The Impact of the Safe Third Country Agreement on Canada's Legal Obligations[1]

We are calling on the Government of Canada to suspend the *Safe Third Country Agreement* (the Agreement) pursuant to Article 10(3). Continuing to apply the Agreement violates both the *Canadian Charter of Rights and Freedoms* and Canada's international obligations.

Many persons seeking asylum in Canada who have entered from the United States face a credible threat to their security and fundamental rights if they are returned to the United States. Our report concludes that refugees returned to the United States face prolonged detention, limited access to legal information and counsel, and possible deportation to countries where they may be tortured or killed.

Canada is in breach of the *Canadian Charter* if the United States violates the fundamental rights of asylum seekers who Canada has refused in accordance with the Agreement. In Canada, asylum seekers have constitutional rights to life, liberty, security of the person, access to counsel upon detention and procedural fairness. By returning asylum seekers to the United States, Canada violates those rights. Canada also breaches its own international legal obligations not to participate in possible indirect refoulement. The authors of this report believe that Canada's continued participation in the *Safe Third Country Agreement* violates Canada's constitutional and international obligations.

The authors of this report urge that, in order meet its obligations under the *Charter* and international law, the Government of Canada must immediately suspend the operation of the STCA and undertake a more rigorous, objective review of the United States' policies and practices for processing asylum claims. If such a review leads to a valid, evidence-based conclusion that the US is safe for refugees notwithstanding the concerns raised herein, then the STCA can be brought back into force at that time.

Background of this report

In the wake of a series of executive orders signed by the President of the United States in January 2017, Canadian law students united on the weekend of February 4–5, 2017 to examine the legality of the *Safe Third Country Agreement* between Canada and the United States. Together, a combined total of 845 students from 22 Canadian law schools conducted 3,143 hours of legal research to determine whether the US can properly be considered a "safe third country" for asylum seekers and refugees.

[1] A team of McGill law students drafted this report using the underlying research from the Canada-wide Research-a-thon on February 4-5, 2017. Contributors include Rachelle Bastarache, Lisen Bassett, Farnell Morisset, Brodie Noga and Anna Gilmer.

This report reflects a small portion of the research conducted that weekend. The full research materials belong to the Canadian Council for Refugees and are not being shared in their entirety. The aim of this report is to inform public discussion and refocus it on the legality of both the Agreement and any subsequent actions that the Government of Canada may take in response to the increased crossings at unauthorized border locations.

The report delineates both Canada's legal obligations under the *Canadian Charter of Rights and Freedoms* and its international obligations, which are in jeopardy as a result of certain practices in the United States, exacerbated by the recent Travel Ban and Executive Orders.

Background on the Safe Third Country Agreement

The Safe Third Country Agreement[2] is a bilateral agreement between the United States and Canada that came into effect in 2004. In brief, the STCA requires asylum seekers to claim asylum in the first of the two countries they arrive in. It was passed with the intention of reducing administrative burdens on border agencies. However, any administrative convenience comes at the price of placing asylum seekers in precarious and dangerous situations.

The practical effect of the STCA is that when an asylum seeker makes a claim at the US-Canada border, they will be denied eligibility to seek asylum unless they fall under a narrow range of exceptions. The exceptions are for those with family in Canada, unaccompanied minors, document holders and those whose admission to Canada is in the public interest.

As a consequence, refugees who may be inappropriately denied asylum in the US – or who may not even have access to asylum there – are denied the right to make a claim in Canada, even if Canada would grant them status if they arrived through another country. The exceptions under the STCA are too narrow to protect refugee claimants who may not receive due consideration in the United States.

The STCA does not apply to claimants who arrive in Canada through unauthorized border crossings. As a result, refugees make dangerous border crossings into Canada in order to avoid the treaty's effect. The number of such unauthorized border crossings into Canada from the United States has increased, suggesting that at least some asylum seekers in the United States feel there has been a material change. Though it is doubtful the asylum claiming systems in the two countries were ever equivalent, the Trump administration's policy choices have made the differences much starker.

The STCA is based on the assumption that both Canada and the United States promote and fulfill their obligations under the 1951 Refugee Convention. To safeguard the fundamental rights of

[2] 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. Online at: http://www.cic.gc.ca/english/department/laws-policy/safe-third.asp. [STCA]

asylum seekers, Canada's *Immigration and Refugee Protection Act* (IRPA) requires the continual review of the United States' system for claiming asylum. The review focuses primarily on four factors:

Whether the United States:

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

As discussed below, the United States' mass detention, mass deportation and denial of access to information and counsel requires the Government of Canada to undertake a rigorous review of the policies and practices of processing asylum claims in the United States. This should be done during the suspension of the agreement to ensure those in need of asylum have access to their rights under international law

The Executive Orders make enforcement of the STCA a violation of *Charter* rights and international obligations

As a result of the Trump administration's newly implemented executive orders, namely the "Enhancing Public Safety in the Interior of the United States" order (hereinafter "Interior Enforcement Order") and the "Border Security and Immigration Enforcement Improvements" Order (hereinafter "Border Enforcement Order") signed on January 25, 2017 and the "Protecting the Nation from Foreign Terrorist Entry into the United States" (hereinafter "Travel Ban") signed on March 6, 2017,[4] the designation of the US as a safe third country is being called into question. Given the STCA's impact on Canada's domestic and international obligations owed to asylum seekers, we conclude this agreement is no longer a viable, if it ever was.

This report does not represent an exhaustive list of how compliance with the STCA violates Canadian domestic law. Instead, our report focuses on three critical aspects of Canada's legal obligations towards asylum seekers which Canada is breaching by continuing to apply the STCA.

1. Deportation

A. Under International Law

[3] http://www.cic.gc.ca/english/department/laws-policy/menu-safethird.asp

[4] The underlying research was conducted in response to the January 28, 2017 Executive Order (EO) of the same name, however that Order was subsequently blocked by the United States 9th Circuit Court of Appeals. The March 6, 2017 EO largely restates the first EO such that the analysis here continues to apply.

Article 33 of the 1951 Refugee Convention provides that:

> "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[5]

"Non-refoulement" is one of the fundamental principles of the United Nations Convention relating to the Status of Refugees. It is considered "so fundamental that no reservations or derogations may be made from it".[6] "Refoulement" means forcible expulsion or return. Under the Convention, indirect refoulement is also prohibited in situations where the asylum-seeker is removed to a third country where they will then be in jeopardy of subsequent removal to the territory where they would be at risk of persecution.[7]

B. Under the Charter

The right to non-refoulement also falls under Canada's domestic obligations under section 7 of the *Charter* which guarantees the right to life, liberty, and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. In *Burns v. United States*,[8] the Supreme Court recognized the appropriate avenue to assess an extradition order where capital punishment is possible is under section 7.[9] Where a denial of entry would constitute a de facto extradition to the United States, as in *Burns*, the issue turns on whether the threatened deprivation of the potential refugee's security of person is in accordance with the principles of fundamental justice.[10] The Court then notes "section 7 is concerned not only with the act of extraditing, but also the potential consequences of the act of extradition".[11]

When an asylum seeker arrives at a Port of Entry in Canada through the United States, they are refused entry (unless they meet one of the narrow exceptions) and returned to the United States. If that individual is then "refouled" by the United States, Canada has committed indirect refoulement by refusing entry.[12]

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[5] United Nations High Commissioner for Refugees, *Convention and Protocol Relating to the Status of Refugees* (Geneva: The UN Refugee Agency, Dec 2010) at 30.
[6] *Ibid* at 3.
[7] Elihu Lauterpacht & Daniel Bethlehem, "The Scope and Content of the Principle of Non-Refoulement" (2001), United Nations High Commissioner for Refugees at paras 114-121.
[8] *United States v Burns*, (2001) 1 SCR 283, 2001 SCC 7.
[9] *Ibid* at para 57.
[10] *Ibid* at para 59.
[11] *Ibid* at para 60.
[12] Rachel Gonzales Settlage, "Indirect Refoulement: Challenging Canada's Participation in the Canada-United States Safe Third Country Agreement" (2012-2013) 30 Wis. Int'l L.J. 142.

Although the *Charter* necessitates an oral hearing for refugee claimants in Canada when their credibility is at stake prior to a deportation,[13] those being sent back to the United States are not afforded the same opportunity. The Expedited Removal System in the United States gives the Department of Homeland Security (DHS) the power to return non-citizens that arrive without the appropriate visas to their countries of origin without delay and without an immigration court proceeding.[14]

An exception exists for those wishing to claim asylum. As further explained in the section on access to information, many asylum seekers are not given documents in a language they understand, and they are not aware of their right to claim asylum in the United States.[15] Those who do wish to claim asylum must first undergo a credible fear screening to access the full asylum system. In 2014, 59% of these interviews were conducted by telephone.[16] Although it was intended by Congress "to be a low screening standard",[17] according to the U.S. Commission on International Religious Freedoms, in these interviews, "each asylum seeker must demonstrate that s/he personally experienced, or if returned would personally experience, persecution as a member of a group that is persecuted based on a protected ground; a positive credible fear determination cannot be made simply because an asylum seeker belongs to such a group".[18]

Under the Border Enforcement Order, the "expedited removal" process will be expanded.[19] The Department of Homeland Security has been directed to deputize state and local law enforcement officers to perform the functions of federal immigration agents under section 287(g) of the US *Immigration and Nationality Act*.[20] Once deputized, these officers will have the authority to interview individuals to determine their immigration status. It has been well documented that local law enforcement have failed to comply with the terms of the 287(g) agreements,[21] and there is evidence that United States Customs and Border Protection (CBP) has "consistently failed to refer asylum seekers for a credible fear screening".[22] The subsequent deportation of these asylum

[13] *Singh v Minister of Employment and Immigration*, (1985) 1 SCR 177. ["*Singh"]*
[14] Elizabeth Cassidy & Tiffany Lynch, U.S. Comm'n on Int'l Religious Freedom, Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal, (2016) at 35.
[15] *Ibid* at 50.
[16] *Ibid* at 36.
https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf.
[17] Senate, "Proceedings and Debates of the 104th Congress, Second Session," *Congressional Record*, Vol. 142 No. 136, September 27, 1996, found in source above.
[18] *Ibid* at 25.
[19] Harvard Immigration and Refugee Clinical Program, *The Impact of President Trump's Executive Orders on Asylum Seekers* (2017) at 6.
[20] Summary of Executive Order "Border Security and Immigration Enforcement Improvements". American Immigration Council (2017). Online at: https://www.americanimmigrationcouncil.org/research/border-security-and-immigration-enforcement-improvements-executive-order.
[21] *Ibid*; *Supra* note 11; Department of Homeland Security, Director of the Secretary General, "The Performance of Section 287(g) Agreements (2010). Online at: https://www.oig.dhs.gov/assets/Mgmt/OIG_10-63_Mar10.pdf
[22] *Supra* note 16 at p. 6.

seekers without the chance to have an oral hearing could infringe Canada's domestic and international obligations.

2. Detention

United States immigration policy has resulted in the incarceration of an ever-increasing proportion of persons seeking asylum in the US. Though they are nominally detained for civil purposes, asylum seekers are often held in prison or prison-like facilities which amount to a de facto punitive measure. During this detention, asylum seekers are also subject to human rights violations and not given adequate access to legal counsel. This amounts to a violation of the 1951 Refugee Convention, which prohibits states from imposing penalties on asylum seekers simply for illegally crossing an international border. By returning asylum seekers to these conditions in the United States, the government of Canada is also violating its legal obligations under the *Charter*.

A. Under International Law

Article 31 of the 1951 Convention Relating to the Status of Refugees provides that:

> 1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
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> 2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

In other words, the 1951 Refugee Convention does not allow a state to impose penalties on persons seeking asylum simply for illegally crossing an international border, and only allows states to limit the movements of asylum seekers as strictly necessary.[23]

In practice, United States immigration policy violates the 1951 Refugee Convention. Detention-focused immigration laws sweep asylum seekers into increasingly criminalized practices. In 2014, 77% of asylum seekers involved in court proceedings were held in immigration detention.[24] Asylum seekers are regularly held in prison or prison-like facilities, and detainees

[23] United Nations High Commissioner for Refugees, *Convention and Protocol Relating to the Status of Refugees* (Geneva: The UN Refugee Agency, Dec 2010) at 31.
[24] *Supra* note 16 at 1.

with asylum claims are often not distinguished from those with criminal convictions.[25] The United States also relies heavily on private prisons and prison-like facilities for immigration cases, including asylum seekers, where asylum seekers risk being subjected to human rights violations including sexual abuse.[26]

The detention practices that target asylum seekers amount to de facto punitive measures undertaken strictly as a result of illegal border crossings by refugees, in contravention of the 1951 Refugee Convention. These practices and realities are also known, or constructively known, by the government of Canada given the public nature of the reports bringing these practices to light. The government of Canada cannot continue to apply the STCA without being in violation of its international obligations.

B. Under the *Charter*

The *Canadian Charter of Rights and Freedoms*, which forms part of the supreme law of Canada and explicitly applies to the government of Canada, guarantees that:

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> **9.** Everyone has the right not to be arbitrarily detained or imprisoned.

Bearing in mind Canada's aforementioned obligations under the 1951 Refugee Convention prohibiting unnecessary restrictions of movement of asylum seekers, continued adherence by the Government of Canada to the STCA also consists of a breach of the *Charter* rights guaranteed to "everyone" - including asylum seekers. Asylum seekers in the United States are subject to prolonged detention following illegal border crossings. Such detention, in violation of the 1951 Refugee Convention, is arbitrary as states are not permitted to subject asylum seekers to punitive measures simply for having crossed international borders illegally. By returning asylum seekers coming from the United States to that country, the government of Canada is complicit and responsible for this mistreatment of refugees. Such action is in contravention of the *Charter* and therefore contrary to Canada's constitutional obligations towards asylum seekers.

3. Access to Legal Information and Counsel

A. Under International Law

[25] Christina Elefteriades Haines and Anil Kalhan, *Detention of Asylum Seekers En Masse: Immigration Detention in the United States* (2015).
[26] Carl Takei, Michael Tan & Joanne Lin, Shutting Down the Profiteers: Why and How the Department of Homeland Security Should Stop Using Private Prisons, American Civil Liberties Union, 13 (2016).

At a minimum, international obligations require that detained asylum seekers are guaranteed to be informed of their right to legal counsel.[27] This representation, according to the UNHCR, should be free.[28] In the interest of justice, legal assistance should be automatically assigned without payment if the person does not have sufficient means to pay for it.[29]

The United States does not comply with this international standard, nor with the recommendations put forward by the United Nations. Persons in removal proceedings in the United States may be represented; however, they are not afforded the right to legal counsel.[30] In 2009, outgoing Attorney General Michael Mukasey stated that there is no constitutional right to legal counsel for those in immigration court in the United States. Asylum seekers may be represented at their own expense, but those unable to obtain legal counsel will not be provided with representation.[31] Without proper representation, asylum seekers lack fundamental understanding of the process they are undergoing, which critically impedes procedural fairness. Severe conditions have been discovered, which are in non-compliance with federal detention standards.

Customs and Border Protection officers are required to give specific forms and a list of *pro bono* legal providers to asylum seekers. However these forms are often not in the asylum seekers' language and are often translated on the spot by officers who are unqualified to do so effectively.[32] Immigration and Customs Enforcement (ICE) officers are required to provide detainees with various sources of information, including the Legal Orientation Program, which provides information about immigration court procedures and basic legal information. However, many ICE facilities do not provide these services, thus failing to meet basic minimum requirements of access to legal information, let alone counsel.[33] When detainees are able to access representation, it may be confined to videoconference hearings, which has been reported to reduce administrative fairness.[34] Further, most ICE facilities are located in rural areas, where federal detention standards are often not met, where representation rates are lowest, and where reports demonstrate that ICE officers are discouraging detainees from seeking legal representation.[35] A 2011 Report on Immigration in the US found that four of the six largest

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[27] UN High Commissioner for Refugees, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (Geneva: UNHCR, 2013) at p. 26, online: <www.refworld.org/docid/503489533b8.html> accessed 4 February 2017.
[28] *Ibid.*
[29] Donal M Kerwin, "Revisiting the Need for Appointed Counsel" (2005) 4 Migration Policy Institute: Insight 1, online: www.migrationpolicy.org/sites/default/files/publications/Insight_Kerwin.pdf
[30] Amnesty International USA, "Jailed Without Justice: Immigration Detention in the USA", *Amnesty International* (2009), online: <www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf>.
[31] *Ibid.*
[32] *Supra* note 12 at 50.
[33] *Ibid* at 51.
[34] *Ibid.*
[35] *Ibid.,* at 52.

immigration detention facilities are 50 or more miles from a major urban center.[36] The remote location of detention facilities makes it more difficult to access representation. Furthermore, detainees are less likely to pursue procedural rights because of the psychological toll of being detained.[37]

The dangers these violations pose are exacerbated by the US Executive Orders, under which "individuals may now be detained merely 'on suspicion' of violating federal or state law, which includes unauthorized entry."[38] This increases the importance of enforcing the right to counsel in these cases, which is often crucial for the success of an asylum claim: statistics show that one in four asylum seekers are successful when represented in the United States. Only one in 40 are successful when unrepresented. Represented detainees facing custody hearings were four times more likely to be released from detention [39] and 11 times more likely to apply for asylum at all, as compared to unrepresented detainees. [40] These represent important deviations from international standards that substantially affect the lives of asylum seekers, making revision of the United States' status as a safe third country mandatory under Canadian law.

B. Under the *Charter*

The *Canadian Charter of Rights and Freedoms* guarantees that:

> **10.** Everyone has the right on arrest or detention,
>
> b) to retain and instruct counsel without delay and to be informed of that right.

The constitutional guarantee to counsel upon detention in Canada applies to immigration and refugee cases.[41] Despite a lack of an explicit guarantee in the *Charter* for representation by counsel in administrative tribunals, the principles of fundamental justice under section 7 of the *Charter* require Canadian immigration officers to consider even in an initial interview whether the individual before them is entitled to counsel.[42]

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[36] New York Immigrant Representation Study Report: Part 1 "Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings" (2011) 33:2 Cardozo LR 357.
[37] *Ibid*.
[38] Annotated Border Immigration Enforcement Executive Order, National Immigrant Justice Center, § 2(b) (Jan. 27, 2017), https://immigrantjustice.org/research-items/annotated-border-immigration-enforcement-executive-order, as found in *The Impact of President Trump's Executive Orders on Asylum Seekers, supra* note 17.
[39] Ingrid Eagly & Steven Shafer, Access to Counsel in Immigration Court , American Immigration Council (Sept. 28, 2016), at 2, as found in *The Impact of President Trump's Executive Orders on Asylum Seekers, supra* note 17 at 3.
[40] *Ibid.*
[41] Immigration, Refugees and Citizenship Canada, ENF4, Port of Entry Examinations (2016). Online at: http://www.cic.gc.ca/english/resources/manuals/enf/enf04-eng.pdf
[42] *Ha v Canada (Minister of Citizenship and Immigration)*, [2004] 3 FCR 195, 2004 FCA 49; Steven Meurrens, The Right to Counsel at the Port of Entry (2014). Online at: http://meurrensonimmigration.com/the-right-to-counsel-at-the-port-of-entry/

Though a constitutional guarantee to counsel upon detention in Canada does not mean that the United States has to do the same, the government of Canada must consider the effects the lack of access to counsel has on claimants when reviewing the STCA. The United States Congress has also put in place several financial barriers to asylum seekers gaining access to counsel, primarily by preventing the use of Legal Service Corporation funds to assist asylum seekers.[43] The lack of representation disproportionately affects women and children: 50% of children and 70% of families lack representation in immigration court.[44] The proportion of unrepresented asylum seekers has doubled since 2000, yet the number of lawyers serving them has not changed.[45]

Conclusion

In conclusion, Canada's continued participation in the STCA violates our international obligations. Under international law it is clear that States cannot "contract out" of their *jus cogens* legal obligations.[46] Any indication that Canada may be at risk of participating in indirect refoulement should cause the Government to suspend the STCA. Though the full impact of the Executive Orders discussed remains to be seen, the statistical analyses reviewed in this report demonstrate the inequality in the asylum systems in Canada and the United States dating back to the beginning of this Agreement. Yet as stated by Prof. Audrey Macklin, "the worse the US looks in its treatment of non-citizens, the worse Canada looks for insisting on an agreement that will forcibly divert people into that system."[47] Under international law, a country cannot transfer refugees to a state it knows to be in violation of the *Refugee Convention.*[48] The "Travel Ban" and other executive orders are flagrant violations of the *Refugee Convention* and as such, Canada's refusal to admit refugees at the US-Canada border is itself a violation of international law.

[43] Sabrineh Ardalan, "Access to Justice for Asylum Seekers: Developing an Effective Model of Holistive Asylum Representation" (2015) 48:4 U Mich. JL Ref 1001, online: <http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1141&context=mjlr>.

[44] American Immigration Lawyers Association, *Due Process Denied: Central Americans Seeking Asylum and Legal Protection in the United States* (16 June 2016), available at: http://www.aila.org/File/DownloadEmbeddedFile/68331

[45] New York Immigrant Representation Study Report: Part 1 "Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings" (2011) 33:2 Cardozo LR 357.

[46] Foster, Michelle. "Responsibility Sharing or Shifting? "Safe" Third Countries and International Law" Refuge (0229-5113); Fall 2008, Vol. 25 Issue 2 64.

[47] Macklin, Audrey. "The Values of the Canada-US Safe Third Country Agreement" (Ottawa: Caledon Institute of Social Policy, 2003).

[48] *Supra* note 44 at p.72.