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# **The U.S./Canada Safe Third Country Agreement: A Geographical Evaluation**

Sarah Anne Ryman

Candidate for B.A. Degree  
in International Relations and Spanish with Honors

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APPROVED

Thesis Project Advisor: \_\_\_\_\_  
Alison Mountz

Honors Reader: \_\_\_\_\_  
Jennifer Hyndman

Honors Director: \_\_\_\_\_  
Samuel Gorovitz

Date: \_\_\_\_\_

## **Abstract**

The U.S./Canadian border is in the process of being renegotiated as a result of larger processes of redefining and reimagining sovereign territories in North America. New understandings of U.S. and Canadian state sovereignty are creating a conflated “other” of cross-border flows: an illegitimate migrant figure who is securitized, criminalized and disembodied. The contemporary “othering” of the migrant has serious human rights implications such as the restriction of access to refugee protection. U.S. and Canadian states share an agenda of migration control executed through the manipulation of geography and the figure of the migrant.

On paper, the Safe Third Country Agreement (STCA) aims to enhance refugee protection and increase border security. In practice, STCA makes the U.S./Canadian border a battleground for obtaining access to asylum, thus eroding refugee protection in North America and threatening the security of asylum seekers, the U.S. and Canadian states.

In order to evaluate STCA, I conducted field interviews during 2006 and 2007 with persons working in the U.S. and Canadian governments as well as outside the governments in both countries on STCA. Through my analysis of these discussions, official policy documents and relevant literature, I offer three different readings of STCA. This provides a context for STCA and uncovers the motivations for the signing of the policy.

The U.S./Canadian STCA functions as an exclusionary measure in a broader field of exclusions: reconfigurations of the border, state sovereignty, territorial limits of the state and the figure of the migrant which aim to reduce the access to and the quality of asylum.

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## Acknowledgments

When I began this project on the Safe Third Country Agreement (STCA), I viewed U.S./Canadian border policy as being disconnected from my experience as a caseworker for Ecuadorian migrants and Colombian refugees in Cuenca, Ecuador. Months into the project, I was conducting research in Toronto and met with a group of resettled Colombian refugees, who explained to me that STCA had created a barrier for Colombians seeking asylum in Canada. Our discussion triggered a flashback to sitting in my office in Ecuador during the spring of 2005, when clients were asking me about a U.S./Canadian policy called “safe third” and how it would alter their access to refugee protection in North America. While I was unfamiliar with the policy at the time, over the past year and a half I have learned how a migrant assistance office across the equator is intimately connected to U.S./Canadian border policy. The struggle for displaced persons to find safe haven is global.

This project is inspired by the refugee clients I worked with over the years first as a caseworker at the Refugee Resettlement Program in my hometown of Binghamton, NY, and later in Cuenca, Ecuador at the Department of Human Mobility.

I am indebted to my supervisor and mentor, Dr. Alison Mountz, who has guided me as a researcher since my return from Ecuador two years ago. Dr. Mountz has encouraged me to develop my investigative voice and to pursue research relevant to humanitarian issues that can be acted

on. I would also like to thank Dr. Jennifer Hyndman for serving as the Honors reader for this project and for newly inspiring me to explore migration policy related research directions.

During the semester I spent working at the State Department in Washington, D.C., Dr. Michael Schneider, advised me to expand my project to include field work and connected me to many policy makers and researchers.

I am grateful to Stephen Wright, my Honors advisor, for coaching me during my undergraduate experience and supporting me on my various endeavors including my semesters in Ecuador and Washington, D.C. in addition to those on campus. Thank you to the Syracuse University Honors Program for funding this project through the Crown Award.

Lastly, I would like to thank my family, friends and mentors who have sustained me with their love during my undergraduate pursuits. Thanks for teaching me how to channel my passion into meaningful pursuits that have the potential to improve the situations of human beings. As far back as I can remember, my parents emphasized the value of each human life. Thanks, Mom and Dad, for instilling in me a commitment to social justice and for teaching me that I share a human connection with those I do not know or will not meet across the globe.

I leave you with the story of Charles, a Haitian refugee living in Binghamton who was searching for his son in order to bring him to the U.S. as a refugee through family reunification:

Me: I'm sorry we have not received any information on your son.

Charles: Thank you for your help. I will visit next week. God bless you!  
God bless you!

Me: Are you worried about your son? The conflict is raging in Haiti. How long have you been searching?

Charles: Oh, three years. I have not heard from him for three years. I wonder everyday if I should wake up and come to this office to search more. I wonder if he is alive. But I am a father, how can I give up?



## **Introduction: Contextualizing the Safe Third Country Agreement**

Stretching over 4,000 miles of land, the U.S./Canadian border is the longest undefended border in the world. According to the Congressional Research Service (CRS), “among its many challenging natural features are vast mountain ranges such as the Rockies, the Great Lakes, many different river systems, and in the winter heavy snow and bitter cold temperatures” (2). Two sovereign states with different political cultures and understandings of sovereignty are working together to regulate the border.

The U.S./Canadian border is in the process of being renegotiated as a result of larger processes of redefining and reimagining sovereign territories in North America. New understandings of U.S. and Canadian state sovereignty are creating a conflated “other” of cross-border flows, an illegitimate migrant figure who is securitized, criminalized and disembodied (Bigo). The contemporary “othering” of the migrant has serious human rights implications such as the restriction of access for asylum seekers in need of refugee protection.

STCA is one policy that animates this renegotiation of sovereignty by regulating the flow of asylum seekers through assertions of sovereign power at the U.S./Canadian land border. On paper, STCA claims to enhance refugee protection and to increase security in the U.S. and Canada. In practice, STCA functions as a barrier and a deterrent for persons seeking asylum in the U.S. or Canada. As a result, STCA

encourages asylum seekers to utilize informal channels to move across the U.S./Canadian border (such as smuggling and trafficking) which potentially decreases the security of individual asylum seekers and the national security of the U.S. and Canada.

STCA is a piece of the Smart Border Accord (SBA), a bilateral agreement between the U.S. and Canada that was signed in December 2001. The goals of SBA are to increase security and efficiency of movement of cargo and people along the U.S./Canadian border. The coupling of STCA and SBA is illogical; STCA focuses on refugee protection and SBA focuses on national security issues. The odd couple formed when the U.S. and Canadian governments bargained their agendas during the post 9/11 political environment that favored policy making in the name of security. The U.S. entered into the bilateral agreement of STCA with Canada which served Canada's agenda of asylum flow reduction. In return, the U.S. received Canada's cooperation in border regulation through their signing onto the SBA.

The Safe Third Country Agreement (STCA) was signed by the U.S. and Canada in December of 2004. STCA distributes asylum flows between the U.S. and Canada by requiring asylum seekers to make claims in their first countries of arrival, before crossing the border. For example, an asylum seeker succeeds in reaching the U.S. through informal channels but plans to travel to Canada in order to claim asylum will be screened and interviewed at the U.S./Canadian border and

required to make a claim through the U.S. asylum system. Essentially, STCA diverts flows of asylum seekers at the U.S./Canadian land border back to the asylum seeker's country of "last presence", the first "safe third" country encountered.

Until STCA, asylum seekers who reached the U.S./Canadian land border had the opportunity to claim asylum in either the U.S. or Canada. Although the asylum seeker will be processed by either the U.S. or the Canadian systems under the policy, STCA does not allow asylum seekers to choose their country of asylum, a right that asylum seekers had enjoyed prior to STCA's implementation. In 2001, over half of the asylum seekers who made claims in Canada first traveled through the U.S.

It is important to clarify that STCA only applies to land points of entry (POEs). STCA is enacted at the U.S./Canadian land border but does not apply to points of entry such as water ports or airports. If an asylum seeker flies from the U.S. to Canada by airplane makes an asylum claim in Canada, the conditions of STCA would not force her to return to the U.S.

In November 2006, the U.S. Government, the Government of Canada and United Nations High Commissioner for Refugees released a tripartite report, A Partnership for Protection, which evaluated the implementation of STCA and the policy's impact. The introduction of this report offers insight into origins of safe third as a concept and explains the regions that safe third country agreements were first implemented.

International cooperation based on the principle of responsibility sharing provides a basis for states to respond to these challenges, in part by providing for the more orderly handling of refugee applications. To this end, developed countries, including Canada and the U.S., have articulated a “Safe Third Country” policy. The premise of this policy is that where a refugee claimant could have previously sought protection in another safe country, it is reasonable and appropriate to require the refugee claimant to return and make use of that opportunity. (Partnership, Introduction)

Safe Third policies are founded on interpretations of the 1951 Convention relating to the Status of Refugees and the 1967 Protocol by states that asylum seekers must apply for asylum in the first “safe” country they arrive in (UNHCR). Asylum seekers who pass through multiple “safe” countries or apply for asylum in multiple countries are considered to be “asylum shoppers”, a phrase commonly used by the U.S. and Canadian governments to refer to asylum seekers. The excerpt below from the Partnership introduction demonstrates that the safe third concept was developed and implemented for the purpose of distributing asylum flow processing, referred to above as “responsibility sharing”.

The European experience illustrates similar cooperation through responsibility-sharing efforts. Several European states, also faced with the serious challenges described above, began to introduce the Safe Third Country concept into their national legislation during the 1980s, including Switzerland (1979), Belgium (1980) and Sweden (1989). In 1990, European Union states built on the original 1985 Schengen Agreement (related to the harmonization of border and visa controls) first by amending Schengen to include criteria by which to assign responsibility for adjudicating asylum applications to one—but only one — participating state. The Dublin Convention, signed in Dublin, Ireland, on June 15, 1990, replaced these Schengen provisions. The Dublin Convention built on previous experience with use of the Safe Third Country concept in national legislation to establish a multilateral framework of criteria to determine which European Union member state would be responsible for adjudicating an asylum claim, and required that state to accept the return of asylum seekers who had moved to another member state and sought protection. Its underlying premise was that all member states of the European Union could be considered as safe

third countries for the purposes of responsibility and burden sharing with respect to refugee claims. (Partnership, Introduction)

In the discussion of safe third in the EU, the Schengen and Dublin policies are often evoked. As described above, asylum seeker flows are distributed across member states of the EU that are deemed “safe” for asylum processing. The U.S./Canadian STCA is based on the European concept of safe third but differs from the EU practice of safe third because it is a bilateral agreement between two countries that are deemed “safe”: the U.S. and Canada. It is outside the scope of this project to conduct an in-depth analysis of the interpretation and application of “safe third country” in the domestic laws of EU member states and the U.S. and Canada; however these analyses would be necessary for a comprehensive evaluation of the impacts of safe third country agreements across the world.

Through this thesis, I offer an evaluation of the role of STCA in shaping the U.S./Canadian border. I offer three analytical readings of the policy: a literature analysis, a policy analysis and an analysis of interviews with persons involved with STCA’s development and implementation.

In Chapter 1, I review literature relevant to the current debates surrounding borders, sovereignty and refugee protection. I place STCA within broader global and regional trends of asylum.

Chapter 2 provides an analysis of STCA as presented in official policy documents, press releases, speeches and news articles. Please

refer to Appendix 1 for the final text of STCA. I aim to demonstrate how the U.S. and Canadian governments wished STCA to be interpreted by their respective publics.

In Chapter 3, I discuss my findings which draw on interviews with more than 20 key informants from the government, the non-profit and academic sectors in both Canada and the U.S.: Ottawa, Montreal, Toronto, and Washington, DC. The goal of this field work was to understand the motivations for the formation and signing of STCA while evaluating the actual implementation process of the policy on both sides of the border. I explore the difference between the official aims of STCA laid out in Chapter 2 and the actual function of the policy as interpreted by those who work on the many dimensions of STCA such as the policy's implementation and those who work with asylum seekers impacted by the policy.

In the concluding chapter I summarize findings and the various perspectives surrounding the formation, implementation and future of STCA.

## **Chapter 1: (re)defining the post 9/11 border**

This chapter presents current trends in international refugee protection and defines new understandings of the border and sovereignty. I will place STCA in the context of broader changes and argue that STCA is one control mechanism in a large group of policies that aim to regulate and reduce asylum flows (Hyndman and Mountz). Through the application of STCA, the border between the U.S. and Canada has become more of an obstacle and a deterrent to the asylum seeker attempting to realize her asylum journey. The space of the border is a battleground of STCA, where the geographical struggles of the asylum seeker play out. Asylum seekers no longer can move between the U.S. and Canada to make asylum claims in their country of choice which has resulted in lower levels of protection and, in some cases, a denial of protection for asylum seekers. I will discuss this claim further in chapter two. First, I will analyze the trends in asylum regulation that are eroding refugee protection in North America and will locate STCA among these processes.

The review that follows is inherently incomplete since it provides a snapshot of a continually changing border. The border is not only a line on a map; it is a dynamic process. Additionally, I will discuss themes that emerged during my field work that were not laid out in the literature.

### **The U.S./Canadian border steals the spotlight**

Many authors such as Hristoulas, Andreas, Koslowski and Salter, discussed the increase in attention placed on the U.S./Canadian border following the events of 9/11, a manifestation of Canada being perceived as a security threat to the U.S. It is important to note that Canada's refugee and immigration systems were perceived as "lenient" and were cited as a major source of insecurity to the U.S. Hristoulas describes how the "U.S. media has portrayed Canada as a hotbed for terrorist activity. Special emphasis has been placed on Canada's refugee laws..." (30). Continuing Hristoulas' discussion of post 9/11 threat perceptions, Andreas presents a shift in U.S./Canadian border relations that occurred after 9/11:

The openness of the border, labeled 'the world's longest undefended border,' has traditionally been a source of mutual pride, but is now perceived and treated as a source of vulnerability by the United States. Even though none of the 19 hijackers involved in the September 11<sup>th</sup> attacks entered across the border and in fact had been issued visas by the United States, some U.S. media reports have depicted Canada as a haven for terrorists who exploit Canada's liberal refugee and immigration system. (6)

Canadian border enforcement, or the lack of border enforcement, was interpreted by the U.S. as a threat to security in the post 9/11 era. Koslowski explains that Canada was perceived as a "sieve through which terrorists could easily pass" after the events of 9/11 (2). The increased attention on the threat posed by the U.S./Canadian border's lack of enforcement logically encouraged the development of restrictive border policies. However, the U.S. and Canadian states did not wish to tighten the border through measures that would be destructive to their lucrative economic relationship as top trading partners.



Salter articulates the paradox discussed by many of the authors: the need to facilitate trade between the U.S. and Canada while restricting movement as a security precaution. “At different times since the 9/11 attacks, the U.S.-Canadian border has been variously represented as a leaky backdoor into America and as a necessary trade link” (Salter, Passports 82). The border cannot be closed because the trade relationship between the U.S. and Canada is essential to the survival of both economies. The U.S. is Canada’s number one trading partner and Canada serves as the second largest importer of American goods.

Andreas describes the importance of the economic relationship between the U.S. and Canada. As of 2003, “The United States and Canada conduct \$1.3 billion worth of two-way trade a day, most of which is moved by truck across the border. Forty-thousand commercial shipments and 300,000 people cross the 4,000-mile-long U.S.-Canada border every day” (Andreas 7).

The struggle for openness and restrictiveness plays out at the border. Andreas presents the contradictory desires of the liberal nation-state: the desire to keep the border “open for business” and closed to security threats, explaining that during the NAFTA era, “the border had become both more blurred and more sharply demarcated than ever before” (3). The U.S. and Canadian states wish to facilitate economic flows while preventing flows that may threaten the state such as the movements of terrorists.

In order to develop border policies that respond to these seemingly contradictory demands, the U.S. and Canadian governments are attempting to strike a balance (perhaps an unattainable goal) between free movement for economic benefit and restricted movement in the name of security. The struggle persists.

### **Renegotiating the U.S./Canadian border post 9/11**

In order to satisfy demands for openness to trade and heightened security, the border is being renegotiated. Since the U.S./Canadian border is under the microscope of government and media scrutiny, how is the border changing? Through my study of literature on emerging border trends, primary and secondary sources, I have learned that this line on the map is undergoing a makeover, a process that will not likely be completed for years to come, if at all. Therefore, it is important to study the border in order to analyze what is happening as it is happening, in the hopes of influencing outcomes and shaping the new look of the border.

Pauly proposes the ideal border that would balance trade and security, “to reconstruct a physical and psychological border with the United States, one that would keep out as many problems as possible, while still allowing in as many opportunities as Canadians agreed were attractive. Neither high barriers nor open bridges would do. The new border had to be marked by a unique kind of fence.” (93)

While there is a literary consensus over the fact that the border is undergoing a facelift, there are contradictory descriptions of the “new” border, what the “unique fence” would look like. How are the struggles of openness and restrictiveness constructing or deconstructing the border? I argue that the post 9/11 border triages flows into two groupings: desired and undesired. The U.S. and Canadian states execute the deflection and facilitation through the blurring of regimes associated with the border and through the literal act of moving the border.

Andreas offers a look at the renegotiation process occurring in the U.S./Canadian and U.S./Mexican borders.

...borders are very much back in style. Rather than simply being dismantled in the face of intensifying pressures of economic integration, border controls are being re-tooled and redesigned as part of a new and expanding ‘war on terrorism’...Traditional border issues such as trade and migration are now inescapably evaluated through a security lens. (1)

Andreas’ border supports my argument of the blurring of categories at the border, a border that triages flows on the basis of security into those who are legal and those who are illegal. The conflation of all border uses into security considerations diverts focus away from the important considerations of human security and refugee protection.

In addition to the trend of “blurring” categories of cross-border flows (Bigo), many authors discussed the trend of states moving the border away from its traditional location through the processes of transnationalizing, externalizing (Guiraudon and Joppke), borders existing

elsewhere (Zureik and Salter), pushing the borders out (Flynn), and delocalizing (Salter), in order to address security concerns. New understandings of U.S. and Canadian sovereignty are redefining the territorial limits of North America as a region. States are manipulating the border by moving it away from the line on the map; to regulate flows before they reach the border. Borders now occur anywhere the state deems to be a border site. Zureik and Salter discuss the manipulation of traditional definitions of sovereign territory:

The borders of the state need no longer be confined to traditional points of entry which travelers, citizens, immigrants and other transient groups are accustomed to pass through- legally or illegally. Borders now exist elsewhere, so to speak, in places that traditionally belonged to sovereign states, but now have been transformed to enable governments to check across their geographic borders personal identity and monitor the movement of people before such movement actually takes place. (9)

STCA does not fall under these processes of moving the border. However, STCA functions as a deterrent and part of the fortification of U.S./Canadian boundaries. The above trends strengthen and restrict entrance to the U.S. and Canada away from the land border where STCA functions. These various points of fortification are related in that they deter and at times exclude asylum seekers from reaching the U.S. or Canada. Outside of the practical functions of these processes, the deployment of tactics to strengthen and move borders gives context to the goals of the U.S. and Canadian states to reduce flows of unwanted migrants, a category of potential security threats that asylum seekers are often placed under by nation-states. Under STCA, the asylum seekers

who reach the U.S. and Canadian land border will have the opportunity to go through asylum processing in one of the countries. These trends serve to probe a broader agenda of exclusion that prevents or deters asylum seekers from traveling to North America, thus not interacting with STCA at all.

Mirroring Flynn's argument of pushing borders out, Salter notes that one policy initiative of the U.S. is "a distancing of the discriminating and policing function away from the actual site of the international border" (Salter, Passports 75). Salter argues that "the border is not just a line, but a network of POEs that accommodate the global transportation grid. It is better to speak of the 'border function' than of lines in the sand" (Salter, Passports 80). While STCA functions as a deterrent to asylum seekers in North America and in their home or host countries away from the region, asylum seekers may be deterred by interactions with the U.S. and Canadian states in various points across the globe (Mountz). How is the moving the location of the border away from the traditional border site serving the U.S. and Canadian states? By processing people away from sovereign territory, states can stem the undesired flows or facilitate the movement of persons who are desired. When reviewed in the context of STCA, these trends offer new research directions on how many persons are not reaching North America to make claims because they are deterred or prevented from traveling.

Hristoulas describes how continental and border security is being redefined, “rethinking how borders are conceived...Canada, Mexico, and the United States law enforcement agencies would work more closely together away from the physical frontiers to reduce the need for inspection at the borders themselves” (32). Guiraudon and Joppke discuss the “externalizing” of border controls in order to prevent migration (13). They cleverly refer to these multi-site control tactics as “remote control” (14). States assert power over migratory flows at multiple sites and on multiple scales around the globe. Now, more than ever, the border is being renegotiated to exist away from its line on the map. While it is difficult to measure how many potential refugees are deterred or prevented from reaching North America, I believe it is imperative to question the extent of the reduction of access to North America in relation to STCA. The policy of STCA redistributes flows between the U.S. and Canada but why are the overall numbers of asylum seekers in North America decreasing? Some may be deterred by STCA while others are may be deterred by these globalized policing practices of the U.S. and Canadian states.

### **Sovereignty and mobile bodies**

Since the renegotiating of the border is a manifestation of the reimaginings of state sovereignty by the U.S. and Canadian state actors, it is important to pick up where Scott left off in his project, calling for the investigation of “why the state has always seemed to be the enemy of

‘people who move around’” (1). How are assertions of sovereign power over persons on the move serving the state? Regulation of movement is essential to the sovereign identity of the state (Nyers). As the state aims to protect those within its borders, the state securitizes and criminalizes migration as a means of controlling those who attempt to enter or may attempt to enter the state territory.

STCA is a policy that sweepingly criminalizes and securitizes asylum seekers. As discussed in the introductory chapter, the safe third country agreements were first implemented in Europe to prevent “asylum shopping”, the act of asylum seekers passing through multiple countries which are considered to be “safe” countries to make asylum claims or asylum seekers making claims in multiple countries. While this act of “asylum shopping” is employed by many asylum seekers as a means to obtain the highest level of protection or in some cases, as a survival strategy, the U.S. and Canadian states view the exercise as an abuse by non bona fide refugees to their asylum processing systems. STCA returns asylum seekers to the first country in North America the asylum seeker passed through, preventing asylum seekers from accessing the system that may be in their best interests of protection.

Bigo describes the securitization of immigration as a way for the state to exercise sovereignty. Bigo presents Scott’s “seeing like a state”, the ways the state views itself and others. “Securitization of the immigrant as a risk is based on our conception of the state as a body or a container

for the polity. It is anchored in the fears of politicians about losing their symbolic control over territorial boundaries” (Bigo, Unease 65). The state defines itself at territorial limits through the regulation of migrant bodies. Similarly, Hyndman and Mountz present the perspective of states, “asylum seekers and undocumented migrants embody insecurity by testing the porosity of political borders” (80). The state forces the migrant to embody insecurity by disembodimenting the migrant of its natural representation of human rights, democracy, and humanitarianism. Asylum seekers and refugees traverse to the U.S. and Canada to escape persecution and to enjoy the protection offered by these democratic states. The state views the mobile migrant body as a security threat. Salter discusses the mobile body as being, “...regarded in the same light as a criminal or as a victim of an epidemic: his mere physical presence increases the risk of violence” (Salter, Threshold 38).

In particular, asylum seekers embody insecurity because they are viewed by states as illegally mobile bodies. Asylum seekers who pass through multiple “safe” countries are criminalized by the STCA, since they are forced to return to their last safe country of presence. Walters offers another perspective on the relationship between security and movement: “Insecurity is bound up with themes of mobility: it is the movement, the circulation, the presence of unauthorized bodies which have violated the borders of the nation-state” (Walters, Domopolitics 247). Crosby discusses this criminalization of the asylum seeker: “The expression



'forum shopping' connotes the idea that choosing the country of asylum is essentially an opportunistic abuse of the international regime of refugee protection." (6) In theory, STCA attempts to eliminate the "abuse" of asylum seekers exercising a preference in their protection. In practice, the U.S. and Canadian governments currently have no method for measuring how STCA is achieving this aim.

States securitize and criminalize the mobile body as a means to reinforce their sovereignty. Through STCA, the U.S. and Canadian states usurp the ability of asylum seekers to exercise their agency at the U.S. and Canadian land border. Nyers illustrates the relationship between state sovereignty and asylum seekers by describing the use of the 'foreigner' as a means to execute a "national (re)founding" (1076). "Whenever a state ponders whether or not to grant asylum to an individual, it is making an intervention in the politics of protection. This is a significant political issue because the capacity to decide upon matters of inclusion and exclusion is a key element of sovereign power" (1071).

In what ways is sovereign power asserted over the mobile body? States exercise sovereign control over migration flows through the manipulation of geography. International refugee law does not provide asylum seekers with a defined right to enter a country to claim asylum but does grant the right to seek asylum. Penz presents the restricted rights of asylum seekers:

One such right is a right to asylum, in the form of a prohibition of the forced return of those who have reached foreign territory and can claim individual persecution (non-refoulement). It is a limited right, because it does not include a clear right to entry and does not apply to other forms of victimization, such as by general rather than specifically targeted violence. (46)

States exploit the geographies of asylum by intercepting asylum flows outside of sovereignty territory making it difficult for asylum seekers to claim asylum (Hyndman and Mountz). The international refugee protection regime has yet to define and monitor obligations for states performing interdiction and deflection away from their traditional territorial limits. What rights do asylum seekers have in the grey zones of state control? Nyers discusses the “*mezzanine spaces of sovereignty* – that is, those spaces which are *in-between* the inside and the outside of the state” (1080). Territory is deemed by the sovereign state to be non-sovereign territory for its benefit. Hyndman and Mountz explain that “the refugee crisis moves into sovereign territory, which in turn is converted to non-sovereign territory” (85).

As long as the denial of access to asylum occurs away from the sovereign territory, states are able to mask their dwindling support for the institution of asylum. On paper, states have committed to international and domestic agreements that acknowledge the humanitarian need for refugee protection. However, in practice, states are reducing access to the protection that can be a matter of life or death for the asylum seeker. Gibney summarizes the contradictions surrounding the institution of asylum: “A kind of schizophrenia seems to pervade Western responses to

asylum seekers and refugees; great importance is attached to the principle of asylum but enormous efforts are made to ensure that refugees (and others with less pressing claims) never reach the territory of the state where they could receive its protection” (2). Regardless of the high value placed on asylum by states, in practice, Western states are reducing access to refugee protection.

STCA serves to close off Canada or the U.S. to the asylum seeker coming from the other side. By closing off regions of sovereign territory and interacting with flows before they touch sovereign soil, states are reinforcing their sovereign identities. According to Hyndman and Mountz: “The North American Safe Third Country Agreement represents a different architecture of enmity, a fortification to exclude the dangerous other whose exclusion fortifies sovereignty of the states involved” (90). Sovereignty is “fortified” through the exclusion of whom?

### **Reconfiguring the migrant “other”**

How are new imaginations of sovereignty reconfiguring the undesired cross-border flow, the migrant “other”? What does the “other” of the border look like? The securitization and criminalization blurs the “other” into a homogenous threat to state security (Bigo). The blurring of the “other” disembodies distinct migrants who were the asylum seeker, the economic migrant, the terrorist, the criminal, the smuggler and the trafficker into an undefined person on the move who threatens the state.

Those seeking asylum at the U.S./Canadian border are first securitized under the “migrant” category and then criminalized as “asylum shoppers” when they are identified as asylum seekers.

The nation-state asserts its sovereignty over the “other” and manipulates the visibility of the “other’s” figure in order to reinforce sovereignty and justify state policies. Bigo defines the new “other” of the contemporary border. Bigo describes the “immigrant” as the foreign being that is invading the “body” of the state. (Bigo, Unease 67) Bigo explains the utility of the word “immigrant” by describing its broad and heterogeneous meaning. “Immigrant” can encompass any person or population that the state desires to present as a security risk. Bigo’s analysis of the use of the broad category of “immigrant” by the state supports my argument that the categories of the undesired migrant are blurring into one because it is more useful for the state to have an undefined enemy, thus applicable to all who are illegally en route.

The all encompassing “immigrant” of Bigo is highlighted by Hyndman and Mountz who discuss the “...increasingly blurred distinction among suspected criminals, terrorists, and refugee claimants. Since 9/11, but starting well before, migrants have come to stand in for all that threatens state security and welfare...” (78). The aim to reduce “abuses” in the U.S. and Canadian asylum systems through STCA shifts the focus from the human rights needs of the asylum seeker to the presumed security threat and illegality of the asylum seekers’ movement.

The undesired “immigrant” is held up against the desired migrant who moves for purposes that are interpreted as beneficial to the states. The U.S. and Canadian states aim to facilitate cross-border flows of persons who are formally employed in the U.S. and Canada and to encourage tourism in North America. Crosby lists these binaries of desired and undesired flows: such as “illegal/legal, documented/undocumented, political/economic” (3). STCA contributes to the formation of these binaries, pitting refugee agency against the agency of the state by forcefully redirecting flows of asylum seekers who would “abuse” the U.S. and Canadian asylum systems by exercising a preference.

I return to Nyers who discusses the types of migrants that are discriminated against and cast as undesired by the states:

Asylum seekers, refugees, non-status residents, undocumented workers, so-called ‘over-stayers’ and ‘illegals’ – together, they have come to constitute a kind of ‘abject class’ of global migrants. Whatever their designation, these migrants are increasingly cast as the *objects* of securitized fears and anxieties, possessing either an *unsavoury agency* (ie they are identity-frauds, queue jumpers, people who undermine consent in the polity) or a *dangerous agency* (ie they are criminals, terrorists, agents of insecurity). (1070)

The reconfiguration process of the undesired migrant is creating a Nyers’ “abject class” of cross-border flows. The migration policies of the European Union such as the Schengen Agreement triage flows into desired and undesired just as the U.S./Canadian border is now executing. The danger of policies such as STCA is that asylum seekers are perceived as threats before they are recognized as those in need of

protection. Walters discusses the “others” of the Schengen border, discussing the transnational “threats” of people who move and how they are perceived as homogenously dangerous:

A security field has been assembled through elite and public discourse which brings together crime, drugs, asylum seekers, human smugglers, terrorists, and so on, as though their association were quite natural. ...This association of refugees with crime, drugs, and terrorism, and their distancing from discourses of democracy, human security, and human rights have been powerfully contested by domestic and international groups such as Amnesty International and the United Nations High Commissioner for Refugees. (Walters, Mapping 570)

Migrants who once represented multiple motivations for movement such as economic need, the need for asylum protection or for personal reasons (or a mixture of all), are conflated into a singular “other” who embodies insecurity. Under STCA, asylum seekers are placed in the “other” category and many remain there unless their asylum claims are accepted by the U.S. or Canada.

Some bureaucrats themselves view the migrant “other” as having one face, one category, or as Heyman writes, “a one-dimensional other” (268). In an interview with one of the directors of an Immigration and Naturalization Service (INS) district, Heyman described this person’s view of the migrant as “aliens appeared as an anonymous liquid flow that constantly threatened to seep through holes in INS dikes and pour into the interior of the United States” (268). The training of U.S. and Canadian border agents is beyond the scope of this thesis, but is an area of investigation relevant to understanding the domination of security responses to cross-border flows.

Why are the disembodiment and the homogenization of the undesired migrant convenient to the state? An undefined migrant “other” allows states to have broad, uniform border policies that do not require the resources and training to separate the terrorist from the asylum seeker. The state can more readily deny access if the person without papers at the border is a presupposed security threat before considering the possibility of the person needing asylum. Some potential asylum seekers may be removed because they do not or are not identified as asylum seekers because of profiling by border patrol, language barriers or cultural issues. The U.S. and Canadian states are looking through a security lens which is making it difficult for them to see asylum seekers.

Walters speaks to the convenience of an undefined “other” and the state desires of simplicity:

Never mind this complex interrelation of the political and the economic in the production of exodus. Nor that the decision to pack one’s bags and move thousands of miles facing all sorts of life-threatening risks in the process is never made lightly. If this complex reality doesn’t fit our moral categories, we’ll make it. We’ll filter the white noise of multiple mobilities and establish clear ‘routes’ and ‘channels’. If we can just identify the genuine refugee, or the high-skilled migrant, this will allow us to deal with the others, the ‘bogus’ with greater confidence from the public and thus with more firmness. Just as with the old poor law, we’ll send the undeserving and the illegitimate on their way. The difference is the next parish is no longer just down the road. Instead, it’s a specially-chartered plane-trip to the nearest applicable ‘safe third country’ or most recent ‘country of transit’. (Walters Domopolitics 249)

The simplicity of ‘us’ and ‘them’ creates two groups: the desired flows and the dangerous flows. STCA is a policy that reinforces this binary by employing a simplistic triage approach. The simplification,

homogenization and blurring of the migrant “other” has serious human rights and protection implications such as mistreatment and denial of access.

### **Manipulating the (in)visibility of the migrant “other”**

What measures are employed to control the migrant “other” through STCA? STCA reduces the visibility of the asylum seeker by discouraging formal border movements; those who go or remain “underground” are less visible. Simultaneously, STCA gives the image of false security by executing high-profile crackdowns. These moments of insecurity are used to justify policies that heighten border enforcement (Nevins). This method achieves two goals: to discourage flows before they happen and to give an impression of national security. Essentially, the figure of the migrant “other” is manipulated and deployed by states in order to serve state agendas of security and exclusion (Mountz).

For example, Colombian refugees and Ecuadoran migrants whom I worked with in an Ecuadorian migrant assistance office asked me if they would be able to reach Canada with the new border policy, STCA. The policy was viewed by potential migrants and asylum seekers, in Ecuador, as a barrier, serving as a deterrent. Border regulation produces visible events such as high-profile crackdowns that make the image of the border appear safe and efficiently managed, placebos of security. However, border regulation does not increase the security of the border environment



by default. Regulation pushes border flows outside of the public eye, making informal cross border activities invisible in order to offer a false image of security.

STCA serves to manipulate the visibility of the migrant in order to give images of insecurity and security at the border that will advance U.S. and Canadian policies. I agree with Andreas that heightening border regulation increases illegal movements and pushes these movements out of visibility. The border appears to be more secure because the increase in illegal activity becomes invisible. Andreas presents the success of the “high visibility” border campaigns in making the border appear to be more secure or “more under control” by explaining that “Illegal crossers were pushed out of sight (into more remote deserts and mountains) and therefore out of the media spotlight and the public’s mind” (5).

Bigo discusses the “refusal” of the state to “accept that immigration is now out of their control generates an inflation of coercive discourse that masks the fact that they are playing more with symbols than with effective measures” (Bigo, Migration 125). Border control offers symbolic representations of security to mask the increasing insecurity of the border. Those excluded by border policies become invisible. Hyndman and Mountz build on their discussion of the disembodied migrant figure as a security threat by offering the increasing invisibility of the “refugee” through the employment of “states of exception”, “making it possible to

disembody 'the refugee' in public discourse and, in corresponding fashion, to erase the refugee from the immigrant-receiving Western state" (86).

The decreasing visibility of the asylum seeker under STCA has human rights implications such as asylum seekers being abused by smugglers and traffickers, services utilized since legal channels to move between the U.S. and Canada are eliminated by STCA. STCA gives the false image of security for asylum seekers in the U.S (Nadig, Koser). and Canada. However, those remaining undocumented and becoming less visible may not receive the protection they need. Crosby calls for increasing the visibility of the invisibles of containment: "We need to move away from a triage approach and instead embrace a construct that allows us to make visible and include all those who are affected and made vulnerable by containment policies" (11). There is a perpetual struggle between the state and migrant of visibility, as migrants exercise their agency. Nyers explained that migrants execute "sovereign (re)takings" by making themselves visible in a system that wants them to be invisible (1086). States and migrants are fighting blow for blow over inclusion and exclusion.

The increase in attention on the U.S./Canadian border has distorted the realities of "safety" and "security" of the border. By making border enforcement policies such as STCA more visible, STCA makes cross-border movements less visible, deterring and discouraging formal movements of asylum seekers. Zureik and Salter argue that "there has

been no deep structural change to the process of crossing borders since the terror attacks of 9/11, but the amount of public attention and policy scrutiny has increased” (48). I contend that there have been significant changes to the border during the post 9/11 era. The events of 9/11 set in motion a number of policies that had incubated for years prior. These policies are reconfiguring and restructuring the border. Both the policies and the image of safety constructed by the states are destructive to the interests of those migrating and those within the U.S. and Canada. STCA threatens the security of the asylum seeker and of the U.S. and Canadian states. There is no evidence that STCA is increasing security. There is less protection offered and an increasingly insecure environment created by the policies and manipulations of visibility.

### **Europeanizing North American control**

Outside of North America, there are models of these regulatory practices of the migrant. There is much to be learned about the renegotiations of borders in North America by reviewing the renegotiations occurring in Europe. The EU served first as an incubator and second as a model for North American migration policies. Many authors have discussed an “Europeanization” of the U.S./Canadian border and North American migration control strategies including, Guiraudon and Joppke, Andreas, Walters, Abell, and Clarkson, as being part of a broad agenda of containment among Western states.

Guiraudon and Joppke note that “the containment of illegal immigration has quickly moved to the top of Western states’ immigration control agenda, and it provides the main impetus to the supranationalization of immigration policy in the European Union...” (7). Canada and the U.S. are attempting to define a security perimeter that closes their combined territories off to undesired migration. This supranationalization process is modeled after the EU, when states joined together to open their borders internally to trade and to deflect flows at the external borders of Europe as a region. In his section on “Future Border Trajectories”, Andreas describes North America

...multilateral policy harmonization and a ‘pooling’ of sovereignty to build a formal North American security perimeter (a ‘fortress North America’). Such a path would represent a Europeanization of border controls and thus a qualitative transformation of the continental integration project. (12)

Walters discusses the purpose of the EU perimeter, formed by the Schengen Agreement, “...Schengen does not appear to be connected with a politics of war and peace, of geographical territory understood as a power resource” (Walters, Mapping 562). Power for what purpose? Power to exclude persons on the move?

One question that emerged from my review of the literature surrounding Europeanization was: how does the ideal model of migration control uphold or undermine international refugee protection? To what standards is harmonization adhering to or aiming for? Which state practices are considered to be best and exemplary? Abell calls for Canada

to put pressure on the United States to prevent a harmonization process that would not result in the “lowest common denominator’ for Canada, but in higher standards for the United States” (587).

Contrasting the U.S. government and media opinions, Clarkson presents the Canadian system as being “safer” than the U.S. immigration system: “Full policy harmonization would also weaken Canadian refugee and immigration procedures that had proved more effective at monitoring terrorists than had those of their American counterparts” (78). Clarkson cites a quote from his interview with Janet Dench who deems the “exporting U.S. practices and North-Americanizing the insecurity that characterized American society” as dangerous to Canada (78).

Common practices and harmonization can decrease the quality of protection by executing a “race to the bottom” of refugee protection. The pressures circulated between the EU states, the U.S. and Canada encourage policies of exclusion that make these territorial regions less accessible and less appealing to potential refugees in search of safe haven.

Abell presents the refugee protection gaps that have resulted from EU safe third country provisions:

...the EU system has resulted in the ‘lowest common denominator’ in that each EU country is trying to be more strict than its neighbor. If conditions in one EU member state are not favorable for asylum seekers, there is the belief they will try to reach another EU member state instead where they will probably be recognized as refugees, leading to a higher number of asylum applications for that same country. This thinking has resulted in stricter refugee procedures in all of the member countries of the European Union. (588)

The U.S./Canadian STCA can be expected to exclude refugees in similar ways to the EU STCA, given that the EU was the model for North America. The signing of STCA can be contextualized within this trend of Europeanization. Abell discusses how Canada followed the EU model. Not only did Canada follow the EU model, Canada felt pressure from the EU to implement a Safe Third policy, and then pressured the U.S. to sign. Abell argues that “Canada has not been immune to the developments in the European Union, and its immigration policies towards refugee determination have changed accordingly” (570). Since Western states harbor a fear of being overrun with by masses of asylum seekers, the states aim for high levels of exclusion in order to look less appealing to asylum seekers.

Abell describes the pressure experienced by the Canadian state:

...there was a belief that Canada’s fair and open determination system would not be able to cope with the pressures generated by the diminution of asylum opportunities in Europe. Canada was seen as having no choice then but to adopt similar protectionist policies to the ones in place in the European Union... (576)

States recognize the value of geography and are aware that asylum seekers use geography to respond to restrictive policies. In order to avoid flows of asylum seekers transferring from one region to another, states cooperate with other states to tighten their common borders. Canada is geographically isolated from land migration flows except for its southern territorial limit that is shared with the U.S. STCA serves as a way for Canada to fortify its territory to reduce asylum flows.

### **STCA: deterring and denying access**

How does the literature support the argument that STCA is a control that achieves exclusion through geography? Hyndman and Mountz propose that STCA and "...other restrictive measures designed to thwart the arrival of asylum seekers, conveniently exploit Canada's geography to lessen the perceived burden of receiving refugees. This agreement is but one of many that together fortify borders and acts of sovereignty through exclusion" (82). Under STCA, Canada is closed off to asylum seekers who attempt to reach Canadian territory via the land border.

Crosby places STCA among the regulatory practices of the state:

Since the early 1990s with the end of the Cold War, there has been a shift from policies committed to resettlement as a permanent solution to refugee crises, as outlined in the Geneva Convention, to policies aimed at containing refugee populations in the regions where crises occur – essentially, the 'not in my backyard' syndrome. These containment policies include strategies of diversion and deflection (for example, safe third country agreements and transit-processing zones), deterrence (detention of asylum applicants, denial of access to employment), and, increasingly, prevention of movement altogether. (6)

STCA has advanced the agenda of the U.S. and Canadian states of restricting access to asylum seekers. STCA is a policy of control and deterrence that is part of a broad range of policies that erode refugee protection in North America. The processes of redefining and reimagining U.S. and Canadian sovereignties are causing migrants to struggle at various border battlegrounds (wherever the state deems a border) from an

inferior position of presumed illegality. Some asylum seekers struggle with STCA at the battleground of the U.S./Canadian land border and are directly redistributed by the U.S. and Canadian states. Those asylum seekers who do not interact directly with STCA at the U.S./Canadian land border may be deterred or prevented from reaching North America by interactions with the U.S. and Canadian states at processing points around the globe through mechanisms of interdiction and interception. Outside of direct or indirect interactions with the U.S. and Canadian states, asylum seekers may be deterred from traveling to North America due to their ideological interaction with STCA; they are discouraged from travel because STCA is interpreted as an obstacle to realizing their asylum journeys. Nyers presented the exclusionary function of STCA. "These agreements act in ways that reverse the flows of established transnational migratory paths, turning them into transnational corridors of expulsion" (1070).

Nyers, Crosby, and Hyndman and Mountz support my argument and concern that Safe Third rejects its official aims of enhancing refugee protection by serving as a policy of control as part of a broad range of exclusionary measures such as interdiction and interception. These policies are restricting access to refugee protection in North America by closing off pieces of sovereign territory to asylum flows.

**Summarizing the post 9/11 border**



How do I define the post 9/11 border and sovereignty in North America? Defining the new understandings of the border and sovereignty with 9/11 as a benchmark is useful. It serves to contextualize the changing border and state in the well defined post 9/11 era, when “post 9/11” is a phrase of powerful currency. However, 9/11 did not initiate the development of new ideas for migration regulation, but set in motion policies that were conceived decades prior. Ackleson describes 9/11 as a “focusing event” that provided the political impetus for the signing of the Smart Border (150). The post 9/11 border refers to a time period more than an era of new ideas and projects.

Just as U.S. and Canadian agendas of exclusion have operated for years, we can expect U.S. and Canadian border policies to advance agendas of exclusion into the foreseeable future. Gibney summarizes a forecast of exclusion: “There will be no let up in the tight control currently exercised over asylum in the years ahead. ...the events of that fateful September day will ensure that any future attempts to liberalise asylum policy are likely to founder on the rocks of preserving the security of US citizens” (Gibney 165).

While the forecast of refugee protection in North America is bleak, I believe there is hope for a more inclusionary approach in the future. I argue that receiving asylum seekers is in the national interest of the U.S. and Canadian states. Since STCA has not yet enhanced the security of

the border, the state and the person who moves, the needs of security will demand attention and U.S. and Canadian state action.

There were a number of issues raised in my field work issues that were not addressed by the literature. These topics include: the relationship between SBA and STCA, the binary of refugee and state agency, the impact of STCA on specific populations such as Haitians and Colombians, the concept of a “safe” country and the competing agendas within governments that influence migration control. I will discuss these issues in Chapter 3.

## **Chapter 2: Paper versus Practice**

In this chapter, I aim to demonstrate the contradictions between the officially stated goals of the U.S. and Canadian governments contained within the final text of STCA and the practices actually pursued. When I first read the final text of STCA, I was perplexed. How would a regulatory policy achieve its stated goal of enhancing refugee protection? Through my analysis of policy documents, I show that some of the official aims of STCA are not achieved and that the implementation of STCA has resulted in an erosion of asylum protection in North America.

The final text of STCA states responsibility sharing and cooperation on managing flows as the goals of STCA. In contrast, other government documents and various sources demonstrate that the reduction of asylum flows is the desired outcome of STCA and in the interest of the U.S. and Canadian governments.

In the final text of STCA the U.S. Government and Canadian Government present STCA as a bilateral agreement for sharing responsibility: “emphasizing that the United States and Canada...committed to the notion that cooperation and burden-sharing with respect to refugee status claimants can be enhanced...” Before the implementation of STCA, the many asylum seekers traveled through the U.S. to make their claims in Canada. According to UNHCR, in 2001, “over 14,000 people applied for asylum in Canada at a US-Canada land border. This compares to about 200 people who applied for asylum on the US

side of the border. In general, it is estimated that over half of all of Canada's asylum claims (both at the border and inland) are made by people who transited through the US" (1).

The official text of STCA states the aim as sharing the "burden" of refugee claimant flows. In practice, the agreement serves to reduce the flow, not to "share" the flow of asylum seekers. The reduction of flows is not an accidental outcome of STCA. In contrast to the language used in the final text of STCA, the Canadian Government has expressed its wishes to reduce flows in North America in documents such as Citizenship and Immigration Canada's (CIC) Annual Report to Parliament on Immigration for 2005. Excerpts from the report blatantly applaud the reduction of asylum flows into Canada. A decrease in numbers of asylum claimants is deemed a "positive results."

Many recent administrative measures have yielded positive results in the form of reduced intake and reduced inventories in some parts of the system. Intake for 2005 is projected to be a 15-year low at less than 20,000. Intake is lower, due in part to a worldwide drop in refugee claims, and in part to measures that aim to reduce the number of asylum claims made within Canada from individuals who do not always have a genuine need for protection. With a drop in asylum claims, CIC can ensure that the limited resources available are directed at those most in need of protection. By June 2005, the IRB inventory had been reduced by more than half to 22,000, compared to a high of 51,600 in 2002. (CIC, Parliament 35)

As a policy, STCA does not provide a mechanism to determine whether persons seeking asylum in Canada who are deflected to the U.S. under STCA eligibility requirements are genuine or non-bona fide refugees. Without an assessment of the potential asylum seekers deflected to the U.S., the Canadian Government makes a hollow claim

that STCA enhances refugee protection for those who are in most need of protection. The threshold screening interview conducted by the U.S. and Canadian border patrol agents merely adjudicates eligibility for asylum in the U.S. or Canada on the basis of STCA; it does not inquire as to why asylum seekers wish to make claims in Canada over the U.S. or vice versa. Abell describes the threshold screening interview: “The potential or experienced persecution of the asylum seeker is not considered in the threshold screening interview for Safe Third. Cases are not adjudicated on an individual basis, but rather people are assigned countries” (579).

Regarding the drop in refugee claims worldwide, the Canadian Government fails to acknowledge that there are potential refugees who are not able to or discouraged from accessing asylum across the globe; some asylum seekers may avoid formal systems due to fears of deportation or their mobility has been restricted in a way that prevents them from reaching a safe country to make asylum claims.

STCA is a policy of migration control that redistributes flows of asylum seekers between the U.S. and Canada. However, the CIC’s discussion of the 15 year low of asylum claims during STCA’s first year of implementation is significant in that it demonstrates the redistribution of asylum flows from Canada to the U.S. and potentially beyond both countries. Persons who hoped to seek asylum in Canada were either processed in the U.S. system or were deterred from traveling to the U.S./Canadian border formally. It is difficult to measure how many

potential refugees were discouraged by the barrier erected by STCA and resultantly remained undocumented in the U.S., utilized informal channels of migration to cross the U.S./Canadian border, or remained in home or transit countries outside of North America. Later in this chapter I will discuss the implications of Canada's deflection of asylum seekers to the U.S. and the gravity of the fifty percent decrease of asylum claimants to Canada from the U.S. between 2003 and 2005 in Canada. CIC groups STCA with a series of measures to reduce asylum flows, demonstrating that STCA is one piece of an agenda of exclusion from Canadian territory:

CIC, in collaboration with CBSA, continues to look for ways to reduce the exploitation of Canada's refugee system by individuals who do not have a genuine need for protection. The introduction of the Safe Third Country Agreement with the U.S., judicious use of visitor visa requirements and the continued use of interdiction measures abroad have contributed to a decline of almost 20% in asylum claims made within Canada in 2004 in comparison to the previous year. CIC expects that the number of asylum claimants will continue to decrease in 2005. (CIC, Parliament 39)

STCA is part of a broader policy agenda of reducing flows via bilateral agreements, visa restrictions and aggressive interdiction as demonstrated in literature such as Mountz, Walters and Gibney. The reduction of flows and the reduction of access are stated goals. It is troubling that an agreement that officially aims to improve refugee protection is presented as one of the many strategies for reducing access to asylum.

In addition to the CIC's interpretation of STCA as a restrictive measure, non-governmental parties have interpreted STCA as a policy of

exclusion through their assessments. The Harvard report, Bordering on Failure, places STCA in a broader trend of the reduction of asylum access in the 4<sup>th</sup> finding: “The STCA contributes to a rapidly deteriorating refugee protection regime in North America”:

Although beyond the scope of this report, the implications reach beyond the borders of the United States, as interdiction policies stretch to Mexico, other parts of the Americas, and throughout the world. The STCA is only one piece in a puzzle where refugees are trapped in their countries of origins, unable to flee, and are denied fundamental rights. (Harvard 4)

Just as the Canadian Government’s CIC presented STCA as one strategy in a broader agenda of reducing asylum flows, Macklin describes STCA as:

...not the first or only tactic devised by the Canadian government to impede asylum seekers from reaching Canadian territory and claiming asylum...Canada is something of a pioneer in instruments of interdiction. The tools range from carrier sanctions that punish private airlines and shipping lines from transporting improperly documented passengers, to imposition of visa requirements on so-called ‘refugee-producing’ countries, to the interception and deflection of ships suspected of carrying migrants to Canada. (Macklin 5)

The above analyses present an STCA that serves to share the “burden” of asylum processing with the goal of also reducing the “burden” of asylum seekers in North America. The Canadian Government justifies STCA as a policy that will reduce “abuses” to its asylum processing system by non-genuine refugees; however, there is no evidence that STCA is accomplishing this goal. STCA does not provide a mechanism for

the Canadian Government to determine whether or not the asylum seekers being deflected to the U.S are genuine or non-genuine refugees.

### **Failure to equalize systems**

The redirection of asylum flows that were headed towards Canada back to the U.S. has exacerbated the differences between the U.S. and Canadian asylum processing systems. Specific populations of asylum seekers, notably Colombians, are faced with lower acceptance rates in the U.S. than in Canada. One stated goal of STCA implementation is found in Article 8.2 of the STCA, when the U.S. Government and the Canadian Government describe their aim to “resolve differences” (to equalize) their systems. “These procedures shall include mechanisms for resolving differences respecting the interpretation and implementation of the terms of this Agreement. Issues which cannot be resolved through these mechanisms shall be settled through diplomatic channels.” STCA implementation does not inherently encourage equality in the systems.

Through my research, I found that the U.S. and Canadian governments have not attempted to identify specific differences or to pursue routes to resolving the differences. However, what would be the danger of the U.S. and Canadian states pursuing their officially stated aim of resolving differences? As discussed in Chapter 1, research suggests that equalization would be a “race to the bottom” and an overall lowering of asylum processing standards.



The final text of the Agreement acknowledges that some differences between the U.S. and Canadian asylum systems exist, although it does not identify them. Other official statements have described the two systems as “same” and “equal”. By describing the U.S. and Canadian systems as equal, the states deny the reality that asylum seekers experience unequal treatment in North America, giving their preferences foundations.

Former Canadian Immigration Minister, Coderre, describes the U.S. and Canadian systems as equal: "The Safe Third Country Agreement addresses a fundamental concern about asylum shopping for economic advantage interfering with legitimate claims for refugee protection from those in genuine need," said the Minister. "Canada and the United States have the same commitment to refugee protection and the same international obligations. We also face a common challenge in managing access to our respective refugee determination systems" (Coderre 1). In contrast, a number of experts and NGOs contend that the US and Canada do not make the same commitment to refugee protection or interpret their international obligations in the “same” manner. Later in this chapter I will present statements from these sources.

Similar to Coderre’s description of U.S. and Canadian systems, U.S. officials have been quoted as denying the existence of differences between the U.S. and Canada that would significantly impact asylum

seekers. At a presentation to the U.S. House, the Director of Asylum at the Department of Homeland Security, Joseph Langlois describes the U.S. argument an exception for those transiting through the U.S. to make asylum claims in Canada.

Several NGOs urged us to include a transit exception for persons who entered one country simply for the purpose of proceeding to the other to seek asylum there. After considering this suggestion, both the U.S. and Canada agreed that such an exception should not be included. The main reason is that a transit exception would require a significantly more complex process for determining whether an individual was subject to return under the agreement, which would prolong and complicate the determination process to the extent that it could eliminate the benefit of requiring these individuals to apply in the country of last presence. (Langlois 4)

It is illogical to predict the trauma experienced by asylum seekers due to a lengthier processing system is greater than the trauma experienced by being forced to make a claim in a country that they have already traveled to in order to receive protection in a different country. Forcing an asylum seeker to claim asylum in the U.S. as opposed to Canada may result in deportation in addition to an experience of trauma. This excerpt also illustrates the struggle of the U.S. Government to manage asylum flows. Attempting to determine the paths traveled by asylum seekers would “complicate” the management of asylum. While a more complex processing system would be in the interest of the asylum seeker and enhance refugee protection (a stated aim of the STCA), Langlois’ statement demonstrates that the U.S. Government does not wish to pursue a route that would require additional resources. Yet STCA does

increase the traffic of processing in the U.S. system by receiving the asylum seekers deflected from Canada under STCA.

Despite the U.S. and Canadian governments stated goal to “resolve differences” between their systems, both governments rejected the implementation of a reconsideration mechanism which would explore and correct the differences between the U.S. and Canadian systems. In addition, the reconsideration mechanism would provide the Canadian Government with a way to measure how many asylum seekers are genuine refugees and how many are non-genuine refugees who would “abuse” the Canadian asylum processing system. Currently, there is no means for the Canadian Government to assess the impact of STCA on “abuse” reduction. The U.S. chapter of the Partnership report responds to UNHCR’s request for a reconsideration mechanism to be implemented as part of STCA:

The Parties do not believe that an individual request for reconsideration of a threshold screening determination is necessary, because there are sufficient safeguards and oversight mechanisms in place to ensure that the Agreement is appropriately applied to each individual case. Neither the Agreement nor the Statement of Principles provides a right to request reconsideration of a determination that an asylum seeker should pursue his claim for protection in Canada or the U.S. pursuant to the Agreement. (United States, Partnership)

By deeming both countries “safe” systems for processing, monitoring each individual case is not required or conducted by the U.S. and Canada. STCA does not call for the “safeguards” that would ensure fair processing of each case. In the next section I discuss the reduction of asylum protection that has resulted from STCA’s implementation.

### **The differences matter**

The U.S. and Canada have defended their systems as safe and nearly equal. However, reports from non-governmental organizations demonstrate that these differences, whether ignored or acknowledged, have serious implications for asylum seekers in North America. The Colombian asylum seeker population has been cited by many sources as greatly impacted by STCA (USCRI, Harvard, CCR) Since most Colombian asylum seekers face the geographic necessity of crossing through the U.S. to reach Canada, STCA creates a wall that results in their chances of obtaining asylum in North America being significantly diminished.

The Harvard report presents a case study of Colombian asylum seekers in order to illustrate the significant differences in the U.S. and Canadian acceptance rates.

The danger posed by the STCA to refugee claimants is most clearly illuminated by the plight of Colombian refugees. After the STCA went into effect, the number of Colombian refugees who entered Canada from the United States declined by approximately 82%. While the acceptance rate in Canada was 81% in 2003 and 79% in 2005, the acceptance rate in the United States in Fiscal Year 2004 was 45% for those who affirmatively applied and 28% for those appearing before an immigration judge. Despite continued existence of serious, widespread human rights abuses in Colombia, several aspects of the U.S. asylum system pose major obstacles to Colombian refugees seeking protection in the United States. Because of the STCA, Colombians who previously would have legally entered the Canadian asylum system are instead exposed to unnecessary danger and uncertainty in the United States. (Harvard 3)

One U.S. law that has significantly diminished the chance for Colombian asylum seekers to gain refugee protection in the U.S. is the

REAL ID Act. This law bars asylum seekers who have provided “material support” to terrorist organizations, regardless of the voluntary or involuntary nature of the exchange. The conflict in Colombia has created an environment where innocent bystanders are coerced to provide some form of support to the paramilitaries. According to the U.S. Committee for Refugees and Immigrations (USCRI), the REAL ID act has significantly reduced the possibility of asylum seekers obtaining protection in the U.S.

The lack of an exception for those whose support was involuntary virtually halted the acceptance of Colombian refugees. The Office of the UN High Commissioner for Refugees (UNHCR) stopped referring Colombian refugees to the United States for resettlement because it estimated that the material support provision would block 70 percent of applicants, and other potential resettlement countries might not accept those the United States branded as terrorists. In one case, guerillas from the Armed Revolutionary Forces of Colombia raped a woman, killed her husband, and stole their farm animals. Because the guerillas took her animals, UNHCR believed the United States might deem her to have given material support to the guerillas. (USCRI 2)

The UNHCR no longer refers Colombians to the U.S. for resettlement, but those Colombians who travel to the U.S. or through the U.S. to reach Canada are processed in the U.S. system.

A Washington Post article raises the concern over excluding asylum on the basis of providing “material support” to terrorist groups: “Advocates for refugees add that people who were forced to aid terrorist fighters at gunpoint could be labeled as supporters and turned away...” The article discusses the individual case of a Colombian nurse who was not successful in obtaining asylum in the U.S.

A Colombian nurse living in California who declined to give her name said she was abducted by the Revolutionary Armed Forces of Colombia (FARC) outside of Bogotá and forced to treat one of their soldiers. She fled Colombia with her daughter in 2000 after her life was threatened in a note to her family. Her asylum request was rejected last year. 'I had no option,' she said. 'What will happen if I go back? I will be killed. They look for people. They know when they arrive at the airport. They have names.' (Post 1)

In addition to facing the reality of lower success rates in the U.S., refugees may prefer Canada for a variety of reasons. Colombian asylum seekers may view the U.S. role in Colombia as a root cause of their displacement. I interviewed Caitlin Brazill, a lawyer for Catholic Legal Services- Asylum Division, specializes in Colombian asylum casework. Brazill describes the “material support” bar as “one of the major obstacles, especially for those who were forced to pay ransom for their spouses or children.” In some cases, the difficulty faced during the asylum application process in the U.S. can result in Colombians feeling “frustrated”. Brazill generalized, “at least 15 of my clients have said, ‘I should have gone to Canada. I should have gone to Spain’.”

Colombia is not on the U.S. list of countries with visa restrictions; however, Brazill describes the process for obtaining a visa as “more restrictive”, noting that there is a growing market for fake visas, “they sell for three to five thousand U.S. dollars”.

The Colombian population may not seek asylum in the U.S. since the U.S. is playing a role in their displacement. The U.S. has been present in Colombia for over a century, most recently through the execution of Plan Colombia, a U.S. aid initiative to eradicate the growth of coca in the country. Plan Colombia has been criticized as fueling the

conflict in Colombia by militarizing and displacing Colombians. A deeper transnational analysis of U.S. involvement in Colombia is necessary and would illustrate the geopolitical structurings of asylum. The U.S. may discriminate against asylum seekers from countries on the basis of political or geopolitical engagements (or disengagements).

Colombian asylum seekers highlight differences between the U.S. and Canadian systems. The outcomes of asylum adjudications in the two countries are dramatically different. In addition to presenting the case study of Colombians, the Harvard report provides a summary of differences in the two systems that influence asylum success rates.

One explanation for why the Canadian asylum system is more appealing to asylum seekers than the U.S. system is that:

Prior to the STCA, individuals voluntarily entered Canada's well-regulated refugee determination system because the Canadian system offered attractive incentives for legalizing status, such as protection from refoulement, employment authorization, and access to public education and health care, during pending asylum determinations. ...Refugee claimants stranded in the United States frequently are statutorily barred from applying for asylum, and even those who are eligible for asylum have strong incentives not to regularize their status. For example, asylum applicants in the United States cannot receive employment authorization, benefits, or government-sponsored legal representation while awaiting determination of their claim. Further, individuals are wary of entering what is too often dysfunctional and arbitrary U.S. asylum system. (Harvard 21)

The differences between the U.S. and Canadian asylum systems matter, in addition to the political histories and contemporary geopolitics. These result in material impacts and potentially different outcomes on claims for asylum seekers. Until these differences are resolved in a way

that closes the protection gaps and enhances refugee protection in both the U.S. and Canada, asylum seekers' preferences are justified.

### **A call for further investigation**

Until the protection gaps are closed and the multiple issues surrounding the implementation of STCA are resolved, it is in the best interest of asylum seekers to revoke the policy. Before a continuation of STCA, there is a need for further study and evaluation of STCA by the U.S. and Canadian governments, international organizations such as the UNHCR and the International Committee for the Red Cross as well as parties outside of the agreement such as think tanks, NGOs and academics. The Partnership report's evaluation of the implementation of STCA merely examines whether the policy was implemented as agreed by the U.S. and Canada. The report does not assess the broad impacts of the policy on asylum flows and refugee protection. In addition, none of the parties reexamine the basis of the agreement, which would involve an assessment of whether the U.S. and Canada are safe countries and exactly "how safe" they are.

The UNHCR endorses STCA:

Since the Agreement came into force, asylum seekers have been provided with access to a full and fair refugee status determination process in one country or the other. Implementation has been in full compliance with international refugee protection principles and in accordance with international human rights instruments. By establishing clear and consistent criteria for the allocation of responsibility for adjudicating asylum applications, an effective mechanism to share responsibility for providing protection to refugees in North America has been established. At the land borders, exceptions are being effectively



adjudicated and refugee claimants are treated fairly and with respect. By putting in place an orderly process, the Agreement has served to reduce the potential for misuse and strengthened public confidence in the integrity of both countries' refugee determination systems. (UNHCR, Partnership)

The UNHCR evaluated the adherence of the U.S. and Canadian governments to the measures set out in the policy of STCA. The UNHCR argues that both states implemented the Agreement in a way that complies with international refugee obligations, but does not evaluate the broader issues surrounding the implementation of STCA and the arguments for its revocation.

As of spring 2007, the Canadian Council for Refugees (CCR) provides the most comprehensive response to the Partnership report and asks the questions that were not discussed by the U.S. and Canadian governments or the UNHCR. Opposition to STCA from CCR occurred before the signing of the Agreement, mobilizing protest from NGOs across Canada.

The first formal challenge of STCA in Canada was in December 2005, when CCR joined Amnesty International, the Canadian Council of Churches and a Colombian asylum seeker in the U.S. filed a lawsuit against the Canadian Government, claiming that Canada violates its Charter of Rights and Freedoms and its international refugee and humanitarian obligations as a party to the Agreement. The parties call for a revocation of STCA on the grounds that the U.S. is not a "safe" country for asylum processing and that passing off responsibility of processing asylum seekers to the U.S. violates Canadian domestic and international

obligations. This case is significant since it demonstrates the widespread opposition in Canada against STCA.

Aside from the ongoing litigation of the lawsuit, CCR has produced a number of reports and press releases on STCA, some in direct response to Canadian, U.S. and UNHCR statements or reports.

The CCR responds to the Partnership report through the CCR “Safe Third Brief to Standing Committee”, by calling for a reevaluation of the U.S. being considered a “safe” country for asylum processing.

In November 2006, the CCR made a submission to Cabinet presenting evidence that, since the US was designated as a safe third country, there have been a series of developments that mean that the US fails to meet the safe third country test, according to the definition and the factors established in the *Immigration and Refugee Protection Act*. ...This report failed to address the fundamental question of the impact of the Agreement on refugees. It reviewed how the Agreement was being implemented and not what happened to refugees who were turned back at the border or who learned that the Canadian border was closed to them. The report also failed to analyze developments in the US policies and practices and whether these mean that the US can no longer be properly considered a safe third country. (CCR, Brief)

CCR discusses important areas for investigation that the UNHCR, U.S. and Canadian states did not pursue for their year review of STCA such as changes in asylum processing, the individual handling of cases and the counting of persons excluded by STCA. An assessment was made of the implementation of STCA but not of the actual impact of the Agreement on persons seeking asylum in North America.

In addition to CCR’s appearance before the Standing Committee, CCR issued a report, Less Safe Than Ever in November 2006, which

directly responds to the Partnership report. The argument of CCR focuses on the U.S. no longer being a “safe” country for asylum seekers:

The federal Cabinet has the obligation under Canadian law to review the status of the U.S. as a safe third country. In light of the substantial changes in policy and practice in the U.S. since the last review, the U.S. can no longer be considered a safe third country, according to the definition and factors established in the Immigration and Refugee Protection Act. (CCR, Less 37)

Earlier on in the report, the CCR offers a description of detailed concerns of designating the U.S. a safe third country:

...detention practices incompatible with international standards; eligibility bars to asylum (notably excluding most claimants who have been in the U.S. for more than a year); restrictive interpretations of the refugee definition (notably with respect to gender-based claims); patterns of discrimination, particularly against Muslims and Arabs; and eroding standards of procedural protections, such as restrictions on access to meaningful review by the Board of Immigration Appeals. (CCR, Less 8)

The CCR, at the minimum, is demanding that the Canadian Government review its designation of the U.S. as being a “safe” country for asylum seekers. CCR hopes to achieve a revocation of STCA however it is not likely that this will occur due to the close trade relationship between the U.S. and Canada.

### **Human smuggling as a response to STCA**

Among the many aspects of STCA that solicit further investigation, the influence of STCA on human smuggling and trafficking is of an urgent nature. The Canada chapter of the Partnership report strikes down claims

that irregular movements across the border have increased since the implementation of STCA. Below the Canadian government summarizes the concerns it has received regarding a potential increase in human smuggling due to STCA implementation:

During the development phase and since implementation of the Agreement, considerable concern has been expressed by stakeholders and parliamentarians about the possible increase in irregular crossings resulting from the Agreement coming into force. Advocates believe that by limiting access at the land border POEs, claimants who fail to meet an exception may be forced to make dangerous crossings in order to gain access to the Canadian refugee determination system. (Canada, Partnership)

The Canadian Government claims that there has been a decrease in human smuggling:

However, since implementation, Canadian and U.S. law enforcement agencies report that apprehensions of irregular migrants known to have attempted to cross the international border declined (in both directions) in 2005 from the previous year. In 2005, there have been no appreciable shifts from the previous year noted in irregular migration to reflect diversion from the land border to either entry between ports or at air and marine POEs. (Canada, Partnership)

The language used by the Canadian Government in this summary is passive, denying the agency of the state to execute interventions in smuggling networks. The Canadian and U.S. governments have the power to intervene or to ignore informal border movements. The Canadian Government notes found that all POEs processed fewer claims

for asylum over the course of the year. The findings below are incomplete for an analysis of smuggling since they do not demonstrate an attempt to measure informal movements or persons not gaining access to U.S. and Canadian sovereign territory:

The overall number of refugee claims decreased considerably from 2004 to 2005 (approximately 23 percent), and the Agreement may have contributed to a particular decline in the number of land border claims (approximately 55 percent) from 2004 to 2005. However, this decrease has not been reflected in any appreciable shift of the same nationalities that traditionally entered claims at land borders to air or marine POEs or inland offices. Inland office claims have also decreased in 2005, but as a relative proportion of overall claims, the percentage of claims made inland has risen due to a larger decline in POE claims (Canada, Partnership)

The fifty-five percent decrease in claims made at the land border raises a number of questions that are not answered by the U.S. Government, Canadian Government, or the UNHCR in the Partnership report. Asylum claims for the Canadian system decreased by half within the first year of the implementation of STCA because the asylum seekers were either turned back to the U.S. or deterred from traveling to the U.S./Canadian border. One cannot help but wonder how many asylum seekers remained undocumented in the U.S. or how many asylum seekers crossed from the U.S. into Canada by employing irregular migration tactics. In the above excerpt, the Canadian Government claims that there has not been a “shift” in nationalities making claims in Canada

but does not provide statistics on acceptance rates for the various nationalities of asylum seekers.

**Table 1: Refugee Claim Intake in Canada by Year and Location**

<b>Calendar Year</b>	<b>Total Intake</b>	<b>Canada-U.S. Land Border</b>	<b>Airport</b>	<b>Inland</b>
<b>2002</b>	33,461	10,856	4,693	17,912
<b>2003</b>	31,893	10,940	4,179	16,774
<b>2004</b>	25,521	8,896	3,456	13,169
<b>2005</b>	19,735	4,033	3,337	12,365

The statistics and analysis from the Canadian chapter of the Partnership report do not measure informal border crossings or those potential refugees that did not or could not reach the land border to make a claim. Additionally, the statistics do not speak to the persons in the U.S. and Canada who choose to remain underground due to STCA. The Canadian Government Representative, Morgan, who I interviewed, explained that human smuggling is “not a new phenomenon and not significantly worsened by STCA.” However, increased regulation of irregular migration under STCA provides an incentive for the expansion of the smuggling industry.

The U.S. and Canadian governments lack data or have not released data to evaluate the impact of human smuggling. Despite a lack of government issued evidence, there have been a number of informal border movements that have gained media attention. Although news reports, both non-government and government, do not replace data analysis, they illustrate that illicit border flows are occurring in the time period following implementation of STCA and highlight specific populations experiencing difficulty in navigating North American asylum systems.

A press release from the U.S. Immigration and Customs Enforcement (ICE) on February 14, 2006, described the apprehension of a smuggling network. Through a joint investigation by U.S. Immigration and Customs Enforcement and Canadian authorities 16 people were charged with “conspiracy to smuggle illegal aliens into the United States, and also with harboring and transporting illegal aliens within the United States.” The indictment demonstrates the cooperation between the U.S. and Canada to combat irregular migration. The press release quoted U.S. Attorney Murphy saying that “The charges are based upon the interdiction of at least 74 illegal aliens smuggled into the United States by the conspiracy, and the more than 2,000 incriminating telephone conversations intercepted by the RCMP during the latter part of 2005.”

The discovery of this smuggling network occurred in 2005, the first year that STCA was implemented. While this group of smugglers may not have increased their activity due to STCA, their assistance of moving at least 74 persons across the border is quite significant. How many of the “illegal aliens” are persons in need of asylum? How many potential refugees employed the services of this smuggling network to make their asylum claims?

There was another major crackdown at the U.S./Canadian border in 2005, during STCA’s first year; the discovery of a tunnel that connected the state of Washington and British Columbia. This tunnel is the first discovered on the U.S./Canadian border. An article from the USINFO archive reports the first tunnel discovered on the U.S./Canadian border in July 2005. U.S. Attorney John McKay states that, “The presence of a tunnel on our northern border threatens the security of both countries, whether it is used to smuggle drugs, contraband or even terrorists. Shutting it down, just as it is completed, is a huge blow to these criminals” (USINFO 1).

McKay’s quote implies that he views all tunnel activity to be illegal and threatening to national security. There is no mention of the tunnel being used by asylum seekers to reach sovereign territory to gain refugee protection.



The ICE news release that was included in the article discussed above, "Tunnel Discovered Between Canada and U.S.; Joint Investigation Leads to Arrest of Drug Smugglers," illustrates the significance of the tunnel to the state:

Special Agent in Charge of the Drug Enforcement Administration, Seattle Field Division, Rodney Benson states 'this tunnel seizure, the first of its kind on the United States and Canada border, is one of only 34 cross-border tunnels ever discovered in the United States. This unregulated and uncontrolled point of entry could have constituted a real threat to the United States, not only in terms of drug trafficking, but to the national security of our nation. (USINFO 2)

These government articles illustrate the intentional or unintentional disconnect made by government employees between border enforcement policies and illicit cross-border flows. Crackdowns offer a glimpse into the market forces at work over the U.S./Canadian border. People are buying and selling in order to increase their mobility and the market appears to be healthy during the early years of STCA.

However, governments intentionally may ignore these links. The two news releases cited above made by the U.S. Government describe two high-profile crackdowns at the border. These events may serve to offer a false appearance of border security through the apprehension of the migrant "others" bodies. While the U.S. and Canadian states chose to make the bodies involved in these networks visible, how many migrant bodies are being pushed out of sight in order to give the impression of effective border enforcement?

Without attempting to measure informal border movements, bureaucrats continue to claim that “there is no evidence” to back the claim of increased smuggling in response to policies such as STCA. A lack of statistics makes it difficult to STCA’s role in border movements and to contest the hollow claims made by government servants.

### **Eroding asylum**

As long as STCA continues to operate as part of a security agenda of migration control which includes exclusionary tactics such as interdiction, off-shore processing, and visa restrictions, support for asylum in the U.S. and Canada both within the government and outside will continue to erode. The U.S. Government agreed to STCA in order to entice the Canadian Government to sign onto SBA. Although garnering support for the institution of asylum is a stated goal of STCA, the policy inherently and structurally reduces the legitimacy of asylum processing. The U.S. and Canadian governments state that they aim to enhance the legitimacy of their respective asylum processing systems, “desiring to...strengthen the integrity of that institution (asylum) and the public support on which it depends” (STCA Final Text). In turn, STCA reduces the level of refugee protection in North America by restricting the access of asylum seekers to the Canadian system for adjudication, a system that has historically higher acceptance rates for specific populations such as Colombians.

The implementation of STCA has failed to “resolve differences” between the U.S. and Canadian asylum systems such as differential treatment of Colombians, benefits granted to asylum claimants during their processing period, security policies such as the REAL ID Act, and detention practices. Prior to STCA some asylum seekers traveled to the country that best met their protection needs and where they enjoyed higher acceptance rates. Asylum seekers are now at the mercy of the border patrol agent who distributes flows through the “threshold screening interview”. The asylum seekers are the bodies of the U.S./Canadian border caught in the landslide of an eroding North American protection regime.

In this chapter I have analyzed the official aims of STCA and the realities of implementation that do not serve these aims. In the following chapter, I will present a reading of the policy from those directly involved with STCA through analyzing a series of interviews I conducted in 2006.

### **Chapter 3: Discussions of STCA**

This chapter presents and analyzes data gathered in 2006. I conducted 20 interviews with government employees, academics and NGO employees regarding STCA. The semi-structured interviews took place in Washington, DC, Toronto, Montreal and Ottawa. While the majority of the interviews were conducted in person, some occurred by phone. Generally speaking, the duration of the interviews was one hour. I recorded interview notes by hand instead of voice recording the interviews because I was not allowed to bring recording devices into some of the interview venues.

Some of the participants are named because these persons specifically requested that they be identified. Those who made such requests were NGO employees, researchers and asylum lawyers. I interviewed Janet Dench who serves as the Executive Director of the Canadian Council of Refugees (CCR) and Martin Jones who is a Research Associate for the Centre for Refugee Studies at York University in Ontario.

The government servants requested to speak off the record and for purposes of protecting their identities; I do not provide titles of their positions or home departments within their governments. The government interviewees are referred to with gender-neutral pseudonyms. Within the U.S. federal government, I conducted interviews at the Department of State and the Department of Homeland Security. Within the Canadian

Government, I conducted interviews with Citizenship and Immigration Canada and the Department of Foreign Affairs and International Trade.

I posed a series of questions regarding STCA. My initial questions solicited information that would place STCA in the context of U.S./Canadian relations and increasing border security efforts such as the Smart Border Declaration and the Security and Prosperity Partnership of North America. My secondary questions probed the function of STCA as an implemented policy. Please refer to Appendix 2 for a list of interview questions. My goal was to learn the motivation and impetus for the development and signing of STCA as one step to understand the policy's impact on asylum seekers. I attempted to identify the priorities of the parties involved in relation to border regulation.

In this section, I will analyze the findings from the interviews conducted, paying particular attention to the points in which the discussions diverged and connected. I aim to extract the themes, patterns, and debates contained within the discussions of Safe Third. In addition, I seek to connect these findings to the broader debates in international refugee protection and security beyond the scopes of these interviews.

### **The signing of STCA**

The series of questions that initiated dialogue during the interviews aimed to uncover the impetus for STCA. Why was it signed when it was? What were the motivations of both nation-states?

Participants' responses demonstrated that the U.S. and Canada had different motivations for signing STCA and benefited from the Agreement in different ways. The Canadian Government wanted to sign STCA in order to reduce the flow of asylum seekers to Canada from the U.S. Canadian Government Representative, Morgan, described the Canadian asylum system as being "overburdened" prior to the signing of STCA and that public support was declining as a result of providing benefits to asylum seekers, particularly in the 1990s. Morgan estimated that one third of all asylum seekers who arrived in Canada came from the U.S. and that very few went to the U.S. from Canada. STCA requires the U.S. to process the asylum seekers who would have previously traveled to Canada to claim asylum. Simply stated, the Canadian Government's goal was to reduce the asylum seeker flow from the U.S. by having the U.S. increase processing. Morgan described this joint processing as "sharing the burden" in managing asylum flows.

I received a similar but expanded response from Canadian Government Representative, Jamie, who explained that STCA was signed for security purposes in addition to being a response to the "backlog" in the Canadian system. The "backlog" refers to a period in Canadian asylum processing during the 1990s when the Immigration and Refugee

Board (IRB) was unable to quickly adjudicate the high volume of refugee claims. The claims made by these two servants warrant an investigation into the documented changes in public opinion in Canada regarding refugee protection during the “backlog” period. Additionally, research executed on the shifting numbers of refugees making claims in the Canadian system over the past two decades would be relevant.

The Canadian Government’s goal, as described by representatives Morgan and Jamie, to reduce asylum flows was achieved within the first year of STCA’s implementation. According to the Canadian Government’s chapter in the Partnership report, the overall number of refugee claims dropped 23 percent between years 2004 and 2005. The Canadian Government explains that “the Agreement may have contributed to a particular decline in the number of land border claims (approximately 55 percent) from 2004 to 2005,” (Partnership Canada Chapter). According to Table 1 in the Canada chapter, in 2004, there were 8,896 claims for refugee status in Canada made at the U.S./Canadian land border and this number decreased to 4,033 in 2005 (Partnership Canada Chapter). A decrease in asylum flow intake at the land border was achieved with the implementation of STCA, serving Canada’s agenda of “burden-sharing”.

In contrast, I found that the U.S. motivation for signing STCA was unclear since the U.S. does not directly “benefit” from the agreement in relation to asylum seeker flows. U.S. Government Representative, Casey,

asked me to explore the following questions through my thesis research: “Why did the US sign it? What does the US get? Does it work?” Similarly, a Congressional Research Service employee, Bailey, asked me to explore “who benefits from STCA” because it is not clear how the U.S. Government benefits. I estimate that these questions were raised by persons inside and outside the government because STCA actually increases the amount of processing by the U.S. Government; STCA diverts potential Canadian refugee flows to the U.S. for handling. Another possible explanation for these questions is that U.S. motivations regarding STCA were not articulated publicly. The act of probing U.S. intentions surrounding STCA demonstrates that U.S. motivations were not clearly defined to all within the U.S. Government.

### **Relationship between STCA and SBA**

The answers to these questions materialize when STCA is placed in the context of SBA. STCA is not a policy that stands in isolation for the U.S. Government. The indirect benefits to the U.S. Government emerged from my discussions with bureaucrats on both sides of the border. STCA is a bilateral agreement that the Canadian Government had wanted for at least a decade. Canadian Government Representative, Morgan, described STCA as the piece that Canada had wanted for “20 years” and explained that the U.S. used it as a “carrot” to bring Canada on board with SBA. According to Morgan, the U.S. performed “foot dragging” because it



had “less interest, a different self-interest” regarding STCA. Similarly, the U.S. Government Representative, Alex, explained that “STCA was something Canada wanted for years” and that it was a way to “get Canada on board for the 30 point action plan”. While dialogue surrounding the border had continued on some level between the U.S. and Canada for many years, the event of 9/11 provided the catalyst to negotiate a comprehensive border policy between the U.S. and Canada. In the context of heightening security, STCA became part of the broad SBA, as one of the 32 points. The U.S. signed onto STCA in order to gain Canada’s cooperation with SBA. As Canadian Government Representative, Morgan, explained, “STCA and Smart Border were thrown together out of necessity of the focus on security post 9/11. The basis of STCA was not security.”

SBA serves a variety of agendas: trade efficiency, security and the reduction of asylum flows in North America. It makes sense, therefore that the persons I interviewed provided very different responses to my questions regarding the purpose of Smart Border. Since, “the basis of STCA was not security” (Morgan), how can STCA be included as an action point for the SBA? How does SBA relate to asylum and refugee protection?

One outcome of SBA desired by both governments is an increase in cross-border information sharing. Canadian Government Representative, Jamie, described the most important aspects of SBA as

being the information sharing and trade efficiency. United States Government Representative, Pat, suggested that the “Smart Border is about trade and efficiency, not terrorism. STCA is not that significant.” Pat also noted that before 9/11 there was poor information sharing and said that now there is “constant communication”.

In contradiction to the above claim, STCA does make provisions for the facilitation of information sharing. Below are excerpts from the final text of the STCA. Articles 7 and 8 specifically encourage information sharing.

#### ARTICLE 7

The Parties may:

- a. **Exchange such information as may be necessary for the effective implementation of this Agreement subject to national laws and regulations. This information shall not be disclosed by the Party of the receiving country except in accordance with its national laws and regulations. The Parties shall seek to ensure that information is not exchanged or disclosed in such a way as to place refugee status claimants or their families at risk in their countries of origin.**
- b. **Exchange on a regular basis information on the laws, regulations and practices relating to their respective refugee status determination system.**

#### ARTICLE 8

1. **The Parties shall develop standard operating procedures to assist with the implementation of this Agreement. These procedures shall include provisions for notification, to the country of last presence, in advance of the return of any refugee status claimant pursuant to this Agreement.**

(Final Text of the Safe Third Country Agreement)

In addition to information sharing and trade efficiency two interviewees raised the goal of minimizing security threats from Canada was raised by two interviewees. In response to my question regarding the priority of the Northern border for the United States, Lee Hamilton explained that, “The

border is a national security issue and problem”, explaining that the Northern border is “more of a focus” due to the Muslim population in Canada. The U.S. has a larger Muslim population than Canada. Thus, why is the Canadian Muslim population considered to be “more of a focus”? Are Muslim Canadians viewed as security threats?

At briefing at the U.S. Embassy in Ottawa, the officers discussed US/Canadian relations from their perspectives of working in the Embassy. I questioned the Economic Officer about the controversy and impact of the SBA and STCA. Appropriate to his position, he discussed the need to maintain a healthy economic relationship with Canada but did not mention migration. The Economic Officer stated that the goal is to make the border “safe but open to commerce, not to damage the economic relationship”. Does this statement imply that a ‘safe’ border is one that is not open to asylum seekers? Or that the cross-border movements of humans and goods for economic purposes take precedence over flows of persons in need of refugee protection?

In response to my questions regarding the motivations and purposes of STCA and SBA, neither refugee protection nor increasing access for asylum seekers were presented as priorities; these goals were not mentioned.

### **Lack of information**

After probing the purpose of STCA, I asked questions regarding the impact of STCA in its first year of implementation. What is STCA actually accomplishing or not accomplishing? Is STCA enhancing refugee protection, as it officially aims to in its final text? I also asked questions about the impact of STCA on migration flows across the border, specifically regarding its impact on human smuggling. The responses that follow demonstrate the need for research on the impact of STCA on informal border movements such as smuggling and trafficking.

Canadian Government Representative, Morgan, acknowledged that, unfortunately, the impact of the policy was difficult to measure. Morgan explained that “smuggling is not a new phenomenon” and that there is no evidence that it is worse now as a result of STCA.

Canadian Government Representative, Jamie, discussed the networks across the border. It was confirmed that Vive la Casa in Buffalo coordinates with Canadian border officials; however it was not discussed in what ways. Vive la Casa is a large NGO that assists asylum flows. It is beyond the scope of this project to conduct a study of the ways in which STCA influences the structure of cross-border networks. However, an investigation of the relationship between government, NGOs and asylum flows would be relevant to understanding the impact of STCA. This representative also stated that there is no evidence of an increase in smuggling and irregular migration but acknowledged that there is “pressure” for these movements to increase. The above claims that

informal movements have not increased due to STCA are assertions made without evidence backing them and contradict the evidence presented in chapter 2 from secondary sources.

There is research that evaluates the relationship between border policies and human smuggling (Mountz, Sharma). Sharma offers insight into the impact of restrictive border policies on informal cross-border flows by problematizing the criminalization of persons who engage in and execute smuggling and trafficking plans by presenting these routes as migration strategies. The migration strategies of smuggling and trafficking become more salient and necessary as state migration policies become more restrictive.

...most people using migration as a survival strategy today are unable to move without the aid of smugglers who move people for profit instead of for reasons of social justice. It is virtually impossible for migrants today to move without the assistance of forgers who produce the necessary identity papers for travel. Furthermore, clandestine migrations usually involve one form of deception or another at border crossings. Often, but certainly not always, migrants experience coercion and even abuse during their journeys. (Sharma 91)

In addition to debates within literature regarding human smuggling, there are historical examples of the smuggling and policy relationship. An important piece of analyzing the influence of STCA on human smuggling would be a review of Safe Third's impact on informal movements in Europe and, where possible, in North America.

In response to my question regarding an increase in human smuggling since STCA, Dench of the Canadian Council for Refugees replied that "we are just seeing the beginning of the human smuggling

increase. There has not been a huge increase of inland claims but it may take some time. And we must think about how many people just don't have access now." Since informal movements and access are difficult to measure, an increase in inland claims would not necessarily indicate an increase of smuggling.

In addition to monitoring informal movements, there is a lack of information regarding the processing of a case from start to finish. How have the experiences of asylum seekers changed since STCA implementation? Martin Jones, a refugee lawyer and researcher, emphasized the need to increase monitoring of case processing and asked, "Do people actually get removed?" What are the details of detention, adjudication and deportation for asylum seekers processed under STCA?

Persons within the U.S. Government are raising similar questions as well as those outside. The United State Government Representative, Casey, asked a series of questions regarding the impact of STCA: "How are asylum seekers now processed? Is U.S./Canadian integration permanent? What are the federal and local responses? What are the problems with non-identical obligations in both countries?" That government employees raise these questions a year after the policy's implementation demonstrates the inadequacy of monitoring and communicating the impacts of STCA at multiple scales: the federal state, the individual asylum seeker, communities lining the border, and so on.

It is important to measure informal movements across the border in order to understand whether asylum seekers are having difficulty accessing asylum through formal channels and are resorting to informal migration strategies. Do the U.S. and Canadian governments view measurement of these clandestine movements as priorities? If informal movements were closely monitored and showed a significant increase since the implementation of STCA, it would demonstrate that people are using informal channels to gain refugee protection because the formal channels are insufficient or perceived to be by asylum seekers. While states may view smuggling to be a “phenomenon” (as described by Canadian Government Representative, Morgan), smuggling often increases in response to the policies implemented by states. As discussed in chapters 1 and 2, in many cases, smuggling is in direct response to state policy. It is possible that asylum seekers will employ smuggling networks as a means to reach the sovereign territories to make their asylum claims.

Aside from the important questions of how to measure informal movements across the border, it is also important to develop ways to measure or estimate the number of asylum seekers who are not accessing the U.S. or Canadian systems at any level due to STCA. How is STCA preventing or discouraging access to North American refugee protection?

The lack of information on informal border movements could be considered a security risk. Canada's system has been criticized by the U.S. Government for being too open and lenient in comparison to the U.S. system. However, it could be argued that failing to monitor undocumented movements or to formalize the status of those estimated 12 million migrants in the U.S. who are undocumented is also a security risk. Dench explained that "the Canadian system does not create security risks necessarily. The Canadian system is formal." The formality of the Canadian system refers to having a significantly smaller population of persons who are undocumented in Canada in contrast to the U.S. The regulatory and deterrent functions of STCA may result in asylum seekers remaining undocumented in the U.S. or employing human smugglers to cross the U.S./Canadian border. This possibility raises a number of concerns about the national and human security.

### **Refugee agency versus state agency: an unnecessary binary**

The liberal state faces the paradox of maintaining open borders to trade and the movement of humans for the purposes of labor, while regulating the borders in regards to immigration and security. As sovereign states exercise their right to control their territorial borders, refugee agency is pitted against the agency of the state. As I discussed in chapter 1, there is a constant battle for inclusion and exclusion.



United States Government Representative, Sam, asked “Who chooses the new nation-state? The asylum seeker or nation state? If your state fails you, if you’re harmed should you have the right to choose?” Sam contended that the state has the right to control its borders and that the state chooses who enters. Without a defined “right to entry”, states manipulate these geographies of asylum to deny access without blatantly violating their international obligations to refugee protection. Regarding my question about the asylum seeker having the right to enter the state of their choice, Dench noted that, “There isn’t a spelled out ‘right to choose’ for asylum seekers but there’s no requirement that an asylum seeker must make a claim in his/her first safe country of presence.”

While manipulating geographies of asylum for the purposes of reducing flows may serve the U.S. and Canadian states’ short term agendas, restricting asylum seeker mobility is not in the long term interest of the state. Putting aside questions of the legality of refugee versus state agency, Dench emphasized that there are “moral questions of choice” as well: “For refugees, most choices have already been taken away from them and they have suffered trauma. So it is a respect issue. You respect the refugee’s wishes to stay in Canada or the U.S. or to go to a different country.”

Dench then tied the ‘right to choose’ to the national interest of the state: “The state is better off having people who want to be there. Forcing a state on them is senseless. Let them choose and they are more willing

and able to contribute. By thwarting refugee desires and the migration outcomes desired, the future is not promising. Refugee choice is a long term policy interest. The policies are too short sighted right now.” Providing refugees with a “right to choose” would help the state improve its policies by serving as a gauge of efficacy.

Jones explained that allowing refugees to choose their states for asylum processing provides states with indicators of protection gaps or systems that are effective in providing refugee protection. Jones employed the idea of the asylum system being a “market”. When I posed a question regarding the differences between the U.S. and Canadian asylum processing systems matter, he replied, “it seems to matter to asylum seekers themselves. Choice becomes relevant in the way you look down upon spontaneous asylum seekers. I’m a believer in the market. There’s a reason that people want to go to Canada. There really must be more protection in Canada.”

Dench presented the “absurdity” of STCA, by explaining, “The people getting to Canada were refugees. If they weren’t, why wouldn’t they just stay in the U.S.?” Geographically, it would not be logical for a migrant to prolong his or her journey by traveling through the U.S. to Canada. There are few explanations for extending one’s trip, one being the need for a higher level of refugee protection or increased access to refugee protection.

The exercise of agency by refugees does not usurp state agency. The state can benefit from studying the choices that refugees make and the demands they place on the system. In the long term, informed refugee choice may lead to more stable resettlement situations. However, refugee agency challenges sovereignty. As I explained in chapter 1, the regulation of the mobile body reinforces the sovereignty of the state.

The regulation of the Haitian population through the application of STCA serves as an example of state agency usurping refugee agency. As presented in chapter 2, the U.S. and Canada formed a side agreement during the signature of STCA that made Canada responsible for resettling a number of Haitian refugees. The Haitian displaced population has historically been a difficult population for the U.S. due to the proximity of Haitians to U.S. sovereign territory. The U.S. practices interdiction to deflect the flows of Haitians before reaching U.S. soil in order to deny them access to asylum. The U.S. Committee for Refugees and Immigrants (USCRI) discusses the U.S. control of the Haitian population:

The United States returned some 1,800 Haitian and 3,000 Cuban asylum seekers it interdicted on the high seas while they were trying to reach Florida. The only way the Haitians could claim asylum was to shout their claim out on the Coast Guard vessel prior to return, but even this did not always work. The Coast Guard took those who passed the “shout” test to the U.S. Naval Base at Guantánamo Bay, Cuba, where Department of Homeland Security (DHS) asylum officers interviewed them on the merits of their claims. DHS, however, did not permit those they found to be refugees to enter the United States, but continued to detain them until they could find another country to accept them. (USCRI 2)

Canadian Government Representative, Jamie, discussed the agreement regarding the resettlement of Haitians as an incentive for the

U.S. in signing STCA. In response to how STCA benefits the U.S. this representative listed information sharing and Canada's agreement to resettle Haitians.

Regarding the "deal" in STCA for the processing of Haitians, Dench explained that the U.S. Government interdicts boats of Haitian migrants, houses them at Guantanamo and sends them to Canada to be processed as asylum seekers. The side deal of STCA demonstrates the U.S. utilization of policy to usurp the agency of displaced Haitians and to evade the geographical proximity of Haiti to the U.S. Canada offered to resettle Haitians in order to make STCA more attractive to the U.S. (Macklin).

### **What is "safe"?**

The foundation of STCA is that both the U.S. and Canadian systems of asylum processing are considered to be "safe". This United States Government Representative, Sam, stressed the concept of "safe" during our discussion of STCA, "What does STCA call for? The concept of 'safe'. The concept that a country does not engage in *refoulement*."

There are a range of definitions and levels of "safe" that were presented in the interviews. Sam acknowledged that the concept of "safe" for the U.S. and Canada is "debatable". Sam offered the posed the question regarding the U.S. asylum system, "Is the failure so egregious that we don't have a reasonable system? Our system assures that we will not commit *refoulement*...but we make mistakes." What version of "safe"

are the Canadian and U.S. governments adhering to? The system as a whole being “safe” seems irrelevant when each case must be handled “safely”.

What *is* a “safe” system. Jones provided an interesting analysis of the “safe” concept and the “finger pointing” that goes on between the U.S. and Canada. He agreed that not engaging in refoulement is the minimum consideration of being a “safe” country but that a country can engage in refoulement indirectly. “If a state restricts many refugee convention rights which, in effect, pushes them to leave, then isn’t that refoulement?” As Western states fortify entire regions from asylum flows, persons in need of protection have fewer opportunities to reach sovereign territory to make their asylum claims. I argue that the trends discussed in chapter 1 of pushing asylum seekers away from sovereign territory through the externalizing and transnationalizing of borders is a form of *refoulement* (Mountz).

Since the U.S. and Canada handle asylum cases in different ways, there is a demand from critics of STCA and from the UNHCR is that the U.S. and Canadian states implement an appeals mechanism. This provision would allow asylum seekers to argue their case for applying in one country over the other. The Canadian system is guided by the Immigration and Refugee Protection Act (IRPA) of 2002 and the U.S. system is guided by the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Pistone presents the policies governing the

U.S. asylum system such as the IIRIRA and the 1995 regulations which preceded the IIRIRA.

The 1995 regulations also eliminated the automatic grant of a work permit when an application for asylum is filed. Instead, a procedure was established whereby most work permits are not granted until after a person receives asylum or the application has been on file with the INS for 180 days. Consequently, the prospect of receiving work authorization, long perceived as a magnet for frivolous asylum claims, was eliminated. (Pistone 4)

U.S. Government representative, Sam, explained that a reconsideration or appeals mechanism for STCA is not necessary since both countries are deemed “safe”. If an asylum seeker is not processed in the “safe” system of Canada, the asylum seeker will be processed in the “safe” system of the U.S. However, the condition of “safe” does not require that the systems process claims in the same manner. Through discussions with interviewees, I learned that the differences in the systems have real implications for refugee protection. Jones, for example, discussed how the U.S. and Canada interpret STCA and their international obligations differently, noting that two similar systems produce different results. The reduction of access to asylum for Colombian asylum seekers was discussed in chapter 2.

Many interviewees noted some differences as significant during our discussions. A question emerges: how do these differences or a lack of equality among the two systems relate, if at all, to the “safety” of the systems? The employee of the Congressional Research Service, Bailey, questioned the permanence of the policy and believed there was

likelihood that it would be challenged from the Canadian side. Bailey cited the difference between U.S. and Canadian systems, explaining that “illegals” are given full constitutional rights under the Canadian Charter of Rights and Freedoms, which is “different from us”. The struggle over harmonization demonstrates the varied levels of protection offered by the U.S. and Canadian systems as well as presents the dangers of equalizing the systems to a reduced standard of refugee protection

When discussing how Canada and the U.S. are comparably “safe” countries, Dench described Canada’s obligations to asylum seekers. “International obligations apply to each case. Especially with gender based claims. When someone steps onto Canadian soil, Canada needs to apply its interpretation of Safe Third and it is Canada’s responsibility.” One important difference between the Canadian and American asylum processing systems is that in the U.S. asylum seekers have one year limits to apply for asylum. In Canada, there are no time limits. Dench cited a lack of legal aid and social assistance making it difficult for asylum seekers, especially women, to apply for asylum under the one year bar. Pistone discusses the difficulty of asylum seekers to meet the one year bar for asylum in the U.S.

...the conditions and circumstances surrounding the flight of asylum seekers prevent them from being able to handle the types of matters we would commonly expect other arriving immigrants to be able to. ...From the moment most asylum seekers begin their flight from persecution, they are focused on mere survival. They are typically running away from personal danger and are primarily concerned with saving their lives. When they arrive in the United States, they often cannot express their fears of persecution immediately or meet the application filing deadline necessary for asylum protection. Because many

asylum seekers have been persecuted by their governments, they genuinely fear government officials and are unable or unwilling to tell the truth about their persecution to anyone they do not know and trust, let alone a uniformed official. Having been tortured or severely persecuted, many suffer from mental disorders that impeded their ability to talk about what happened to them. (Pistone 6)

A major debate among interview participants involved the significance of visa restrictions between the U.S. and Canada in relation to asylum processing. The U.S. and Canada have different requirements on persons that need visas to travel to the U.S. or Canada. If a country wants to reduce flows of persons from another country, a visa restriction could be imposed. Many advocates for asylum seekers describe visa restrictions as measures for Western states to reduce the mobility of persons from specific countries.

Canadian Government Representative, Jamie, listed the implementation issues of STCA as being the “direct backs” and detention practices. This person described the visa discrepancies as “not a big deal”, meaning that the different visa requirements did not significantly alter the access to asylum in the U.S. and Canada.

In contrast to the response of some government servants, Dench noted visa differences and usages as a “major issue”. Canada and the U.S. impose visas in order to stop flows of asylum seekers from a certain country. “So the people who need protection most do not get access to claim asylum.” Ironically, more people come from countries without visa restrictions to claim asylum; states that do not have horrendous human



rights records, comparatively. Dench cited the example of there being an increase of asylum seekers from Mexico making claims in North America.

Dench continued: "It's not that they don't need protection. It's just that if you look at the people accessing the system, one may say that they are not in dire need of asylum or that people are abusing the system, undermining the system. But the states are responsible for who is in the system. And then they can use it as an argument to further reduce or deny access to the asylum system. This repackaging creates barriers for the people who need asylum most."

The visa issue does not actually fit within the debate of "safe"; it is the total denial of safe access in the name of security. When states deny access to certain countries through visa restrictions, potential asylum seekers from those countries do not have the opportunity to evaluate the "safe" nature of the destination states' asylum system.

In chapter 2, I presented a policy related documents that describe the U.S. and Canada as having the "same" or "similar" systems for asylum processing. Contrasting the official policy claims, government servants acknowledged during these interviews that there are a number of differences between the two systems. One of the stated goals of STCA is for the U.S. and Canada to resolve differences between their systems and to harmonize their approaches to asylum regulation. I agree with the CCR's request for a review of the "safe" nature of the U.S. system and for an evaluation of differences between the systems. The differences are

recognized by government servants off the record; it is time for a public and transparent evaluation.

### **Thanking the EU for STCA**

If safe third country agreements are not required by international refugee law then where did the U.S./Canadian STCA come from? In response to my question regarding the forecast for the North American refugee protection regime, Dench responded by saying that she believes “we are heading towards Europe”. My interview findings reinforce the literature that describes North American control policies as resulting from an Europeanization process. The EU implemented STCA in 1989. Through discussion of the emergence of Safe Third Country as a policy concept, interviewees explained that the U.S. and Canada followed the EU STCA model that was implemented in the 1980s. States look to one another for best practices in border enforcement (Mountz). U.S. Government Representative, Sam, presented STCA as an EU concept. Along with the circulation of exemplary practices, there is a circulation of pressure to create the tightest border. This relates to the geography of the states’ territorial limits. When the EU attempted to reduce asylum flows by fortifying its external borders, Canada felt pressured to do the same through bilateral cooperation with the U.S. The pressure stems from the fear that asylum flows will be deflected from one region to another. Perhaps Canada believed that a reduction of asylum access in Europe

would increase flows to North America, increasing the “burden” of asylum processing for the Canadian state.

Canadian Government representative, Morgan, explained that Canada is following the EU Safe Third model and learning from the EU’s difficulties with “asylum shopping” and the overburdening of benefit systems. When placing this excerpt in the context of Europeanization of North American control strategies, Canada “learned” how to decrease access to asylum from the EU.

### **The future of STCA**

I questioned interviewees about their expectations of the future of STCA. Is STCA permanent? Will STCA be expanded to include non-land POEs such as sea port, air port in addition to the land border? I found that the Canadian Government representatives expected STCA to expand to all POEs and that the U.S. Government representatives insisted that expansion would not occur. The varied responses illustrate the struggle of states to balance their desires for total control of all POEs and the geographical realities prevent the attainment of total control.

United States Representative, Sam, responded to my question regarding the potential expansion of STCA to non-land POEs by explaining that it was unlikely because only the land POE is “indisputably under the sovereign states control”. U.S. representative, Pat, provided a

similar response by explaining that “there’s no clarity on non-land POEs. So, it is not going to happen and is not being considered.”

The U.S. Government representatives may share the Canadian desire to expand STCA to all non-land POEs, but view it as a difficult task to define the limits of state sovereignty in an airport or in the ocean. For example, where does US sovereign territory begin in the Miami airport- in the tunnel between the plane and the airport building? On the runway?

As demonstrated in the interviews, government employees understand that they are required to respond to asylum seekers who reach the land borders. When discussing the ability of states to control their land POEs, Jones explained that “when a migrant shows up at the border, Canada has already opened the door. They are already there. You can’t practice interdiction then. So, do we push them back out or let them stay?” Both Dench and the United States Government representatives offer insights into why governments are increasing processing of potential flows away from the land border and sovereign territories. These measures are intended to reduce asylum seeker intake while appearing to uphold obligations to refugee protection.

### **Making sense of STCA**

The official language of STCA says it aims to enhance refugee protection and border security. I have come to understand STCA to function as a policy of exclusion for refugees who wish to claim asylum in

Canada by traveling through the U.S. My goal was to understand the priorities for U.S. and Canadian policy makers and officials regarding STCA. The interviews I conducted offered a variety of motivations and goals relating to STCA. Some contradicted others. The U.S. and Canadian representatives presented very different interests in entering STCA.

In regards to the Canadian government's motivations, my findings demonstrate that one aim of the Canadian Government in signing STCA was to achieve a reduction in asylum flows, confirming that the aim of STCA was to exclude potential refugees. Canadian representative, Morgan, suggests that it was to reduce the flow of asylum seekers into Canada by having the U.S. "share the burden" of processing. Although the U.S. and Canada are both signatories to the 1951 Convention, none of the government employees stated that refugee protection is the top priority of the policy, or even is a priority. Immigration and refugee protection were not presented as being relevant to the SBA. To have multiple discussions with policy makers about the motivations for the signing of STCA without any mention of refugee protection is disturbing; illustrating a cavernous gap between paper and practice. In practice, STCA reduces the access to refugee protection in North America, operating as an exclusionary measure.

As presented by the official policy statements and by the interviewees, STCA does not stand on its own; it is a piece in a larger

policy construction between the U.S. and Canada. Since STCA does not accomplish what it claims to in terms of refugee protection, it must accomplish something else that is relevant to the U.S. and Canadian governments. STCA is presented as a piece of the Smart Border Action Plan, a comprehensive policy that would make the border “smarter” and “safer”. If border regulation is not about the protection of migrants crossing the border, what does border regulation accomplish? How does STCA fit into the “importance” of making the border more secure? After 20 years of STCA not fitting naturally into border policy, how is it fitting now?

United States Representative, Pat, described STCA as an incentive to bring Canada on board to Smart Border. Yet, the focus of STCA is not on refugee protection. While STCA is one point of our broader border plan and does not directly serve U.S. interests, it is impacting the lives of individuals in need of refugee protection in North America. According to Pat, STCA may not be “that significant”. However, the implementation of STCA has had significant and serious consequences for refugees who experience varying levels of exclusion regardless of where the policy falls on the list of priorities.

Since STCA does not accomplish its officially stated goals, what does the policy accomplish for the states? Or perhaps a better question is, what vision or broader policy for the state is furthered by STCA? Agendas of control are executed by the U.S. and Canadian states with the intention of reducing asylum flows. The following interview excerpt

demonstrates how STCA serves as a policy of control justified by the need for enhanced security. At the U.S. Embassy briefing in Ottawa the officers discussed U.S./Canada relations from their perspectives of working in the Embassy. The Political Officer discussed cooperation between the U.S. and Canada by describing the two countries as “partners in defense of North America”. In response to the language used by the Political Officer at the U.S. Embassy in Ottawa, I must ask: What do these and other government employees perceive what North America is being defended from?

Some of the interviewees discussed the EU asylum system and policies as models for North American asylum processing. The mention of the EU Safe Third policy by Canadian Government Representative, Morgan, is important because it demonstrates that countries are looking to each other for common practices in the management of migration (Mountz). It is important to place the U.S. and Canadian policies on the global stage of refugee protection and migration management. Is the ultimate goal of countries such as Australia, Canada, the U.S. and EU countries to prevent or at least to manage the access to asylum seekers? While these states may not pursue that goal directly, the implementation of policies such as safe third country agreements reduces access to asylum.

The danger of looking to other countries for effective asylum system models and policies is that these systems are constantly changing.

Systems are human constructions which lack permanency and can fall victim to changing political tides (Mountz). For example, border regulation responds to geographical tactics of human smugglers just as human smuggling networks are designed in response to changes in border regulation strategies.

Given the dynamic nature of systems, it is imperative that those working within and outside them constantly evaluate their effectiveness. Dench dispelled the argument that the Canadian system is “safer” than the U.S. system in an absolute way by emphasizing the “need to improve and share concern over what each other is doing. Canada may not always be ‘safe’; the system has its flaws. Same with the U.S. system”. It is important for us to hold those in the system accountable and to monitor the shifts in the system. Let us not wait for the day the border has finalized itself; it will never arrive.

The time has come for those inside and outside of STCA to respond to the unanswered questions of STCA. CRS employee, Bailey, asked the question that many of the interviewees asked, “who benefits?” I was shocked to hear a United States Government Representative, Casey, and others pose these same questions. In light of the serious human impact of migration policy shifts or new policies, it is ethical to have these questions answered before individuals are affected by the policy. Who is working to provide answers to these questions? In what ways are the experiences of asylum seekers impacted by the policy? I thought I would



discover the answers to my questions through existing research and my field work interviews. Instead, the interview participants asked *me* to investigate questions surrounding STCA's impact. Researchers and government servants can collaborate on investigating the realities of STCA since asylum seekers themselves are negotiating them on a daily basis.

**“Safe”: a futile title**

Lists of 'safe' countries can shift intentionally or unintentionally. States may intentionally reduce measures that provide a high quality of asylum access or implement measures that deny access altogether in order to reduce the overall flow of asylum seekers.

The act of deeming a country as ultimately 'safe' is irrelevant since each country must handle each individual case in a way that honors international obligations to refugee protection. In order for a system to be 'safe', the processing of each case must fulfill this title of "fair". I agree with United States Representative, Sam, that the U.S. is a relatively "safe" system for asylum processing compared to other systems but asylum processing must not be evaluated in relative terms; not all asylum seekers get equal treatment. For example, the Colombian population has a significantly lower acceptance rate in the U.S. than in Canada. The issue at hand is the treatment and protection of each individual asylum seeker. An asylum system must provide for the proper handling of each case. The

“mistakes” that sometimes occur, as described by Sam, can result in the loss of a human life. Rather than designating countries “safe” for asylum processing, energy should be devoted by the international community to evaluate how levels of refugee protection vary depending on the asylum seekers’ geographical location at the time the claim is made. While it is outside of the scope of this project to investigate the specific adjudication processes on multiple scales in the U.S. and Canada, a comparative analysis would be relevant to evaluating levels of refugee protection offered in North America.

While the title “safe” is not adequate to describe an asylum system, the implementation of the STCA has made the debate about the concept of “safe” relevant to the reality of seeking asylum in North America. This concept is the justification for the STCA policy and translates into the actual experience of the asylum seeker. The definition of a “safe third country” involves more than ensuring non-refoulement. If the U.S. and Canada are failing to promote systems that welcome asylum seekers by promoting policies that reduce the quality of access to asylum seekers, then the ‘safety’ of the U.S. and Canada must come into question.

The mixture of priorities and motivations surrounding STCA presented by the interview participants suggest that a blurring of the security, migration and human rights regimes is occurring. These systems were once very distinct, with different responsibilities and agendas. Now states present security as an umbrella which is all-encompassing. The

North American security regime is dominating and compromising the aims of the others. Systems are products of state visions. The vision for North America post 9/11 gazes through a lens of security.

Based on the interview with United States Government Representative, Sam, I gained a deeper understanding of the U.S. approach to the border: that a sovereign state has the right to control its border and that the U.S. has the right to decide who enters. Regardless of the foundation of this person's argument for state agency overriding refugee agency, debating the question of "who chooses the new nation state" in relation to asylum seekers seems irrelevant when they arrive at the border in need of protection. Asylum seekers move regardless of the theoretical support for them. Rather than refusing to process asylum seekers, the state must develop ways to process these migrant flows in accordance to its international obligations. Flows of asylum seekers will not disappear since migration is a means of survival for many. It is in the interest of the state to develop policies that respond to asylum flows which are sustainable in the long term.

While states maintain the right to control the borders of their sovereign territory, it is important to recognize that providing asylum seekers with the freedom of choice is relevant to the national interests of states involved. Asylum seekers aim to continue their asylum journeys until they believe they have reached a safe haven. This raises the question: why is choice a controversial and thwarted concept in

government? From my perspective, states aim to reduce flows in the short term without estimating the long term forecast. The failure to forecast is illustrated by interview participants who asked *me* questions regarding the value of STCA as a policy. The choices made by asylum seekers during their journeys for refugee protection speak of the protection gaps in systems and the potential quality of protection at system offers. Why are the majority of asylum seekers in North America aiming to resettle in Canada? How do the “market” forces demonstrate which system is “safer” or at least perceived to be “safer” by asylum seekers themselves? Dench made the point that the current policies of the Canadian and the U.S. governments are short sighted. Acknowledging the long term interests of refugees should be included in the policy considerations of the governments.

In addition to physical differences between the U.S. and Canadian asylum processing systems, the differences in motivations presented by the interviewees demonstrate that during the course of 2006, Canada and the U.S. currently have different visions of migration management. The discrepancies in the answers regarding the expansion of STCA demonstrate that Canada and the U.S. are not harmonized. Are they heading in that direction? Is full harmonization sought or attainable? How are the U.S. and Canada using each other, their relationship to accomplish their different visions of the sovereign state? These questions are relevant to the experience of the asylum seeker. The harmonization

process presents the danger of resulting in a lower level of refugee protection offered by the U.S. and Canada. Differences in state visions will play out at the border where sovereign power is asserted.

Dench mentioned the “North American perimeter” concept and the harmonization process that is attempting to achieve that ideal of territorial control. “Canada will not give in completely to the U.S. because of sovereignty and the strong refugee advocacy community.” However, these new imaginations of sovereignty may work together to create a wall around the U.S. and Canada. The outcome of U.S./Canadian border renegotiations depend on the sovereignty that emerges from these processes.

Canadian Government Representative, Morgan, when questioned about the controversy and opposition surrounding STCA in Canada, responded, “there is a good deal of support, virtually no opposition”. This representative believes that the argument can be made by the public that Canada’s system is still “too generous”, demonstrating this Morgan’s perception that there is space to create even more restrictive policies than STCA. As demonstrated in previous chapters and by my interviews with non-governmental organization employees, researchers and asylum lawyers, there are a number of parties and individuals who oppose STCA. In the conclusion that follows, I discuss possible steps forward to reduce the protection gaps caused by STCA.

**Conclusion: Will safe third ever be “safe”?**

STCA is a policy of migration control that redistributes flows of asylum seekers between the U.S. and Canada. In practice, the regulatory policy of STCA functions as a policy of exclusion by deterring and discouraging people to seek sanctuary in North America. During the first year of implementation, asylum claims made in Canada at the land border reached a 15 year low. This suggests that persons who wished to seek asylum in Canada were either processed in the U.S. system or did not cross the U.S./Canadian border formally. These potential refugees were deterred by the barrier erected by STCA and resultantly remained undocumented in the U.S., utilized informal channels of migration to cross the U.S./Canadian border, or remained in home or transit countries outside of North America.

Research on the U.S./Canadian border will never be final because the border is always altering in response to different flows at different geographical sites. Walters presents a metaphor of anti-virus software that describes the nature of the new border: “It captures the fact that immigration control is not a static, once and for all time accomplishment but a dynamic, strategic affair – a field of tactics and counter-tactics” (255). States have more agency than they recognize; it is state policy, among other factors, that feeds the demand for informal migration strategies. The history of informal cross-border flows developing from

restrictive migration policies demonstrates that the impacts of Safe Third Country agreements on flows are not unpredictable.

Through the pursuit of this project, I found that there are a number of silences surrounding STCA. While there are many secondary sources that discuss the impacts of STCA, as illustrated by chapters 1 and 2, there is a lack of government released data on the policy that would be useful to execute a comprehensive evaluation of STCA, which was demonstrated by my interviews with government employees. Without more information on STCA, it is difficult to explore the exclusions and protection gaps that are currently hidden impacts of the policy.

In order to uncover evidence to assess the extent that STCA functions as an exclusionary policy, the advocacy and international communities must pressure the U.S. and Canadian governments to release the following data: the nationalities of asylum seekers whom are diverted to U.S. and Canada under the application of STCA, the acceptance rates by nationality of those processed under STCA, the acceptance rates of persons pursuing gender-based claims, and information on persons who are exempt and non-exempt on the basis of the “family” exception of STCA. With this information, researchers could effectively conduct comparative studies of the protection offered by the U.S. and Canadian asylum processing systems and evaluate the impacts of STCA on protection, particularly for specific populations such as Colombian asylum seekers and those pursuing claims on the grounds of

gender persecution.

Since it may be difficult to encounter the formal data, it would be valuable for those interacting with persons impacted by STCA to conduct an informal data gathering. NGOs serve as effective collection sites because they experience traffic of asylum seekers interacting with or deterred by STCA. These sites could include NGOs along the U.S./Canadian border, NGOs in second countries such as Ecuador and NGOs within the U.S. and Canada that work with asylum seekers. Information collected by these NGOs would enable researchers to explore the impacts of STCA on human smuggling and trafficking, to gauge the number of potential refugees remaining undocumented in the U.S. because they are deterred by STCA and to assess the deterrent affect of STCA on asylum seekers in second countries of asylum such as Colombian asylum seekers in Ecuador.

There are a number of ways to alter STCA in order to improve access to and the quality of protection in the U.S. and Canada. The U.S. and Canadian governments could initiate a review of differences in their systems that may be resulting in protection gaps and begin a process to close these gaps. The danger with this harmonization process is that it may result in a lower level of refugee protection in North America. The advocacy community would need to participate in the harmonization process in order to pressure the U.S. and Canadian governments to strive for higher levels of protection. Asylum seekers would benefit from a



broadened dialogue, increased consultation and frequent monitoring of the U.S. and Canadian governments with the advocacy communities. Until protection is improved in the U.S., implementing an exemption from STCA for asylum seekers who are of nationalities that have historically different acceptance rates between the U.S. and Canada such as Colombian asylum seekers would alleviate the diminished or denied protection experienced by some asylum seekers under STCA.

I have argued that STCA is a policy that is not sustainable in the long term and that asylum seekers will never achieve the same level of protection under STCA as they did before the policy's implementation; safe third will never be "safe" because the U.S. and Canadian asylum systems will never be equal. It is in the interest of the U.S. and Canadian states to reject the concept of safe third and to develop policies that enable asylum seekers to realize their asylum journeys. Through consultation with advocacy groups and the international community, the U.S. and Canada could close protection gaps and improve the quality of protection offered in North America. By increasing the access to asylum and the quality of refugee protection in the U.S. and Canadian states, asylum seekers would make claims in both systems. A balanced flow of asylum seekers can be achieved without regulatory policies such as STCA.

Policies of control will never be fully effective in regulating, deterring or preventing the movement of asylum seekers. The need for safe haven

persists and those persons in need will continue to move in order to survive.

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**Appendix 1: Final text of the Safe Third Country Agreement**

**AGREEMENT  
BETWEEN  
THE GOVERNMENT OF CANADA  
AND  
THE GOVERNMENT OF THE UNITED  
STATES OF AMERICA**

**FOR COOPERATION IN THE EXAMINATION  
OF REFUGEE STATUS CLAIMS  
FROM NATIONALS OF THIRD COUNTRIES**

**THE GOVERNMENT OF CANADA AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA** (hereinafter referred to as “the Parties”),

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

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

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

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



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

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

**CONVINCED**, in keeping with advice from the United Nations High Commissioner for Refugees (UNHCR) and its Executive Committee, that agreements among states may enhance the international protection of refugees by promoting the orderly handling of asylum applications by the responsible party and the principle of burden-sharing;

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

**HAVE AGREED** as follows:

## **ARTICLE 1**

1. In this Agreement,
  - a. **“Country of Last Presence”** means that country, being either Canada or the United States, in which the refugee claimant was physically present immediately prior to making a refugee status claim at a land border port of entry.
  - b. **“Family Member”** means the spouse, sons, daughters, parents, legal guardians, siblings, grandparents, grandchildren, aunts, uncles, nieces, and nephews.
  - c. **“Refugee Status Claim”** means a request from a person to the government of either Party for protection consistent with the Convention or the Protocol, the Torture Convention, or other protection grounds in accordance with the respective laws of each Party.
  - d. **“Refugee Status Claimant”** means any person who makes a refugee status claim in the territory of one of the Parties.

- e. **“Refugee Status Determination System”** means the sum of laws and administrative and judicial practices employed by each Party’s national government for the purpose of adjudicating refugees status claims.
  - f. **“Unaccompanied Minor”** means an unmarried refugee status claimant who has not yet reached his or her eighteenth birthday and does not have a parent or legal guardian in either Canada or the United States.
2. Each Party shall apply this Agreement in respect of family members and unaccompanied minors consistent with its national law.

## **ARTICLE 2**

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

## **ARTICLE 3**

1. In order to ensure that refugee status claimants have access to a refugee status determination system, the Parties shall not return or remove a refugee status claimant referred by either Party under the terms of Article 4 to another country until an adjudication of the person’s refugee status claim has been made.
2. The Parties shall not remove a refugee status claimant returned to the country of last presence under the terms of this Agreement to another country pursuant to any other safe third country agreement or regulatory designation.

## **ARTICLE 4**

1. Subject to paragraphs 2 and 3, the Party of the country of last presence shall examine, in accordance with its refugee status determination system, the refugee status claim of any person who arrives at a land border port of entry on or after the effective date of this Agreement and makes a refugee status claim.
2. Responsibility for determining the refugee status claim of any person referred to in paragraph 1 shall rest with the Party of the receiving country, and not the Party of the country of last presence, where the receiving Party determines that the person:
  - a. Has in the territory of the receiving Party at least one family member who has had a refugee status claim granted or has been granted lawful status, other than as a visitor, in the receiving Party’s territory; or

- b. Has in the territory of the receiving Party at least one family member who is at least 18 years of age and is not ineligible to pursue a refugee status claim in the receiving Party's refugee status determination system and has such a claim pending; or
  - c. Is an unaccompanied minor; or
  - d. Arrived in the territory of the receiving Party:
    - i. With a validly issued visa or other valid admission document, other than for transit, issued by the receiving Party; or
    - ii. Not being required to obtain a visa by only the receiving Party.
3. The Party of the country of last presence shall not be required to accept the return of a refugee status claimant until a final determination with respect to this Agreement is made by the receiving Party.
4. Neither Party shall reconsider any decision that an individual qualifies for an exception under Articles 4 and 6 of this Agreement.

## **ARTICLE 5**

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

- a. Any person being removed from Canada in transit through the United States, who makes a refugee status claim in the United States, shall be returned to Canada to have the refugee status claim examined by and in accordance with the refugee status determination system of Canada.
- b. Any person being removed from the United States in transit through Canada, who makes a refugee status claim in Canada, and:
  - i. whose refugee status claim has been rejected by the United States, shall be permitted onward movement to the country to which the person is being removed; or
  - ii. who has not had a refugee status claim determined by the United States, shall be returned to the United States to have the refugee status claim examined by and in accordance with the refugee status determination system of the United States.

## **ARTICLE 6**

Notwithstanding any provision of this Agreement, either Party may at its own discretion examine any refugee status claim made to that Party where it determines that it is in its public interest to do so.

## **ARTICLE 7**

The Parties may:

- a. Exchange such information as may be necessary for the effective implementation of this Agreement subject to national laws and regulations. This information shall not be disclosed by the Party of the receiving country except in accordance with its national laws and regulations. The Parties shall seek to ensure that information is not exchanged or disclosed in such a way as to place refugee status claimants or their families at risk in their countries of origin.
- b. Exchange on a regular basis information on the laws, regulations and practices relating to their respective refugee status determination system.

## **ARTICLE 8**

1. The Parties shall develop standard operating procedures to assist with the implementation of this Agreement. These procedures shall include provisions for notification, to the country of last presence, in advance of the return of any refugee status claimant pursuant to this Agreement.
2. These procedures shall include mechanisms for resolving differences respecting the interpretation and implementation of the terms of this Agreement. Issues which cannot be resolved through these mechanisms shall be settled through diplomatic channels.
3. The Parties agree to review this Agreement and its implementation. The first review shall take place not later than 12 months from the date of entry into force and shall be jointly conducted by representatives of each Party. The Parties shall invite the UNHCR to participate in this review. The Parties shall cooperate with UNHCR in the monitoring of this Agreement and seek input from non-governmental organizations.

## **ARTICLE 9**

Both Parties shall, upon request, endeavor to assist the other in the resettlement of persons determined to require protection in appropriate circumstances .

## ARTICLE 10

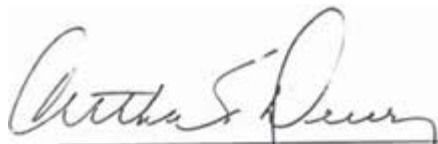
1. This Agreement shall enter into force upon an exchange of notes between the Parties indicating that each has completed the necessary domestic legal procedures for bringing the Agreement into force.
2. Either Party may terminate this Agreement upon six months written notice to the other Party.
3. Either Party may, upon written notice to the other Party, suspend for a period of up to three months application of this Agreement. Such suspension may be renewed for additional periods of up to three months. Either Party may, with the agreement of the other Party, suspend any part of this Agreement.
4. The Parties may agree on any modification of or addition to this Agreement in writing. When so agreed, and approved in accordance with the applicable legal procedures of each Party, a modification or addition shall constitute an integral part of this Agreement.

**IN WITNESS WHEREOF**, the undersigned, being duly authorized by their respective governments, have signed this Agreement.

**DONE** at Washington D.C., this 5<sup>th</sup> day of December 2002, in duplicate in the English and French languages, each text being equally authentic.



**FOR THE GOVERNMENT  
OF CANADA**



**FOR THE GOVERNMENT  
OF THE UNITED STATES  
OF AMERICA**

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**Procedural Issues Associated with  
Implementing the Agreement for  
Cooperation in the Examination of  
Refugee Status Claims from  
Nationals of Third Countries**

**Statement of Principles**

The Parties intend to act according to the following principles:

1. **Opportunity for Third Party During Proceedings.** Provided no undue delay results and it does not unduly interfere with the process, each Party will provide an opportunity for the applicant to have a person of his or her own choosing present at appropriate points during proceedings related to the Agreement. Details concerning access to proceedings will be set out in operational procedures.
2. **Proof of Family Relationship.** Procedures will acknowledge that the burden of proof is on the applicant to satisfy the decision-maker that a family relationship exists and that the relative in question has the required status. Credible testimony may be sufficient to satisfy a decision-maker in the absence of documentary evidence or computer records. It may be appropriate in these circumstances to request that the applicant and the relative provide sworn statements attesting to their family relationship.
3. **Standard for Determining Eligibility for an Exception to the Agreement.** The United States will use the preponderance of evidence standard to determine whether an applicant qualifies for an exception under the Agreement. Canada will use the balance of probabilities standard to determine whether an applicant qualifies for an exception under the Agreement. These standards are functionally equivalent.
4. **Review.** Each Party will ensure that its procedures provide, at a minimum: (1) an opportunity for the applicant to understand the basis for the proposed determination; (2) an opportunity for the applicant to provide corrections or additional relevant information, provided it does not unduly delay the process; and (3) an opportunity for the applicant to have a separate decision-maker, who was not involved in preparing the proposed determination, review any proposed determination before it is finally made.
5. **Record of Interview and Eligibility Determination.** Upon request and subject to national law, Canada and the United States will share all written materials pertaining to whether an applicant qualifies for an exception under the Agreement. Subject to national law, this information will also be available to the applicant.
6. **Requests to Reconsider Exception Determinations.** Each Party will have the discretion to request reconsideration of a decision by either Party to deny an applicant's request for an exception under the Agreement should new information, or information that has not previously been considered, come to light.

7. **No Reconsideration of Positive Determinations.** Neither Party will reconsider any decision that an applicant qualifies for an exception under the Agreement.
8. **Timeframe for Return Under the Agreement.** Returns to the country of last presence under the Agreement must take place within 90 days after the original refugee status claim is made.

**Appendix 2: Interview questions**

What were the motivations for the signing of STCA?

What is your impression on Canadian/U.S. harmonization?

Is harmonization occurring?

How is the experience of refugees at the border changing and how is it related to the policy changes?

What is the forecast for the permanence of the STCA policy and the impacts of its implementation?