

Unsafe At Any Time? The U.S.-Canada Safe Third Country Agreement - Andrew Moore, Univ. of Detroit-Mercy

On December 23, 2004 over four hundred people, men, women and children, crossed the Canadian border at Fort Erie, coming from Buffalo, New York.¹ They waited in sub-zero temperatures on school buses and in a make shift camp, separated from their luggage and basic necessities.² They came from many parts of the world and all of them asserted that they were refugees and wanted to make those claims in Canada before it was too late. It became too late on December 29, 2004, when Safe Third Country Agreement (STCA) entered into force between the U.S. and Canada. Under this agreement, Canada started to turn back to the U.S. those coming through the U.S. to the Canadian border claiming to be refugees. Since December 29, the number of refugee applicants at the Canadian border has fallen precipitously.³

The STCA was part of a comprehensive border security agreement in the wake of the September 11, 2001.⁴ An agreement of this sort had been proposed previously in 1993 but never finalized.⁵ An accord in 1995 permitted the return of refugee claimants, but neither country relied upon the privilege.⁶ According to the press releases following its enactment, the STCA “allocates responsibility between the United States and Canada whereby one or the other country (but not both) will assume responsibility for the processing of certain asylum seekers...” and

¹ Canadian Council for Refugees, Closing the Front Door on Refugees, Report on the First Year of the Safe Third Country Agreement, at 27. Available at <http://www.web.ca/~ccr/doceng.htm#Safe_third>

² *Id.*

³ *Id.* at 3.

⁴ Department of Homeland Security, Press Release, U.S.-Canada Smart Border/30 Point Plan Update (December 6, 2002).

⁵ Arthur C. Helton, *Toward Harmonized Procedures in North America: The Proposed Memorandum of Understanding for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries*, 26 CORNELL INT'L L. J. 737 (1993).

⁶ Howard Adelman, *Canadian Borders and immigration post 9/11*, 36 INT'L MIGRATION REV. 15 (2002).

thereby “enhances the two nations’ ability to manage, in an orderly fashion, asylum claims brought by persons crossing our common border.”⁷ However, many refugee advocates conclude that the STCA is really about reducing the number of refugee claims made in Canada simply because Canada considers itself overburdened.⁸ In response they have come up with a variety of reasons why Canada should rescind the STCA, rooted in both policy and law.

The theory behind the STCA, is that if a genuine refugee arrives in the U.S., he or she should make a claim in the U.S. because it is a safe country and genuine refugees should be satisfied with the first safe place they find. But this all hinges on the belief that the U.S. is a safe country for all refugees. This then raises two interrelated questions: Does the U.S. depart from the international law on refugee protection so as to make it unsafe? Will Canada violate its international legal obligations by returning a person to the U.S. if its system does not comport with international law?

This issue of legal accountability arises because of the concept of complicity in international law. Canada cannot return a refugee applicant to a country where he or she will have his or her right violated nor can Canada send a refugee applicant to a country knowing that he or she will in turn be sent on to another country and ultimately back to the place where he or she faces persecution. The U.S. system must comport with minimum legal protections before Canada can return a refugee applicant to its borders. The title poses the question whether the U.S. system is

⁷ U.S. Citizenship and Immigration Services, Press Release, United States and Canada Implement Safe Third Country Agreement on Asylum (December 29, 2004).

⁸ Audrey Macklin, *Disappearing Refugees: Reflections on the Canada-U.S. Safe Third Country Agreement*, 36 COLUM. HUM. RTS. L. REV. 365, 369-71 (2005)

at variance with the international system to the extent that no refugee applicant should be sent back under any condition.

The answer this article gives is that there are several specific cases in which a refugee applicant should not be sent back, but a lack of clear international standards and an absence of data make it impossible to firmly conclude the U.S. system is so fundamentally flawed as to preclude operation of the STCA. Part I explains how safe third country agreements work and how they came about. Part II will cover the specific provisions of the U.S.-Canada agreement. Part III will describe the international protection regime as well as the domestic systems of Canada and the U.S. Part IV reviews the ways that safe third country agreements have been found to violate international law and introduces the complicity principle, under which a nation sending a refugee applicant back can be found to violate its international legal obligations. Part V will then apply the complicity principle to assess when Canada may be in violation of its international obligations. Lastly, this article will conclude with a look at how the STCA may be challenged in those cases in which Canada would be complicit in a violation of Canada's international legal obligations.

Before proceeding, a word about terminology. The term "refugee" used in Canada and the U.S. refers to a person who fits a definition established in the international treaty concerning refugees, the 1951 Convention Relating to the Status of Refugees (hereinafter 1951 Refugee Convention). However, Canada and the U.S. use different nomenclature for the same legal protection given to someone who meets the definition of refugee. The U.S. uses the term "asylum" to denote a legal status of protection granted to a person who meets the international

definition of a refugee whereas Canada uses the term “refugee status.” This article will use both “asylum seeker” and “refugee applicant” to describe someone who is requesting the protections provided in international law.

I. The Evolution of Safe Third Country Agreements

A. Definition

The title to the STCA derives from a concept that has emerged in international refugee law relatively recently. A man, woman or child running from danger leaves the home country in which she or he faces persecution (the first country) and ultimately arrives in a country in which she or he wants to receive protection (the second country). As a renowned refugee scholar pointed out, however, the quickest route between the first country and the second country is seldom a straight line.⁹ Countries through which they pass are referred to as third countries. And safe third country agreements are concerned with the movement between the third country and the second country.

Basically, a safe third country agreement between nations means that once a person fleeing persecution crosses through the territory of one of the nations party to the agreement, it is that transit nation which is responsible for dealing with any refugee claims or requests for asylum. If an individual should attempt to enter another country party to the agreement (i.e. the second country), he or she may be summarily returned to the third country without any determination whether that person should receive protection from persecution.

⁹ Stephen Legomsky, *Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection*, 15 INT’L J. REFUGEE L. 567 (2003).

B. History of safe third country agreements

The U.S. and Canada are certainly not alone in creating a safe third country agreement. These agreements exist among many countries trying to control the movement of people from third countries to second countries. Such agreements were originally developed between countries belonging to the European Union (E.U.).¹⁰ Pressures of large-scale refugee movements and claims of inequitable burdens lead to the evolution of safe third country agreements.

Between 1985 and 2000, the Western European countries were inundated with a wave of over five and a half million people requesting protection from persecution.¹¹ In order to deal with this flood, as well as to harmonize immigration policies more generally, several E.U. countries entered into the Schengen Convention in 1990.¹² Among other things, the Convention tried to establish responsibility for processing asylum claims so that applicants seeking protection would be limited to applying in one Western European country.¹³ The Convention established responsibility on the basis of several criteria rather than the desires of the person seeking protection. The Schengen Convention also provided that a party to the Convention could return an asylum seeker to a third country on the basis of the criteria.¹⁴

Following on the heels of the Schengen Convention came the Dublin Convention, which further institutionalized safe third country agreements. The Dublin Convention established that the first E.U. country an asylum seeker arrives in is the country in which an application for

¹⁰ Gretchen Borchelt, *The Safe Third Country Practice in the European Union: A Misguided Approach to Asylum Law and a Violation of International Human Rights Standards*, 33 COLUM. HUM. RTS. L. REV. 473, 490-499 (2003).

¹¹ Maryellen Fullerton, *Failing the Test: Germany Leads Europe in Dismantling Refugee Protection*, 36 TEX. INT'L L.J. 232 (2001).

¹² Named after the town in Luxembourg where the treaty was signed.

¹³ Borchelt, *supra* note 10, at 493-500.

¹⁴ *Id.*

protection should be made.¹⁵ The Dublin Convention also authorized the return of an asylum seeker to a non-E.U. state, if that state could be considered safe.¹⁶ Both Conventions allowed rejection of an asylum seeker's application on the basis that a third country was more properly the place in which the application should be made. Finally, in 2003 the safe third country provisions were codified in an E.U. regulation, making it part of E.U. law as opposed to a separate international convention.¹⁷

At the same time, within individual E.U. countries, changes in domestic refugee and asylum law occurred due to disproportionate burdens in dealing with the flood of asylum seekers. Germany changed its domestic law in response to the fact that it was handling upwards of fifty percent of all refugee applicants in Western Europe between 1983 to 1993.¹⁸ Prior to 1993 Germany had codified its commitment to refugees in its constitution, which stated: "Persons persecuted on political grounds shall enjoy the right of asylum."¹⁹ In 1993 several provisions were added that sharply curtailed this protection, most notably a safe third country provision. In addition to the E.U. countries, which are presumptively safe countries, Germany identified any non E.U. country with which it shared a border as a safe country, thereby establishing what has been called a *cordon sanitaire* around Germany.²⁰ Basically, it became impossible to file an asylum claim if one traveled through another country to get to Germany. The number of asylum

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Panayiotis N. Papadimitriou & Ioannis F. Papageorgiou, *The New 'Dubliners': Implementation of European Council Regulation 343/2003 (Dublin II) by the Greek Authorities*, 18 J. REFUGEE STUD. 299, 302-3 (2005).

¹⁸ Fullerton, *supra* note 11, at 232.

¹⁹ *Id.*

²⁰ *Id.* at 243-4.

applications in Germany were cut in half in 1994 and have been on a downward trend ever since.²¹

Hand in hand with these developments was the evolution of bilateral readmission agreements. E.U. countries entered into bilateral agreements with Central and Eastern European countries to take back those persons who had traveled through those countries to apply for asylum in a Western European state.²² These agreements facilitated the ultimate goal of pushing back asylum seekers to other countries on the grounds that they could seek protection in those other countries. Asylum seekers now face the prospect of being sent back by a series of countries, each claiming that another is a safe third country, raising criticisms of safe third country agreements that will be discussed below.

II. The STCA between the U.S. and Canada

Similar pressures to the European experience brought about the agreement between Canada and the U.S. The number of asylum claims in the U.S. and Canada over the timeframe mentioned above, 1985-2000, totaled 1.6 million.²³ There is also the factor of a disproportionate flow of people seeking asylum between the U.S. and Canada. While in absolute numbers of asylum seekers the U.S. greatly exceeds Canada,²⁴ when it comes to movement between the two countries, with the U.S. or Canada serving as the third country, the statistics are clear and revealing. Since at least 1990, the flow of persons leaving the U.S. to seek refugee status in

²¹ UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, STATISTICAL YEARBOOK, 2001, ANNEX C.2.

²² Fullerton, *supra* note 11, at 250.

²³ UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, STATISTICAL YEARBOOK, 2001, ANNEX C.1.

²⁴ In 1985 Canada had 13,00 new asylum applications, the U.S. had 16,622; in 1990 Canada had 36,735 new asylum applications and the U.S. had 73, 637; in 1995 Canada had 26,072 new asylum applications, the U.S. had 149,065; in 2000 Canada had 34,252 new asylum applications, the U.S. had 40,867. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, STATISTICAL YEARBOOK, 2001, ANNEX C.1 & C.2.

Canada has been forty-four times the number of persons leaving Canada to seek asylum in the U.S.²⁵

There are many reasons for this disproportionate flow. But there are two reasons related to Canada's refugee determination system that are of particular note. First, the general perception is that asylum applicants stand a better chance of succeeding in their applications in Canada. Statistics suggest that Canada has a higher rate of approval of asylum applications than the U.S., although this is somewhat open to dispute.²⁶ In addition, Canada applies a separate "humanitarian and compassionate" consideration which provides an alternate means of attaining permanent residency in Canada if a refugee determination cannot be made.²⁷

Along with a system more likely to grant an asylum application, there are hurdles in the U.S. system making an application for asylum more difficult. Most significantly, perhaps, is the requirement in the U.S. that an asylum seeker apply within one year of arrival.²⁸ No such requirement exists in the Canadian system. There are also several bars and restrictions on receiving protection in the U.S. not found in the Canadian system.

Second, Canada has a far more generous system of support for those going through the process of applying for protection. When a person enters Canada to apply for asylum, he or she

²⁵ According the Canadian Council of Refugees, from 1990-2004 on the U.S.- Canadian border 8,750 claimants per year applied in Canada as compared to only 200 cases per year in the U.S. Canadian Council of Refugees, Closing the Front Door on Refugees, Report on First Year of the Safe Third Country Agreement, at 2, available at <http://www.web.ca/~ccr/doceng.htm#Safe_third>.

²⁶ See *infra* notes 170-179. According to the UNHCR, in 2002, the acceptance rate for refugee claims in Canada was 57.8% compared to an acceptance rate of 34.9% in the U.S. It should be noted that both of these rates are significantly higher than the average (13%) for all countries studied in the working paper. However, as will be discussed *infra*, these statistics are open to challenge.

²⁷ Immigration and Refugee Protection Act, ch. 27, 2001 S.C. sec. 25 (Can.).

²⁸ 8 U.S.C. 1158(a)(2)(B) (2003). There are several narrow exceptions to this rule. 8 U.S.C. 1158(a)(2)(D) (2003).

has access to critical support mechanisms, such as social assistance to cover living expenses and comprehensive medical care, free legal representation (depending on the province), and permission to work.²⁹ The U.S. does not provide financial support or free legal assistance, and changed its laws regarding work permits so that far fewer asylum seekers now receive permission to work.³⁰

Canada, convinced of a disproportionate flow of applicants arriving in the U.S. for the purposes of traveling to its border, wanted an agreement similar to the European model. Thus, the STCA designates Canada and the U.S. as “safe third countries” vis-à-vis each other.³¹ A claim for protection must be made in the first country in which a refugee/asylum claimant lands.³² The STCA provides that the country designated as the third country must make a determination as to whether a person fits the definition of refugee and prohibits removal of that person to another country until a refugee status determination has been made.³³

The STCA has several important limitations. The first important limitation is its scope of application. The STCA only applies at land border ports of entry on the U.S. Canada border.³⁴ It

²⁹ See Citizenship and Immigration Canada’s website <http://www.gc.cic.ca/english/refugees/asylum-5.html>. See also Tom Clark, *Roundtable: Changes to Legal Aid: Legal Aid, International Human Rights & Non-citizens*, 16 WINDSOR Y.B. ACCESS JUST. 218, 222-3 (1998). This system has not been free from critique as revealed by Mr. Clark’s paper. For a critique of the provision of housing see Robert A. Murdie, *Pathways to Housing: The Experiences of Sponsored Refugees and refugee Claimants in Accessing Permanent Housing in Toronto*, May 2005 (unpublished manuscript).

³⁰ See 8 U.S.C. 1158(d)(2)(2003). See also John Fredriksson, *Bridging the Gap Between Rights and Responsibilities: Policy Changes Affecting Refugees and Immigrants in the United States Since 1996*, 14 GEO. IMMIGR. L.J. 757, 773-775 (2000).

³¹ 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, December 6, 2002, art. 1.1 (A) (hereinafter the STCA). The text is available at <http://www.cic.gc.ca/english/policy/safe%2Dthird.html> (last visited in February 3, 2006).

³² *Id.* at art. 4.

³³ *Id.* at art. 3.1

³⁴ *Id.* art. 1.1

does not apply to airports, seaports, and those claims made “inland” in which a refugee applicant most likely entered Canada unlawfully. As has been noted by scholars, this structure encourages unlawful entry and reliance on smugglers, increasing the likelihood of victimization.³⁵

In addition to the limited scope of coverage, the STCA contains a number of exceptions. First, there are several exceptions based on family relationship. Those with family members who are citizens, or have been granted refugee status or other lawful status will not be subject to the STCA.³⁶ Additionally, if the family member is at least 18, has filed an application for refugee protection and not ineligible to pursue a refugee claim, then the STCA will not be applied.³⁷ The term family member is defined in a limited fashion, however, by regulations in both the U.S. and Canada.³⁸

Second, there are exceptions based on nationality. The STCA excludes nationals from Canada and the U.S or those who are stateless but habitually reside in the either the U.S. or Canada.³⁹ Additionally, persons from certain designated countries may enter and make a refugee/asylum claim in Canada or the U.S. The Canadian government periodically designates countries to which Canada is currently not returning persons and nationals of these countries are

³⁵ See Macklin, *supra* note 8.

³⁶ STCA, *supra* note 31, art. 4.2(a).

³⁷ *Id.* at 4.2(b).

³⁸ The relationship between the relatives must be a closer familial relationship than cousins: siblings, children, parents, grandchildren, grandparents, nieces and nephews and aunts and uncles are all eligible family relationships to qualify for the exception. See Regulations Amending the Immigration and Refugee Protection Regulations, 138 Canadian Gazette, No. 22, November 3, 2004, sec. 159.6. Available at <<http://canadagazette.gc.ca/partII/2004/20041103/html/sor217-e.html>> (Last visited February 3, 2006).

³⁹ STCA, *supra* note 31, art. 2.

not subject to the STCA.⁴⁰ Lastly, nationals from countries from which the U.S. or Canada does not require a visa to enter and people who have valid travel visas are exempt from the STCA.⁴¹

A third group of exceptions is on public interest grounds. The STCA contains a specific article allowing the U.S. and Canada, in their own discretion, to consider a refugee application when in the public interest to do so.⁴² However, the scope of this public interest exception is unclear. Additionally, unaccompanied minors without parents in either Canada or the U.S. also are excluded from the STCA.⁴³ There are several other specific limitations in the regulations of Canada that will be addressed below.

In spite of these exclusions, the STCA is having a significant impact at the border. One measure of the impact is in the decline of refugee applications in Canada. According to nongovernmental organizations monitoring the implementation, in 2005 the total number of refugee claims fell and at its current pace will result in lowest number of refugee claims since Canada's current refugee determination system came into effect in 1989.⁴⁴ Claims made at the border where the STCA applies were 50% lower than as compared to the same period in 2004.⁴⁵ In terms of numbers, an estimated 3,110 claimants are "missing."⁴⁶ Thus, the STCA is having a genuine impact on a considerable number of refugee applicants and demands a determination of

⁴⁰ See Citizenship and Immigration Canada's refugee processing manual, Processing Claims for Refugee Protection in Canada, PP1, at 81. Available at <http://www.cic.gc.ca/manuals-guides/english/pp/pp01e.pdf> (last visited February 3, 2006).

⁴¹ STCA, *supra* note 31, art. 4(d)(i) & (ii).

⁴² *Id.* at art 6.

⁴³ *Id.* at art. 4.2.

⁴⁴ Canadian Council of Refugees, Closing the Front Door on Refugees, Report on the First Year of the Safe Third Country Agreement, at 5. Available at <http://www.web.ca/~ccr/doceng.htm#Safe_third>.

⁴⁵ *Id.* The rate of decline varies among nationality, with Columbian refugee applicants falling 73% as compared to the same period in 2004.

⁴⁶ *Id.* The "missing" figure comes about by taking the percentage of refugee applications from January to November 2005 as compared to 2004 and projecting how many claims would have been made at the border. Then the number of actual claims filed is subtracted from that figure.

whether Canada is in compliance with its international obligations by its participation in this agreement.

III. The International and Domestic Protection Regime

A. International Protections-nonrefoulement and basic human rights

This ground has been well-plowed already in textbooks and treatises,⁴⁷ so this will be a brief review of the sources of rights refugees enjoy and the mechanisms to implement those protections. It is against this system that the STCA should be measured because the U.S. and Canada are bound by the international obligations they have undertaken.

The modern foundational international treaty for refugee law is the 1951 Refugee Convention, with the 1967 Protocol Relating to the Status of Refugees (an additional agreement modify the 1951 Convention) drafted under the auspices of the United Nations.⁴⁸ The 1951 Refugee Convention defines who a refugee is and provides certain protections for that person. A refugee is one who “owing to a 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.”⁴⁹ Thus, an individual must demonstrate that he or she is being

⁴⁷ See KAREN MUSALO, JENNIFER MOORE & RICHARD A. BOSWELL, *REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH* (2d ed. 2002); GUY S. GOODWIN GILL, *THE REFUGEE IN INTERNATIONAL LAW* (1996); JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* (1991).

⁴⁸ The creators of 1951 Refugee Convention were responding to the conditions of post-war Europe and limited the protections provided under the Convention to people in Europe who were forced to flee their own countries prior to January 1, 1951. See Joan Fitzpatrick, *Revitalizing the 1951 Refugee Convention*, 9 HARV. HUM. RTS. J. 229, 232 (1996). The 1967 Protocol recognized that the problem of refugees was a global problem and eliminated the date and time restrictions. *Id.*

⁴⁹ Convention Relating to the Status of Refugees, July 28, 1951, Art. 1A, 189 U.N.T.S. 150. (*hereinafter* Refugee Convention)

persecuted by the government or someone the government is unable or unwilling to control, and the persecution is on account of at least one of the five stated grounds.

The central protection of the 1951 Refugee Convention is called *nonrefoulement*, developed from the French verb *refouler*, to return.⁵⁰ This provision, found in Article 33, states:

No contracting state may expel or return a refugee in any manner whatsoever to the frontiers of territories where his or her life or freedom would be threatened on account of race, religion, membership of a particular social group or political opinion.⁵¹

There is a plethora of other rights found in the 1951 Refugee Convention. When refugees have greater connections to the country of protection, they receive a greater scope of rights protections. There are a few basic rights everyone claiming refugee status receives, regardless of their lawful status, such as freedom from discrimination, access to courts, religious freedom and the right to benefit from educational systems among some others.⁵²

The year before the Refugee Convention was created, United Nations established a body called the Office of the High Commissioner of Refugees (UNHCR).⁵³ Its mission is to promote the adoption of treaties protecting refugees, supervise the application of the Refugee Convention and propose amendments to the Convention.⁵⁴ Thus, the UNHCR monitors the conditions of refugees around the world and under the terms of the Refugee Convention, all state parties are to

⁵⁰ Borchelt, *supra* note 10, at 494-498.

⁵¹ Refugee Convention, *supra* note 49, at art. 33, 189 U.N.T.S. 150.

⁵² Refugee Convention, *supra* note 49, at arts. 3, 4, 16, 22. These rights have previously been detailed in James C. Hathaway & Anne K. Cusick, *Refugee Rights Are Not Negotiable*, 14 GEO. IMMIGR. L.J. 481, 493 (2000). This article details the various levels of connection found in the Refugee Convention.

⁵³ Refugee Convention, *supra* note 49, at art. 35.

⁵⁴ Statute of the UNHCR, U.N. Doc. A/RES/428(V) at para. 8(a).

co-operate with the UHNCR to “facilitate its duty of supervising the application of the provisions of the Convention.”⁵⁵ The UNHCR, in fulfilling its mandate, drafted a handbook on procedures and criteria for determining refugee status and issues guidelines updating or supplementing the procedures and substantive law on the protection of refugees.

In addition to the 1951 Refugee Convention, protection for refugees and the provision of *nonrefoulement* is found in other international treaties and conventions.⁵⁶ Scholars are basically in agreement that protecting refugees from return to a country where they will be persecuted has evolved into a customary international norm binding all nations.⁵⁷ This is the central, but certainly not the only protection granted to those facing persecution.

These refugee rights are part of a larger web of human rights protections. Foundational in this system is the Universal Declaration of Human Rights (UDHR), adopted by the United Nations in 1948.⁵⁸ The UDHR is not a legally binding treaty but rather represents an aspirational statement by the nations of the world of how humans must be treated. After this Declaration was adopted, many human rights treaties were drafted under the auspices of the United Nations, and have entered into force. Of particular importance for this article are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These treaties spell out in detail the basic rights that all humans enjoy

⁵⁵ Refugee Convention, *supra* note 49, at art. 35.

⁵⁶ See e.g. Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (*hereinafter* CAT), Dec. 10, 1984, Art. 3, 1465 U.N.T.S. 85; American Convention on Human Rights, Nov. 22, 1969, Art. 22, 1144 U.N.T.S. 123.

⁵⁷ Borchelt, *supra* note 10, at 480-491.

⁵⁸ For text and information see the website of the United Nations High Commissioner for Human Rights at <<http://www.unhcr.ch/udhr/index.htm>> (last visited on February 3, 2006).

regardless of their lawful status within a particular country. These treaties also contain methods of monitoring and redressing violations.

Alongside this international regime is a regional regime of human rights protections, also the product of treaties. Both the U.S. and Canada participate in the Organization of American States (OAS) which administers the human rights protection regime for the American continents.⁵⁹ At the heart of this system likewise is an aspirational declaration, the American Declaration of the Rights and Duties of Man (American Declaration).⁶⁰ Like the international system, binding treaties flowed from this foundational statement, providing protection. Further, under the auspices of the OAS several enforcement mechanisms operate to monitor and provide means of rectifying violations.⁶¹ While many of the rights are duplicative, the regional system provides an additional level of protection for refugees.

B. Domestic protections-asylum

Beyond the international norm of *nonrefoulement*, several countries provide asylum to those meeting the definition of refugee. As noted in the Introduction, asylum means that once a country recognizes someone is a refugee he or she is permitted to remain in that country lawfully until either she or he no longer fear persecution or receive some other lawful status (e.g. citizenship).⁶² However, currently, the protection of asylum is a product of domestic law rather than an enforceable right under international law.

⁵⁹ See the Organization of American State's website at <<http://www.oas.org>>

⁶⁰ American Declaration of the Rights and Duties of Man, adopted at Bogota by the Ninth International Conference of American States, Mar. 30-May 2, 1948. O.A.S. Res. XXX. O.A.S. Off. Rec. OEA/Ser. L/V/I.4 Rev. (1965). Available at <<http://www.oas.org/juridico/english/ga-res98/eres1591.htm>>

⁶¹ See *infra* notes 270-5

⁶² See *e.g.* the definition of asylum found in U.S. law, 8 U.S.C.sec. 1158(c).

It is not possible to firmly locate asylum as a human or refugee right at the international level. Asylum is recognized in the UDHR and the American Declaration.⁶³ However, the treaties at both the international and the regional level do not include it. As a consequence, asylum, rightly or wrongly, is perceived to be a matter of privilege rather than a human right obligating the U.S. and Canada to provide such protection to refugees.⁶⁴

However, both the U.S. and Canada abide by the 1951 Refugee Convention and the 1967 Protocol⁶⁵ and have complex administrative systems designed to assess refugee claims. Further, both the U.S. and Canada grant both forms of protection, *nonrefoulement* of refugees and asylum to those who qualify for such status.⁶⁶ Under the laws of both countries, a person may not be entitled to receive asylum but the principle of *nonrefoulement* may still apply. That is, the U.S. and Canada may still recognize that they may not deport someone to the country from which he or she fled. This is subject to restrictions and exclusions found in the Refugee Convention

Receiving asylum in both countries can lead to more permanent legal status. In Canada someone deemed to be entitled to refugee protection can become a legal permanent resident with permission to remain in Canada.⁶⁷ In the U.S., someone receiving asylum must wait, currently

⁶³ Universal Declaration of Human Rights, Dec. 10, 1948, art. 14, G.A. res. 217A, U.N. GAOR, 3rd Sess., Pt. I, Resolutions, at 71; American Declaration of the Rights and Duties of Man, Mar. 30-May 2, 1948, art. XXVII, O.A.S. Res. XXX O.A.S. Off. Rec. OEA/Ser. L/V/I.4 Rev. (1965).

⁶⁴ See Joan Fitzpatrick, *supra* note 48, 245-249 (1996).

⁶⁵ The U.S. did not ratify the 1951 Convention but all of the legal obligations are made binding through the U.S.'s adoption of the 1967 Protocol.

⁶⁶ In U.S. law, the provision against *nonrefoulement*, called restriction on removal, is found at 8 U.S.C. 1251(b)(3) and the protection of asylum is found in 8 U.S.C. 1158(a)-(d) (2002). In Canadian law, the principle of *nonrefoulement* is found in Immigration and Refugee Protection Act, ch. 27, 2001 S.C. sec. 115 (Can.) and its asylum provisions, referred to as refugee protection, are found in sec. 95.

⁶⁷ Immigration and Refugee Protection Act, ch. 27, 2001 S.C. sec. 21(2) (Can.).

for years, before they may receive legal permanent residence.⁶⁸ Likewise more permanent legal status allows family members to gain lawfully entry to the country of asylum. Neither of these benefits are available to those who simply qualify for *nonrefoulement*.

C. Compatability of Safe Third Country Agreements with the international protection regime

Since this international legal structure is aimed at protection, it does not explicitly address or recognize safe third country agreements. But it does not prohibit them either. Advocates for safe third country agreements assert the concept is implicitly found in the 1951 Refugee Convention.⁶⁹ They point to Article 31, which forbids countries from imposing punishment on refugees who, “coming directly from a territory where their life or freedom was threatened,” enter without authorization.⁷⁰ The reference to coming “directly from the territory” implies that someone not coming directly can be refused the protections provided under the Refugee Convention if there is another safe country. Such agreements do not violate the Convention obligations as long as the asylum seeker will not face persecution in the third country and can claim some sort of protection in that third country.⁷¹ Therefore, the second country does not have to determine whether an individual meets the definition of refugee before returning him or her to the third country so the reasoning goes.

⁶⁸ 8 U.S.C. sec. 1159(a)-(c) (2003).

⁶⁹ See Mark Krikorian, *The U.S.-Canada Safe Third Country Agreement: A Vital First Step*, Center for Immigration Studies, October 16, 2002 <<http://www.cis.org/articles/msktestimony1016.html>.

⁷⁰ Refugee Convention *supra* note 49, at art. 31.

⁷¹ Borchelt, *supra* note 10, at 477.

The UNHCR has not formally accepted or rejected the existence of safe third country agreements, but it rejects the interpretation of Article 31 that suggests the drafters of the 1951 Refugee Convention anticipated and recognized safe third country agreements. The UNHCR Guidelines on Detention of Asylum Seekers concludes that the “coming directly” language was intended to exclude only those asylum seekers who had settled temporarily in another country. Asylum seekers who merely transited through another country are still protected by Article 31.⁷²

However, rather than condemning their existence, the UNHCR recommends safeguards for their operation.⁷³ These safeguards reflect the concerns that emerge from the operation of safe third country agreements already in existence. To understand the need for these safeguards, it is necessary to review the criticisms of the safe third country practice in Europe.

IV. The Legal Problems with Safe Third Country Agreements

Scholars studying the European experience have identified several possible ways that safe third country agreements may run afoul of the 1951 Refugee Convention and the international rule on *nonrefoulement*. It is important to understand that these criticisms are not that the safe third country agreement itself violates international law, but that a country will return a refugee applicant to a third country under such an agreement and the third country is not genuinely safe.

A. Orbits and Chains

Orbits occur when a destination country has a safe third country provision but does not have a readmission agreement with the third country through which the asylum seeker passed. The

⁷² OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, UNHCR REVISED GUIDELINES ON APPLICABLE CRITERIA AND STANDARDS RELATING TO THE DETENTION OF ASYLUM SEEKERS, February 1999.

⁷³ Borchelt, *supra* note 10, at 515-6.

asylum seeker is then shuttled back and forth with neither the second country nor third country willing to make a determination about the applicant's status as a refugee.⁷⁴ This would constitute a violation of the Refugee Convention because neither country is willing to accept responsibility for making a refugee status determination.

A chain occurs in the opposite situation. The asylum seeker arrives in a destination country that has a safe third country agreement with a third country that in turn has a safe third country agreement with another country through which the asylum seeker passed. In this way, the asylum seeker is forced to retrace his or her path of flight, with each *refoulement* leading closer to the country in which the asylum seeker fears persecution. Likewise, this would be a violation and it is tied to the next problem connected with safe third country agreements, nonexistent or unfair refugee determination processes.

B. Nonexistent or unfair refugee determination processes

With orbits, the risk is that no country is willing to take responsibility for the person seeking protection. With chain *refoulements*, asylum seekers are pushed back to countries with fewer resources and less developed refugee determination systems. In fact, in the European system there is the possibility that the asylum seeker is *refouled* to a country that does not even belong to the 1951 Refugee Convention or the 1967 Protocol.

With fewer resources and weaker systems there is an increased risk an unfair process results in a false determination that a person is not a refugee. However, some scholars assert that unfair refugee determination systems exist even among the developed Western European countries

⁷⁴ Legomsky, *supra* note 9, at 584.

which are party to the 1951 Refugee Convention. These Western European countries also may be third countries to which an asylum seeker is *refouled*.⁷⁵

Regardless of whether the person is given an unfair refugee determination or none at all, the danger is that the asylum seeker will ultimately be *refouled* to the country from which he or she fled.⁷⁶ In fact, the legal literature details several examples of this actually occurring, although details are lacking and there has not yet been a serious study of *refoulement* consequences in the European system or elsewhere.⁷⁷ The violation of the *nonrefoulement* obligation is probably the gravest violation of the 1951 Refugee Convention.

C. Violations of other refugee and human rights

Other rights may also be placed in jeopardy. For example, prolonged and indefinite detention has been and remains a concern.⁷⁸ Basic human needs like food and shelter are another example. In Europe, as the chain *refoulement* extends from west to east, the countries are less able to provide necessities for asylum seekers. Therefore, basic human rights become a significant issue beyond simply processing a refugee application.

D. Other issues

⁷⁵ Borchelt, *supra* note 10, at 509. Germany's domestic refugee law is a common example cited because German law requires the asylum seeker to prove that persecution is by the government. Unlike many other countries interpreting the 1951 Refugee Convention, Germany does not recognize persecution by non-governmental forces. See Fullerton, *supra* note 11, at 264-5.

⁷⁶ Legomsky, *supra* note 9, at 583.

⁷⁷ See Borchelt, *supra* note 10, at 510-12; Fullerton, *supra* note 11, at 252. There is a disturbing lack of study on the frequency with which *refoulement* occurs. Some recent reports suggest that it does not happen that often. MIGRATION AND ASYLUM LAW AND POLICY IN THE EUROPEAN UNION, FIDE 2004 NATIONAL REPORTS 470 (Imleda Higgins, ed. & Kay Hailbronner, gen. Rptr. 2004)

⁷⁸ Legomsky, *supra* note 9, at 583.

In addition to violating the 1951 Refugee Convention and other refugee rights, safe third country agreements are criticized on other grounds. Privacy and confidentiality can be critically important to a refugee fearing his or her own government. Failing to keep an asylum seeker's identity private so that the country of origin discovers that person's location and that he or she is claiming persecution could further endanger the asylum seeker.⁷⁹

Lastly, criticism surrounds the criteria used in the European system for determining whether someone should be returned to a third country. Links that an asylum seeker has with a second country or third country are not considered. That is, the asylum seeker might have significant personal reasons for transiting to a second country and not making a request for asylum in a third country.⁸⁰ Yet the decision to return the asylum seeker does not consider links or the asylum seeker's desires.

E. The Complicity Principle and Minimum Legal Protections

A question of law arises however, as to whether the country that *refouled* the asylum seeker to a third country can be held in violation of its international legal obligations because the third country further *refouled* the asylum seeker to the country of origin or otherwise violated the 1951 Refugee Convention. The language of the Refugee Convention and scholarship on this point reveals that the *nonrefoulement* obligation of the second country continues even if it has returned

⁷⁹ *Id.* at 585-6.

⁸⁰ *Id.* at 587.

the asylum seeker to a third country.⁸¹ This view is shared by the UNHCR and many international bodies as well as the courts of individual countries.⁸²

Professor Stephen Legomsky, a well-known scholar in the field of refugee law, proposed a tool for assessing when a second country may transfer an asylum seeker to a third country without violating its own obligations under the 1951 Refugee Convention or other international law. He referred to it as the “complicity principle,”⁸³ which, quite logically, declares that a second country cannot send an asylum applicant to any third country in which it knows the treatment by the third country would be a violation if second country had engaged in such treatment.⁸⁴ This principle is not foreign to, but has roots in the domestic legal systems of both the U.S. and Canada.⁸⁵

Emerging out of the operation of the complicity principle, Legomsky proposed a set of minimum legal requirements for returning asylum seekers that address the criticisms from the European experience.⁸⁶ These minimum legal requirements offer criteria to determine whether the third country meets the requirement of giving effective protection to the asylum seeker and are intended to address the criticisms emerging from the European safe third country experience.

Therefore, they provide a benchmark by which to evaluate the U.S.-Canada STCA.

⁸¹ See Borchelt, *supra* note 10, at 478.

⁸² Legomsky, *supra* note 9, at 618-20.

⁸³ *Id.* at 620. Professor Legomsky relied in part upon the Articles on State Responsibility developed by the International Law Commission to articulating this principle. He further bolsters this principle through the application of the object and purpose clause of the Vienna Convention of the Law of Treaties. That is, the Vienna Convention provides the background for reading the 1951 Convention and one of the basic principles is that a treaty’s provisions must be read consistently with the treaty’s object and purpose. Allowing a country to avoid its obligations to refugees by simply returning them to another country that will then return them to a place of persecution would be contrary to the purposes of the Refugee Convention

⁸⁴ *Id.*

⁸⁵ See *Singh v. Minister of Employment and Immigration*, [1985]1 S.C.R. 177. See also Macklin, *supra* note 8, at 399. Macklin discusses Canadian law adopting the complicity principle.

⁸⁶ *Id.* at 673.

Under Legomsky's minimum legal standards analysis, an asylum seeker cannot be returned to a third country if:

First, the third country does not agree to readmit the asylum seeker;

Second, the asylum seeker has a well-founded fear of persecution in the third country;

Third, the third country will *refouler* the asylum seeker because it has a more limited interpretation of a provision of the Refugee Convention and the destination country considers the provision to have only one possible interpretation;

Fourth, the destination country knows the third country will violate other Refugee Convention rights. The degree of certainty in the term "knows" is inversely related to the importance of the Convention right at stake. The more important the right, the less certitude is required;

Fifth, the destination country knows the third country will violate an asylum seeker's rights protected under a human rights treaty to which the destination country is a party;

Sixth, the third country will not provide a fair hearing;

Seventh, the third country will not provide effective protection for the duration of a refugee's status as a refugee.

Eighth, even if a third country is a safe country, an asylum seeker's strong family ties are in the destination country.⁸⁷

⁸⁷ Legomsky, *supra* note 9, at 674-5. Legomsky has one more minimum guideline, and that is that the eight guidelines listed are considered on a case by case basis.

The next step is to assess whether the U.S. system fails to meet these minimum protections, thereby generating an obligation on Canada not to return asylum seekers under the complicity principle.

V. Assessing the STCA under the Complicity Principles and Minimum Legal Protections

As noted in the introduction, this will be a review of the U.S. system. Prior to the enactment of the STCA, many nongovernmental organizations, as well as the UNHCR, identified a number of limitations in the U.S. system that led to a conclusion that the U.S. was not safe.⁸⁸ This part will provide a critical review of these deficiencies, organized around the concerns that arise for safe third country agreements generally. It will apply Legomsky's minimum legal protections criteria to assess the U.S. system.

A. Orbits and Chains

Before addressing the fairness of the U.S. asylum system, one common criticism of safe third country agreements should be addressed: orbits and chains. With regard to orbits, the STCA functions as a readmission agreement, so, an asylum seeker should not be bounced back and forth between Canada and the U.S. However, reality may be different. Some of the responses to the STCA expressed concern that asylum seekers would face a legal limbo in the event that the

⁸⁸ See Canadian Council for Refugees, 10 Reasons Why safe Third Country is a Bad Deal, available at <<http://www.web.net/~ccr/10reasons.html>; KAIROS: Canadian Ecumenical Justice Initiatives, Safe Third Country Agreement, updated December 17, 2004, available at <<http://www.kairoscanada.org/e/refugees/safeCountry/index.asp?id=1>; UNHCR Comments on the Draft Agreement between Canada and the United States of America for "Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries" available at <<http://www.web.net/~ccr/safethird.htm>; American Immigration Lawyer's Association's Canada Chapter Comments on Safe Third Country Regulations, available <<http://www.aila.org/content/default.aspx?docid=8063>.

U.S. and Canada disagree on the application of the agreement given an asylum seekers background.⁸⁹

Currently, there are no reported cases of the U.S. and Canada transporting a refugee applicant back and forth before sending them to the first country of origin. In order to satisfy minimum legal protections not only must the third country explicitly agree to readmit the person being returned, but must actually do so.⁹⁰ Therefore, the process must be continually monitored to assure that orbits do not occur.

On the question of chain *refoulement*, the STCA specifically states that an asylum applicant *refouled* by either country will be given a refugee status determination and will not be removed to any other country until that determination has taken place.⁹¹ In fact, the STCA states explicitly that no one claiming refugee status may be removed to another country pursuant to another safe third country agreement. The STCA explicitly prevents chain *refoulements*. This meets another aspect of the minimum legal requirements for return of asylum seekers, the safe third country agrees to give the asylum seeker a fair refugee status determination.⁹²

B. Unfair refugee determinations

Assuming that the STCA functions as intended, and no person Canada returns to the U.S. is further *refouled* elsewhere or is simply bounced back and forth, the next question to raise is the fairness of the U.S. determination system. Critiques of the U.S. system's fairness lie at the heart

⁸⁹ AILA InfoNet Doc. No. 02122641 (posted Dec. 26, 2002).

⁹⁰ *Id.*

⁹¹ STCA, *supra* note 31, art. 3.1 & 3.2.

⁹² Legomsky, *supra* note 9, at 673.

of much of the criticism of the STCA. Particularly, critics of the STCA point to the U.S.'s accelerated deportation process called expedited removal, the one year time limit for filing an asylum claim in the U.S., the broad exclusions in U.S. law from receiving refugee protection, differences in interpretation of the definition of the term refugee as it applies to gender based persecution, a lack of legal representation for asylum seekers in the U.S., and overall lower rates of success in being granted protection in the U.S. We will deal with these claims in turn.

1. Expedited removal

Expedited removal is used in cases in which people come to the U.S. without travel documents (passport and visa) or have fraudulent documents.⁹³ Under this process a person arriving in the U.S. is simply returned to his or her home country without a hearing unless she or he expresses a fear of persecution or request asylum.⁹⁴ While the initial determination of removing someone is made by the first immigration inspector, an expression of fear or a request for asylum moves the process to a second stage in which the person receives a “credible fear” hearing conducted by an officer specially trained in interviewing people seeking protection.⁹⁵ A decision by the interviewing officer that the applicant has no credible fear is subject to review by an immigration judge.⁹⁶ Without a determination of credible fear, the process ends and the person is deported from the U.S.

⁹³ See 8 U.S.C. 1224(b)(1) (2003).

⁹⁴ 8 U.S.C. 1224(b)(1)(A)(i). Once a person express fear or asks for asylum, the inspector should schedule the person for what is called a “credible fear” hearing with an official specially trained in assessing refugee claims. The credible fear hearing then may lead to a full hearing before an immigration judge. For a full analysis of the expedited removal process, see Karen Musalo, *The Expedited Removal Process: Report on the First Three Years of Implementation of Expedited Removal*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1 (2001).

⁹⁵ Musalo, *supra* note 94, at 3-9.

⁹⁶ 8 U.S.C. 1225(b)(1)(B)(iii)(2003).

The expedited removal process generates the possibility that an asylum seeker will not receive a full hearing. However, according to the STCA, those returned from Canada seeking asylum should have a “refugee status claim examined by and in accordance with the refugee status determination of the United States.”⁹⁷ Further, according to the supplementary information included with the final implementation rules for the STCA, the Department of Homeland Security considers those being sent back from Canada as never having left the U.S. Because they have never left the U.S., they should not be subject to expedited removal, except with rare exceptions.⁹⁸ Presumably, this means that a person returned from Canada should receive a full hearing before an immigration judge to assess his or her claim to refugee status, and avoid the risks of expedited removal. But the U.S. was not willing in its regulations to forbid the application of expedited removal for those asylum seekers being returned by Canada.⁹⁹ Therefore, the expedited removal process remains a possible limitation to receiving a hearing.

If an asylum seeker is subject to expedited removal, does the expedited removal procedure comport with minimal legal requirements? The UNHCR, pursuant to its mandate,¹⁰⁰ established guidelines identifying core elements for fair and efficient asylum processes. They include: access to procedures that are fair and nondiscriminatory, access to guidance and advice on procedure and access to legal counsel, opportunity to be heard in a personal interview, to present

⁹⁷ See STCA, *supra* note 31, art 5(b)(ii).

⁹⁸ Implementation of the Agreement Between the Government of the United States and the Government of Canada Regarding Asylum Claims Made in Transit and at Land Border Ports of Entry, Final Rule 69 Fed. Reg. 69,479-90 (2004) (to be codified at 8 C.F.R. pts. 208, 212, 235, 1003). This follows from the fact that expedited removal applies only to arriving aliens and the Department of Homeland Security is declaring that those returned to the U.S. from Canada under this agreement are not arriving aliens. The supplementary notes offered an example of an exceptional case, a person granted parole. Parole means a person is allowed into the country but is legally not admitted, so they stay in a state of arriving in the U.S. not matter how long they actually remain in the U.S. If a person’s parole period expires (the U.S. places time limits on how long parole lasts) before they are sent back by Canada to the U.S., then they are subject to expedited removal.

⁹⁹ *Id.*

¹⁰⁰ See *supra* note 53-4.

evidence concerning personal circumstances and conditions in the country of origin, and opportunity for independent review of a negative decision.¹⁰¹

Scholarship criticizing expedited removal has focused on procedures that lead to increased likelihood of errors.¹⁰² Professors Phil Schrag and Michele Pistone, in a thorough analysis, pointed to deficiencies in the procedure, both during the inspection stage when an immigration official initially determines whether a non-citizen should be denied admission and whether they may have the possibility of receiving protection and during the stage when a non-citizen is interviewed to determine whether they have a credible fear of persecution.¹⁰³ Shortcomings include inadequate interpreters and inadequate information to the asylum seeker about the procedure during the initial screening stage, and use of telephonic interpretation and limited role of counsel if there is a negative determination in the credible fear stage.¹⁰⁴ There are concerns of inhumane treatment of asylum seekers, and unnecessary detention throughout the process.¹⁰⁵

These procedural shortcomings are serious, especially given that a refusal to give a person the opportunity to claim asylum could mean life or death. Even scholars who write in support of

¹⁰¹ UNHCR, Global Consultations on International Protection, Asylum Processes, EC/GC/01/12 (2001) (*hereinafter* ¹⁰¹).

¹⁰² Michele R. Pistone & Philip G. Schrag, *The New Asylum Rule: Improved But Still Unfair*, 16 GEO. IMMIGR. L.J. 1, 32-36 (2001). This article provides detailed examples of legitimate asylum seekers being denied a hearing and deported from the U.S.

¹⁰³ *Id.* at 53-76. There are two parts to the initial screening stage, primary inspection and secondary inspection. In primary inspection anyone whose admissibility is in doubt is sent to secondary inspection. It is in secondary inspection that a U.S. immigration official will make a determination as to whether an individual has a fear of returning to their country of origin that may give a right to protection. If an individual expresses fear of persecution or requests asylum, he or she is sent on for a “credible fear” interview to determine whether they have credible fear of persecution that should be determined by an immigration judge.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 61-5, 70-3. Issues related to detention are addressed below.

the expedited removal process recognize that the procedure needed amendment.¹⁰⁶ However, the UNHCR's minimum standards only identify core elements, and it appears that the U.S. does meet them. The U.S. does give an opportunity to request protection, interpreters are used to assist in the initial interview, the applicant is told that he or she can request protection from persecution, the person may have a personal interview with a U.S. immigration official trained in asylum law and there is review of negative determinations by an immigration judge. In fact, U.S. law allows U.S. immigration officials to reconsider their decision of denying a person has a credible fear even after an immigration judge upholds an initial negative holding.¹⁰⁷

Thus, the expedited removal process does not place the U.S. in violation of international law and therefore does not trigger Canada's obligation not to return an asylum seeker. This is, of course, not to endorse expedited removal as a preferred procedure over a procedure that gives all entrants a full hearing. Rather, it is a legal question about what procedures are required. A troubling end to this conclusion, however, is the absence of data about the error rate of the expedited removal process of the system.¹⁰⁸ The existing data reveals that the vast majority of those expressing fear of return end up having a full hearing before an immigration judge.¹⁰⁹

¹⁰⁶ See David A. Martin, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 VA. J. INT'L L. 673, 694 (2000).

¹⁰⁷ Pistone & Schrag, *supra* note 102, at 48.

¹⁰⁸ A criticism of the expedited removal process, however, has been the unwillingness of the U.S. government to reveal data on the expedited removal process. See Musalo, et al., *supra* note 94, at ii. This comprehensive study revealed that expedited removal to a large extent affected citizens of Mexico entering the U.S from the southern border. Over 90% of expedited removals involved Mexican citizens and nine of the top ten ports of entry with the most expedited removals were along the U.S.-Mexico border. The study also revealed that very few non-citizens stopped at the initial admission stage were referred for a credible fear hearing but those that were largely found to have a credible fear.

¹⁰⁹ UNITED STATES COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL (2005)(*hereinafter* USCIRF). According to this study eighty five percent of arriving aliens who express some sort of fear are sent to a credible fear hearing. USCIRF, at 6. Of that eighty five percent that are sent on to a hearing, ninety percent are found to have a credible fear entitling them to a full hearing before an immigration judge. And only one percent receive a negative credibility finding. USCIRF at 4.

However, there are anecdotal cases demonstrating that the system might have made a mistake,¹¹⁰ and there is no study of what has happened to those who never received a full hearing to make their claim. A comprehensive study of the expedited removal process conducted by the United States Commission for International Religious Freedom, a bipartisan federal agency created by Congress, concluded that expedited removal process suffered from inconsistent practices and flaws in information sharing between the initial interviews and the hearings before immigration judges.¹¹¹ However, no attempt was made to identify cases in which asylum was improperly denied. This leaves an unsettling uncertainty about how often expedited removal results in a denial of refugee status that should have been granted.

2. One year filing deadline

Another hurdle is a one-year filing deadline the U.S. imposes for asylum claims, which has some limited exceptions.¹¹² This restriction automatically bars those seeking protection from receiving asylum. Such a rule, the UNHCR declared in its guidelines for fair and efficient asylum processes, is “at variance with international protection principles.”¹¹³ It has been critiqued in scholarship as arbitrary and harmful because it excludes valid claims by refugees.¹¹⁴

However, this is not as damning of the U.S. system as it may seem on the surface. As noted above, international refugee law requires that the U.S. and Canada not *refoule* someone to a place

¹¹⁰ Pistone & Schrag, *supra* note 102, at n. 189.

¹¹¹ See USCIRF, *supra* note 109, at 5. The USCIRF was established by Congress to monitor religious freedom and determine whether the U.S. was consistently fulfilling its obligation to provide asylum to those being persecuted. *Id.* at 1.

¹¹² 8 U.S.C. 1158(a)(2)(B) is the one year rule. Exceptions of changed country conditions or extraordinary circumstances permit filing an asylum application beyond one year in the U.S. 8 U.S.C. 1158(a)(2)(D). The burden rests with the asylum seeker to prove by clear and convincing evidence that the application was filed within one year.

¹¹³ Asylum Processes, *supra* note 101.

¹¹⁴ See Schrag & Pistone, *supra* note 97, at 1-33.

where their life or freedom is threatened.¹¹⁵ The further protection of asylum is not mandated by the 1951 Refugee Convention or by international law generally. The protection of *nonrefoulement* in the U.S. has no one-year limit and thus someone may still seek this form of protection at any time.

There are, however, significant legal differences between asylum and *nonrefoulement* protection in U.S. law. The provision for *nonrefoulement* in U.S. law, popularly known by its former name “withholding of deportation” (hereinafter withholding),¹¹⁶ is more limited than asylum. Most importantly, withholding does not require a person to demonstrate that he or she is a refugee. Rather, U.S. law states as follows:

...[t]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group or political opinion.¹¹⁷

There are several important consequences to detaching the refugee definition from the protection of withholding under U.S. law. First, withholding has a heightened evidentiary burden as compared to asylum.¹¹⁸ In order to make a case for withholding, an applicant must demonstrate by a clear probability that his or her life or freedom would be threatened.¹¹⁹ To

¹¹⁵ See *supra* notes 50-1 and accompanying text.

¹¹⁶ This provision used to appear in 8 U.S.C. 1253(h), but now appears as restriction on removal, 8 U.S. C. 1231(b)(3).

¹¹⁷ 8 U.S.C. sec. 1231 (b)(3).

¹¹⁸ *INS v Stevic*, 467 U.S. 407, 422 (1984).

¹¹⁹ The U.S. Supreme Court upheld this interpretation in 1984. U.S. law places a higher evidentiary burden on the applicant when seeking restriction on removal because Congress’s intent when codifying the U.S.’s international obligation was to retain the objective standard of showing it was more probably than not that the applicant’s life or freedom would be threatened. Congress, according to the Supreme Court, saw this as consistent with the *nonrefoulement* obligations under the 1951 Refugee Convention. See *Immigration and Naturalization Service v. Stevic*, 467 U.S. 407 (1984).

receive the protection of asylum, the applicant has a lower burden of proof in meeting the definition of being a refugee. They must show a reasonable possibility of persecution, which takes into account the subjective perceptions of the asylum seeker. To put it in terms of percentages, for withholding, the applicant must show a better than 50% chance their life or freedom would be threatened. Under the well-founded fear standard for asylum, the risk of persecution could be considerably less than 50% but still create a well-founded fear in an applicant, qualifying them as a refugee.¹²⁰

Secondly, someone granted withholding is not entitled to other refugee rights under U.S. law. For example, once someone demonstrates he or she is a refugee and entitled to receive asylum, this opens the door to gaining lawful permanent residence.¹²¹ Further, asylum status in the U.S. allows spouses and children to receive protection as well.¹²² Beyond *nonrefoulement*, withholding under U.S. law does not contain any of the other rights contained in the Refugee Convention, either.

Applying Legomsky's proposed minimum legal requirements, Canada is prohibited from returning an asylum seeker to the U.S. if Canada knows the U.S. will *refoule* a refugee due to a more limited interpretation of the 1951 Refugee Convention.¹²³ However, if Canada considers the provision at issue to be susceptible to several possible interpretations, then Canada may return the applicant if the U.S.'s interpretation is permissible. This then raises the question

¹²⁰ *Immigration and Naturalization Service v. Cardozo-Fonseca*, 480 U.S. 407, 421-2 (1987).

¹²¹ 8 U.S.C. sec. 209.

¹²² 8 U.S.C. sec. 208(b)(3)

¹²³ Legomsky, *supra* note 9, at 673.

whether Article 33 of the Refugee Convention has only one meaning when it comes to the burden of proof on the refugee to prove his or her life or freedom would be threatened.

The Refugee Convention does not articulate the standard of proof that an applicant that is under to show that life or freedom would be threatened. This does not lead, however, to the conclusion that the Refugee Convention's *nonrefoulement* provision is susceptible to multiple interpretations. Scholars and critics of the U.S.'s withholding of removal provision point out that the U.S. is alone in imposing a different burden of proof for *nonrefoulement* as compared to asylum.¹²⁴ More importantly, the differing burdens of proof between asylum and withholding result in the U.S. only protecting a group of "super refugees" from *refoulement*.¹²⁵ That is, a person has to show more than the fact that he or she has a well-founded fear in order to receive the protection of withholding under U.S. law. The Refugee Convention, in contrast, uses the term refugee throughout the Convention without qualification. This demonstrates that the U.S. imposition of a higher burden is contrary to the burden of proof that is accepted in the Refugee Convention.

Therefore, Canada cannot, under the complicity principle, return a refugee applicant to the U.S. if he or she would face the one-year bar to applying for asylum. While *nonrefoulement* may still be available, the burden of proof is at variance with that in the Refugee Convention. Further, no other rights protected in the Refugee Convention are covered when a person receives the protection of withholding in U.S. law.

¹²⁴ Leena Khandwala, Karen Musalo et al., 05-08 Immigr. Briefings 1, 11-2 (August, 2005) *citing* Joan Fitzpatrick, *The International Dimension of Refugee Law*, 15 BERKELEY J. INT'L L. 1, 3 (1997).

¹²⁵ Hathaway & Cusick, *supra* note 52, at 515.

3. Bars to receiving protection-criminal grounds

The one-year filing deadline and the differing standards for receiving the protection of withholding in U.S. law are just one example of the issue of differing interpretations of the 1951 Refugee Convention. Another area of variance is the interpretation of the Convention's exclusions from its protections. There are two sets of exclusions. One set applies to all of the protections in the Convention.¹²⁶ Another set applies more narrowly to the central protection of *nonrefoulement*.¹²⁷ The U.S. parts ways with most of the other countries party to the Convention regarding the scope of these exclusions, which are included in both the U.S.'s asylum and withholding provisions, especially when it comes to exclusion on criminal grounds.

One bar to receiving the protection of *nonrefoulement* is raised when the refugee is convicted of a particularly serious crime and represents a danger to the community.¹²⁸ Canada and the UNHCR hold that when an asylum seeker is a criminal, there must be a two part finding. First, in order to determine whether a crime is particularly serious, the nature of the criminal act must be assessed in context and balanced against the risk of persecution the asylum seeker faces if returned. Second, an independent assessment must be made as to whether the asylum seeker is a danger to the community.¹²⁹

¹²⁶ Refugee Convention, *supra* note 49, at art. 1F. There are three grounds of exclusion from the Convention; those committing crimes against peace, war crimes or crimes against humanity (emerging from the Nuremberg trials), those who committed a serious non-political crime outside the country of refuge prior to admission, and lastly those who are guilty of acts contrary to the principles of the United Nations.

¹²⁷ Refugee Convention, *supra* note 49, at art. 33. Article 33 excludes those who for whom there are reasonable grounds to believe are a danger to the security of the U.S., those having been convicted by a final judgment of a particularly serious crime constitute a danger to the community of the country in which protection is sought.

¹²⁸ *Id.*

¹²⁹ See Kathleen Keller, *A Comparative and International Law Perspective on the United States (Non)Compliance With Its Duty of Non-Refoulement*, 2 YALE HUM. RTS. & DEV. L.J. 183, 189-190 (1999) *citing* Re Chu and Minister of Citizenship and Immigration, 161 D.L.R. 4th 499 (June 1, 1998).

The U.S., contrarily, takes a categorical approach, declaring a whole set of crimes referred to in U.S. immigration law as aggravated felonies to be particularly serious if conviction carries a sentence of five or more years.¹³⁰ For aggravated felonies in which the sentence of less than five years, the U.S. government may still determine that the crime is particularly serious.¹³¹ Further, the U.S. rejects any need for balancing the crime against risks of persecution. The U.S. also holds that aggravated felonies, being particularly serious crimes, make the asylum seeker presumably dangerous to the community. Therefore, there is no separate investigation of whether an asylum seeker is in fact dangerous.

It is important to realize that the term aggravated felony in U.S. immigration law covers a whole series of non-violent crimes that would never ordinarily be considered as aggravated or a felony. U.S. immigration law defines aggravated felony by a list of crimes that has expanded dramatically over the past decade. Receiving stolen property, committing fraud, forging or destroying a passport, and bribery are all aggravated felonies under U.S. immigration law.¹³² Recently, the U.S. administrative agencies concluded that driving a stolen car could be an aggravated felony.¹³³

Another bar found in the Refugee Convention, prevents a person from claiming protection if there is serious reason to believe the person committed a serious nonpolitical crime outside the country in which protection is sought and prior to admission. Again, contrary to the UNHCR recommendations and contrary to the Canadian approach, the U.S. government rejected any

¹³⁰ 8 U.S.C. 1231(b)(3)(B)

¹³¹ *Id.*

¹³² 8 U.S.C. 1101(a)(43)(G), (M), (P), (R). *See also* Keller, *supra* note 129, at 198-200.

¹³³ *In re Brieva*, 23 I. & N. Dec. 766 (B.I.A. 2005).

balancing of the risks of persecution to determine the seriousness of the crime.¹³⁴ This approach was upheld by the U.S. Supreme Court.¹³⁵

Does this difference in interpretation violate minimum legal protections? As noted above, Canada cannot send back an asylum seeker if the U.S.'s interpretation of the Convention is inconsistent with the accepted understanding on a matter for which there should be one standard.¹³⁶ There is certainly room for debate among countries about the meaning of the term 'particularly serious crime' or 'serious non political crime'. However, international law places limits on how nations interpret their treaty obligations. The Vienna Convention on the Law of Treaties was created to codify international law on treaty formation and state party adherence to its obligations.¹³⁷ Canada ratified the Vienna Convention on the Law of Treaties and is bound by its provisions. According to the Vienna Convention, state parties to treaties must interpret the treaty in good faith and consistent with the object and purpose of the treaty.¹³⁸ Further, under the complicity principle, Canada must ensure that U.S. interpretation of the Refugee Convention is in good faith and in a manner consistent with its object and purpose.¹³⁹

The object and purpose of the Refugee Convention is to provide protection from persecution. Overly broad understandings of the criminal exclusion grounds and refusal to determine whether a refugee actually represents a threat to the community (a specific requirement of the treaty) defeat the object and purpose of the treaty. Further, there is an identifiable consensus on the

¹³⁴ Keller, *supra* note 129, at 200-02. *See* Suresh v Canada, [2001], 208 D.L.R.(4) 1.

¹³⁵ Immigration and Naturalization Service v. Aquirre-Aquirre, 526 U.S. 415, 119 S. Ct. 1439 (1999).

¹³⁶ Legomksy, *supra* note 6, at 673-4.

¹³⁷ Vienna Convention on the Law of Treaties, concluded May 23, 1969, 1155 U.N.T.S. 331.

¹³⁸ *Id.* at art. 31.

¹³⁹ *See* Vienna Convention on the Law of Treaties, *supra* note 137.

types of crimes that fit under the exclusions.¹⁴⁰ This consensus demonstrates that the U.S. decision to include non-violent and minor property crimes stretches beyond bounds of reasonable interpretation. Lastly, it is clear from the wording of the Refugee Convention that the person at issue must actually be considered a danger to the community, requiring an actual determination of that issue.

Canada cannot uphold its obligations under the Refugee Convention if it returns an asylum seeker to the U.S. who would then be barred from protection because of exclusions inconsistent with the object and purpose of the treaty. If it does, Canada becomes complicit in the U.S.'s bad faith interpretation. Part of the screening process in Canada must include assessing whether an asylum seeker faces exclusion from protection in the U.S. based upon an overly broad interpretation of the criminal conduct provisions.

It should be noted that Canada's regulations and the procedure manual to implement the STCA already recognize in a limited way the application of the complicity principle in this area. Canada's procedures do state that the STCA will not be applied to those who would be excluded from protection in the U.S. on criminal grounds. But, the procedure manual limits this exception to the STCA. This exception only applies to those who would receive protection because they would face torture if returned to their own country, and would be denied protection in the U.S. because of criminal activity.¹⁴¹ That is, if someone faces the probability of torture if returned to his or her own country, and the U.S. would deny them the protection of *nonrefoulement* on criminal grounds, then Canada will not apply the STCA. Instead Canada will process the

¹⁴⁰ See Hathaway & Cusick, *supra* note 52, at 538; Keller, *supra* note 129, at 207.

¹⁴¹ See PP1Processing Refugee Claims, Citizenship and Immigration Canada, at 83, available at <<http://www.cic.gc.ca/manuals-guides/english/pp/index.html>> (last visited on February 3, 2006).

application for protection. Presumably, this exception to the STCA is based upon the recognition that the U.S.'s laws limiting protection on criminal grounds are inconsistent with international law. However, this exception does not apply more broadly to those facing persecution other than torture or those whose life or freedom would be threatened. This lacuna must be addressed in Canada's regulations and procedures.

4. Bars to receiving protection-the terrorism provision

The U.S. also bars anyone who has engaged or is engaged in a terrorist activity.¹⁴² A reference to terrorism is not found in the Refugee Convention, but it does contain a bar for those who pose a security threat to the country in which protection is sought.¹⁴³ Although having a bar on terrorist activity does not seem unreasonable, the description of terrorist activity in the U.S. immigration law goes well beyond the kinds of activities that the drafters of the Convention would have considered as representing a threat to security, as noted by scholars.¹⁴⁴ The term includes things that may well be considered political activities that do not represent a threat to the security of the U.S.

As with the case of the criminal bars to receiving protection, an overly broad exclusion generates the risk of a refugee being sent back without a reason supported by the language of the Refugee Convention. Canada cannot fulfill its obligation under international law when it returns an asylum seeker who faces *refoulement* under this provision.

¹⁴² 8 U.S.C. 1231(b)(3)(B). There is a limited exception to these bars, when it is more likely than not that the person will be tortured if returned to first country. This is discussed in greater detail, below. *See supra* notes 248-9.

¹⁴³ Refugee Convention, *supra* note 49, at art. 33 (2).

¹⁴⁴ Hathway & Cusick, *supra* note 51, at 536-7, Keller *supra* note 129, at 202-3.

The U.S. “war on terror” and U.S. refusal to abide by its international agreements, gives further cause to fear that a returned asylum seeker will be sent back to the country of origin without consideration of the merits of the case. A prime example is the U.S. policy of rendition, sending non-citizens from the U.S. to country where there is significant risk they will be tortured.¹⁴⁵ In a recent, well-known case, a Canadian citizen, Maher Arar, arrived in the U.S. on his way to Canada. Instead of allowing him to travel on, the U.S. sent him to Syria, his birthplace, where he asserts he was tortured to determine whether he knew anything about terrorist plans.¹⁴⁶ While Arar was not seeking protection in the U.S. and rendition would be forbidden under the STCA, the U.S. practice demonstrates a willingness to flaunt its international obligations under human rights laws. The International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT), which both the U.S. and Canada ratified, forbid this practice.¹⁴⁷ The U.S. government’s position, that such renditions take place in the context of a war on terrorism and are therefore lawful,¹⁴⁸ could easily be applied to the refugee context under the STCA.

The Arar case also demonstrates the application of the complicity principle. The international body established to monitor the CAT, the Committee against Torture, found that Canadian authorities had a role in the U.S. action, implicating Canada’s responsibility under the

¹⁴⁵ Jane Mayer, *Outsourcing Torture*, THE NEW YORKER, Feb. 14, 2005. See also Scott Shane, *Detainee’s Suit Gains Support From Jet’s Log*, N.Y. TIMES, March 30, 2005 at A1.

¹⁴⁶ *Id.*

¹⁴⁷ International Covenant on Civil and Political Rights (*hereinafter* ICCPR), opened for signature December 19, 1966, art. 7 999 U.N.T.S. 171, 174. See CAT, *supra* note 48, at art. 3.

¹⁴⁸ See Joan Fitzpatrick, *Rendition and Transfer in the War Against Terrorism: Guantanamo and Beyond*, 25 LOY. L.A. INT’L & COMP. L. REV. 457, 461 (2003).

Convention.¹⁴⁹ Canada had an obligation to do more to prevent Arar's rendition even though the U.S. actually engaged in the practice.

The complicity principle prohibits Canada from sending back an asylum seeker whom the U.S. identifies as having engaged in a terrorist activity unless Canada is able to ascertain with specificity what the person is accused of doing and whether represent a threat to security. Minimum legal protection standards forbid the application of overly broad exclusions in this area as well as in criminal matters.

5. Limitation on protection-gender based asylum claims

Another asserted source of unfairness in the U.S. system arises in the area of gender-based claims. The Refugee Convention's definition of a refugee does not include gender as a ground under which a person can claim she is being persecuted. Women must fit their claims into one of the recognized categories for persecution.¹⁵⁰ There are a wide variety of ways women can be particularly vulnerable to persecution, one of which is the all too common practice of physical abuse. A question of interpreting the Refugee Convention arises because it is not clear to what extent the term refugee was intended to cover cases of domestic abuse.

There are two issues that arise in assessing whether a claim of a victim of domestic violence should be treated as a refugee. One is the level of official acquiescence necessary before concluding that the abuse is attributable to the government. In order to be considered a refugee,

¹⁴⁹ *Committee against Torture, Consideration of Reports Submitted by State Parties under Article 19 of the Convention*, at 2, CAT/C/CO/34/CAN available at <<http://www.unhchr.ch/tbs/doc.nsf>>. See also Lisa Schlein, THE TORONTO STAR, May 21, 2005 at A12.

¹⁵⁰ See *supra* note 51 and accompanying text.

an applicant must show the persecution was by the government or by someone the government was unwilling or unable to control.¹⁵¹ A second issue is tying the abuse to a recognized convention ground (race, religion, nationality, etc.) so that the victim fits within the definition of a refugee. Recent scholarship on this issue points out that Canada recognizes battered women as refugees when their country of nationality or residence refuses to protect them from an abusive spouse or partner.¹⁵² Women can comprise a particular social group, which is one of the categories recognized in the definition of a refugee. The U.S. is currently unsettled on whether domestic violence which occurs purely at the hands of a spouse or partner can constitute persecution by the government within the meaning of the Refugee Convention.¹⁵³ For nearly five years the U.S. government waited to promulgate final regulations on domestic violence as a grounds for receiving asylum in the U.S. The regulations have not yet been issued.

A claim under the complicity principle would require evidence of a clear international standard for handling domestic abuse claims and failure of the U.S. to adopt it. Critics of the STCA assert that there is a clear international standard for gender based claims of domestic violence.¹⁵⁴ The UNHCR established norms for adjudicating gender-based claims, most recently in 2002. These guidelines include domestic violence as a particular way in which women and girls can become refugees.¹⁵⁵ The UNHCR guidelines assert that persecution can occur at the

¹⁵¹ *Id.*

¹⁵² Amy K. Arnett, *One Step Forward, Two Steps Back: Women Asylum-Seekers in the United States and Canada Stand to Lose Human Rights Under The Safe Third Country Agreement*, 9 LEWIS & CLARK L. REV. 951, 965-970 (2005). See Canadian Council for Refugees, *Closing the Front Door on Refugees*, Report on Safe Third Country agreement 6 months after implementation, August 2005, available at <<http://www.web.ca/~cct/closingdoor.pdf>> (hereinafter *Closing the Front Door*).

¹⁵³ See Arnett, *supra* note 152, at 956-65.

¹⁵⁴ Arnett, *supra* note 152, at 955-6; *Closing the Front Door*, *supra* note 152, at 9.

¹⁵⁵ *Id.*

hands of a non-state actor, such as an abusive husband.¹⁵⁶ If the government fails (due to inability or unwillingness) to provide protection, then the connection between the persecution and one of the convention grounds can occur through the government failing to protect because of category recognized by the convention (e.g. membership in a particular social group etc).¹⁵⁷ Lastly, the guidelines explicitly recognize that sex can be a characteristic that comprises a particular social group and women as a gender can be a subset of this particular social group.¹⁵⁸ The fact that this recognition may generate a very large group who can fit the refugee definition is irrelevant, according the guidelines.

While these guidelines are clear, the problem with declaring the U.S. in violation is that the U.S. has yet to flatly reject these guidelines. Arguably, the U.S. administrative agency that hears appeals from the immigration courts, the Board of Immigration Appeals, rendered a decision in 1999 that is contrary to the above guidelines.¹⁵⁹ However, that decision was withdrawn pending the establishment of guidelines that have yet to be released. In fact, there are decisions within the U.S. administrative system that recognize the unique risks of women toward persecution on the

¹⁵⁶ Arnett, *supra* note 152, at 964. See UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, GUIDELINES ON INTERNATIONAL PROTECTION: GENDER-RELATED PERSECUTION WITHIN THE CONTEXT OF ARTICLE 1A(2) OF THE 1951 CONVENTION AND/OR ITS 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, HCR/GIP/02/01, MAY 7, 2002, at 5. (*hereinafter* GUIDELINES ON GENDER RELATED PERSECUTION)

¹⁵⁷ GUIDELINES ON GENDER RELATED PERSECUTION, at 6.

¹⁵⁸ *Id.* at 7.

¹⁵⁹ In *Re R-A-*, 22 I & N. Dec. 906 (B.I.A. 1999) the Board of Immigration Appeals (part of the Executive Office for Immigration Review which is part of the Department of Justice) heard an appeal of a woman from Guatemala who was severely abused by her husband. The immigration judge granted asylum on the basis that the applicant, Rodi Alvarado was persecuted by her husband, and the government failed to protect her, because she belonged to the particular social group of Guatemalan women who have been involved intimately with male Guatemalan companions, who believe that women are to live under male domination. Further, the immigration judge asserted that Ms. Alvarado was persecuted by her husband on the basis of her political opinion that she objected to male domination. The B.I.A. overturned the immigration judge's decision on the basis that Ms. Alvarado did not establish the existence of particular social group of Guatemalan women nor was her husband persecuting her because of her political opinion that women should not be dominated by men. The B.I.A. did not doubt that Ms. Alvarado's husband's abuse rose to the level of persecution or that the government failed to protect her. See Arnett, *supra* note 139, at 961-5. A representative of the UNHCR wrote to the then Attorney General, John Ashcroft, expressing the view that Rodi Alvarado clearly fit within the definition of refugee, entitling her to protection.

basis of their gender and at the hands of private actors.¹⁶⁰ Critics assert that the lack of clear precedent and guidelines in the U.S. system have lead to inconsistent results.¹⁶¹

This last point leads to another larger issue beyond the treatment of domestic violence claims. It has been asserted by critics that there is a disparity in approval rates between the U.S. and Canada when it comes to gender-based asylum claims. In other words, women lose claims in the U.S. that they would have otherwise won in Canada because of the handling of gender based refugee claims. The Canadian government predicted such a result when it drafted its implementing regulations.¹⁶² To address this concern the Canadian government commissioned a study by a well-known refugee law scholar, Professor David Martin. Professor Martin concluded that gender-based violence claims in the U.S. system have a high percentage of success based upon the data available.¹⁶³ The data came from a website maintained at the University of California Hastings College of Law by the Center for Gender and Refugee Studies. The center's director, Professor Karen Musalo, also a well-known refuge scholar, disagreed with the findings. In her view the gender based claims on the website are not representational because the website is skewed toward successful cases. Unsuccessful cases are underreported.¹⁶⁴

Applying the complicity principle to the issue of the differing treatment of domestic violence claims, if Canada considers this an issue upon which differing interpretations are permissible, then it can return women to the U.S. who have domestic abuse claims. Given the UNHCR

¹⁶⁰ Arnett, *supra* note 152, at 960-1, citing *In Re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996).

¹⁶¹ *Id* at 977.

¹⁶² Regulations Amending the Immigration and Refugee Protection Regulations, Regulatory Impact Statement, 136 Canadian Gazette, No. 43, October 26, 2002.

¹⁶³ See David A. Martin, Treatment of Gender-Based Asylum Claims in the United States, Memorandum prepared for the Attorney General of Canada, available at <<http://www.cic.gc.ca/english/policy/asylum-gender-us.html>.

¹⁶⁴ Closing the Front Door, *supra* note 152, at 9.

guidelines, however, it appears that the range of permissible interpretation is greatly reduced. Therefore, if Canada knows that the U.S.'s system contravenes those guidelines, Canada cannot send back an asylum seeker who will be denied protection. But with the U.S. lacking guidelines on gender related claims, Canada may reasonably assert that it does not have knowledge that the U.S. system is in violation of UNHCR guidelines. In fact, it declared that the U.S. and Canada have substantially similar law on the subject of gender-based claims.¹⁶⁵ However, Canada did commit to review the STCA one year after implementation and must, under the complicity principle, evaluate the U.S.'s handling of gender-based claims and domestic violence claims in particular.

6. Systemic indicia of unfairness

There are several issues arising in the U.S. system that provoke the question whether any refugee applicant could be sent back to the U.S. under the STCA. These issues would suggest that the entire system is unsafe for any refugee applicant, as compared to the above issues of fairness which concern specific groups of applicants (i.e. those who are barred by the one-year deadline, those who are barred because of criminal convictions, gender based claims etc.).

a) Lack of representation

U.S. law provides for a privilege of obtaining an attorney, however this arises in a limited fashion in the event an asylum seeker is placed in expedited removal.¹⁶⁶ There is no right to an attorney in the sense that the government must provide an attorney and there is a long and

¹⁶⁵ Regulations Amending the Immigration and Refugee Protection Regulations, Regulatory Impact Statement, 138 Canadian Gazette, No. 22, November 3, 2004.

¹⁶⁶ 8 U.S.C. 1362 (2003). The privilege of an attorney arises only in removal proceedings before an immigration judge so in expedited removal the asylum seeker usually faces the initial interview and credible fear hearing without the benefit of an attorney. A detained alien in expedited removal may consult with someone of their choosing. 8 U.S.C. 235(b)(1)(B)(iv).

troubled history of road blocks to preventing aliens from retaining attorneys, particularly for those in detention.¹⁶⁷ These roadblocks lead to litigation in the U.S. that established the right to access to an attorney. Statistics reveal that one-third to two-thirds of all asylum seekers are represented, depending on the stage of the process.¹⁶⁸ But representation varies widely based on geography and national group.¹⁶⁹

Canada, on the other hand, provides legal assistance through a province-based system, although the availability varies from province to province. Some provinces are accused of failing to provide legal representation, especially to detained asylum seekers.¹⁷⁰ Legal aid in Canada works on a needs-based fee system in which an applicant below an income threshold can have a province pay for the legal services rendered. Critics of the system assert that some provinces pay such a low fee that it is practically impossible to find representation and that the priorities of funding leave non-citizens rights unprotected.¹⁷¹

Studies comparing represented and unrepresented asylum seekers show that having an attorney greatly increases chances of success.¹⁷² However, there is no information about the

¹⁶⁷ See Margaret Taylor, *Promoting Legal Representation For Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647, 1663-1675 (1997).

¹⁶⁸ See Andrew I. Schoenholtz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMMIGR. L.J. 739, 742 (2002).

¹⁶⁹ *Id.* at 742-3.

¹⁷⁰ Canadian Council of Refugees, Submission of the Canadian Council of Refugees On the occasion of the visit to Canada of the U.N. Working Group on Arbitrary Detention, June 8, 2005 <<http://www.web.net/~ccr/WGAD.HTM>.; Tom Clark, *supra* note 29 222-3 (1998).

¹⁷¹ Clark, *supra* note 29, at 229-30.

¹⁷² HUMAN RIGHTS FIRST, IN LIBERTY'S SHADOW, U.S. DETENTION OF ASYLUM SEEKERS IN THE ERA OF HOMELAND SECURITY, at 39 (2004) (*hereinafter* IN LIBERTY'S SHADOW). This report referenced a study done by Georgetown University's Institute for the Study International Migration which revealed that a represented asylum seekers in the U.S. is four to six times more likely to win asylum claim. A study of asylum seekers in expedited removal proceedings by the U.S. Commission on International Religious Freedom revealed that asylum seekers without counsel had a 2% chance of being granted asylum as compared to the 25% success rate with representation. See USCIRF, *supra* note 109, at 4.

merits of the underlying claims that were part of the study. It is impossible to assess how many of the unsuccessful claims of unrepresented asylum seekers would have proven meritorious with the benefit of an attorney. It is reasonable to suppose that some number of those claims would have been successful. But it is also reasonable to suppose that some number of those claims would still fail and in fact the asylum seeker did not have representation because there was no meritorious claim to be pursued.

Additionally, it is difficult to draw a conclusion on the basis of minimum legal standards that Canada would violate its legal obligations by returning a refugee applicant who is unable to obtain legal counsel. The Refugee Convention, and ICCPR both contain provisions regarding access to courts and the right to a fair hearing in order to vindicate the rights protected.¹⁷³ The UNHCR recommends that asylum seekers receive advice and guidance at all stages of the refugee determination process.¹⁷⁴ But the only clear standard for a fair hearing is that, at the minimum, an asylum seeker must be given information on the process for applying for protection.¹⁷⁵ There are no clear international benchmarks against which to judge the U.S. system under the complicity principle.

b) Disparity in recognition rates

A second concern regarding overall fairness in refugee determination is the disparity in approval rates between the U.S. and Canada. According to a recent UNHCR study, the U.S. in 2002 had a 34.9% refugee recognition rate and Canada had a recognition rate sixty five percent

¹⁷³ See Refugee Convention, *supra* note 49, at art. 16; ICCPR *supra* note 147, at art. 14. The Refugee Convention provides that a refugee receive the same access to legal assistance as a national, but this is reserved for refugees who are habitually residing in the country.

¹⁷⁴ USCIRF, *supra* note 109, at 45.

¹⁷⁵ *Id.*

higher, at 57.8%.¹⁷⁶ It should be noted that Canada and the U.S. are two of the most generous in the world in recognizing claims, both surpassing the 2002 average refugee recognition rate of 13%.¹⁷⁷ But, with both countries adhering to the same Refugee Convention, and applying the same international definition of the term refugee, it would be reasonable to expect a closer recognition rate. Obviously, the issues raised above play some role in a lower U.S. recognition rate, but there are many other factors in both countries that also produce the significant disparity.

The UNHCR study explored a number of factors that might impact refugee recognition rate since the study noted a huge disparity among countries.¹⁷⁸ These factors may account for some of the disparity between the U.S. and Canada. Factors include the composition of the asylum seeking population for each receiving country,¹⁷⁹ the overall asylum burden each country carries, political ideology, foreign policy concerns,¹⁸⁰ cultural views and economic conditions of each receiving country. In addition, the different systems that Canada and the U.S. employ also play a role. While the U.S. is criticized as not maintaining international standards resulting in wrongful

¹⁷⁶ Kate, Mary-Anne, *The Provision of Protection to Asylum Seekers in Destination Countries*, Working Paper No. 114, United Nations High Commissioner for Refugees, May 2005.

¹⁷⁷ *Id.* at 1. Canada and the U.S. rank number one and two respectively in terms of refugee recognition. However, the study went on to include recognition rates on humanitarian grounds, in which an applicant would not need to demonstrate refugee status. If these recognition rates are included, the Canada remains number one, but the U.S. falls to third in the world.

¹⁷⁸ *Id.* The study noted that an asylum seeker in Canada was 145 times more likely to be found to have experienced persecution than the country with the lowest recognition rate, Greece.

¹⁷⁹ It should be noted that the U.S. and Canada share three countries in common when looking at a list of the top ten countries of origin for each. *See* Canadian Council for Refugees, Immigration and Refugee Board, Refugee Protection Division, Statistics 2004 <<http://www.web.net/~ccr/irb2004stats.html>, U.S. Dept. of Justice, Executive Office for Immigration Review, FY 2004 Statistical Yearbook, at J1 (2005).

¹⁸⁰ For a review of how U.S. foreign policy played a role in shaping asylum policy *see* Inna Nazarova, *Comment: Alienating "Human" from "Right": U.S. and U.K. Non-Compliance with Asylum Obligations under International Human Rights Law*, 25 *FORDHAM INT'L L.J.* 1335, 1368-1377 (2002). *See also* Kevin R. Johnson, *A "Hard Look" at the Executive Branch's Asylum Decisions*, 1991 *UTAH L. REV.* 279, (1991).

denials of refugee status, Canada is criticized as being too generous, with a system that produces false positives, granting refugee status to those that really should not receive it.¹⁸¹

Some scholars, however, challenge this perception. Professor Audrey Macklin, in a review of the STCA, drew statistics from a non-governmental organization that placed Canada and the U.S. much closer together in approval rates, 56% for Canada compared to 46% for the U.S. in 2001.¹⁸² Her assertion is that Canada is not radically more generous and in fact both countries have become much less generous over the past few years, closing the gap even more.¹⁸³ There are other non-governmental entities which provide statistics revealing no significant difference at all between Canada and the U.S.¹⁸⁴ While Professor Macklin's point was challenging the STCA's justification as a means of increasing security, it also challenges the notion that the U.S. and Canadian systems are dramatically different from one another. It, in effect, challenges the whole notion that unfairness in the U.S. system is revealed through disparity of approval rates because no great disparity exists.

Given the disagreement over approval rates and whether Canada is more generous, and the lack of comparative study large number of factors that are reflected in recognition rates, and the

¹⁸¹ Randall Hansen et al., *Report on the Workshop on Refugee and Asylum Policy in Practice in Europe and North America*, 14 GEO. IMMIGR. L.J. 801, 805 (2000).

¹⁸² Macklin, *supra* note 8, at 412. Professor Macklin cited statistics from the U.S. Committee for Refugees and Immigrants to support her contention that there is only a ten percent difference. The difference may be explained the fact that the U.S. has two different systems for processing refugees, an affirmative process whereby a refugee applicant approaches the U.S. government and asks for asylum. A second process is called defensive asylum, in which a refugee applicant faces deportation by an immigration judge and asks for asylum as a relief for deportation. Canada only has one process before an Immigration and Refugee Board. It may be that some estimates of U.S. approval rates include the affirmative process as well as the defensive claims, whereas others only compare the defensive claims because it is comparing approval rates by U.S. immigration courts with the Canadian panel decisions.

¹⁸³ *Id.* at 413.

¹⁸⁴ Another source found on the web asserted that Canada and the U.S. were practically the same. See The New Internationalist, number 350, devoted to facts on refugees at <<http://www.newint.org/issue350/facts.htm> last visited on February 1, 2006>

lack of developed standards for refugee determination systems, it is impossible to conclude on the differing recognition rates alone that the U.S.'s system is so unfair as to be in violation of international law. The entire U.S. system cannot be judged out of compliance as to make any return a violation of Canada's obligations under the Refugee Convention. This issue should, however, encourage the U.S. and Canada to examine the factors that effect recognition rates to more precisely determine whether there is a disparity and how the disparity occurs.

c) Reversal of administrative asylum decisions by U.S. courts

A very recent phenomenon that perhaps evokes the greatest concern over the entire U.S. system is the growing frequency and tone with which federal judges are reversing decisions by the immigration administrative system. The U.S. system is structured so that after a hearing before the immigration judge and an administrative appeal, the federal circuit courts of appeal are the last body to which an asylum applicant can appeal as of right.¹⁸⁵ Federal courts have been experiencing a very dramatic upsurge in appeals lately, connected primarily to two events. First, changes were made in the administrative structure and procedure in 2002 to dissolve a large backlog of cases handled by the administrative appeals body, the Board of Immigration Appeals (BIA).¹⁸⁶ Streamlining of procedures resolved a large number of cases but had the effect of moving a large of cases from the administrative system into the federal courts.¹⁸⁷

¹⁸⁵ 8 U.S.C. sec. 1252 (2005). Of course, the U.S. Supreme Court may grant certiorari in immigration cases, but that is not by right, and it happens in a small percentage of cases.

¹⁸⁶ Elizabeth Cronin, John Palmer, Stephen Yale-Loehr, *Why Are So Many People Challenging Board of Immigration Appeals Decisions In Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, CORNELL LAW SCHOOL WORKING PAPER SERIES, PAPER 18, at 2 (2005) available at <<http://lsr.nellco.org/cornell/clsops/papers/18>>(last visited February 7, 2006). Immigration Judges and the Board of Immigration Appeals are part of the Executive Office for Immigration Review, which is part of the Department of Justice under the Attorney General of the United States.

¹⁸⁷ *Id.* The streamlining features included reducing the size of the B.I.A., providing for a review by a single member of the B.I.A. rather than the usually panel of three judges, and allowing a single B.I.A. member to affirm an immigration judge without writing an opinion.

Second, this surge is the result an increase in the appeal rate as well.¹⁸⁸ That is, more people are appealing their decisions to the federal courts after completion of administrative appeals.

Statistics on this phenomenon are remarkable. Nationwide, the number of appeals to the federal courts from the immigration system shot upward from approximately 270 per month in April of 2002 to approximately 1,100 per month in April of 2004. Several circuits have been particularly hard hit, with appeal rates soaring one thousand percent in the same time frame.¹⁸⁹ With this dramatically increased caseload, one federal judge has handed down reversals with declarations that the administrative system is fundamentally flawed. Judge Richard Posner, a famous jurist sitting on the seventh circuit, stated in a very recent opinion “the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice.”¹⁹⁰ And Judge Posner drew attention to the problem by starting his opinion with the statistic that forty percent of immigration appeals were reversed by the seventh circuit court in 2005.¹⁹¹ Other federal judges have joined Judge Posner in expressing their exasperation at the quality of administrative justice.¹⁹² The majority of these appeals and reversals are asylum cases.¹⁹³

The reasons for the federal judges’ declarations are numerous. Factual errors, legal errors in both procedure and substance, extreme bias, unsupported conclusions, and unreadable opinions

¹⁸⁸ *Id.*

¹⁸⁹ See e.g. the experience of the second circuit court of appeals. Mark Hamblett, *Circuit Struggles to Cope with Upsurge in Asylum Appeals*, N.Y. LAW JOURNAL, Nov. 25, 2005 at 1. See also Adam Liptak, *Courts Criticize Judges’ Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, at A1.

¹⁹⁰ *Benslimane v. Gonzalez*, 430 F.3d 828 (7th Cir., 2005). In the particular case, Judge Posner was referring not only to asylum cases, but to all appeals of immigration cases on the merits.

¹⁹¹ *Id.* at 1.

¹⁹² See Liptak, *supra* note 189, at A22.

¹⁹³ *Id.* at A1. Asylum and other protection claims were included in the streamlining procedures that produced the flood of appeals in the federal courts. See Cronin et al., *supra* note 186, at 36.

have been identified in various decisions.¹⁹⁴ Federal judges have begun naming individual immigration judges in opinions for what they perceive to be inappropriate behavior toward asylum seekers.¹⁹⁵ With this mounting criticism from the federal bench, the Attorney General ordered a review of all immigration courts and the BIA to address those “whose conduct can aptly be described as intemperate or even abusive and whose work must improve.”¹⁹⁶ Subsequent reports reveal the absence of a formal disciplinary system for judges who become abusive or demonstrate a pattern of incompetence.¹⁹⁷

Do these publicly acknowledged problems in the adjudication of immigration cases mean that the U.S. system is so flawed as to be unfair to any asylum seeker who is returned under the STCA? The answer to this question turns partly on whether the federal judges’ complaints reveal a statistically significant number of cases. There are very few studies of the percentage of cases that are overturned by the federal courts. Judge Posner cited a list of cases demonstrating that other federal courts have acknowledged the problem. However, most of the cases cited in Judge Posner’s decision largely focus on a particular judge’s inappropriate or biased behavior rather than alleging a systemic problem.¹⁹⁸ And in response to Judge Posner’s declaration, the U.S. government asserts that most immigration judges and the BIA do their job properly and the government wins most of the appeals in federal court, citing a figure of a ninety percent success rate.¹⁹⁹ While both figures are more than anecdotal, neither provides a complete picture of just how often federal courts overturn the B.I.A. or immigration judges.

¹⁹⁴ *Benslimane v. Gonzalez*, 430 F.3d 828 (7th Cir., 2005).

¹⁹⁵ *See Wang v. Attorney General*, 423 F.3d 260, 263 (3rd Cir. 2005).

¹⁹⁶ The Attorney General, Memorandum to Immigration Judges, January 9, 2006 (copy on file with the author).

¹⁹⁷ Pamela A. MacLean, *immigration judges come under fire*, N.Y. LAW JOURNAL, Feb. 6, 2006.

¹⁹⁸ *Benslimane v. Gonzalez*, 430 F.3d 828, (7th Cir., 2005).

¹⁹⁹ Liptak, *supra* note 189, at A1.

One of the few recent studies done on appeals to the federal courts explored whether, among many other variables, increasing error rates by the immigration judges and BIA was a cause for the growth in the rate of appeals.²⁰⁰ The study used a sampling of BIA decisions and federal cases,²⁰¹ and calculated the reversal rate (number of cases in a given month that were filed and then look at how many of those cases were ultimately overturned). The authors concluded that the reversal rate, while fluctuating widely in the past, reveals no increase in the error rate.²⁰² However, the authors cautioned that the study does not look at all BIA decisions, only those appealed to federal courts, and it covers the short period after the streamlining measures took effect in 2002.²⁰³

Of course, this study begs the question, what is an acceptable error rate even if a more complete study can be done? It may be easier to conclude what is not an acceptable error rate such as that evidenced by the forty percent reversal rate used by Judge Posner. However, that figure comes from a single federal judge, on a single court, regarding a single year. Further, the study mentioned above looked into the reversal rates in three specific federal courts over a ten year period, from 1994-2004.²⁰⁴ Those rates are far lower than the rate cited by Judge Posner, although the data for the past two years is incomplete.²⁰⁵ Lack of a more thorough study makes it impossible to conclude that the rate of error is so high that the system is fundamentally flawed.

²⁰⁰ Cronin, *supra* note 186.

²⁰¹ *Id.* at 40-48.

²⁰² *Id.* at 61-3.

²⁰³ In fact, the authors of the study found that the reversal rate fell significantly after March of 2002 but assert that this is misleading because there are far more cases appealed in a given month now as compared to the number of cases that being resolved. *Id.* at 62.

²⁰⁴ *Id.* at 77.

²⁰⁵ *Id.* at 79-82.

Another response to the phenomenon of federal judges overturning the BIA and immigration judges, is to draw the opposite conclusion; the reversals are evidence that the U.S. system does meet international standards. While errors are made by the administrative agencies, the federal courts are performing their role, catching the errors and using their opinions to send a message to the government when the system moves toward an unacceptable level of mistakes at the administrative level.²⁰⁶ From this perspective, Canada may assert that it is not complicit in a violation of law by the U.S. because the U.S. system is regulating itself properly. The counter-argument would be that these cases revealing bias and error by immigration judges are the tip of the iceberg since many cases are not appealed because the applicant gives up. While this counter-argument has intuitive appeal, there is no data on which to base a conclusion. All three systemic issues (lack of counsel, disparity in approval rates, federal courts overturning the BIA) lead to problems of lack of international standards and lack of data about the U.S. system to assess its overall fairness.

C. Violations of other refugee and human rights

Applying the complicity principle to other rights protected in the Refugee Convention leads to other problems with Canada's participation in the STCA due to U.S. practices that violate the spirit and letter of the Refugee Convention. Further, applying the complicity principle to other human rights obligations of Canada raises interesting challenges regarding the scope of the principle itself.

1. Detention

²⁰⁶ According to Judge Posner, however, this has been a problem for several years and there has been a failure to respond by the government. *See Niam v Ashcroft*, 354 F.3d 652, 654 (7th Cir., 2003).

First, and perhaps most significantly, is the issue of detention. In 1996 the U.S. started routinely detaining asylum seekers who enter the country without travel documents (e.g. a passport) or with fraudulent documents.²⁰⁷ Detention goes hand in hand with the expedited removal process discussed above.²⁰⁸ This policy initially applied to official ports of entry (POEs), but 2004 saw a significant expansion to points in between POEs and inland of the border.²⁰⁹ While those detained represent a small number of the total number of asylum seekers in the U.S.,²¹⁰ and many asylum seekers are eligible for parole,²¹¹ some asylum seekers remain detained for the full period in which they are in proceedings, which can last months or even years.²¹² For a brief period in 2003 the U.S. stated that it would extend mandatory detention to nationals of countries in which “al-Qaeda, al-Qadea sympathizers and other terrorists groups” are known to have operated (mostly middle eastern and Islamic countries).²¹³ Additionally, post September 11, the U.S. announced it would detain all Haitians entering the U.S. without documents, regardless of their intent to request asylum.²¹⁴ As a result of these mandatory

²⁰⁷ 8 U.S.C. 1225(b)(1)(B)(iii)(IV).

²⁰⁸ See *supra* notes 93-96 and accompanying text.

²⁰⁹ Department of Homeland Security, Press Release, August 10, 2004

<<http://www.dhs.gov/dhspublic/display?theme=43&content=3930&print=true>.

²¹⁰ This is due to the fact that most asylum claims are raised by aliens who have already entered the U.S., lawfully or otherwise who currently are not subject to expedited removal. Those subject to detention for entering the U.S. without documents or with fraudulent documents comprise a small percent of the total number of asylum seekers. For example, in 2002 there 100,690 asylum seekers, 80,097 of whom filed affirmatively with the government, meaning the asylum seeker had already entered the U.S. and was not caught at the border with no documents or fraudulent documents. See Migration Policy Institute, U.S. Detention of Asylum Seekers and Human Rights, March 1, 2005 <<http://www.migrationinformation.org/Feature/print.cfm?ID=296>.

²¹¹ There is no official regulation on granting parole. Asylum seekers going through the expedited removal process who establish a credible fear of persecution are eligible for parole if: they establish that they have a credible fear of persecution, there is no question about their identity, a U.S. citizen or other family members with lawful presence in the U.S. are willing to house and support the asylum seeker while their claim is pending, they pose no danger to the U.S. and are not ineligible for asylum. IN LIBERTY’S SHADOW, *supra* note 172, at 8 (2004).

²¹² UNITED STATES COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, STUDY ON ASYLUM SEEKERS IN REMOVAL, VOL. II EXPERT REPORTS, STATISTICAL REPORT ON DETENTION, FY 2000-2003, AT 337 (2003) (*hereinafter* USCIRF II).

²¹³ Press kit from the Department of Homeland Security, announcing “Operation Liberty Shield”

<<http://www.dhs.gov/dhspublic/display?theme=43&content=4234&print=true>>

²¹⁴ Andrew I. Schoenholtz, *Refugee Protection in the United States Post-September 11*, 36 COLUM. HUM. RTS. L. REV. 323, 364 (2005).

detention policies and very limited parole, which is not reviewable by any court,²¹⁵ tens of thousands of asylum seekers have been detained over the past several years.²¹⁶

Both the Refugee Convention and other international human rights treaties only permit detention under specific circumstances. As with the above issues, the question is whether the U.S. practice is consistent with international law and whether Canada can maintain its international obligations when sending an asylum seeker back to the U.S. knowing they will be subject to detention under U.S. law.

As noted above, Article 31 of the Refugee Convention forbids the imposition of penalties on refugees who have come unlawfully into the territory of a country party to the Convention.²¹⁷ Further the Refugee Convention prohibits restriction on the physical movement of refugees except those restrictions necessary and only to those whose status is not yet regularized.²¹⁸ The UNHCR guidelines for the detention of asylum seekers start with the proposition that asylum seekers should not be detained unless there are exceptional reasons.²¹⁹ Exceptional reasons include verifying identity, determining whether there is a valid claim for refugee status, deal with asylum seekers deliberately trying to mislead authorities or to protect national security or order.²²⁰ Along with these limited reasons for detention, the UNHCR guidelines proposed procedural safeguards. These include informing the asylum seeker of the reasons for detention,

²¹⁵ 8 U.S.C. 236(e).

²¹⁶ IN LIBERTY'S SHADOW, *supra* note 172, at 7.

²¹⁷ Refugee Convention, *supra* note 49, at art. 31.

²¹⁸ *Id.* However, the Convention seems to imply that penalties are permissible if the refugee does not present themselves "without delay" and provide and "show good cause" for this or her unlawful presence.

²¹⁹ UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, GUIDELINES ON THE DETENTION OF ASYLUM SEEKERS, GUIDELINES 1 & 2.

²²⁰ *Id.*

allowing an asylum seeker to challenge the individual determination for their detention, and the right to contact the local UNHCR office.²²¹

Additionally, the ICCPR, to which both the U.S. and Canada are party, in Article 9 forbids arbitrary arrest and detention.²²² The UNHCR, in a study of the growing use of detention, analyzed the current justifications for a broad detention policy. The UNHCR concluded that detention is arbitrary and contrary to human rights norms, if it fails to make individualized determinations about the reason for detaining a particular person.²²³ Additionally, the ICCPR in Article 10 requires that a person detained be brought before a court without delay to have the lawfulness of their detention adjudicated.²²⁴

The U.S. gives two primary justifications for its broad detention policy. The first is the high absconding rate for those who go through the immigration process and are suppose to be deported from the U.S. The U.S. government asserted that the numbers of aliens absconding ranged from eighty five to ninety five percent prior to the broader use of detention.²²⁵ This compares with only ten percent for aliens who are detained.²²⁶ Secondly, in the wake of September 11, mandatory detention for asylum seekers from particular countries is justified on public safety and national security.

²²¹ *Id.*

²²² ICCPR, *supra* note 147.

²²³ UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, EXECUTIVE COMMITTEE OF THE HIGH COMMISSIONER'S PROGRAMME, DETENTION OF ASYLUM-SEEKERS AND REFUGEES: THE FRAMEWORK, THE PROBLEM, AND RECOMMENDED PRACTICE EC/49/SC/CRP.13, June 4, 1999

²²⁴ ICCPR, *supra* note 147, at art. 10.

²²⁵ See Hansen, et al., *supra* note 181, at 806-7; Martin, *supra* note 106, at 702; DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION AND CUSTOMS ENFORCEMENT, ENDGAME: OFFICE OF DETENTION AND REMOVAL STRATEGIC PLAN, 2002-2012.

²²⁶ Martin, *supra* note 106, at 702.

In a scholarly critique of these rationales, Professor Michele Pistone asserts that the true reason for the broad detention policy in the U.S. is deterrence of undocumented immigration, not prevention of absconding.²²⁷ Professor Pistone's research demonstrates that huge discrepancies exist in the rate of parole in various parts of the U.S.²²⁸ and reveals that bed space governs parole choices. If a detention facility has bed space, then asylum seekers are denied parole and remain behind bars.²²⁹ In fact, Pistone's analysis continues, changes in the U.S. law make absconding far less likely, revealing the true reason for detention is deterring those without documents from coming to the U.S.²³⁰ In spite of this data, the U.S. continues to detain between ninety five and ninety eight percent of those without documents for up to ninety days,²³¹ and detains an increasing proportion of asylum seekers for the full duration of proceedings.²³²

In addition to this critique of the motive for the U.S. detention policy, further and more precise statistical analysis challenges the absconding rate asserted above. A distinction between aliens who are in proceedings (e.g. those with pending asylum and withholding claims) and those with final removal orders must be made. Once those two groups are separated out, the absconding rate changes dramatically. The U.S. government now acknowledges that the absconding rate for those who are going through proceedings is somewhere between twenty two to thirty percent and the higher figures are for those who have completed their cases and have an

²²⁷ Michele Pistone, *Justice Delayed is Justice Denied*, 12 HAR. HUM. RTS. J. 197, 224 (1999).

²²⁸ The variance runs between a ninety-seven percent parole rate in Harlingen Texas, to under four percent parole rate in Newark, New Jersey. Migration Policy Institute, U.S. Detention of Asylum Seekers and Human Rights, March 1, 2005 <<http://www.migrationinformation.org/Feature/print.cfm?ID=296>.

²²⁹ *Id.* at 228-232.

²³⁰ *Id.* at 232-240. For example, the use of the expedited removal process means that most people who enter without documents are automatically sent back to their own countries. Few make a request for asylum. Of those that do make an asylum claim, the majority are found to have a credible fear and they have incentives to appear at hearings and participate in the process rather. This is due to the fact that most applicants cannot work lawfully until their claims are approved and a grant of asylum most likely leads to lawful permanent residence in the U.S. These assertions are supported by the three study of the expedited removal process. See Musalo, *supra* note 94.

²³¹ USCIRF, *supra* note 109, at 371-4.

²³² *Id.* at 333.

order for removal issued against them.²³³ These statistics support Professor's Pistone's conclusion that the changes in 1996 make it less far likely that asylum seekers will simply slip into the general population as undocumented. They have incentives to appear at their immigration hearings and are doing so.

With regard to the rationale of detention for safety and national security, there has been no report of how mandatory detention of national groups has made the U.S. safer. Since the policy did not require any individual and particular linkage between the asylum seeker and a terrorist organization, there is no evidence that any of those detained possessed any information helpful to the U.S. anti-terrorism efforts or deterred conduct that threatened the U.S. The UNHCR, in response to the U.S. announcement of mandatory detention based upon nationality, issued a statement that such a policy was a variance with international human rights norms and standards.²³⁴ The U.S. officially ended the mandatory detention policy for aliens from the thirty-three designated countries a month after it started.²³⁵ However, it has not ended the mandatory detention of Haitians and many assert there is an unofficial practice of mandatory detention for Muslims and those from the Middle East.²³⁶

Added to the doubt over the true motive for and efficacy of U.S. detention policy is the issue of detention conditions. Detention in the U.S. occurs in several different types of facilities. There are centers operated by the federal agencies, there are privately contracted detention

²³³ Migration Policy Institute, U.S. Detention of Asylum Seekers and Human Rights, March 1, 2005 <<http://www.migrationinformation.org/Feature/print.cfm?ID=296>

²³⁴ UNHCR News Story <<http://www.unhcr.ch/cgi-bin/texis/vtx/print?tbl=NEWS&id=3e42547>.

²³⁵ Posting on Human Rights First website, <http://www.humanrightsfirst.org/media/2003_alerts/0515.htm.

²³⁶ See IN LIBERTY'S SHADOW, *supra* note 172, at 25.

facilities and, most disturbingly, regular state and local jails throughout the U.S.²³⁷ Placing asylum seekers in regular prisons, in close proximity to actual criminals, violates the UNHCR guidelines.²³⁸ Further, studies and news reports reveals myriad concerns about the inhumane treatment of detainees,²³⁹ interference with their ability to secure legal counsel and their ability to present their claim for protection.²⁴⁰ The UNHCR has repeatedly expressed concern over this practice.²⁴¹

Without individualized assessments of reasons to detain particular asylum seekers, the decision to detain asylum seekers on the basis of nationality, and a parole policy guided by the need to fill detention beds that is not reviewable by any court, the U.S. is at variance with fundamental refugee and human rights law. Applying the complicity principle's standard, Canada should not return an asylum seeker it knows will be detained contrary to the Refugee Convention and the ICCPR. The challenge comes in applying the "knowing" standard to individual cases of asylum seekers.

There are cases in which it is almost certain an asylum seeker will be detained if returned to the U.S. without individualized assessment. Asylum seekers from Haiti and from Muslim and Middle Eastern countries face mandatory detention for the duration of their proceedings. There are cases in which there is a high probability that an asylum seeker will be detained without individualized assessment of the need. Those without travel documents or with fraudulent

²³⁷ Musalo, *supra* note 94, at 33.

²³⁸ UNHCR GUIDELINES ON DETENTION OF ASYLUM SEEKERS, *supra* note 219.

²³⁹ See IN LIBERTY'S SHADOW, *supra* note 172, at 21 (citing a report of the Office of Inspector General of the U.S. Department of Justice). See also Pistone, *supra* note 227, at 207-212;

²⁴⁰ *Id.* at 215-225.

²⁴¹ See UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, MID YEAR REPORT, 2002, NORTH AMERICA AND CARIBBEAN REGIONAL OVERVIEW, 220-222 (2002).

documents facing expedited removal stand a very high likelihood of being detained.²⁴² In both cases, the absence of individualized assessment of the need for detention and the U.S. policy that stands the presumption against detention on its head, make it easy to apply a knowing standard in which Canada would become complicit in the U.S. breaching the Refugee Convention and the ICCPR.

Beyond those two groups of asylum seekers, it becomes more difficult to assess in the individual case whether the U.S. might violate international norms on detention. Canada should, under the minimum legal standards framework, make an assessment of whether it would detain an asylum seeker. Canada's detention policies do not have automatic detention except for a small class of people identified as a security threat and Canada's law requires an independent administrative review of any detention lasting for 48 hours or more.²⁴³ This is not to suggest that Canada's practices are above criticism. Groups in Canada have expressed concern over Canada's practice in the past year, including regional inconsistencies in detention rates, detention in provincial jails, and failures to accommodate people with mental disabilities.²⁴⁴ However, Canada's policies are far closer to UNHCR guidelines and minimum legal standards require it to make an assessment of the need for detaining an asylum seeker before returning him or her under the STCA.

²⁴² In 2002 nearly ninety-five percent of those who had credible fear hearings in expedited removal cases were detained.

²⁴³ Under Canadian law an immigration officer must find the detention necessary to complete an examination of the admissibility or there are reasonable grounds to consider the person a threat to national security or guilty of violating human or international rights. Immigration and Refugee Protection Act, ch. 27, 2001 S.C. sec. 55 (Can.). There is a 48 hour period in which Canada's administrative agency must review the grounds for detention. This is followed up by a review within one week and another within 30 days. Sec. 57.

²⁴⁴ Canadian Council for Refugees, Submission on the Occasion of the visit of the U.N. Working Group on Arbitrary Detention, June, 2005. <<http://www.web.net/~ccr/WGAD.HTM>.

2. Basic Human Needs

A second issue that extends the complicity principle beyond the protections of the Refugee Convention is the provision of basic human needs. While this issue arises in the European context in that poorer Eastern European countries may not be able to provide basic needs for asylum seeker, it also, embarrassingly, arises if Canada sends back to the U.S. asylum seekers under the STCA.

Asylum seekers in the U.S. receive no direct public assistance at all, no medical care and no social support such as food stamps or housing (unless you consider those asylum seekers who are detained as receiving government benefits). They are treated effectively as undocumented aliens.²⁴⁵ In addition, asylum seekers are not permitted to work for the first six months that their applications are pending.²⁴⁶ They must rely upon the mercy of relatives, friends and nongovernmental organizations.

The restriction on public support and on work authorization have been in place since 1996, and were enacted to curb what was seen as abuse of the asylum system. Congress considered the asylum process rife with frivolous claims filed only to obtain work authorization. By denying the opportunity to work for six months and then gearing the administrative system to produce a decision on an asylum application in six months, Congress hoped to eliminate work authorization or receipt of public benefits as an incentive. However, the average asylum applicant must wait a

²⁴⁵ See Fredriksson, *supra* note 30, at 757 (2000).

²⁴⁶ 8 U.S.C. sec. 1158(d)(2)(2003).

year or more for the full processing of an asylum application claim, including appeals, and must figure how to eat, cloth him or herself and attend to health care needs in the meantime.²⁴⁷

In many cases this absence of support impacts the pursuit of the asylum claim. An absence of benefits means that person may be homeless, generating difficulties in maintaining contact with potential witnesses and obtaining evidence. An absence of support also means an absence of mental health care and of dealing with possible emotional trauma that caused the person to flee. A study of asylum seekers in a shelter in New York documents how the circumstances that made a person into a refugee can cripple him or her in asserting a claim.²⁴⁸ Without access to mental health care in many cases, the asylum seeker is handicapped in presenting a convincing claim.

If asylum is granted, then welfare benefits and work authorization become available. However, the receipt of benefits is time limited. Asylees and refugees may receive public benefits for only seven years after which they are cut off, regardless of need.²⁴⁹

In Canada, a dramatically different policy operates. Once an alien is deemed eligible to apply for asylum they receive health insurance, access to education, and social assistance.²⁵⁰ This support continues while their claims are pending. If refugee protection is granted, then public benefits become available as they would for any Canadian citizen.²⁵¹

²⁴⁷ Fredriksson, *supra* note 30, at 760.

²⁴⁸ Hilary N. Weaver, Janine Hunt-Jackson, Barbara Burns, *Asylum Seekers Along the U.S.-Canada Border*, 1 J. OF IMMIGRANT & REFUGEE SERVICES, 81, 89-96 (2003). Although the study concerned asylum seekers who were denied status in Canada, they remained in a U.S. shelter in Buffalo N.Y. and discussed the problems of memory loss and psychological impediments to presenting a refugee claim.

²⁴⁹ Fredriksson, *supra* note 30, at 762.

²⁵⁰ See <http://www.asylumlaw.org/legal_tools/index.cfm?category=59&countryID=35>.

²⁵¹ See <<http://www.cic.gc.ca/english/newcomer/menu-advice.html>>.

Does this disparity reveal a violation of the complicity principle? The Refugee Convention does state that refugees have a right to employment authorization, housing, and public support, but this applies only after refugee status has been determined.²⁵² So, the failure to grant benefits or authorization to work prior to a deciding a claim is not a violation. However, Canada has ratified another human rights treaty that creates legal obligations to provide social support, the International Covenant on Economic, Social and Cultural Rights (ICESCR). While the U.S. has not ratified this treaty, the complicity principle prohibits Canada for violating any international legal obligations it has to give support to refugees and asylum seekers by sending them to the U.S.

The ICESCR was established to recognize that genuine freedom and protection of human rights requires protection of economic and social rights as well as the civil and political rights protected by the ICCPR. To that end, countries which ratify the ICESCR recognize a right to work (Article 6), right to just and favorable conditions of work (Article 7), a right to social security (Article 9), the right to an adequate standard of living (Article 11) and the right to enjoy the highest attainable standard of physical and mental health (Article 12).²⁵³ These rights are exercised without distinction to national or social origin (Art. 2(3)).

But do these rights establish a minimum legal standard to which Canada may be held? And if they do, does the refusal to grant asylum seekers public benefits violate these rights that under the complicity principle would forbid Canada from returning asylum seekers under the STCA?

²⁵² Legomsky, *supra* note 9, at 652. Refugee Convention, *supra* note 49, at art. 17, 21, 23. The Refugee Convention gives such benefits to refugees lawfully staying in the territory.

²⁵³ International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, art 2(3), art.6, art.7, art.11, art.12, 993 U.N.T.S. 3. (*hereinafter* ICESCR)

The question of a clear legal standard arises because the ICESCR states that its provisions should be implemented to the maximum extent of resources, for a progressive realization of its benefits.²⁵⁴ But the answer to the first question is definitely yes, there is a clear international legal obligation on Canada to provide subsistence to refugees and immigrants.²⁵⁵

The second question, whether Canada's positive legal obligations under the ICESCR extend to those who have yet to receive asylum but are in the application process, is harder. Interpretation of the provisions of the ICESCR does not provide a clear cut obligation to do so. While it would be in keeping with the objectives of the IECSCR to provide asylum seekers with a full array of benefits, it is not mandated like the duty not to *refoule* or the prohibition of detention as punishment for unlawful presence.

One could construct the argument that once Canada decides to give benefits to asylum seekers, it now has an obligation to all asylum seekers and it cannot avoid this obligation by returning some to the U.S. This would be an assumption of duty argument under the ICESCR. The difficulty, of course, is in finding support in international law to make such a claim. There is not enough support to conclude that Canada would violate international law under the complicity principle.

²⁵⁴ Stephen Legomsky asserted the progressive nature of the ICESCR makes it a "thin reed" for asserting that return of an asylum seeker would violate rights to subsistence. See Legomsky, *supra* note 9, at 652.

²⁵⁵ The body established to monitor the ICESCR, the Committee on Economic, Social and Cultural Rights, pursuant to the authority granted to it by the United Nations, issued general comments on the nature of the obligations undertaken by parties to the ICESCR. It declared that while the obligations are progressive in nature, and there is flexibility in deciding appropriate means, state parties are under a definite legal obligation to ensure full realization of economic, social and cultural rights. COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, GENERAL COMMENT 3, E/1991/23 (1991) available at < <http://www.unhchr.ch/tbs/doc.nsf>>.

D. Other issues

The STCA does not possess some of the problems manifested in the European system of safe third country agreements. For example, there does not appear to be a problem with breaches of confidentiality by the U.S., at least as far as what has been revealed in the legal literature or reported cases.²⁵⁶ The U.S. has regulations on the maintenance of confidentiality of asylum seekers, which may only be revealed on written waiver by the asylum applicant or by the Secretary of the Department for Homeland Security.²⁵⁷

On the issue of examining links an asylum seeker may have with the U.S. or Canada, the STCA may fare a little better than the European system. The STCA does share with its European counterparts a lack of official recognition of the links that an asylum seeker has to the U.S. as opposed to Canada or vice versa, except for the interest of family unity by providing a close relative exception.²⁵⁸ However, the STCA does contain Article 6, which is intended to give the two countries some flexibility in individual cases by empowering them to consider a claim when it is “in its public interest to do so.”²⁵⁹ The U.S. regulations implementing the agreement recognize that this category could include factors such as humanitarian interest, or health concerns.²⁶⁰ Yet the U.S. has stated that these additional factors may or may not be considered on a case by case basis. There is no assurance that an asylum seeker’s other links will ever be considered, but the STCA provides for the possibility.

²⁵⁶ The U.S. Department of Homeland Security very recently issued an interoffice memorandum providing a fact sheet on confidentiality. It contains the federal regulations on confidentiality of asylum applications, found in 8 C.F.R. 208.6, and answers to frequently asked questions. U.S. Department of Homeland Security, Interoffice Memorandum, HQASM 120/12.8 (June 15, 2005).

²⁵⁷ 8 C.F.R. 208.6.

²⁵⁸ The STCA does not provide for any other specific link to guide application, such as language, religious belief, or other cultural reference. For example, some criticised the STCA for not having an exception for French speakers who may be drawn to Quebec because it is a Francophonic province.

²⁵⁹ STCA, *supra* note 31, at art. 6.

²⁶⁰ 69 Fed. Reg. 69,483 (2004) (to be codified at 8 C.F.R. pts. 208, 212, 235, 1003).

There is an additional problem generated by the STCA not found in comparison to other agreements, however. As described above, the STCA only applies to those asylum seekers who come across land POEs and, in certain limited cases, airports. Much criticism of this provision has already been leveled because it encourages aliens wanting to avoid return to the U.S. to enter Canada unlawfully.²⁶¹ Professor Macklin asserts that in fact one should expect an increase in the smuggling and trafficking of persons into Canada and therefore the STCA undercuts the U.S.'s and Canada's commitment to stopping such practices.²⁶² This commitment is expressed through recent U.S. legislation²⁶³ that established an inter-agency task force, requires the State Department to report on the efforts of other countries to stop the trafficking of persons, and ties foreign aid to the efforts of a country to stop trafficking.²⁶⁴ The STCA's impact is irreconcilable with the stated goals of U.S. law in this regard.

VI. Conclusions

Canada will violate its international legal obligations through the complicity principle if it sends back to the U.S. asylum seekers barred from asylum under the one-year filing deadline, facing exclusion from protections under criminal and terrorism grounds, or facing mandatory and prolonged detention. Other provisions of U.S. law, such as the expedited removal process, the and the more limited protection for gender-based claims cannot be pinned down as violations of international law because minimum legal standards are not as solid or the U.S. position is not yet

²⁶¹ Canadian Council for Refugees, 10 Reasons Why Safe Third Country Agreement Is A Bad Deal, <<http://www.web.net/~ccr/10reasons.html>; Tom Clark, *Why Safe Third Country Is A Bad Deal*, Refugee Update, No. 53 (Spring 2005).

²⁶² Macklin, *supra* note 8, at 419-424. The difference between a smuggled and a trafficked person is that a smuggled person is a willing participant in the process whereas a trafficked person is in a position of having to work in order to pay for their transit into a country. *Id.*

²⁶³ Trafficking Victims Protection Act, 22 U.S.C. 7101 et seq. (2003)

²⁶⁴ *Id.* at 7107.

clear. But, these features certainly mean less protection for those seeking it. Lastly, there are other features of the U.S. refugee determination system which demonstrate a lack of concern for the well-being of asylum seeker, such as the absence of material support, and mental and physical health care as well as the absence of legal assistance.

A. Challenging the STCA

Canada was aware of these concerns when entering into the STCA. Many organizations sent comments to the Canadian government raising many of the issues above.²⁶⁵ Advocates on both sides of the border asserted that Canada needed to amend the STCA or exercise its authority in promulgating regulations to exclude certain groups from coverage under the STCA. In spite of this awareness, Canada did not do so.²⁶⁶ This leads to the question: what can be done to address the concerns raised above about the STCA?

1. Domestic remedies

Plans are underway to bring a civil suit in domestic Canadian courts by a coalition of non – profit agencies.²⁶⁷ The central point of attack will be that the STCA is inconsistent with the Canadian Charter of Rights and Freedoms, principally section 7, which protects life, liberty and security and prohibits deprivation except “in accordance with principles of fundamental fairness.”²⁶⁸ The argument will mostly likely be that the right to request protection under the

²⁶⁵ See AILA’s Canada Chapter Comments on Safe Third Country Regulations, AILA Info Net <<http://www.aila.org/content/default.aspx?docid=8063>; Canadian Council for Refugees, Comments to the Standing Committee on Citizenship and Immigration on the Proposed Safe Third Country Regulations, November 14, 2002 <<http://www.web.net/~ccr/s3cregscommentsstandcomm.html>.

²⁶⁶ Canada did recognize in its regulations that it cannot send an asylum seeker back to the U.S. under the STCA if that person risked facing the death penalty. Regulations Amending the Immigration and Refugee Protection Regulations, 138 Canadian Gazette, No. 22, November 3, 2004.

²⁶⁷ Macklin, *supra* note 8, at 424.

²⁶⁸ CA. CONST. (CONSTITUTION ACT, 1982) PT I (CANADIAN CHARTER OF RIGHTS AND FREEDOMS), 7.

Refugee Convention is a liberty interest that the Canadian Charter protects and *refouling* asylum seekers to the U.S. results in a deprivation of liberty and security. This domestic suit would challenge the entire STCA as a violation of the Charter, requiring a complete rescission of the agreement. This argument will be bolstered by the fact that the Canadian Supreme Court has already recognized that section 7 applies to all humans within Canada and applies to those seeking refugee protection.²⁶⁹

Other fora in which to challenge the STCA are found at the regional and international level. The regional and international human rights protection regimes mentioned above provide monitoring and enforcement mechanisms to which Canada has made itself accountable. This does not mean that litigants can pursue claims in these other for a concurrently or in alternative to the domestic claims. Rather, the regional and international mechanisms rule as inadmissible claims that are concurrently brought before other domestic and international tribunals. Further, exhaustion of domestic remedies is a requirement before bringing a claim at the regional or international level.

2. Regional remedies

At the regional level, one mechanism that monitors the American human rights system is the Inter-American Commission on Human Rights (the Commission).²⁷⁰ There is a second body, the Inter-American Court on Human Rights (the Court). However, the Court depends upon consent

²⁶⁹ Macklin, *supra* note 8 at 424-426; Singh v. Canada (Minister of Employment and Immigration) [1985] 1 S.C.R. 177.

²⁷⁰ See Inter-American Commission's website at <<http://www.cidh.oas.org/what.htm>> (last visited February 16, 2006).

of the parties for its jurisdiction and neither Canada nor the U.S. currently appear before it.²⁷¹

The Commission, on the other hand, is empowered to examine whether a party is abiding by their duties as set forth in the American Declaration, which was adopted at the time the OAS was established.²⁷²

Comprised of seven experts, the Commission can receive petitions from individuals and non-governmental organizations asserting that a right under the American regime has been violated.²⁷³ The Commission decides upon the admissibility of the petition and then works towards friendly settlement of the dispute.²⁷⁴ If unable to do so, the Commission will issue findings of fact and declare whether a country party is in violation of its obligations.²⁷⁵ Countries that are part of the OAS and the American human rights regime are expected to respond to the Commission during its inquiry.

Canada's return of asylum seekers to the U.S. has already been the subject of a petition to the Commission. Prior to the STCA going into effect, Canada began returning asylum seekers to the U.S. out of administrative convenience, stating it did not have enough officers to conduct refugee interviews. Instead, asylum seekers were given a letter with a date and time in the future to

²⁷¹ The Inter-American Court for Human Rights came into existence with the creation of the American Convention on Human Rights, the foundational treaty for the American human right regime. However, neither the U.S. nor Canada have ratified the American Convention. Therefore, the Court has no jurisdiction. *See* American Convention on Human Rights, Nov. 22, 1969, art. 52-73, 1144 U.N.T.S. 123 <<http://www.oas.org/juridico/english/Treaties/b-32.htm>>

²⁷² Unlike the Court, the Commission existed prior to the establishment of the American Convention and its monitoring and enforcement responsibilities are not limited to human rights contained in the American Convention. *See* the Inter-American Commission's website at <<http://www.cidh.oas.org/what.htm>>

²⁷³ *See* the Inter-American Commission's website at <<http://www.cidh.oas.org/personal.eng.htm>>

²⁷⁴ *See* the Inter-American Commission's website at <<http://www.cidh.oas.org/what.htm>>

²⁷⁵ *Id.*

return for a refugee determination interview.²⁷⁶ This policy was referred to as a “direct back.”²⁷⁷

A group of non-governmental organizations submitted a petition to the Commission identified two provisions of the American Declaration that the direct back policy violated. First, Article XXVII, establishes that “every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in a foreign territory, in accordance with the laws of each country and with international agreements.”²⁷⁸ As part of the Commission’s analysis, the petition asserted, violations of the Refugee Convention could also be considered to assist in interpreting the scope of rights contained in the right to asylum. Second, the petition also asserted the direct back policy violated Article XVII, the right to a fair trial.²⁷⁹

The Commission has yet to act on this petition, but it serves as a good model for a claim against Canada for *refouling* asylum seekers under the STCA. The claims will be essentially the same, namely that Canada is violating the right of asylum seekers to a refugee determination hearing.²⁸⁰ As a result of Canada failing to give a refugee determination hearing, asylum seekers are ultimately *refouled* by the U.S. in violation of the basic prohibition found in the Refugee Convention and customary international law. Further, the absence of an appeal mechanism to contest the return to the U.S. violates the right to a fair trial in the American Declaration.

²⁷⁶ Letter to Santiago Canton, Executive Secretary for the Inter-American Commission on Human Rights, March 31, 2004 available at < <http://www.web.net/~ccr/IACHRpet.PDF>>.

²⁷⁷ *Id.*

²⁷⁸ American Declaration of the Rights and Duties of Man, adopted at Bogota by the Ninth International Conference of American States, Mar. 30-May 2, 1948. O.A.S. Res. XXX. O.A.S. Off. Rec. OEA/Ser. L/V/I.4 Rev. (1965). Available at < <http://www.oas.org/juridico/english/ga-res98/eres1591.htm>> .

²⁷⁹ Petition to Santiago Canton, Executive Secretary, Inter-American Commission on Human Rights, March 31, 2004, *on file with the authors.*

²⁸⁰ Under the direct back policy the argument is that the asylum seeker was detained by the U.S. and could not make it back to Canada for their refugee determination hearing. Instead, they were *refouled* by the U.S. in violation of the American Convention and the Refugee Convention. *Id.*

A few observations about bringing a petition before the Commission. First, exhaustion of domestic remedies is expected or a petition would have to explain why domestic remedies do not need to be exhausted before it decides a petition is admissible.²⁸¹ The petition before the Commission on the administrative practice of direct backs tried to make the case that domestic remedies do not need to be exhausted. However, if a domestic suit on the STCA is filed in Canada, obviously the Commission would wait for the Canadian courts to completely resolve all matters before passing on a petition.

Second, like the domestic claim, a petition before the Commission will challenge the STCA *in toto*. While it will rely upon the specific deficiencies in the U.S. refugee determination system reviewed above, the assertion under the American Declaration will be much broader. The claim will be that Canada has a positive legal obligation to hold a refugee determination hearing and grant asylum to those who warrant it, based upon the language of Article XXVII. The petition will have to address the language of Article XXVII which qualifies the right to seek and receive asylum by asserting those rights are exercised in conformity with domestic as well as international law. The STCA, being part of Canadian domestic law, qualifies the right to seek and receive asylum in Canada.²⁸² This is not to predict defeat for such a claim, but it may well be that the Commission will base its decision on a more narrow shortcoming of the U.S. refugee determination system for a smaller group of asylum seekers rather than declare the STCA a violation in its entirety and forbid return of all asylum seekers.

²⁸¹ There are several reasons for not requiring exhaustion of domestic remedies: when due process of law is not afforded by domestic legislation; when a party asserting human rights is not granted access to domestic remedies; or there is an unwarranted delay by the domestic legal system in rendering final judgment. American Convention on Human Rights, *opened for signature* Nov. 22, 1969, art. 46(2), 1144 U.N.T.S. 123 available at <<http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/documents/eng/documents.asp>>.

²⁸² The commission in a previous case held that if a right is established in international but not domestic law, it would not be recognized as a right under Article XVII of the American Declaration. *See* Case 10.675, Report No. 51/96, United States, Mar. 13, 1997, Annual Report of the IACHR 1996, paras. 151-57.

3. International remedies

International fora exist to challenge the STCA. These fora are a product of the human rights treaties ratified by Canada and the U.S. These bodies are not courts, but rather are committees of experts, elected by the parties to the treaty. These committees do a number of things; they receive reports from countries on adherence to the treaty, they draft comments on the content of the treaty provisions to further explain the obligations contained therein, and if empowered, they may receive communications regarding violations. The function of the committees in receiving communications is to determine whether a violation of a treaty occurred. So, the result of challenging the STCA before these committees may be more circumscribed as compared to the challenge brought before Canada's courts or the American Commission.

The ICCPR establishes the Human Rights Committee (HRC) to monitor and assist countries in compliance with their obligations.²⁸³ The HRC, under an optional protocol to the ICCPR, may receive communications from individuals and groups asserting violations of protected rights.²⁸⁴ As with the Commission in the American system, the HRC cannot consider a communication unless all domestic remedies have been exhausted and no other international body is considering the matter. Thus, the HRC is an alternative to, not a contemporaneous forum for, challenges to the STCA after Canadian courts decide the case. But Canada has and does respect its decisions and will amend its practices accordingly.

²⁸³ The Human Rights Committee is a body of 18 independent experts elected by the countries that are party to the ICCPR. These experts do not represent individual countries but are selected for their expertise. ICCPR *supra* note 147 at art. 28.

²⁸⁴ Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 1, 999 U.N.T.S. 302 (*hereinafter* Optional Protocol) available at <<http://www.ohchr.org/english/law/ccpr-one.htm>>. Canada ratified the Optional Protocol making itself accountable to the Committee. The U.S. has not ratified the Optional Protocol.

A communication challenging the STCA must identify the provisions of the ICCPR that are being violated. The HRC then brings the communication to the attention of the country accused of the violation, which must in six months respond with an answer, clarification or statement of remedies offered.²⁸⁵ The HRC then gives its observations to the country and the individual on breaches committed and what must be done to rectify the human rights violations.²⁸⁶

In fact, decisions by the HRC have already impacted the enforcement of the STCA. The Committee has already adopted the principle that Canada may not be complicit in a violation of the ICCPR by returning someone to the United States.²⁸⁷ Further, the HRC has concluded in certain cases that Canada violated the ICCPR because extradition of a person to the U.S. who faced death penalty amounted to cruel and inhumane treatment.²⁸⁸ In implementing the STCA, Canada's regulations stated that an asylum seeker cannot be returned to the U.S. if they would face the death penalty.²⁸⁹

The exact violation alleged in a communication to the HRC would depend on the particular individual being returned to the U.S. But, likely provisions of the ICCPR include Article 9 freedom from arbitrary detention, Article 26 prohibiting non-discrimination, Article 14 equal

²⁸⁵ *Id.* at art. 4.

²⁸⁶ *Id.* at art. 5.

²⁸⁷ *Communication No. 470/1991: Canada 18/11/93*, U.N. Doc. CCPR/C/48/D/470/1991 at para. 6.2 available at <<http://www.unhchr.ch/tbs/doc.nsf>>

²⁸⁸ *Communication No. 469/1991: Canada 07/01/94* U.N. doc. CCPR/C/49/D/469/1991 at para. 16.4 available at <<http://www.unhchr.ch/tbs/doc.nsf>> The case concerned Mr. Charles Ng who faced trial and execution in California. The evidence presented to the committee demonstrated that the way the state carried out the execution, by cyanide gas, the prisoner would experience prolonged suffering.

²⁸⁹ Regulations Amending the Immigration and Refugee Protection Regulations, 138 Canadian Gazette, No. 22, November 3, 2004, sec. 159.6.

access to courts and, perhaps Article 7, freedom from torture. The HRC has further elucidated the scope and meaning of these articles through general comments published by the United Nations.²⁹⁰ Comment 8 on the right to liberty and security of persons makes it clear that the provisions of Article 9 of the ICCPR address detention for immigration purposes, among others.²⁹¹ Thus, an asylum seeker facing detention in the U.S. may be able to send a communication addressing the conditions under which he or she is detained.²⁹²

Another international body to which an asylum seeker may turn is the Committee Against Torture, established by CAT.²⁹³ The CAT Committee likewise can receive individual communications, after exhaustion of domestic remedies, and functions in a very similar fashion to the HRC.²⁹⁴ The core provision of CAT are Articles 1, which defines torture, and 3, which contains the *nonrefoulement* provisions.²⁹⁵ An asylum seeker facing return under the STCA may claim that she or he will not be able to apply for asylum or protection from *nonrefoulement* in the U.S. and a result be returned to a country in which he or she will experience torture. Provisions of U.S. law, however, provide additional protection for those who may be tortured, reducing the likelihood that a communication would be based on this situation.

²⁹⁰ See e.g. UNITED NATIONS, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS, COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES, U.N. Doc. HRI/GEN/1/Rev. 7 (2004) available at <<http://www.ohchr.org/english/bodies/hrc/comments.htm>.>

²⁹¹ *General Comment No. 8: Right to liberty and security of persons (Art. 9)*:. 30/06/82 available at <<http://www.unhchr.ch/tbs/doc.nsf>.>

²⁹² See *supra* note 222.

²⁹³ See *supra* note 56, at art. 22.

²⁹⁴ *Id.*, at arts. 17-24.

²⁹⁵ See *supra* note 56.

The U.S., after ratifying CAT, created a special limited ground of protection for those who are barred from asylum and withholding of removal, called deferral of removal.²⁹⁶ If a barred asylum seeker can demonstrate that it is more likely than not he or she will be tortured in the country to which he or she should be returned, then the U.S. will grant a deferral on removal and not return that person.²⁹⁷ However, it may be the case that a person subjected to the STCA could face a chain *refoulement*, from Canada to the U.S., and from the U.S. to another third country that may eventually return him or her to the place where torture will occur. Or, another possible basis of a communication to the CAT Committee is that the standard of proof required by U.S., more probable than not, is too high. Thus, the CAT Committee could still be an international forum in which to pursue a challenge to the application of the STCA.

B. Another path to follow

If the STCA leads Canada into a troubled relationship with the U.S.'s flawed system, making it complicit in violations of the Refugee Convention and other human rights treaties, then another approach to this problem might be a shared refugee processing system with the U.S. Rather than trying to shove applicants back to the U.S. or forcing them to sneak across the border, Canada and the U.S. should work to eliminate the disparities that drive refugee applicants to pick the more desirable system. The U.S. and Canada entered into this agreement on the assertion that the two systems were substantially similar. It is clear, however, that there are differences so significant as to generate the problem the STCA is attempting to address. Of course, a danger to

²⁹⁶ 8 C.F.R. sec.208.17.

²⁹⁷ *Id.* Even if an asylum seeker is barred under criminal grounds or terrorism grounds, the U.S. will not return that person. So, the U.S.'s overly broad exclusions, putting the U.S. at odds with international standards, would not bar protection.

this approach is that the Canadian system will end up looking like the U.S. system rather than vice versa.

September 11, 2001 continues to cast a long shadow over immigration reform on both sides of the border. But it is important to recognize the STCA detracts from security as well as implicates Canada in a system that does not meet international obligations.²⁹⁸ A merged refugee processing system should start with an agreement of what international law requires and what genuine challenges threaten the system of assessing who is a refugee and who is not. Elimination of those aspects like overbroad use of detention and overbroad bars to seeking protection should be paramount. A shared refugee processing system could be the road to a better refugee processing system, by eliminating inconsistencies and developing a shared understanding of international refugee and human rights law.

²⁹⁸ Macklin, *supra* note 8.