crossed the border from the United States into Canada than in the other direction.<sup>285</sup> Canada is far removed from most conflict regions,

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<sup>283</sup> Interview with Gregory Boos (Attorney), Canada-US Immigration Law Center (Aug. 3, 2012), para. 78.

<sup>284</sup> See STCA, *supra* note 6 at Preamble (emphasizing the parties’ commitment “to the notion that cooperation and burden-sharing with respect to refugee status claimants can be enhanced”). See also Macklin, *supra* note 29 at 394-395 (noting that in the context of the STCA “burden-sharing” refers to the asymmetrical flow of refugee claimants between the United States and Canada, and promotes “the notion that each state should take responsibility for a proportion of the refugee flow that is commensurate with its population, or resources, or some combination thereof”). Macklin further critiques the use of the phrase “burden sharing” for portraying refugees as a liability and advocates instead for use of the expression “responsibility sharing” as better capturing the fact that the international refugee regime “operates on the basis of duties voluntarily assumed by the states which acceded to the 1951 Refugee Convention and the 1967 Protocol” at 394. See also Stephen H. Legomsky, *Secondary Refugee Movements and the Return of Asylum Seekers* 15(4) INT’L J. REFUGEE L. 567, 606-607 (2003) (noting that focusing on the burdens of refugee protection is inappropriate given that refugees “bring not only ‘burdens’ but also benefits and opportunities” and advocating for use of the expression “responsibility sharing”). Any discussion of asymmetry in asylum flows must also recognize the profound asymmetry between the number of asylum seekers admitted by Canada and the United States, and states located closer to conflict regions. As Legomsky explains, while destination states like Canada and the United States accept significant numbers of refugees “those numbers constitute only a tiny proportion of the world’s total refugee population,” and “some of the more common destination state practices have the effect of distributing the responsibility for refugee protection inequitably, with the effect of distributing obligation disproportionately on “developing countries and on countries whose frontiers are geographically most accessible”, at 570-572. For further analysis of responsibility sharing in the context of the Safe Third Country Agreement, see Michelle Foster, *Responsibility Sharing or Shifting? “Safe” Third Countries and International Law*, 25 (2) REFUGEE 64 (2008).

<sup>285</sup> Between 1995 and 2001, approximately one-third of all refugee claimants in Canada entered at the Canada-U.S. border, ranging in numbers from roughly 6,000 per year to 14,000 per year. In contrast, during this same period, approximately 200 refugee claimants entered the United States from Canada annually. See AUDREY MACKLIN, CALEDON INSTITUTE OF SOCIAL POLICY, THE VALUE(S) OF THE CANADA-U.S. SAFE THIRD COUNTRY AGREEMENT 11 (2003), available at <http://www.caledoninst.org/Publications/PDF/558320703.pdf> (last visited Oct. 23, 2013). See also JOE FONTANA, M.P. (CHAIR), STANDING COMM. ON CITIZENSHIP AND IMMIGRATION HOUSE OF COMMONS OF CANADA,

and many asylum seekers who seek protection in Canada must first travel through the United States.<sup>286</sup> As one practitioner interviewed for this report explained: “The reality is we don’t have many refugees coming to Canada compared to Europe because, you see, not many people are able to come here. It’s far; the only land crossing we have is with the United States.”<sup>287</sup>

Canada and the United States were driven by different motivations in negotiating towards the STCA. While the United States entered into the STCA primarily to fortify the border, Canada entered into the STCA primarily to deter asylum seekers from making refugee claims in Canada.<sup>288</sup> In a report released by U.S. Custom and Border Protection, Canada Border Services Agency, and Royal Canadian Mounted Police, the agencies explain: “[w]hile the primary focus for

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HANDS ACROSS THE BORDER: WORKING TOGETHER AT OUR SHARED BORDER AND ABROAD TO ENSURE SAFETY, SECURITY, AND EFFICIENCY, Doc. No. RP1032046, 8 (Dec. 2001), available at <http://www.parl.gc.ca/content/hoc/Committee/371/CIMM/Reports/RP1032046/cimm02rp/cimm02rp-e.pdf> (last visited Oct. 29, 2013) (noting that at that time, approximately one-third of all refugee claimants seeking asylum in Canada entered through the United States).

<sup>286</sup> For asylum seekers who travel overland from South or Central America, it is impossible to reach Canada without first passing through the United States. For asylum seekers who travel by air from overseas locations, the relative scarcity of direct flights to Canada from many regions of the world often requires transit through the United States. See Legomsky, *supra*, note 284 at 583 (discussing barriers that prevent asylum seekers from reaching Canada without first entering the United States, and noting that the STCA “will result in Canada returning more refugee status applicants to the United States than vice versa, a significant consequence in the light of the differences in approval rates and reception conditions”).

<sup>287</sup> Interview with Saleem Spindari (Community Outreach Program Coordinator), MOSAIC British Columbia (May 16, 2012), para. 40.

<sup>288</sup> See e.g. Macklin, *supra* note 285 (discussing the parties’ motivations in entering the STCA). Critics further suggest that in implementing the STCA, Canada and the United States were motivated by considerations that were neither acknowledged nor initially disclosed. In August 2002, the Canadian Council for Refugees obtained a document entitled “Draft Note to Accompany a Canada-United States Agreement for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries” (Jun. 2002) (unpublished), cited in Macklin, *supra* note 285 at 3-4. The text of the Draft Note was also provided by the Canadian Council for Refugees upon request. The Note indicates that in exchange for agreeing to the STCA, Canada would “resettle up to 200 persons per year referred by the Government of the United States who are outside the United States and Canada. . .and have been determined by the Government of the United States of America and the Government of Canada to be in need of international protection.” Soon after the STCA came into effect, Canada resettled 14 Haitian refugees from Guantanamo Bay, referred to Canada for resettlement by United States officials under Art. 9 of the STCA. See UNHCR, STCA MONITORING REPORT, *supra* note 176 at 19. Refugee advocates criticized the Draft Note as a “side deal” agreed to by Canada to push the STCA through, and as an indication of Canadian and U.S. willingness to “trade” in interdicted individuals. See e.g., Campbell Clark, *Plan to Send Canada Refugees from Ships Criticized*, THE GLOBE AND MAIL (PRINT EDITION) (Aug. 5, 2002) (citing Bill Frelick, Director of Refugee Programs for Amnesty International in the United States criticizing the Note, stating “[i]t’s basically come down to trading in people and it’s unseemly”).



the United States was security, Canada sought to limit the significant irregular northbound movement of people from the United States who wished to access the Canadian refugee determination system.”<sup>289</sup> And indeed, the effects of the STCA have been felt unevenly on either side of the border, as it has kept large numbers of asylum seekers *out* of Canada and *in* the United States.<sup>290</sup>

Statistics obtained from the Canada Border Services Agency show that Canada has found several hundred claimants ineligible under the STCA each year since the STCA’s implementation, as follows:<sup>291</sup>

Year	Rejected Refugee Claimants under the Canada/US Safe Third Country Agreement
2005	301
2006	402
2007	500
2008	640
2009	768
2010	761
2011	591
2012	544 <sup>292</sup>

These numbers, however, only tell part of the story. The STCA not only turns asylum seekers away at the border, but also deters asylum seekers who are aware of the policy from presenting themselves at the border. As a result, its effects are far more significant than the above numbers reveal. Statistics

<sup>289</sup> See UNITED STATES CUSTOMS AND BORDER PROTECTION, CANADA BORDER SERVICE AGENCY, AND ROYAL CANADIAN MOUNTED POLICE, U.S.-CANADA: JOINT BORDER THREAT AND RISK ASSESSMENT 12 (2010), available at [www.cbsa-asfc.gc.ca/security-securite/pip-pep/jbtra-ecmrf-eng.pdf](http://www.cbsa-asfc.gc.ca/security-securite/pip-pep/jbtra-ecmrf-eng.pdf) (last visited Nov. 1, 2013). See also Macklin, *supra*, note 285 at 16 (noting that the United States’ concern with national security “explains why the United States would assent to an agreement that it refused to sign a few years earlier and which can only amount to a make-work project for the US asylum system”).

<sup>290</sup> While practitioners in Canada reported a decline in the number of asylum seekers entering Canada since the STCA’s implementation, practitioners in the United States reported a correlating rise in the number of asylum seekers housed in their shelters or being held in detention. See Interview with Martha Mason (Executive Director), Rod McDowell (Board President), and Ronald Gray (Board Vice-President), Fort Erie Multicultural Centre (Jul. 25, 2012), paras. 11-12, 24 and 32; Interview with Lynn Hannigan (Director) and Sister Judith Carroll (Counselor), Casa El Norte (Aug. 3, 2012), paras.34-35.

<sup>291</sup> CBSA 2012 data, *supra* note 100. These figures include claimants rejected at the border, in addition to two additional claimants rejected in 2005 (one at the airport, one inland); five claimants rejected in 2005 (two at the airport, three inland) and one additional claimant rejected in 2011 (inland).

<sup>292</sup> The statistics for 2012 are current to May 8, 2012.

obtained from CBSA show a striking decline in asylum claims made at the Canada-U.S. border after the STCA came into effect, as follows:<sup>293</sup>

<b>Year</b>	<b>Asylum Claims Made at the Border Pre-STCA</b>	<b>Year</b>	<b>Asylum Claims Made at the Border Post-STCA</b>
1997	6,000	2005	4,041
1998	6,224	2006	4,478
1999	9,556	2007	8,191
2000	13,270	2008	10,802
2001	14,007	2009	6,295
2002	10,856	2010	4,642
2003	10,938	2011	2,563
2004	8,904	2012	3,790

Assessed differently, these same statistics show a steady decline in the number of asylum claims made at the border each year relative to the total number of asylum claims received by Canada:<sup>294</sup>

<b>Year</b>	<b>Percentage of Asylum Claims Made at the Border Pre-STCA</b>	<b>Year</b>	<b>Percentage of Asylum Claims Made at the Border Post-STCA</b>
1997	24.7%	2005	20.4%
1998	24.5%	2006	19.5%
1999	31.7%	2007	28.7%
2000	35.0%	2008	29.3%
2001	31.3%	2009	18.9%
2002	32.4%	2010	20.0%
2003	34.3%	2011	10.1%
2004	34.9%	2012	18.5%

<sup>293</sup> CBSA 2012 data, *supra* note 100. Statistics from 1997-2001 cited in CLOSING THE FRONT DOOR, *supra* note 202. There were slight inconsistencies between the CBSA data presented in CLOSING THE FRONT DOOR and the data provided by the CBSA in 2012. Where such inconsistencies in data were identified, this report cites to the data provided by CBSA in 2012. A Freedom of Information request completed by Citizenship and Immigration Canada (Sept. 13, 2012) (CR-12-0226; DPU-12-1422) shows that the gender division for claims lodged at the border is as follows: 2005: 114 females and 185 males; 2006: 151 females and 251 males; 2007: 208 females and 292 males; 2008: 248 female and 392 males; 2009: 340 females and 423 males; 2010: 345 females and 416 males; 2011: 245 females and 345 males. CBSA also provided copies of informational bulletins relating to the STCA further to Freedom of Information Request File A-2012-01381 /TW, filed with the Canada Border Services Agency under the Access to Information Act, R.S.C. ch. A-1 (1985) (Can.) (completed Jun. 11, 2012).

<sup>294</sup> *Id.*

Notably, before July 2009, asylum seekers from countries on which Canada had imposed a temporary suspension of removals were allowed entry into Canada under the STCA's "moratorium country exception".<sup>295</sup> Since moratorium countries are, by definition, countries with some of the most egregious human rights records in the world, asylum claims from these countries are among the most compelling and urgent. As the above numbers demonstrate, after the Canadian government removed this exception in 2009, the number of asylum claims made at the Canada-U.S. border declined even further. The removal of the moratorium country exception was acutely felt on both sides of the border. Fort Erie Multicultural Centre in Fort Erie, Ontario, for example, reported a fifty percent drop in the number of asylum seekers staying at their shelter after the moratorium country exception was removed.<sup>296</sup> Practitioners in Vive La Casa in Buffalo, New York, reported a correlating rise in the number of asylum seekers housed in some U.S. shelters.<sup>297</sup>

#### (ii) Inconsistent Application of STCA Exceptions

Data collected for this report further indicates that Canadian border officials sometimes apply inconsistent and inflexible evaluation standards when considering the STCA's exceptions. Of the four exceptions identified in the STCA, the family member exception is the most frequently used.<sup>298</sup> To trigger this

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<sup>295</sup> *Regulation Amending the Immigration and Refugee Protection Regulations*, 143 (16) CAN. GAZETTE 1470-72 (Aug. 05, 2009), available at <http://canadagazette.gc.ca/rp-pr/p2/2009/2009-08-05/pdf/g2-14316.pdf> (last visited Oct. 27, 2013) (noting that the STCA's exception for nationals benefiting from a temporary suspension of removals has "left Canada open to large influxes from the United States of refugee protection claimants from nationals of [temporary suspension of removals] countries", and announcing that the amendment to repeal this provision "will protect the integrity of the refugee status determination system by ensuring that refugee protection claimants who have had the opportunity to have their claims assessed in the United States are not making claims in Canada, and will reduce pressures on, and costs to, the refugee protection system").

<sup>296</sup> Interview with Martha Mason (Executive Director), Rod McDowell (Board President), and Ronald Gray (Board Vice-President), Fort Erie Multicultural Centre (Jul. 25, 2012), paras. 22, 151-154.

<sup>297</sup> See Interview with Martha Mason (Executive Director), Rod McDowell (Board President), and Ronald Gray (Board Vice-President), Fort Erie Multicultural Centre (Jul. 25, 2012), paras. 24 and 32 (speaking of increased intake at Vive La Casa).

<sup>298</sup> See Interview with Martha Mason (Executive Director), Rod McDowell (Board President), and Ronald Gray (Board Vice-President), Fort Erie Multicultural Centre (Jul. 25, 2012), para. 97. The practitioners we interviewed noted that the document holder and public interest exceptions are rarely applied at the Canadian border. These practitioners further noted that the unaccompanied minor exception was more frequently applied at the Canadian border in the years 2005-2010, but that fewer unaccompanied minors are now entering Canada under this exception, paras. 97-104. For an account of child claimants presenting at the Canadian border see Annie Poulin, *Réfugiés: des dizaines d'enfants*

exception, an asylum seeker must satisfy a Canadian border services officer that he or she has a family member in Canada. While the burden of proof is on the claimant, officers are required to make reasonable efforts to confirm family relationships.<sup>299</sup> The necessity of applying flexible standards of proof is recognized in the Operations Manual used by Canada's border agents, which states:

Credible testimony may be sufficient to satisfy a decision-maker in the absence of documentary evidence or computer records. It may be appropriate in these circumstances to request that the applicant and the relative provide sworn statements attesting to their family relationship.<sup>300</sup>

When the STCA was first implemented, Canadian officials stated they would take a generous and liberal approach to the family member exception, and would not insist on proof of original documents to prove family relationships.<sup>301</sup> Data collected for this report, however, indicates that Canadian border officers sometimes apply inflexible standards in evaluating the family member exception.

Practitioners on both sides of the border spoke of a growing insistence on original documentation to satisfy the STCA's family member exception, and

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*arrivent seuls à la frontière chaque année*, CBC RADIO-CANADA (Jul. 26, 2013) (in French) *available at* <http://www.radio-canada.ca/regions/ontario/2013/07/26/001-refugies-enfants-fort-erie.shtml> (last visited Oct. 27, 2013).

<sup>299</sup> CANADIAN COUNCIL FOR REFUGEES AND SOJOURN HOUSE, WELCOME TO CANADA: THE EXPERIENCE OF REFUGEE CLAIMANTS AT PORT-OF-ENTRY INTERVIEWS 25 (2010), *available at* <http://ccrweb.ca/files/poereport.pdf> (last visited Oct. 23, 2013) (hereinafter CCR & SOJOURN HOUSE) (explaining the burden of proof in the context of the STCA's family member exception).

<sup>300</sup> CITIZENSHIP AND IMMIGRATION CANADA, PROCESSING CLAIMS FOR REFUGEE PROTECTION MANUAL, 63 (2012) *available at* <http://www.cic.gc.ca/english/resources/manuals/pp/pp01-eng.pdf> (last visited Oct. 23, 2013), *cited in* CCR & SOJOURN HOUSE, *id.* at 24. These same principles are outlined in Statement of Principles accompanying the Safe Third Country Agreement. *See* PROCEDURAL ISSUES ASSOCIATED WITH IMPLEMENTING THE AGREEMENT FOR COOPERATION IN THE EXAMINATION OF REFUGEE STATUS CLAIMS FROM NATIONALS OF THIRD COUNTRIES: STATEMENT OF PRINCIPLES, Citizenship and Immigration Canada, *available at* <http://www.cic.gc.ca/english/department/laws-policy/safe-third.asp> (last visited Oct. 23, 2013), at para. 2 (noting that while the burden of proof is on the applicant to satisfy a decision-maker as to the existence of a family relationship "credible testimony may be sufficient to satisfy a decision-maker in the absence of documentary evidence of computer records", and that in such circumstances it may be appropriate to request the applicant and relative to provide sworn statements attesting to the family relationship.).

<sup>301</sup> CCR & SOJOURN HOUSE, *id.* at 25 (citing statements made at a meeting in Niagara Falls Dec. 16, 2004).

noted that some Canadian officials place an inordinately high value on original identity documents.<sup>302</sup> As one attorney explained:

The Canadians are really big on documents. They like to see an original birth certificate and original photo ID, or passport preferably or a country ID from the individual coming into Canada, and they'll accept copies of documents from the relatives in Canada . . . So we're very insistent on documents because in our experience, the Canadians are insistent on it. The better the documents, the better your chances of getting in.<sup>303</sup>

The emphasis on original documentation can erect significant hurdles for some asylum seekers. In some cases, obtaining original documents – or any documents at all – is nearly impossible.<sup>304</sup> Asylum seekers typically flee their countries of origin quickly and unexpectedly, and cannot bring their identity documents with them for fear of being discovered. Others flee from regions where it is difficult or dangerous to obtain identity documents – or any documents – because the government is unstable, corrupt, or ineffective. As noted above, the UNHCR expressly recognizes that due to these and other circumstances, asylum seekers are “perhaps more likely than other aliens to find themselves without identity documents”.<sup>305</sup> Without identity documents, such claimants face serious barriers in gaining admission into Canada, even in situations where they may fit within the STCA’s family member exception.

Practitioners on both sides of border described a general lack of uniform procedure in assessing family relationships, and inconsistency in evaluating the family member exception.<sup>306</sup> Some Canadian border officials have even denied entry to claimants who present at the border with original documentation

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<sup>302</sup> Interview with Peter Murrett (Attorney), *Vive La Casa* (Jul. 27, 2012), para. 32; Interview with Lynn Hannigan (Director) and Sister Judith Carroll (Counselor), *Casa El Norte* (Aug. 3, 2012), paras. 43-46.

<sup>303</sup> Interview with Peter Murrett (Attorney), *Vive La Casa* (Jul. 27, 2012), paras. 32 and 34.

<sup>304</sup> For discussion *see supra*, notes 63-65.

<sup>305</sup> United Nations High Commissioner for Refugees (UNHCR), *Identity Documents for Refugees, supra*, note 65 at para.3.

<sup>306</sup> Interview with Peter Murrett (Attorney), *Vive La Casa* (Jul. 27, 2012), para. 40; Interview with Rebecca Cohen (Senior Attorney) and Kelly Steffens AuBuchon (Staff Attorney), *Freedom House* (Jul. 27, 2012), paras. 29-34. Interview with Lynn Hannigan (Director) and Sister Judith Carroll (Counselor), *Casa El Norte* (Aug. 3, 2012), para. 68.

showing a family relation in Canada.<sup>307</sup> The assessments varied dramatically between officers.<sup>308</sup> As one practitioner explained: “As far as I can tell, it’s entirely subjective.”<sup>309</sup> As another noted: “they can decide at any point that they don’t believe the person or there is something not quite right and just return them to the U.S.”<sup>310</sup> Practitioners further reported that claimants who were not particularly close with their Canadian family members often faced difficulties when officers interpreted the lack of closeness as an indicator of fraud.<sup>311</sup> In one case, an asylum seeker who was unable to satisfy the officer as to the validity of the family relationship on the basis of documentation and testimonials had to provide DNA evidence to substantiate the claim.<sup>312</sup>

Practitioners on both sides of the border also pointed to a growing culture of hostility and disbelief at the Canadian border since the STCA came into effect, and noted that asylum seekers are frequently dismissed, disgraced, and demeaned.<sup>313</sup> As one practitioner described: “I saw a huge shift . . . before it was an attitude of kindness and we’re obligated as a country to accept refugees.”<sup>314</sup> Other practitioners described a similar shift in attitude, and noted that asylum seekers are increasingly “treated as if they’re criminals before they’re found guilty.”<sup>315</sup> Being met with accusation and disbelief can impose terrible burdens on asylum seekers. As one practitioner described:

People are afraid. When they go through the process, they’re hungry, they haven’t slept the night before, they’re afraid . . . It’s

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<sup>307</sup> Interview with Lynn Hannigan (Director) and Sister Judith Carroll (Counselor), Casa El Norte (Aug. 3, 2012), para. 177; Interview with Michele Jenness (Executive Director), Vermont Immigration and Asylum Advocates (Aug. 10, 2012) para. 62.

<sup>308</sup> Interview with Rebecca Cohen (Senior Attorney) and Kelly Steffens AuBuchon (Staff Attorney), Freedom House (Jul. 27, 2012), paras. 25-29; Interview with Michele Jenness (Executive Director), Vermont Immigration and Asylum Advocates (Aug. 10, 2012) para. 62.

<sup>309</sup> Interview with Peter Murrett (Attorney), Vive La Casa (Jul. 27, 2012), para. 40.

<sup>310</sup> Interview with Rebecca Cohen (Senior Attorney) and Kelly Steffens AuBuchon (Staff Attorney), Freedom House (Jul. 27, 2012), Freedom House (Jul. 27, 2012), para. 32.

<sup>311</sup> Interview with Martha Mason (Executive Director), Rod McDowell (Board President), and Ronald Gray (Board Vice-President), Fort Erie Multicultural Centre (Jul. 25, 2012), para. 74.

<sup>312</sup> Interview with Martha Mason (Executive Director), Rod McDowell (Board President), and Ronald Gray (Board Vice-President), Fort Erie Multicultural Centre (Jul. 25, 2012), para. 58.

<sup>313</sup> Interview with Ramani Balendra (Centre Coordinator), South Asian Women’s Community Centre (Aug. 13, 2012), para.81-85; Interview with Lynn Hannigan (Director) and Sister Judith Carroll (Counselor), Casa El Norte (Aug. 3, 2012), paras. 139-149.

<sup>314</sup> Interview with Michele Jenness (Executive Director), Vermont Immigration and Asylum Advocates (Aug.10, 2012) para. 193.

<sup>315</sup> Interview with Lynn Hannigan (Director) and Sister Judith Carroll (Counselor), Casa El Norte (Aug. 3, 2012), para. 146.

just a terribly traumatic experience about wondering if they are able to come in. And unfortunately a lot of officers don't make that easy for them on the human level . . . you have to be humane – show some sort of human respect.<sup>316</sup>

In a 2010 study into the experience of refugee claimants at port of entry interviews, the Canadian Council for Refugees and Sojourn House arrived at similar conclusions.<sup>317</sup> Based on a combination of claimant experiences and practitioner observations, the study found significant inconsistencies among border agents in evaluating family relationships, and similarly observed that claimants from certain countries appear to encounter stricter standards of evidence than others. The study concludes that Canadian border officers' "unreasonable and inconsistent assessments of family relationships have in some cases undermined the fair application of the family member exception."<sup>318</sup>

The tendency towards inflexibility and disbelief is demonstrated by the case of *Cishahayo v. Canada*.<sup>319</sup> This case involved asylum applicant Audace Cishahayo, who fled Burundi to seek asylum in Canada. Mr. Cishahayo arrived in Washington, D.C. on November 2, 2011, and twelve days later, made a claim for Canadian refugee protection at the Canada-U.S. border.<sup>320</sup> He sought entry into Canada under the family member exception to the STCA, as he had two sisters in Canada, one of whom was a Canadian citizen and the other recognized as a Convention refugee and in the process of applying for permanent residence.<sup>321</sup> Mr. Cishahayo presented his passport from the Republic of Burundi, as well as a national identification card and a health insurance card both of which bore his photo and listed the names of his parents to establish the relationship with his Canadian citizen sister.<sup>322</sup> A CBSA officer interviewed Mr. Cishahayo in person,

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<sup>316</sup> Interview with Lynn Hannigan (Director) and Sister Judith Carroll (Counselor), Casa El Norte (Aug. 3, 2012), paras. 144 and 162.

<sup>317</sup> CCR & SOJOURN HOUSE, *supra* note 299 at 3, 23-25 (based on interviews with 45 claimants and 37 practitioners about experiences at Canadian ports of entry, report identifies inconsistencies in evaluating family relationships under the STCA family member exception, and in some cases, inflexibility leading to the rejection of claimants who in fact have family members in Canada and should benefit from the exception to the safe country rule).

<sup>318</sup> *Id.* at 25.

<sup>319</sup> *Cishahayo v. Canada* (Minister of Public Safety and Emergency Preparedness), [2012] FC 1237 (Can.)

<sup>320</sup> *Id.* at paras. 1-3.

<sup>321</sup> *Id.*

<sup>322</sup> Interview with Michele Jenness (Executive Director), Vermont Immigration and Asylum Advocates (Aug. 10, 2012) para. 62.

interviewed one of Mr. Cishahayo's sisters over the telephone, and also asked that same sister to fax copies of her Canadian passport and a photo identification card.<sup>323</sup> The officer doubted the authenticity of Mr. Cishahayo's identity documents and family connections, rejected his claim, and returned him to the United States pursuant to the STCA.<sup>324</sup>

Upon his return to the United States, Mr. Cishahayo was initially detained in Clinton County Jail. He then wrote a letter to the Chief Supervisory Customs and Border Protection Officer in Champlain, New York requesting that his negative eligibility decision be reconsidered.<sup>325</sup> He enclosed six identity documents to supplement the documents he had presented to the CBSA upon his initial attempt to enter Canada, namely: a birth certificate, proof of residence, marriage certificate, baptismal certificate, and copy of the biographic page of a previous Burundian passport.<sup>326</sup> The CBSA officer tasked with reconsidering Mr. Cishahayo's claim concluded that the documents did not bring any new information to light, and recommended that the negative eligibility decision regarding Mr. Cishahayo's admissibility into Canada stand.<sup>327</sup>

With the benefit of assistance on both sides of the border, Mr. Cishahayo appealed his negative eligibility decision before the Federal Court of Canada. The Court ultimately allowed his application, and sent his claim back for reassessment by a different officer.<sup>328</sup> Asylum seekers who do not have the benefit of legal assistance no doubt encounter far greater barriers in contesting improper decisions made by Canadian border agents.

This case highlights the inflexible application of the STCA's family member exception at certain border crossings, and also points to the very real possibility that asylum seekers who show family connections in Canada and present original identity documents may nonetheless be denied entry into Canada for arbitrary or unprincipled reasons.

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<sup>323</sup> Cishahayo v. Canada, [2012] FC 1237 (Can.) *supra* note 319 at para. 4; Interview with Michele Jenness (Executive Director), Vermont Immigration and Asylum Advocates (Aug. 10, 2012) para. 62.

<sup>324</sup> Cishahayo v. Canada, [2012] FC 1237 (Can.) *supra* note 319 at paras. 4-5.

<sup>325</sup> *Id.* at para. 6.

<sup>326</sup> *Id.* at para. 8.

<sup>327</sup> *Id.* at para. 8.

<sup>328</sup> *Id.* at paras. 25-26 (finding that "an officer reconsidering a negative eligibility decision under the STCA has the duty to give the applicant an opportunity to disabuse the officer of any concern over the authenticity of the applicant's documents. . . the officer in the present case breached the duty of procedural fairness by not giving the applicant this opportunity before drawing an adverse inference from the officer's concern over document forgery").



(iii) Limited Access to Appeal

In December 2012, provisions implementing Canada's new Refugee Appeal Division (RAD) came into effect.<sup>329</sup> These provisions prohibit asylum seekers who lawfully enter Canada under one of the STCA exceptions from appealing negative decisions to the RAD.<sup>330</sup> As Citizenship and Immigration Canada explains:

The RAD will provide most claimants and the Government of Canada with an opportunity to establish that the [Refugee Protection Division] decision was wrong in fact or law or both. It will also allow for the introduction of new evidence by claimants that was not reasonably available when the [Refugee Protection Division] rejected the claim and, in exceptional cases, allow for an oral hearing . . . DCO claimants, and those determined to have a manifestly unfounded claim or a claim with no credible basis, would not have access to the RAD. Refugee claimants who were subject to an exception in the Safe Third Country Agreement and those who arrived as part of a designated irregular arrival would also not have access.<sup>331</sup>

These provisions fundamentally restrict STCA claimants' legal rights, as there is no principled reason to carry the STCA over to restrict asylum seekers' access to appeal. They impose an arbitrary distinction on STCA claimants, and weaken the scope of protection available to them under Canadian law.

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<sup>329</sup> The basis for the Refugee Protection Division is set out in §110 of the IRPA, S.C. ch. 27 (2001) (Can.), which states: "110. (1) Subject to subsections (1.1) and (2), a person or the Minister may appeal, in accordance with the rules of the Board, on a question of law, of fact or of mixed law and fact, to the Refugee Appeal Division against a decision of the Refugee Protection Division to allow or reject the person's claim for refugee protection". The RAD has the power to confirm or set aside a decision of the Refugee Protection Division, or to refer a matter back to the Refugee Protection Division for reassessment. See IRPA, S.C. ch.27 (2001) *supra* note 13 at §111. The IRPA further prescribes that members of the RAD are to be appointed by the Governor in Council, see IRPA § 153(1)(a). Appeals may be made on errors of law or errors of mixed fact and law, see §110(1).

<sup>330</sup> IRPA, S.C. ch.27 (2001), *supra* note 13 at §110(2)(d).

<sup>331</sup> Citizenship and Immigration Canada, *Backgrounders – Overview of Reforms to Canada's Refugee System* (2012) available at <http://www.cic.gc.ca/english/department/media/backgrounders/2012/2012-02-16.asp> (last visited Nov. 1, 2013) (explaining RAD eligibility).

### 3. Making the Border More Dangerous and Disorderly

*“The STCA...creates more risk than it protects the security of this country.”<sup>332</sup>*

#### (i) Prompting a Rise in Illegal Activity Along the Border

Insofar as the STCA and other interdiction measures create substantial barriers for asylum seekers to reach Canada through authorized measures, they create incentives for irregular migration. UNHCR has repeatedly cautioned that enhanced border restrictions trigger increases in unauthorized border crossings:

[T]he myriad of migration controls which many countries, including Canada, have established, also have the effect of making it more difficult for asylum seekers to seek protection. In many cases, persons in need of protection have no option other than to resort to the use of false documents and the services of smugglers.<sup>333</sup>

As Janet Dench, Executive Director the Canadian Council for Refugees, further explains: “the higher the fences created by interdiction,” the more migrants are “forced to turn to smugglers to help them overcome the barriers.”<sup>334</sup> Not only are these services extraordinarily expensive, but also, asylum seekers who use smugglers to cross the border are at increased risk of exploitation.<sup>335</sup>

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<sup>332</sup> Interview with Saleem Spindari (Community Outreach Program Coordinator), MOSAIC British Columbia (May 16, 2012), para. 26.

<sup>333</sup> UNHCR, Comments on Bill C-11, An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger (Submission to the House of Commons Standing Committee on Citizenship and Immigration, Mar. 5, 2001) (Ottawa: UNHCR, 2001) *available at* <http://ccrweb.ca/c11hcr.PDF> (last visited Nov. 13, 2013), at 13-14.

<sup>334</sup> Dench, *supra* note 32 at 35.

<sup>335</sup> Chacon, *supra* note 185 at 1613 (noting that as immigration restrictions and border enforcement increase, the sophistication and violence of organizations that promote illicit movement of people across borders tend to grow, giving examples from U.S.-Mexico border crossings). For an analysis of the costs of unauthorized border crossings across the U.S.-Mexico border *see* UNITED NATIONS OFFICE ON DRUGS AND CRIME, TRANSNATIONAL ORGANIZED CRIME IN CENTRAL AMERICA AND THE CARIBBEAN: A THREAT ASSESSMENT (SEPT. 2012) *available at* [http://www.unodc.org/documents/data-and-analysis/Studies/TOC\\_Central\\_America\\_and\\_the\\_Caribbean\\_english.pdf](http://www.unodc.org/documents/data-and-analysis/Studies/TOC_Central_America_and_the_Caribbean_english.pdf) (last visited Oct. 9, 2013) (estimating a total annual value of about US \$85 million paid by irregular migrants from Guatemala, El Salvador and Honduras for smuggling across the U.S.-Mexico Border, based on 2010 data). *See also* BRYAN ROBERTS ET AL., DEP'T OF HOMELAND SEC. OFFICE OF IMMIGRATION STATISTICS, AN ANALYSIS OF MIGRANT SMUGGLING COSTS ALONG THE SOUTHWEST BORDER (Working Paper) (Nov. 2010), *available at*

Before the Safe Third Country Agreement came into effect, critics cautioned that its implementation would encourage unauthorized border crossings, and leave asylum seekers more vulnerable to exploitation. For example, in a hearing before the U.S. Subcommittee on Immigration and Border Security in 2002, Amnesty International USA warned that the Safe Third Country Agreement “could foment illegal smuggling and encourage traffickers who prey upon desperate refugees.”<sup>336</sup> In the course of parliamentary hearings before the Standing Committee on Citizenship and Immigration Canada in 2002, UNHCR explained:

Asylum seekers who know they can no longer seek admission at the border—because they are not entitled under the agreement to do so—may very well engage the services of smugglers to take them across the border illegally, in order to make a claim inland. Indeed, this is what we have seen happen in other countries that have implemented similar arrangements.<sup>337</sup>

Amnesty International Canada further cautioned as follows:

As you've heard from many of us, a crude instrument of this sort simply exposes countless individuals to the risk of unlawful detention, puts women at risk of not receiving protection from very compelling harms, and is going to increase the likelihood that people are going to take dangerous, stupid chances . . . and cross borders illegally. Such an instrument will only further misery and insecurity and does not seem, from our perspective, to be getting to the nub of the problem.<sup>338</sup>

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<http://www.dhs.gov/xlibrary/assets/statistics/publications/ois-smuggling-wp.pdf> (last visited Oct. 31, 2013) (estimating the impact of enforcement on the price smugglers charge to bring people across the U.S.-Mexico border).

<sup>336</sup> U.S. and Canada Safe Third Country Agreement: Hearing Before the Subcommittee on Immigration, Border Security, and Claims of the Comm. on the Judiciary, H.R., 107th Cong., 2nd Sess. 8, 45 (2002) (Statements of Bill Frelick, Director Refugee Program, Amnesty International) *available at* [http://commdocs.house.gov/committees/judiciary/hju82363.000/hju82363\\_0.HTM](http://commdocs.house.gov/committees/judiciary/hju82363.000/hju82363_0.HTM) (last visited Oct. 9, 2013).

<sup>337</sup> *Citizenship and Immigration Comm. of the Parliament of Canada*, CIMM 37<sup>th</sup> Parl., 2nd Session, Meeting No. 4, 1605 (Nov. 19, 2004), *available at* <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=575306&Language=E&Mode=1&Parl=37&Ses=2> (testimony of Judith Kumin, Representative of the United Nations High Commissioner for Refugees in Canada).

<sup>338</sup> *Id.* at 1715 (testimony of Alex Neve, Secretary General of Amnesty International Canada).

Given the clandestine nature of unauthorized border crossings and human smuggling activities, it is difficult to report on these activities with any precision. However, data collected for this report suggests that unauthorized border crossings and human smuggling activities across the Canada-U.S. border have generally increased since the STCA came into effect in 2004. A 2012 Threat Assessment Report issued by the Canada-U.S. Integrated Border Enforcement Team (IBET) indicates that Canada-bound human smuggling attempts between border ports of entry increased by 58 percent in 2011 as compared with the previous years.<sup>339</sup> The report, obtained under the Access to Information Act, concludes as follows:

Canada-bound human smuggling activity [between ports of entry] has surged in 2011. The number of human apprehensions was 487 in 2011, compared to 308 in 2010, representing a 58% increase in activity.<sup>340</sup>

Refugee advocates have attributed the rise in human smuggling activities, in part, to the Safe Third Country Agreement.<sup>341</sup> As practitioners interviewed for this report explained, before the STCA came into effect, “there was no reason for

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<sup>339</sup> INTEGRATED BORDER ENFORCEMENT TEAM, CANADA/UNITED STATES IBET THREAT ASSESSMENT FOR 2012 (REPORTING ON YEAR 2011), obtained via Freedom of Information Request File A-2012-07453, filed by Jim Bronskill with the Royal Canadian Mounted Police under the Access to Information Act, R.S.C. ch. A-1 (1985) (Can.) (completed Oct. 12, 2013) (hereinafter IBET 2012 THREAT ASSESSMENT). Copy provided upon request. See also Jim Bronskill, Canadian Press, *Canada-bound human smuggling attempts jumped 58% in 2011: report* NATIONAL POST (Nov. 20, 2013) available at <http://news.nationalpost.com/2013/11/20/canada-bound-human-smuggling-attempts-jumped-58-in-2011-report/> (last visited Nov. 20, 2013) (reporting on findings made in a 2012 Integrated Border Enforcement Team threat assessment report, obtained pursuant to an Access to Information Request, and stating that the “Authorities apprehended 487 people as smugglers attempted to sneak them into Canada at remote locales, up from 308 in 2010, says the binational report on border security”). See also Royal Canadian Mounted Police, CANADA/UNITED STATES IBET THREAT ASSESSMENT 2010 (REPORTING ON YEAR 2009), available at <http://www.rcmp-grc.gc.ca/ibet-eipf/reports-rapports/2010-threat-menace-eng.htm> (last visited Nov. 1, 2013) (hereinafter IBET Threat Assessment 2010) (noting a “considerable decrease in the number of human smuggling events” in 2009 as compared with 2008, as well as “a decrease in the number of intercepted migrants”).

<sup>340</sup> IBET 2012 THREAT ASSESSMENT, *id.* at 4.

<sup>341</sup> Bronskill, *supra* note 339 (stating “An advocacy group for refugees attributes the 58% rise in Canada-bound human smuggling attempts to an agreement between the countries that has prompted desperate refugees to turn to criminal groups willing to help them across the border. Under the Safe Third Country agreement, which took effect in December 2004, Canada and the U.S. recognize each other as safe places for refugee claimants to seek protection”).

irregular entry.”<sup>342</sup> Indeed, in 2003 Canadian officials estimated that 90 percent of migrants, including asylum seekers, crossed the border into Canada at official ports of entry.<sup>343</sup> Practitioners interviewed for this report indicated a sharp increase in unauthorized border crossings after the STCA came into effect, stating “we see more now than ever . . . people are risking their lives . . . It’s their only way to get into Canada.”<sup>344</sup>

Statements made by Canadian government agencies further support the claim that the STCA is partially responsible for triggering the rise in unauthorized border crossings. For example, a 2007 IBET Threat Assessment Report states that “more migrants are attempting to find a way around the provisions for the Safe Third Country Agreement, arriving in Canada by air, ferry or illegally between the ports of entry in order to enter refugee claims in Canada inland.”<sup>345</sup> Moreover, a 2010 CBSA Evaluation Study, pointing to an increase in “inland” asylum claims made from within Canadian territory, suggests “that the rise in inland claims is due in part to irregular migrants entering Canada between [ports of entry] to file refugee claims at inland CBSA and/or CIC offices, to avoid being turned back at the border based on the Safe Third Country Agreement.”<sup>346</sup>

In some cases, attempts to cross the Canadian border without inspection have turned tragic. Practitioners interviewed for this report state that some asylum seekers have been injured or drowned while attempting to enter Canada by

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<sup>342</sup> Interview with Lynn Hannigan (Director) and Sister Judith Carroll (Counselor), Casa El Norte (Aug. 3, 2012), para. 109.

<sup>343</sup> BORDERING ON FAILURE 1 (2006), *supra* note 7 at 22 citing Denis Coderre, Minister of Citizenship and Immigration, Address at the Renaissance Club (Mar. 11, 2003). The border spans 5,255 miles, or 7,000 miles when including Alaska.

<sup>344</sup> Interview with Lynn Hannigan (Director) and Sister Judith Carroll (Counselor), Casa El Norte (Aug. 3, 2012), para. 111. See also Interview with Saleem Spindari (Community Outreach Program Coordinator), MOSAIC British Columbia (May 16, 2012), para. 28; Interview with Michele Jenness (Executive Director), Vermont Immigration and Asylum Advocates (Aug. 10, 2012) para. 164; Interview with Peter Murrett (Attorney), Vive La Casa (Jul. 27, 2012), para. 92.

<sup>345</sup> Royal Canadian Mounted Police, CANADA-UNITED STATES IBET THREAT ASSESSMENT (2007) *available at* <http://www.rcmp-grc.gc.ca/ibet-eipf/reports-rapports/threat-menace-ass-eva-eng.htm> (last visited Nov. 1, 2013) (providing an overview of “illegal activity with a cross-border nexus”, and reporting further that “Apprehensions have decreased since 2005 at certain key IBET locations, such as Windsor/Detroit and Pacific, due to successful intelligence-led investigations. These investigations have also displaced human smuggling activity to other parts of the border. U.S. CBP/BP reported 1,417 apprehensions at the Canada/U.S. border in 2005, compared to 1,113 in 2006”).

<sup>346</sup> See CBSA, CBSA DETENTIONS AND REMOVALS PROGRAM – EVALUATION STUDY (2010), *available at* <http://www.cbsa-asfc.gc.ca/agency-agence/reports-rapports/ae-ve/2010/dr-rd-eng.html> (last visited Nov. 3, 2013) (recording an increase in “inland” asylum claims made from within Canadian territory, from 13,178 in 2004 to 17,546 in 2009).

swimming or otherwise crossing the Niagara River.<sup>347</sup> Others have been seriously injured by attempting to cross the border on railway bridges. One man who attempted entry in this manner, for example, lost both his legs.<sup>348</sup> Uniformly, practitioners on both sides of the border interpreted these attempts as signs of extreme desperation. As one practitioner explained: “It is very dangerous as you can imagine . . . For us, to see someone swim the Niagara River, or take the canoe across the river, they’re obviously desperate.”<sup>349</sup>

Asylum seekers who attempt to cross the border clandestinely are also more likely to be labeled as “irregular” upon arrival and be subject to state sanctions and diminished legal protections.<sup>350</sup> Indeed, recent changes in Canadian law empower the Minister of Public Safety to designate two or more people who arrive in Canada together as “designated foreign nationals” or “irregular arrivals” based on a mere suspicion – not proof – that they have been smuggled into Canada. The consequences of being designated “irregular” include mandatory detention (for those over fifteen years of age), with limited detention review options, no right to appeal adverse decisions, and no right to apply for permanent residence or family reunification for five years even after a refugee claim is recognized.<sup>351</sup> These restrictions erect serious barriers for genuine asylum seekers, and impede their ability to advance successful claims.

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<sup>347</sup> Interview with Lynn Hannigan (Director) and Sister Judith Carroll (Counselor), Casa El Norte (Aug. 3, 2012), Casa El Norte (Aug. 3, 2012), para. 89-91; Interview with Martha Mason (Executive Director), Rod McDowell (Board President), and Ronald Gray (Board Vice-President), Fort Erie Multicultural Centre (Jul. 25, 2012), para. 38.

<sup>348</sup> Interview with Lynn Hannigan (Director) and Sister Judith Carroll (Counselor), Casa El Norte (Aug. 3, 2012), (Aug. 3, 2012), paras. 83-85.

<sup>349</sup> Interview with Lynn Hannigan (Director) and Sister Judith Carroll (Counselor), Casa El Norte (Aug. 3, 2012), paras. 98 and 114.

<sup>350</sup> Macklin, *supra* note 29 at 366 (explaining the different legal consequences that flow from being categorized as “illegal”). See also CATHERINE DAUVERGNE, MAKING PEOPLE ILLEGAL (2008) (analyzing the intertwining nature of asylum and illegality in the context of unauthorized border crossings).

<sup>351</sup> See IRPA, S.C. ch.27 (2001), *supra* note 13 at §§ 11(1)(1.1)-(1.3); 20.1; 20.2; 24 (5)-(6). Canadian refugee rights groups have criticized the “designated foreign national” policy. See e.g. Press Release, Canadian Association of Refugee Lawyers, *Canadian Association of Refugee Lawyers Challenges the Legality of Group Designation of Five Groups of Refugee Claimants* (Dec. 6, 2012) available at <http://carl-acaadr.ca/our-work/issues/DFNR> (last visited Nov. 13, 2013); CANADIAN COUNCIL FOR REFUGEES, BILL C31 – DIMINISHING REFUGEE PROTECTION: A SUBMISSION TO THE HOUSE OF COMMONS’ STANDING COMMITTEE ON CITIZENSHIP AND IMMIGRATION (2012), available at <http://ccrweb.ca/files/ccrbriefc31.pdf> (last visited Nov. 13, 2013).

*(ii) Destructive Impact on Refugee Shelters and Centers Along the Border*

As the number of asylum seekers being processed and sheltered by Canadian non-governmental organizations, faith groups, and refugee shelters working along the Canada-U.S. border has decreased as a result of the STCA, some of these groups have been forced to consider alternative functions for their shelters.<sup>352</sup> Some have had to lay off qualified staff persons and scale back their operational budgets and services in order to remain open.<sup>353</sup>

These organizations offer crucial, life-saving services for asylum seekers, such as housing, food, legal assistance, emotional support, counseling, language services, and information about Canada's refugee assessment process. If these service providers close their doors, the border will become even more dangerous for asylum seekers who will have fewer places to turn for assistance.

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<sup>352</sup> Interview with Martha Mason (Executive Director), Rod McDowell (Board President), and Ronald Gray (Board Vice-President), Fort Erie Multicultural Centre (Jul. 25, 2012), para. 164.

<sup>353</sup> *Id.*

## PART FIVE: CONCLUSIONS

*“All Canadians must now understand that our humanitarian tradition and our openness towards refugees are historic artifacts. The battle lines in the current fight are not about leading the world, but about following it to a worse future for refugees.”*<sup>354</sup>

For decades, Canada was known for its leadership in matters of refugee protection. After the Supreme Court of Canada released its decision in *Singh v. Canada* in 1985, the Canadian government revamped its refugee regime to ensure that asylum seekers had access to fair and reasoned refugee determinations. Canada introduced a tribunal process for first-instance refugee decisions to ensure asylum seekers had an opportunity to have their claim heard and assessed on the merits.<sup>355</sup> These reforms entrenched procedural fairness as a cornerstone of Canadian asylum policy, and established Canada as a world leader that raised the standards of refugee protection worldwide.<sup>356</sup> Canada was not just recognized for its progressive laws, but also, for the generosity of its people. In 1985, UNHCR awarded the “people of Canada” the Nansen Refugee Award, awarded annually to a person or group for outstanding work on behalf of the forcibly displaced, in recognition of “the major and sustained contributions of the People of Canada to the cause of refugees”.<sup>357</sup> Canadians are the first and only people to have been honored collectively with this award.<sup>358</sup>

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<sup>354</sup> Catherine Dauvergne, *Refugee Rules the End of Canada’s Humanitarian Tradition*, THE GLOBE AND MAIL (Jan. 29, 2013) available at <http://www.theglobeandmail.com/commentary/refugee-rules-the-end-of-canadas-humanitarian-tradition/article7937115/> (last visited Nov. 13, 2013).

<sup>355</sup> *Singh v. Canada*, [1985] 1 S.C.R. 177 (Can.).

<sup>356</sup> See Testimony of Deborah E. Anker, Harvard Immigration and Refugee Clinic, Citizenship and Immigration Committee of the Parliament of Canada (Feb. 8, 2007), CIMM, 39th Parl., 1st sess. Meeting No. 33, 2 (Feb. 8, 2007), available at <http://www.parl.gc.ca/content/hoc/Committee/391/CIMM/Evidence/EV2683238/CIMMEV33-E.PDF> (last visited Nov. 13, 2013) (hereinafter Anker CIMM Testimony) (offering testimony about the Safe Third Country Agreement and stating that for “decades Canada has served as a model whose example raised the standards of refugee protection worldwide, and especially in the United States.”)

<sup>357</sup> See Citizenship and Immigration Canada, *Nansen Medal Awarded to the “People of Canada”* available at <http://www.irb-cisr.gc.ca/Eng/NewsNouv/NewNou/2009/Pages/Nansen.aspx> (last visited Nov. 13, 2013).

<sup>358</sup> See UNHCR, *Nansen Refugee Award: Past Winners (1985)* available at <http://www.unhcr.org/nansen/50374dc66.html> (last visited Nov. 13, 2013).



Canada's leadership in refugee protection was particularly influential in the United States. For example, throughout the 1980s, the United States refused to grant asylum to all but a trickle of asylum seekers fleeing civil wars and conflict in Nicaragua, El Salvador, and Guatemala.<sup>359</sup> In contrast, throughout this time, Canada served as an important safety valve for Central American refugees who, as United States policy makers and courts later acknowledged, faced discrimination under the United States asylum regime.<sup>360</sup> Canada's example inspired major reforms in U.S. policy towards Central America.<sup>361</sup>

In 1993, Canada became the first state signatory to the Refugee Convention to issue guidelines recognizing women's eligibility to claim refugee protection on grounds of gender related persecution.<sup>362</sup> The Canadian Immigration and Refugee Board's release of the Gender Guidelines is credited with starting "a

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<sup>359</sup> See Susan Gzesh, *Central Americans and Asylum Policy in the Regan Era*, MIGRATION POLICY INSTITUTE: MIGRATION INFORMATION SOURCE available at <http://www.migrationinformation.org/Feature/display.cfm?id=384> (last visited Nov. 13, 2013) (describing the United States' response to the civil wars in the region, and noting that President Ronald Reagan "saw these civil wars as theaters in the Cold War. In both El Salvador and Guatemala, the United States intervened on the side of those governments, which were fighting Marxist-led popular movements. In Nicaragua, however, the United States supported the contra rebels against the socialist Sandinista government.") See also MARIA CRISTINA GARCIA, *SEEKING REFUGE: CENTRAL AMERICAN MIGRATION TO MEXICO, THE UNITED STATES, AND CANADA* (2006) (detailing the United States response to the political upheaval in Nicaragua, El Salvador, and Guatemala, through comparative analysis with Mexico and Canada).

<sup>360</sup> For example, between 1982 and 1987, Canada admitted 15,877 asylum seekers from Central America. Canada also admitted asylum seekers from the region at much higher approval rates than the United States. From 1980 to 1986, Canada approved between 21 and 60 percent of Salvadoran asylum applications, and between 28 and 71 percent of Guatemalan asylum applications. By comparison, the United States approved between 3 percent and 5 percent of Salvadoran and Guatemalan petitions during this period. See Garcia, *Canada: A Northern Refuge*, *id.* at para 10. See also Garcia, *SEEKING REFUGE*, *supra* note 412 at 130 (citing Statistics Canada for figures of asylum seekers admitted during the period); Susan Bibler Coutin, *Cause Lawyering and Political Advocacy: Moving Law on Behalf of Central American Refugees*, in Austin Sarat and Stu Scheingold, eds. *CAUSE LAWYERING AND SOCIAL MOVEMENTS* (2006) (analyzing of the sanctuary movement in the United States and its influence in shifting United States policy); Anker CIMM Testimony, *supra* note 356 at 2 (stating that during the 1980s Canada "Served as an important safety valve for central American refugees").

<sup>361</sup> See Anker CIMM Testimony, *supra* note 356 at 2 (stating that during that "Canada's example inspired major reforms in the U.S. system and even changes in U.S. policy towards central America").

<sup>362</sup> The Guidelines were originally issued by the Canadian Immigration and Refugee Board Chairperson in March 1993, but were updated in 1996 to reflect the Supreme Court of Canada's decision in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 (Can.) that "gender" could be recognized as fitting within the "'particular social group" ground enumerated in the Refugee Convention. See IMMIGRATION AND REFUGEE BOARD (IRB), *GUIDELINES ISSUED BY THE CHAIRPERSON PURSUANT TO SECTION GUIDELINE 4: WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION* (1996), available at <http://www.irb-cisr.gc.ca/eng/brdcom/references/pol/guidir/Pages/GuideDir4.aspx> (last visited Oct. 22, 2013).

movement for profound change – for fairness and equal treatment of women and children – not only for refugee law, but for human rights more generally.”<sup>363</sup> Canada’s leadership prompted the United States to issue similar gender guidelines two years later.<sup>364</sup> More broadly, the Guidelines’ release established Canada as “the country that really led the way in terms of the international community granting protection to women fleeing gender persecution.”<sup>365</sup>

With the rapid expansion of Canada’s border technologies under the rubric of the Multiple Borders Strategy, entry into the Safe Third Country Agreement, and most recently, the introduction of new legislation, Canada has radically changed course. The Multiple Borders Strategy measures and Safe third Country Agreement result in the effective denial of rights to which asylum seekers are entitled under domestic and international law. These measures also create incentives for unauthorized border crossings and dangerous activities that threaten the lives and safety of asylum seekers. Indeed, since the Safe Third Country Agreement came into effect in 2004, unauthorized border crossings and human smuggling activities across the Canada-U.S. border have been on the rise. Tragedies of asylum seekers losing life or limb in desperate attempts to cross the border and seek refuge in Canada now occur. These stories show the immense human toll that comes with disallowing persecuted people the right to *seek* asylum in Canada.

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<sup>363</sup> See Deborah Anker, Harvard Law School, Harvard Immigration and Refugee Law Clinic, Comment, Comments on the Occasion of the Tenth Anniversary of the Immigration and Refugee Board Gender Guidelines, CANADIAN COUNCIL FOR REFUGEES (March 2003) available at <http://ccrweb.ca/gendergcom.htm> (last visited Oct. 23, 2013).

<sup>364</sup> See UNITED STATES BUREAU OF IMMIGRATION SERVICES, CONSIDERATIONS FOR ASYLUM OFFICERS ADJUDICATING ASYLUM CLAIMS FROM WOMEN (1995), available at: <http://www.state.gov/s/l/65633.htm> (last visited Oct. 12, 2013).

<sup>365</sup> See Wendy Young, Director of Gov’t Relations, Women’s Commission for Refugee Women and Children, Comment, Comments on the Occasion of the Tenth Anniversary of the Immigration and Refugee Board Gender Guidelines, CANADIAN COUNCIL FOR REFUGEES (last updated March 2003), <http://ccrweb.ca/gendergcom.htm> (noting further that Canada’s leadership “was particularly effective in setting an example for the US which issued guidelines shortly thereafter”). See also Shauna Labman and Catherine Dauvergne, *Evaluating Canada’s Approach to Gender-Related Persecution: Revisiting and Re-embracing ‘Refugee Women and the Imperative of Categories’* in Efrat Arbel, Catherine Dauvergne, and Jenni Millbank eds. GENDER IN REFUGEE LAW: FROM THE MARGINS TO THE CENTRE (forthcoming, 2014) (evaluating the current situation of women claiming asylum protection in Canada, considering the inter-relationship between public discourse, high-level doctrinal developments, and scholarly critique).

In addition to closing its border to asylum seekers, the Canadian government has also ushered in sweeping changes to Canada's refugee system.<sup>366</sup> Under the current system asylum seekers face vastly accelerated timelines, have limited recourse to appeal negative decisions, and have restricted access to safety nets like humanitarian and compassionate considerations and Pre-Removal Risk Assessments.<sup>367</sup> The Canadian government also dramatically scaled back the provision of health care for refugees and refugee claimants, and now denies basic, emergency, and life-saving medical care to thousands of people who have lawfully sought Canada's protection.<sup>368</sup> Widely condemned as "manifestly unfair" and "draconian",<sup>369</sup> these reforms have been criticized as bringing "a dramatic end to what was once known as Canada's humanitarian tradition."<sup>370</sup>

Now more than ever, with global displacement on the rise,<sup>371</sup> and with more states parties to the Refugee Convention adopting regressive asylum policies and punitive exclusion measures, Canadian leadership is crucial in the international arena. By closing its borders to asylum seekers, Canada is setting a poor example for other nations, and contributing to the deterioration of refugee protection around the world. Canada is turning its back on a proud history of refugee protection, and renegeing on its fundamental refugee protection obligations under domestic and international law.

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<sup>366</sup> See Protecting Canada's Immigration System Act, S.C. 2012 c-17 (Can.), *supra* note 1 (implementing legislative changes).

<sup>367</sup> See CITIZENSHIP AND IMMIGRATION CANADA, PROTECTING CANADA'S IMMIGRATION SYSTEM (2013) *available at*: <http://www.cic.gc.ca/english/refugees/reform.asp> (last visited Oct. 23, 2013) (outlining changes to Canada's asylum seekers). See also CANADIAN ASSOCIATION OF REFUGEE LAWYERS, THE NEW REFUGEE SYSTEM, *available at* <http://carl-acaadr.ca/our-work/issues/bill-c31> (last visited Oct. 23, 2013) (critiquing legislative changes to refugee regime).

<sup>368</sup> On February 25, 2013, the Canadian Association of Refugee Lawyers and Canadian Doctors for Refugee Care challenged the legality of the Canadian government's cuts to refugee health care before the Federal Court of Canada. See Canadian Association of Refugee Lawyers, Health Care for Refugees *available at* <http://www.carl-acaadr.ca/our-work/issues/IFHP> (last visited Oct. 22, 2013) (outlining changes to the provision of health care for refugees and explaining legal challenge).

<sup>369</sup> See *e.g.* PROTECT REFUGEES FROM BILL C-31: JOINT STATEMENT BY AMNESTY INTERNATIONAL, THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS, THE CANADIAN CIVIL LIBERTIES ASSOCIATION, AND THE CANADIAN COUNCIL FOR REFUGEES (March 2012), *available at* <http://ccrweb.ca/en/protect-refugees-c31-statement> (last visited Oct. 22, 2013) (criticizing refugee law reforms); Press Release, Canadian Civil Liberties Association, Media Advisory: Human Rights Group Protest Draconian Refugee Bill (Mar. 15, 2012), *available at* <http://ccla.org/2012/03/15/media-advisory-human-rights-groups-protest-draconian-refugee-bill/> (last visited Oct. 13, 2013) (same).

<sup>370</sup> Dauvergne, *supra* note 354.

<sup>371</sup> See UNHCR, DISPLACEMENT: THE NEW 21<sup>ST</sup> CENTURY CHALLENGE (2012 Global Trends Report) 2 (2013), *available at*: <http://unhcr.org/globaltrends/june2013/> (last visited Oct. 23, 2013) (reporting 45.2 million forcibly displaced people worldwide, the highest level in almost 20 years).

