BORDERING ON FAILURE:

The U.S.-Canada Safe Third Country Agreement Fifteen Months After Implementation

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EXECUTIVE SUMMARY

On December 29, 2004, the United States and Canada implemented the Safe Third Country Agreement ("STCA" or "Agreement") in order to exercise more control over the United States-Canada border. Under the STCA, Canada and the United States recognize each other as safe third countries for refugee claimants, and each country is permitted to return to the other country individuals who have traveled through that other country, with few exceptions. In other words, individuals must generally seek refugee protection in the first country – either the United States or Canada – that they enter.

Little information exists about how the STCA is affecting refugees because the Agreement does not provide for regular, meaningful monitoring of the impact of the STCA on refugees. This report—which is based on fact-finding visits in 2005 to three ports of entry along the United States-Canada border, follow-up interviews, and additional research—provides information and analysis of the preliminary impact of the STCA by compiling and analyzing data collected from non-governmental organizations ("NGOs"), detainees, refugee claimants, and Canadian immigration officers.

Fifteen months after implementation, the statistics and observations collected from the fact-finding investigations indicate that the STCA not only fails to accomplish its stated goal of securing the border, but indeed makes the border less secure, endangering the lives of refugee claimants and threatening the security of the United States and Canada. The fact-finding investigations reached the following four major conclusions:

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

Statistics collected from NGOs along the United States-Canada border demonstrate that the STCA has caused a significant decline in the number of refugee claimants legally crossing from the United States to Canada, disproportionately affecting the Colombian refugee community. Although the U.S. and Canadian governments both claim to offer generous systems of refugee protection, several aspects of the U.S. asylum system violate international legal standards. For example, the one-year filing deadline for asylum applicants is incompatible with international legal standards that prohibit asylum requests from being excluded from consideration based on failure to fulfill formal requirements, and the routine detention and in some instances inhumane treatment of detained asylum seekers. By stranding in the United States individuals who would otherwise have sought refuge in Canada, the STCA is jeopardizing the ability of refugee claimants to receive fundamental protections.

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 2004[1] and 79% in 2005, the acceptance rate in

[1] Canadian Council for Refugees, Immigration and Refugee Board: Refugee Protection Division, Statistics 2004, http://www.web.ca/ccr/irb2004stats.html (last visited Mar. 20, 2006).

the United States in Fiscal Year 2004 was 45% for those who affirmatively applied[2] and 28% for those appearing before an immigration judge.[3] Despite the 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.

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

Prior to STCA implementation, NGOs along the border worked jointly with immigration officers to move applicants through the inspection and application process. As the number of refugee claimants being processed and sheltered by the NGOs has decreased since the STCA went into effect, however, directors of refugee shelters have started considering alternative functions for their shelters. If NGOs close their doors, the border will become increasingly dangerous for refugees who will have fewer and fewer places to turn for information, food, and shelter.

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

Refugee claimants who are stranded in the United States frequently are statutorily barred from applying for asylum, 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 a dysfunctional and arbitrary U.S. asylum system. For those who seek legal refugee protections, often the only option is to enter Canada and file an asylum claim there. Because the STCA has made crossing from the United States to Canada extremely dangerous, smugglers (and worse) are increasingly active at the border, placing refugee claimants at further risk. The creation of a border controlled by smugglers has not only allowed smugglers to exploit refugee claimants, but also promotes a dangerous, lawless environment along the border.

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

For decades, Canada served as a model whose example raised the standards of refugee protection worldwide. In 1986, the people of Canada became the only nation to be awarded the Nansen medal, presented annually by UNHCR to a person or group for outstanding service in

[2] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Yearbook of Immigration Statistics: 2004, Table 18, *available at* http://uscis.gov/graphics/shared/statistics/yearbook/2004/Table18.xls (last visited Mar. 20, 2006).
[3] U.S. Department of Justice, Executive Office of Immigration Review, FY 2004 Asylum Statistics, http://www.usdoj.gov/eoir/efoia/FY04AsyStats.pdf (last visited Mar. 20, 2006).

supporting refugee causes.[4] In 1993, Canada became the first nation to issue guidelines recognizing the eligibility of female refugees for status and the right of female refugees to fair and equal treatment.[5] The publication of the Canadian Guidelines prompted the United States to issue similar gender guidelines two years later. Now, despite glaring disparities in burden-sharing between developed countries and developing countries (the latter shelters 71% of the world's refugees),[6] Canada has adopted the STCA and has chosen to turn away one-third of the claimants who arrive at its border.[7] Other, earlier reports have described in detail that the United States is not a "safe country" for many refugees, challenging the underlying legitimacy and supposed rationale of the STCA. 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.

[4] *See* Citizenship and Immigration Canada, Milestones of the 20th Century, http://www.cic.gc.ca/english/department/milestones/ (last visited Mar. 20, 2006).

[5] Canadian Council for Refugees, Refugee Women Fleeing Gender-Based Persecution, http://www.web.ca/ccr/gendpers.html (last visited Mar. 20, 2006) (stating that in 1993, Canada became the first country to issue gender guidelines). *See* Canadian Immigration and Refugee Board, Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution (Nov. 13, 1996), *available at* http://www.irb-cisr.gc.ca/en/about/guidelines/women_e.htm (last visited Mar. 20, 2006).

[6] *See* U.S. COMM. FOR REFUGEES AND IMMIGRANTS, WORLD REFUGEE SURVEY 2005, at 13 (2005) (stating that in 2004, nations with per capita incomes of less than $2,000 hosted 71% of the world's refugees, while nations with per capita incomes over $10,000 hosted 5% of the world's refugees).

[7] *See* Associated Press, *U.N.: Asylum Requests Fall in Rich Nations*, N.Y. TIMES, Mar. 17, 2006 (stating that the number of asylum seekers in European and North American countries fell sharply in 2005 to the lowest levels in two decades).

I. INTRODUCTION

The purpose of this report is to compile and analyze data about the preliminary impact of the Safe Third Country Agreement ("STCA" or "Agreement") implemented by the United States and Canada on December 29, 2004.[8] The statistics and observations presented in this report were collected from fact-finding visits and follow-up research in 2005 and 2006 at three ports of entry along the United States-Canada border. Researchers interviewed representatives of non-governmental organizations ("NGOs"), detainees, refugee claimants, and Canadian immigration officers, and conducted follow-up telephone interviews conducted in fall 2005 and spring 2006.

Section I explains the methodology of the fact-finding investigations. Section II presents an overview of the Agreement, explains the history of the Agreement, details how the Agreement was implemented, and sets forth critiques of the U.S. asylum system. Based on the fact-finding investigations, Section III concludes that the STCA is: (1) causing a significant decline in the number of refugees who can access fundamental protections, disproportionately affecting the Colombian refugee community; (2) threatening the existence of NGOs along the United States-Canada border; (3) subjecting refugee claimants to arbitrary detention in the United States; and (4) encouraging individuals who would normally have entered Canada's refugee determination system to remain underground in the United States or cross the border illegally.

II. METHODOLOGY

This report is based on fact-finding missions to three ports of entry along the United States-Canada border: Detroit-Windsor, Buffalo-Fort Erie, and Champlain-Lacolle. Additional sources of information include, but are not limited to, telephone interviews, cases and petitions, and legal scholarship and commentary.

During March 28-30, 2005, a delegation[9] conducted interviews in Detroit, MI, with David Koelsch and Bradley Maze of Freedom House, a nonprofit organization that provides shelter and assistance to refugee claimants. Through Freedom House, the delegation gained access to a detention center where refugee claimants are held and were able to interview a number of detainees at Monroe County Jail, located in Monroe, MI.

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[8] 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, U.S.-Can., Dec. 5, 2002, *available at* http://www.cic.gc.ca/english/policy/safe-third.html (Dec. 5, 2002) [hereinafter STCA]. For the final rule, see 69 Fed. Reg. 69,480 (Nov. 29, 2004).

[9] This delegation consisted of four individuals: James L. Cavallaro (Clinical Director of the Human Rights Program and Clinical Professor of Law at Harvard Law School); Peter Cho and Amy Penn (both enrolled in the human rights advocacy program at Harvard Law School); and Michelle Nyein (a member of the Harvard Law Student Advocates for Human Rights).

A second delegation[10] visited Buffalo, NY, and Fort Erie, ON, from March 30, 2005, to April 1, 2005. In Buffalo, the delegation met with Devin O'Neill and Molly Short of Vive la Casa, a refugee shelter and services center, as well as with a refugee claimant who was temporarily staying at Vive. In Fort Erie, the delegation interviewed Theresa Anzovino of the Peace Bridge Newcomer Centre, Lynn Hanigan of Casa El Norte Refugee Assistance Program, Jim and Shirley McNair of Matthew House, a refugee shelter, a refugee claimant who was temporarily residing at Matthew House, and Sandra Gooderham of the Fort Erie Multicultural Center, a refugee resettlement center. The delegation also met with Christina Harrison, a legal officer of the United Nations High Commissioner for Refugees (UNHCR), and Julie Ward, a special consultant retained by UNHCR pursuant to Article 8(3) of the STCA.

On May 6, 2005, a third delegation[11] traveled to Lacolle, QC, where the delegation met with three Canadian immigration officers, and Montreal, QC, where the delegation interviewed Sadeqa Siddiqui of the South Asian Women Community Centre, Ricardo Ulloa of the Centre Scalabrini, and Myriam Hamez of Jardin Couvert.

Additionally, during September 20-26, 2005, three students[12] conducted follow-up telephone interviews with Janet Dench of the Canadian Council for Refugees, Bradley Maze of Freedom House, Claudette Miller of Vive la Casa, Lynn Hanigan of Casa el Norte, Shirley McNair of Matthew House, Ricardo Ulloa of Centre Scalabrini, and Sadeqa Siddiqui of the South Asian Women Community Centre. On March 17, 2006, one student[13] conducted follow-up telephone interviews with Bradley Maze of Freedom House and Maria Rosciglione of Vive la Casa.

Researchers typically interviewed personnel in NGO offices, and a number of NGO personnel accompanied delegation members on fact-finding visits to Canada Border Services Agency offices, border checkpoints, and detention centers. Interviews with detainees at the Monroe Detention Center were held in detention facility classrooms without correction officers present. When interviewees were not fluent in English, delegates conducted interviews through the aid of translators. Several interviews were conducted in Spanish with the assistance of Professor Cavallaro, several interviews were conducted in French with the assistance of a French translator, and one interview was conducted with the assistance of an Albanian translator.

[10] The second delegation consisted of four individuals: Professor Cavallaro; Ms. Nyein; and Mark Jensen and Andrea Glen (both members of the Harvard Law Student Advocates for Human Rights).

[11] The third delegation consisted of three individuals: Professor Cavallaro; Deborah Anker (Director of the Immigration and Refugee Clinical Program and Clinical Professor of Law at Harvard Law School); and Nancy Kelly and John Willshire-Carrera (Managing Attorneys of the Harvard Immigration and Refugee Clinic).

[12] The group consisted of Ms. Nyein; and Elodie Moser and Michele Murphy (both enrolled in the human rights advocacy program at Harvard Law School).

[13] The student who conducted the interviews was Ms. Nyein.

III. THE SAFE THIRD COUNTRY AGREEMENT

A. Overview of the STCA

On December 5, 2002, the United States and Canada signed the Safe Third Country Agreement ("STCA" or "Agreement")[14] as part of a 30-point action plan associated with the Smart Border Declaration, a joint venture between both nations to securely facilitate "the free flow of people and commerce" in the wake of the terrorist attacks of September 11, 2001.[15] The Agreement went into effect on December 29, 2004.[16]

1. Basic Provisions

Under the STCA, United States and Canada must each recognize the other nation as a safe third country for asylum seekers. The STCA permits Canada to return to the United States asylum seekers who are attempting to enter Canada from the United States at a land border point of entry.[17] Likewise, the United States may return to Canada asylum seekers who are attempting to enter from Canada.[18] Thus, the "receiving country" may return a refugee claimant to the "country of last presence," the country in which the individual was physically present immediately prior to making a refugee status claim at a land border point of entry, without substantively reviewing the merits of the claim.[19]

2. Exceptions

Exceptions to the STCA include: (1) asylum seekers with a family member in the receiving country if the family member has lawful immigration status other than visitor status or if the family member is at least 18-years-old and has a refugee application pending;[20] (2) unaccompanied minors;[21] and (3) individuals who are not required to obtain a visa to enter only the receiving country.[22] In addition, either country may review any asylum claim made to that

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[14] STCA, *supra* note 8.

[15] Smart Border Declaration: Building a Smart Border for the 21st Century on the Foundation of a North American Zone of Confidence, U.S.-Can., Dec. 12, 2001, *available at* http://www.canadianembassy.org/border/declaration-en.asp (last modified June 10, 2005).

[16] Citizenship and Immigration Canada, Canada-U.S. Safe Third Country Agreement, http://www.cic.gc.ca/english/policy/menu-safethird.html (last modified June 30, 2005).

[17] STCA, *supra* note 8, art. 4.

[18] *Id.* While an average of 8,750 refugee claimants per year entered Canada from the United States from 1990 to 2004, only approximately 200 refugee claimants per year entered the United States from Canada. CANADIAN COUNCIL FOR REFUGEES, CLOSING THE FRONT DOOR ON REFUGEES: REPORT ON THE FIRST YEAR OF THE SAFE THIRD COUNTRY AGREEMENT 2 n.4 (2005), *available at* http://www.web.ca/ccr/closingdoordec05.pdf (last visited Mar. 20, 2006) [hereinafter CCR].

[19] STCA, *supra* note 8, arts. 1, 4.

[20] *Id.* art. 4.2(a)-(b). Eligible family members include a spouse, sons, daughters, parents, legal guardians, siblings, grandparents, grandchildren, aunts, uncles, nieces, and nephews. *Id*. art. 1.1(b).

[21] *Id.* art. 1.1(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.").

[22] *Id*. art. 4.2(c)-(d). Countries for whose nationals Canada does not require a visa but the United States does are Antigua and Barbuda, Barbados, Botswana, Cyprus, Greece, Malta, Mexico, Namibia, Papua New Guinea, Republic of (South) Korea, St. Kitts and Nevis, St. Lucia, St. Vincent, Solomon Islands, Swaziland, and Western Samoa.

country at its discretion, where it determines that it is in its public interest to do so.[23] Canada has exercised this discretion by further exempting nationals of countries to which Canada has temporarily suspended removals,[24] which currently includes nationals of Afghanistan, Burundi, Democratic Republic of Congo, Haiti, Iraq, Liberia, Rwanda, and Zimbabwe,[25] and claimants charged with or convicted of an offense punishable by the death penalty.[26]

3. Limited Formal Review

Formal review of the STCA is limited. Article 8 of the STCA provides that:

> "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 (United Nations High Commission for Refugees) to participate in this review. The Parties shall cooperate with UNHCR in the monitoring of this Agreement and seek input from non-governmental organizations."[27]

Despite a clear need for continued oversight[28] to ensure that the STCA is not endangering lives or violating international obligations, the STCA does not require regular ongoing reviews. Additionally, although the STCA provides for UNHCR monitoring, UNHCR's review is narrowly focused on whether the STCA is being correctly applied, not on whether the STCA, when correctly applied, endangers asylum seekers or promotes illegal border crossings.

NGOs also experience difficulty in monitoring the impact of the STCA. Aside from their lack of critical resources, NGOs may not be able to evaluate the effects of the STCA on asylum seekers who are sent back to the United States because it is nearly impossible to contact them and determine what happened to them.[29] If the individuals are detained upon return to the United States, they confront restricted access to telephones, frequent transfers, detention in isolated locations, and lack of access to legal counsel.[30] As a result, little is known about the 281 refugee claimants who were found to be ineligible to enter Canada under the STCA from January to November 2005.[31] Similarly, it is difficult to evaluate the effects of the STCA on individuals

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Canadian Council for Refugees, Safe Third Country Agreement: Impact on Refugee Claimants Frequently Asked Questions, http://www.web.ca/ccr/s3cFAQ.html (last modified Oct. 18, 2005) [hereinafter CCR FAQs].

[23] STCA, *supra* note 8, art. 6.

[24] Regulations Amending the Immigration and Refugee Protection Regulations, P.C. 2004-1157 (Oct. 12, 2004) (Can.), *available at* http://canadagazette.gc.ca/partII/2004/20041103/html/sor217-e.html (Nov. 3, 2004) [hereinafter Regulations].

[25] See CCR FAQs, *supra* note 22.

[26] *See* Regulations, *supra* note 24.

[27] STCA, *supra* note 8, art. 8(3).

[28] *See* The Safe Third Country Regulations: Report of the Standing Committee on Citizenship and Immigration, Joe Fontana, M.P., Chair (Dec. 2002) (Can.), *available at* http://www.parl.gc.ca/InfocomDoc/37/2/CIMM/Studies/Reports/cimmrp01/03-cov-e.htm (last visited Mar. 20, 2006) (stating that the STCA "is clearly a matter that requires continued oversight by the Committee").

[29] Those who make a claim at the border and who do not fall under any STCA exceptions are almost all individuals who have no contact with refugee NGOs, since NGOs would advise such individuals not to make a claim. CCR, *supra* note 18, at 12.

[30] *Id.*

[31] *Id*.

who choose to live without status in the United States or cross irregularly into Canada when they learn the Canadian border is closed to them, since such individuals rarely identify themselves as applicants to Canada.[32]

B. History of the STCA

In recent years, Canada has implemented measures that have increasingly restricted access to refugee protections. Previously, when refugee claimants arrived at Canadian border points, Canadian immigration officers, in general, immediately conducted eligibility determinations, security screenings, and criminality checks.[33] Sporadically, however, immigration officers would apply a "direct back" procedure in which a foreign national arriving from the United States could be temporarily returned to the United States if immigration authorities were unable to immediately to screen the foreign national.[34] Although the "direct back" policy was not originally intended to apply to refugee claimants, Citizenship and Immigration Canada (CIC) issued administrative guidelines in 2001 authorizing officers to "direct back" refugee claimants in "exceptional circumstances"[35] if the U.S. Immigration and Naturalization Service (USINS)[36] provided assurances that the refugee claimants who were directed back would be able to return to Canada on a specified interview date.[37]

In January 2003, the CIC issued new guidelines altering its policy from requiring assurances from U.S. authorities that refugee claimants who were directed back would be able to return to Canada for their scheduled interviews, to explicitly stating that such assurances were not required.[38] After the issuance of the 2003 guidelines, immigration officers began using direct backs as standard procedure at Canadian border points of entry.[39] At certain border points where it was possible to make appointments in advance,[40] NGOs played a major role in scheduling interviews for refugee claimants, ensuring that on the day that a refugee claimant entered Canada, he or she would already have an entry interview scheduled for that day and would thereby avoid being directed back to the United States. Many refugee claimants continued to be directed back, however, and many failed to appear for their hearing dates in Canada, often

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[32] *Id.* at 10.

[33] If the immigration officer determined that the refugee claim was eligible to be heard, he or she would refer the refugee claimant to the Refugee Protection division of the Immigration and Refugee Board and permit the claimant to remain in Canada with certain rights and access to refugee services. If the immigration officer determined that the refugee claim was not eligible to be heard, the claimant could file for judicial review in the Canadian Federal Court or, in certain cases, file for a Pre-Removal Risk Assessment. *See* Petition to Inter-Am. C.H.R. 2 (March 31, 2004), *available at* http://www.web.ca/ccr/IACHRpet.PDF (last visited Mar. 20, 2006) [hereinafter Petition].

[34] Immigration and Refugee Protection Regulations, s. 41 (2002) (Can.).

[35] Citizenship and Immigration Canada, *CIC Refugee Claimant Deferral and Temporary Return Policy* (Oct. 11, 2001), *quoted in* Petition, *supra* note 33, at 3.

[36] The USINS has been dissolved, and its functions are now assumed by the United States Bureau of Citizenship and Immigration Services (USCIS) in the Department of Homeland Security (DHS).

[37] Citizenship and Immigration Canada, *CIC Refugee Claimant Deferral and Temporary Return Policy* (Oct. 11, 2001), *quoted in* Petition, *supra* note 33, at 3.

[38] Citizenship and Immigration Canada, *Instructions for Front-end Processing of Refugee Claims* (Jan 27, 2003), *quoted in* Petition, *supra* note 33, at 3.

[39] Canadian Council for Refugees, Impacts of Directing Refugee Claimants Back to the United States, http://www.ocasi.org/index.php?qid=668&catid=86 (last visited Mar. 20, 2006).

[40] For example, refugee claimants may schedule entry interviews at the Detroit-Windsor and Buffalo-Fort Erie border points, but not at the Champlain-Lacolle border point.

because they or a family member had been detained or deported to their countries of origin upon return to the United States.[41]

Even under the post-2003 direct back policy, refugee claimants who were able to attend and pass the initial screenings were allowed to enter Canada. Since STCA implementation in December 2004, however, only those refugee claimants who fall under the STCA exceptions have been allowed to enter Canada at land border points of entry. The Canadian government also continues to rely on the direct back policy, returning even claimants who fall within the STCA exceptions to the United States on the basis of administrative convenience.[42]

C. Government Rationale for the STCA

Although the Canadian government has stated that the purpose of the STCA is to create an effective measure of control to limit abuse of Canada's refugee determination system,[43] there is no evidence that significant abuse exists. Nor is there any apparent commonality between refugee claimants who are prevented from making claims and individuals who might seek to abuse the system. Since the professed justification appears ungrounded, it is possible that Canada's primary reason in proposing the STCA is to reduce the overall number of refugees claimants.

For several years, Canada had advocated a safe third country agreement with the United States because approximately one-third of Canada's yearly refugee claimants passed through the United States before applying for entry to Canada.[44] Prior to the terrorist attacks of September 11, 2001, the U.S. government refused to participate in a safe third country agreement with Canada. In the wake of the September 11 attacks, the United States became willing to accept Canada's proposed agreement in order to realize its high priority counterterrorism measures. The U.S. government stated that the STCA itself, however, is not a counterterrorism measure.[45]

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[41] *See* Petition, *supra* note 33, at 6.
[42] CCR, *supra* note 18, at 23.
[43] One of the alleged abuses that Canada and the United States hoped to prevent was "asylum shopping," the practice of seeking asylum in one country after being denied asylum in another country. *See, e.g.*, Press Release, Citizenship and Immigration Canada, Minister Coderre Seeks Government Approval of Safe Third Country Agreement (Sept. 10, 2002), *available at* http://www.cic.gc.ca/english/press/02/0226-pre.html (last modified Sept. 10, 2002); *United States and Canada Safe Third Country Agreement Hearing Before the Subcommittee on Immigration, Border Security, and Claims of the Committee on the Judiciary House of Representatives*, 107th Cong. 8 (2002) (Statement by George Gekas, Chairman of the Subcommittee) [hereinafter House Hearing]. Despite both governments' insistence on the need to prevent asylum shopping, no significant evidence of this phenomenon exists in either direction. *See e.g.*, Bill Frelick, *North America Considers Agreement to Deflect Asylum Seekers*, 7 BENDER'S IMMIGR. BULL. 1403 (Nov. 15, 2002). In addition, the Agreement does not prevent people from claiming both countries, and in some cases may even force them into doing so.
[44] House Hearing, *supra* note 43, at 38 (Statement by Bill Frelick).
[45] Kelly Ryan, Deputy Assistant Secretary for Bureau of Population, Refugees, and Migration at the U.S. Department of State, testified, "We are doing this agreement [STCA], if we go through with it, at the request of Canada, because they believe it is important for reducing their asylum backlog. We don't view this as a counterterrorism measure. But, in order to get the important counterterrorism pieces of the 30-point action plan, this was a trade-off in order to get that." *Id.* at 63.

D. Implementation of the STCA

In November 2004, USCIS announced that the STCA would take effect on December 29, 2004,[46] despite widespread agreement that the date was ill-advised since it was "in the middle of the holiday season and in the depths of winter."[47] With only one month's notice, refugees headed to the United States-Canada border in hopes of being admitted to Canada before the STCA was implemented. One report estimated that in December 2004, 1,800 refugees arrived at Buffalo, New York to cross into Fort Erie, Ontario, a significant increase over the monthly average of 400.[48]

Canadian immigration officers agreed to process refugee claimants who presented themselves at the border prior to the STCA implementation under pre-STCA rules, even if the scheduled entry interviews were not to occur until months after the STCA went into effect. On December 23, 2004, 480 refugees walked across the Peace Bridge from Buffalo, NY, to Fort Erie, ON, and scheduled entry interviews for as late as March 2005.[49] In order to avoid another mass crossing of the Peace Bridge, Canadian officials dispatched 14 immigration officers to process 791 refugees at Vive la Casa, a refugee shelter in Buffalo, rather than requiring the refugee claimants to travel to the border to schedule appointments for asylum interviews.[50]

E. Critiques of the U.S. Asylum System

Refugee advocates on both sides of the border strenuously opposed the STCA and challenged the assertion in the Agreement that both Canada and the United States offer generous systems of refugee protection,[51] since many aspects of the U.S. asylum system violate international legal standards.

- The one-year filing deadline for asylum applicants bars persons who have been in the United States for more than one year from making asylum claims, with certain narrow exceptions.[52] This bar is inconsistent with international refugee law, which provides that asylum requests should not be excluded from consideration based on failure to fulfill formal requirements.[53] Prior to the implementation of the STCA, a number of deserving

[46] Press Release, United States Citizenship and Immigration Services, United States and Canada to Implement Safe Third Country Agreement on Asylum (Nov. 24, 2004), *available at* http://uscis.gov/graphics/publicaffairs/newsrels/Safe3rd_OPA_11_24_04.pdf (last visited Mar. 20, 2006).
[47] CCR, *supra* note 18, at 26.
[48] Clifford Krauss & Robert Pear, *Refugees Rush to Canada to Beat an Asylum Deadline*, N.Y. TIMES, Dec. 28, 2004.
[49] *Id.*; Jay Tokasz, *Refugee Crisis Eases as Canadian Officials Agree to Handle Cases at Buffalo Shelter*, BUFFALO NEWS, Dec. 28, 2004, at B1. Of the 480 refugees who appeared at the border and were directed back to the United States, 17 were detained upon return to the United States. As of April 1, 2005, eleven of the detainees had been released, five had been deported, and one remained in detention. Interview with Devin O'Neill, Attorney, Vive la Casa (April 1, 2005).
[50] Interview with Theresa Anzovino, Executive Director, Peace Bridge Newcomer Centre (March 31, 2005).
[51] STCA, *supra* note 8.
[52] 8 U.S.C. § 1158(a)(2)(B) (2005).
[53] *See, e.g.*, United Nations High Commissioner for Refugees, UNHCR Comments on Proposed Rules on "Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens: Conduct of Removal Proceedings;

asylum seekers who had been statutorily barred from the U.S. asylum system successfully sought asylum in Canada.[54]

- An individual in the United States may be barred from both asylum and withholding of removal (the U.S. equivalent of Article 33 nonrefoulement protection, as explained below) for providing "material support" to "terrorist organizations,"[55] regardless of whether the individual had actual knowledge of the terrorist activities[56] or whether the individual was under duress.[57] This contradicts international legal standards that allow a duress defense[58] and require an applicant's individual responsibility for an act to be established in order to justify exclusion of the individual from refugee protection.[59]

- The United States routinely detains asylum seekers and in some instances treats them inhumanely in violation of international refugee standards.[60] In Fiscal Year 2003, for example, the United States detained approximately 13,800 asylum seekers.[61] Once detained, asylum seekers face significant barriers to pursuing their claims, since they have only limited access to attorneys, family members, and NGOs.[62] In addition, in a number of U.S. detention facilities, asylum seekers are housed with common criminals, are subjected to humiliating strip searches and inmate "counts," and are physically restrained with handcuffs and shackles.[63]

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and Asylum Procedures" (Feb. 4, 1997), *available at* http://unrefugees.org/archives.cfm?ID=122&cat=Archives (last visited Mar. 20, 2006).

[54] *See, e.g.*, CCR, supra note 18, at 11.

[55] "Material support" includes the "transfer of funds, or other material financial benefit." 8 U.S.C.A. § 1182(a)(3)(B)(iv)(VI) (2005). *See generally* IMMIGRATION AND REFUGEE CLINIC & INT'L HUMAN RIGHTS CLINIC, HARVARD LAW SCHOOL, PRELIMINARY FINDINGS AND CONCLUSIONS ON THE MATERIAL SUPPORT FOR TERRORISM BAR AS APPLIED TO THE OVERSEAS RESETTLEMENT OF REFUGEES FROM BURMA (2006), *available at* http://www.law.harvard.edu/academics/clinical/asylum_law/Material_Support_Study.pdf (last visited Mar. 20, 2006).

[56] The "should not reasonably have known" language in 8 U.S.C.A. § 1182(a)(3)(B) appears to be an objective standard that requires no actual knowledge.

[57] In a nonprecedential opinion, the U.S. Court of Appeals for the Third Circuit recently affirmed a Board of Immigration Appeals (BIA) ruling that a Colombian asylum applicant who paid war taxes to a terrorist group was ineligible for refugee protection because he had voluntarily engaged in a terrorist activity. The court, however, declined to rule on whether involuntary conduct could be considered "engag[ing] in a terrorist activity." *Arias v. Gonzales*, 2005 WL 1811822, at *2, *4 (3d Cir. 2005).

[58] United Nations High Commissioner for Refugees, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees ¶ 22 (Sept. 4, 2003).

[59] *Id.* at ¶ 18.

[60] *See e.g.*, Convention Relating to the Status of Refugees, July 28, 1951, art. 31, 189 U.N.T.S. 150; United Nations High Commissioner for Refugees, UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (Feb. 1999) (stating that the detention of asylum seekers is "inherently undesirable" and should be resorted to only "in cases of necessity.").

[61] *See* U.S. COMMISSION ON INT'L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL: EXPERT REPORTS 180 (2005), *available at* http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/index.html (last visited Mar. 20, 2006).

[62] *See id*. at 188–89.

[63] *See id*. at 184–86. *See also* PHYSICIANS FOR HUMAN RIGHTS, FROM PERSECUTION TO PRISONS: THE HEALTH CONSEQUENCES OF DETENTION FOR ASYLUM SEEKERS (2003), *available at* http://www.phrusa.org/campaigns/asylum_network/detention_execSummary/dr12-leg.html#8 (last visited Mar. 20, 2006).

- Unlike Canada and other states parties to the Refugee Convention, the United States requires a higher standard of proof for withholding of removal, a mandatory remedy that provides the non-refoulement protection guaranteed by Article 33 of the Refugee Convention, than it does for asylum, a protection that U.S. law considers discretionary.[64] Consequently, in the United States, a refugee claimant with a well-founded fear of persecution may be denied asylum and returned to his or her country of origin if he or she fails to meet the higher withholding standard.

- The United States is expanding the implementation of expedited removal, a procedure for summarily removing certain non-citizens without review by an immigration judge or the Board of Immigration Appeals. Previously, expedited removal applied at ports of entry and along the border with Mexico. On January 30, 2006, the Department of Homeland Security announced that it was expanding expedited removal to apply along the border with Canada and all coastal areas.[65] Although asylum seekers technically are exempt from expedited removal, procedures to ensure that asylum seekers are protected under expedited removal lack effective quality assurance measures to ensure that they are consistently followed.[66]

- The REAL ID Act of 2005, enacted on May 11, 2005, has further eroded refugee protections in the United States.[67] The REAL ID Act: (1) allows immigration judges to base credibility determinations on the applicant's "demeanor, candor, or responsiveness," as well as on any inconsistency or inaccuracy in the applicant's statement, regardless of whether the "inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim,"[68] in contradiction of UNHCR guidelines that specify that "[u]ntrue statements by themselves are not a reason for refusal of refugee status";[69] (2) requires applicants for asylum or withholding of removal to provide corroborating evidence[70] in contravention of the UNHCR principle that applicants should be given the benefit of the doubt, since persons fleeing from persecution will frequently not possess documentary evidence;[71] (3) places the burden on the applicant charged with aiding a terrorist organization to demonstrate "by clear and convincing evidence" that he or she did not know, and should not reasonably have known, that the organization was a terrorist one; and (4) restricts asylum protection to those who can demonstrate not only that they have a well-founded

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[64] The Supreme Court has established a "well-founded fear" standard for asylum and a "would be threatened" standard for withholding of removal. *See generally* James C. Hathaway & Anne K. Cusick, *Refugee Rights are not Negotiable*, 14 GEO. IMMIGR. L.J. 481 (2000).

[65] Press Release, Department of Homeland Security, Department of Homeland Security Streamlines Removal Process Along Entire U.S. Border (Jan. 30, 2006), *available at* http://www.dhs.gov/dhspublic/display?content=5377 (last visited Mar. 20, 2006).

[66] One study found that in 15% of cases where an arriving alien expressed a fear of return to the inspector, the alien was not referred to an asylum officer. U.S. COMMISSION ON INT'L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL: FINDINGS & RECOMMENDATIONS 6 (2005).

[67] REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (codified in scattered sections of 8 U.S.C.).

[68] This includes inconsistencies within the applicant's statements "whenever made and whether or not under oath." 8 U.S.C.A. § 1158(b)(1)(B)(iii) (2005); 8 U.S.C.A. § 1129a(c)(4)(C) (2005).

[69] UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS ¶ 199 (1988) [hereinafter UNHCR HANDBOOK].

[70] 8 U.S.C.A. § 1158(b)(1)(B)(ii) (2005); 8 U.S.C.A. § 1229a(c)(4)(B) (2005).

[71] UNHCR HANDBOOK, *supra* note 69, ¶ 196.

fear of persecution on grounds of race, religion, nationality, political opinion or membership in a social group, but also that one of those grounds is a "central reason" for the persecution.[72] This last provision may contradict international standards that provide that although a Convention ground must be a contributing cause of the risk of being persecuted, it need not be the sole or even the dominant cause of the risk of being persecuted.[73]

- The state of asylum protection in the United States continues to deteriorate. On December 16, 2005, the House of Representatives passed the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005.[74] If the bill becomes law, it would: 1) criminalize unlawful presence, provision of any charitable assistance by a religious or humanitarian organization to an undocumented alien, and use of irregular documents or misrepresentation of one's status to escape persecution; 2) expand the definition of "aggravated felony" to encompass the new offenses and increase the penalties for committing an "aggravated felony" such that even low-level offenses for which deportation is an excessive and unnecessary sanction would render a non-citizen removable; 3) make detention of asylum seekers the rule rather than the exception and authorize detention of asylum seekers during the pendency of their appeals; and 4) establish a system for default denials and dismissals of petitions for review due to the inaction of a single judge. The Senate is now considering the Comprehensive Immigration Reform Act of 2006, which not only contains the above-mentioned provisions of the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, but also would transfer all petitions for review of removal orders and all appeals of district court habeas cases to the United States Court of Appeals for the Federal Circuit, which currently hears mostly patent cases and appeals from the decisions of certain agencies.

- In addition to problematic substantive law, U.S. refugee decision-makers have been criticized for a lack of consistency, deviation from established legal principles, and the presence of a certain "anarchy" in U.S. refugee jurisprudence.[75] After mounting complaints of abusive conduct and unsound decision-making by immigration adjudicators, the U.S. Attorney General has ordered a review of immigration judges and

[72] 8 U.S.C.A. § 1182(a)(3)(B)(VI) (2005).
[73] James C. Hathaway, *The Causal Nexus in International Refugee Law*, 23 MICH. J. INT'L L. 207, 209 (2002). The Refugee Convention's deliberate use of the passive voice emphasizes that the link between the fear and the ground must be to the general predicament of the applicant (such predicament must relate to one of the five grounds), rather than to the motive or intent of the persecutor or applicant. This approach also is consistent with the Refugee Convention's fundamental purpose of defining the circumstances in which surrogate international protection is warranted. James C. Hathaway et al., *The Michigan Guidelines on Nexus to a Convention Ground*, 23 MICH. J. OF INT'L L. 211, 215 (2002).
[74] H.R. 4437, 109th Cong. (as passed by House, Dec. 16, 2005).
[75] Indisputably, one can point to useful, insightful opinions issued by some decisionmakers. In particular, the Asylum Office of Department of Homeland Security has much to commend it, in terms of solid management, training of adjudicators and implementation of the law. However, especially within the decisionmaking apparatus of the Department of Justice, there is a marked lack of independence and of fair, legally sound and consistent substantive guidance.

Board of Immigration Appeals members.[76] One of the most prominent federal judges in the United States recently commented that "adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice."[77] These problems have been exacerbated by severe restrictions on Department of Justice Administrative review and guidance

IV. FINDINGS AND ANALYSIS

A. Impact of the STCA

Fifteen months after the implementation of the STCA, data collected from NGOs along the United States–Canada border confirm that STCA implementation: (1) has led to a dramatic decrease in the number of refugees provided access to protection in Canada, disproportionately affecting the Colombian refugee community; (2) has begun to threaten the existence of the NGOs at ports of entry; (3) has subjected refugee claimants to arbitrary detention in the United States; (4) has forced individuals who would normally have entered Canada's well-regulated refugee determination system to remain underground in the United States; and (5) has encouraged smuggling and other illegal border crossings.

1. Decreased Access to Refugee Protection

Preliminary data from NGOs operating at the Detroit-Windsor, Buffalo-Fort Erie, and Champlain-Lacolle ports of entry indicate that a significant number of refugees have been denied access to fundamental protections since the STCA went into effect, as evidenced by a striking decline in the number of asylum seekers legally crossing from the United States to Canada, despite no such decline in need for refugee protection.

Decline in Asylum Seekers Legally Crossing from the United States to Canada

The decline was particularly dramatic in the first two months after STCA implementation. For example, at the Buffalo-Fort Erie port of entry, Vive reported that the average number of refugee claimants it registered plummeted from 498 per month during March 2004 – November 2004 to 80 per month in the first two months after the STCA went into effect.[78] The Peace Bridge Newcomer Centre also reported that while it processed an average of 383 refugee claimants per month during 2002-2004, only an average of 53 claimants per month were eligible to enter Canada under the STCA in the first two months of STCA implementation.[79] Similarly, at the Detroit-Windsor port of entry, Freedom House reported that the average number of refugee claimants it served per month decreased from 61 per month

[76] Ann Simmons. Some Immigrants Meet Harsh Face of Justice; Complaints of insensitive -- even abusive -- conduct by some U.S. immigration judges have prompted a broad federal review. LOS ANGELES TIMES, Feb. 12, 2006 at A18.
[77] *Benslimane v. Gonzales*, 430 F.3d 828, 828 (7th Cir. 2005).
[78] Vive, Inc., 2004-2005 Country Statistics [hereinafter Vive Statistics]. In December 2004, with the pre-STCA rush, Vive registered 1177 refugee claimants.
[79] Peace Bridge Newcomer Centre, Monthly Totals of Refugee Claimants Dec. 2001 – Jan. 2005; Peace Bridge Newcomer Centre, Safe Third Claimants Assisted During Months of January 2005 – February 2005 [hereinafter PBNC Safe Third].

during 2003-2004 to 47 per month in the first two months after the STCA went into effect.[80] As the backlog from the December 2004 rush began to clear in March 2005, the decline in refugee claimants at the Buffalo-Fort Erie port of entry became particularly noticeable. Casa el Norte, a refugee shelter in Fort Erie, was completely empty for the month of March,[81] and Matthew House, another refugee shelter in Fort Erie, housed no new refugees in the last three weeks of March.[82]

After the first months of STCA implementation, the number of refugee claimants being processed by Freedom House at the Detroit-Windsor port of entry further decreased from an average of 47 per month in January and February 2005 to an average of 27 per month in April and May 2005, but then gradually increased until reaching an average of 95 per month during November 2005 – February 2006.[83] At the Buffalo-Fort Erie port of entry, the number of refugee claimants being processed by Vive increased from an average of 80 per month in January and February 2005 to an average of 209 per month during March 2005 – December 2005, which was still less than half of the average of 498 refugee claimants processed by Vive per month during March 2004 – November 2004.[84] In Montreal, north of the Champlain-Lacolle port of entry, the Centre Scalabrini and South Asian Women Community Centre both reported that the number of refugee claimants in Montreal had remained low since the STCA had been implemented.[85]

The Changing Face of the Average Refugee Claimant Entering Canada from the United States

The decrease in refugee claimants crossing from the United States to Canada appears to be caused not by decreased need for protection, but by reduced numbers of refugee claimants who are eligible to enter Canada under the STCA. Sixty percent of the 7.35 phone calls that Vive la Casa received each day from January 2005 – March 2005 regarding STCA eligibility were from individuals who were ineligible to enter Canada.[86] As the number of refugee claimants has declined, the characteristics of the claimants have changed, suggesting that refugee claimants who previously would have sought protection in Canada are being denied protection under the STCA.

- **The vast majority of refugee claimants in Canada now fall into one of the STCA exceptions**
  Most refugee claimants in Canada fall under one of the STCA exceptions, suggesting that Canada is denying fundamental protections to those refugee claimants who are not fortunate enough to be a national of one of a very small number of countries or to have relatives living in Canada. In the months immediately after the STCA went into effect,

[80] Freedom House, 2003-2005 Refugee Claimant Data [hereinafter Freedom House Statistics].
[81] Interview with Lynn Hanigan, Casa el Norte (March 31, 2005).
[82] Interview with Jim and Shirley McNair, Matthew House (March 31, 2005).
[83] Freedom House, April 2005 – February 2006 Refugee Claimant Data [hereinafter Freedom House Updated Statistics].
[84] See Vive Statistics, *supra* note 78; Vive, Inc., Country Statistics: January – December 2005 [hereinafter Vive Updated Statistics].
[85] Telephone Interview with Ricardo Ulloa, Centre Scalabrini (Sept. 23, 2005); Telephone Interview with Sadeqa Siddiqui, South Asian Women Community Centre (Sept. 23, 2005).
[86] Vive, Inc., Post Safe Third Country Agreement Implementation Statistics [hereinafter Vive Post Safe Third].

most eligible STCA claimants were admitted into Canada under the family exception. For example, Theresa Anzovino, Executive Director of the Peace Bridge Newcomer Centre, stated in March 2005 that 93% of STCA claimants processed at the Newcomer Centre had used the family exception even if they were eligible under the country exception.[87] Increasingly, however, STCA claimants are being admitted into Canada under the country exceptions. Approximately 30% of the refugee claimants processed by Vive from January 2005 to December 2005 qualified for admission under a country exception,[88] and approximately 75% of the refugee claimants processed by Freedom House from April 2005 to February 2006 qualified under a country exception.[89]

- **The refugee claimants' countries of origin have changed**
  For example, the percentage of Colombians served by Freedom House dwindled from 16% in 2003-2004 to 3% in April 2005 – February 2006, and the percentage of Albanians served by Freedom House decreased from 9% in 2003-2004 to 2% in April 2005 – February 2006.[90] The statistics indicate that large populations of refugees are being denied protection because the declining numbers are due not to reduced need for protection, but to reduced numbers of refugee claimants who are eligible under the STCA.

The Example of Colombian Refugees

The STCA has had a disproportionate, adverse effect on Colombian refugees. Colombia's ongoing civil war has been characterized by serious, widespread violations of human rights and international humanitarian law, as both guerrillas and right-wing paramilitary groups have committed atrocities such as massacres, kidnappings, and torture of civilians, including against real and perceived political enemies.[91] As a result, hundreds of thousands have fled Colombia, with an estimated 250,000 people newly uprooted in 2003 alone.[92] Many of these individuals make their way north to the United States and Canada, often by land. In 2004, for example, 3,259 Colombians had their claim finalized by the Immigration and Refugee Board in Canada.[93] Unlike Africans, many of whom enter Canada through Europe, the overwhelming majority of Colombians who ultimately seek asylum in Canada first pass through the United States.[94]

The STCA, by forcing Colombians who pass through the United States to make their claims in the United States rather than Canada, has drastically reduced their likelihood of making

[87] PBNC Safe Third, note 78; Interview with Theresa Anzovino, *supra* note 47.
[88] Vive Updated Statistics, *supra* note 84.
[89] Freedom House Updated Statistics, *supra* note 83.
[90] Freedom House Statistics, *supra* note 79; Freedom House Updated Statistics, *supra* note 83.
[91] *See, e.g.*, AMNESTY INTERNATIONAL USA, COLOMBIA: 2005 ANNUAL REPORT, *available at* http://www.amnestyusa.org/countries/colombia/document.do?id=ar&yr=2005 (last visited Mar. 20, 2006).
[92] Doug Ford, *The Americas and the Caribbean 2004 Regional Summary*, *available at* www.refugees.org/article.aspx?id=1163 (last visited Mar. 20, 2006).
[93] *See* IRB Statistics, *supra* note 1.
[94] Many children of Colombian refugee claimants speak only English, indicating that their families have traveled through the United States. Telephone Interview with Myriam Hamez, Jardin Couvert (May 6, 2005).

a successful asylum claim. While the acceptance rate in Canada was 81% in 2003 and 2004[95] and 79% in 2005, the acceptance rate in the United States in Fiscal Year 2004 was 45% for those who affirmatively applied[96] and 28% for those appearing before an immigration judge.[97] While all refugee claimants in the United States are disadvantaged by several aspects of the U.S. asylum system that violate international legal standards, Colombian refugee claimants in the United States are particularly affected by the exclusion from asylum and withholding protections of individuals who provided "material support" to terrorist organizations, regardless of whether they were under duress. Recently, the U.S. Court of Appeals for the Third Circuit held that a Colombian asylum applicant who paid war taxes to a guerrilla group was ineligible for refugee protection because he had engaged in a terrorist activity.[98] Such rulings hinder the ability of Colombian refugee claimants, many of whom have been forced to pay ransoms or war taxes to guerrilla or paramilitary groups, to secure fundamental refugee protections in the United States. Because of the difficulty for bona fide refugees of successfully securing asylum in the United States, many Colombians who reach the United States do not apply for asylum.[99] Instead, an estimated 150,000 Colombians remain without legal status in the United States.[100]

On our fact-finding trips, we found that the number of Colombian refugee claimants crossing from Buffalo, NY, to Fort Erie, ON, drastically decreased after the STCA was implemented. Vive, for example, processed an average of 282 Colombians per month from March 2004 – December 2004, representing approximately 50% of total refugee claimants assisted.[101] In contrast, from January 2005 – December 2005, Vive processed an average of 51 Colombians per month, representing 27% of total refugee claimants assisted.[102] 72% of the 7.35 telephone inquiries Vive received each day from January 2005 – March 2005 continued to be from Colombian nationals, but 65% of the Colombians who inquired about the STCA were ineligible.[103] Were all the Colombians who inquired eligible under the STCA, an additional 105 Colombian refugee claimants a month could enter Canada.

By effectively closing the Canadian border to Colombians who pass through the United States, the STCA may increase the likelihood that individuals will live underground in the United States. The strikingly different success rates of Colombian asylum applicants in the United States and Canada highlight underlying differences in the asylum systems of the two countries. The STCA fails to acknowledge these differences in the application of refugee law,

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[95] IRB Statistics, *supra* note 93.
[96] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Yearbook of Immigration Statistics: 2004, Table 18, *available at* http://uscis.gov/graphics/shared/statistics/yearbook/2004/Table18.xls (last visited Mar. 20, 2006).
[97] U.S. Department of Justice, Executive Office of Immigration Review, FY 2004 Asylum Statistics, http://www.usdoj.gov/eoir/efoia/FY04AsyStats.pdf (last visited Mar. 20, 2006).
[98] *Arias v. Gonzales*, 2005 WL 1811822, at *2, *4 (3d Cir. 2005).
[99] U.S. COMMITTEE FOR REFUGEES AND IMMIGRANTS, 2004 U.S. COUNTRY REPORT, *available at* http://www.refugees.org/countryreports.aspx?__VIEWSTATE=dDwxMTA1OTA4MTYwOztsPENvdW50cnlERDpHb0J1dHRvbjs%2BPrImhOOqDI29eBMz8b04PTi8xjW2&cid=183&subm=&ssm=&map=&_ctl0%3ASearchInput=+KEYWORD+SEARCH&CountryDD%3ALocationList= (last visited Mar. 20, 2006).
[100] *Id*.
[101] Vive Statistics, *supra* note 78.
[102] *Id.*
[103] Vive Post Safe Third, *supra* note 86.

thereby denying applicants the ability to seek asylum in the country where they have the best chance of securing protection and leading a safe, productive life.

2. Destructive Impact on NGOs and Cities

After fifteen months, the STCA has also threatened to decimate the well-organized NGO infrastructure that currently exists at the Detroit-Windsor, Buffalo-Fort Erie, and Champlain-Lacolle border crossings. Prior to the enactment of the STCA, NGOs along the border had mutually beneficial relationships with Canadian border officials, working jointly with immigration officers to move applicants through the inspection and application process. At the Detroit-Windsor and Buffalo-Fort Erie ports of entry, NGOs continue to aid refugee claimants, scheduling interviews and pre-screening refugee claimants to guarantee that claimants will be able to establish eligibility under the country[104] or family[105] exceptions at the entry interviews.[106] In addition, at the Detroit-Windsor port of entry, law students and Freedom House staff members monitored a limited number of Canadian entry interviews to ensure that the interviews were properly conducted.[107]

Still, since the STCA went into effect, the dramatic decline in numbers of refugee claimants being processed and sheltered by the NGOs has led directors of refugee shelters in Fort Erie to begin considering alternative functions for their organizations if the number of refugee claimants crossing from the United States to Canada continues to remain so low. Lynn Hanigan of Casa el Norte, who worries that her refugee shelter may have to close, has already approached the Canadian government to discuss participating in government-assisted refugee resettlement.[108] Jim and Shirley McNair of Matthew House have considered renting out rooms, providing guardianship for refugee claimants who are unaccompanied minors, and converting Matthew House into a shelter for refugee women traveling alone with children or a community center for refugees in the Fort Erie area.[109]

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[104] In the Canadian entry interviews, a passport from a country to which Canada has temporarily suspended removals or for whose nationals Canada, but not the United States, does not require a visa, is generally sufficient to establish eligibility under a country exception to the STCA. Interview with David Koelsch, Attorney, Freedom House (March 30, 2005).

[105] In order to establish eligibility under the family exception to the STCA, Canadian immigration officers typically question the anchor relative, by phone or in person, about family relationships. If the anchor relative accompanies the refugee claimant to the entry interview, for example, immigration officers may place the relatives in separate rooms and ask each one to draw a family tree. Canadian authorities generally do not request documents such as birth certificates, which may be difficult to obtain. *Id.*

[106] At the Detroit-Windsor port of entry, for example, Freedom House screens claimants for eligibility under the STCA before an application is sent to the claimant, after the claimant returns the application, and before the claimant attends the entry interview. As part of this process, Freedom House also hand-delivers the claimant's application to the Canadian authorities. The Canadian immigration officials then fax Freedom House a schedule of interviews, typically two weeks in advance of the interviews. Generally, seven or eight interviews are conducted per week at the Detroit-Windsor border point. *Id.*

[107] *Id.* Freedom House no longer monitors Canadian entry interviews due to resource concerns. Telephone Interview with Bradley Maze, Attorney, Freedom House (March 17, 2006). At the Buffalo-Fort Erie port of entry, Vive does not monitor Canadian entry interviews because it considers the conduct of Canadian officials to be consistently professional to the consistently professional. Interview with Devin O'Neill, *supra* note 49.

[108] Interview with Lynn Hanigan, *supra* note 81.

[109] Interview with Jim and Shirley McNair, *supra* note 82.

The potential dismantling of NGOs may adversely affect the livelihood and sustainability of cities and surrounding neighborhoods. Molly Short, from Vive, noted that even immigration officers understood that the economic well-being of Fort Erie was dependent on the Buffalo-Fort Erie border crossing continuing to attract asylum seekers.[110] The STCA may not only dismantle what was once an effective and efficient entry and screening process for refugee claimants entering Canada from the United States, but it may also erode the economic and civic health of cities dependent on refugee populations.

3. Arbitrary Detention

The STCA has also subjected refugee claimants to the risk of arbitrary detention in the United States.[111] Although it is difficult to learn about STCA claimants being detained because detainees have limited contact with friends, family, and legal representation, several instances of STCA claimants being detained have been recorded.

For example, a number of STCA claimants have been detained based on faulty understandings of family relationships. At the Detroit-Windsor port of entry, a refugee claimant from Guinea was sent back to the United States because he considered his cousin to be his "sister" and therefore mistakenly thought that she could serve as his anchor relative under the STCA.[112] Upon his return to the United States, U.S. immigration officials detained him in Monroe County Jail or Calhoun County Jail. At the Buffalo-Fort Erie port of entry, Ms. Anzovino said that she had observed four or five similar cases in which STCA claimants were directed back to the United States based on their misunderstanding of family relationships.[113]

The United States' policy of detaining asylum seekers for prolonged periods is further illustrated by the following two cases. In the first case, a refugee claimant from Hong Kong was detained in January 2005 upon entering the United States from Canada.[114] After being held at a prison in Detroit for approximately two weeks, the refugee claimant was transferred to Monroe County Jail.[115] Although U.S. authorities determined in early February 2005 that the refugee claimant would be sent back to Canada under the STCA, the refugee claimant remained in Monroe County Jail at least until the end of March 2005.[116] In the second case, which occurred prior to STCA implementation, a family from Afghanistan was separated after attempting to enter Canada and being returned to the United States.[117] Upon the family's return to the United

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[110] Interview with Molly Short, Vive la Casa (March 31, 2005).

[111] The risk is somewhat mitigated, however, by well-informed immigrant communities that spread the word that refugee claimants seeking to enter Canada from the United States must be pre-screened by NGOs such as Freedom House and Vive in order to avoid being directed back to the United States and possibly detained.

[112] Interview with David Koelsch, *supra* note 99. Freedom House learned during the screening process that the claimant's "sister" was in fact his cousin, and it advised the claimant, who was ineligible for asylum in the United States due to the one-year statutory bar, not to appear for his interview with Canadian immigration authorities. The claimant, however, insisted on attending the entry interview. At the interview, Canadian immigration officials called the claimant's "sister" and learned that she was actually his cousin. The Canadian authorities immediately directed the claimant back to the United States.

[113] Interview with Theresa Anzovino, *supra* note 47.

[114] Interview with P., Monroe County Jail (March 29, 2005).

[115] *Id.*

[116] *Id.*

[117] Interview with Devin O'Neill, *supra* note 46.

States, the women and children were allowed to proceed to Vive la Casa, but the husband was detained at the Batavia Detention Center for several months, and as of March 2005, the U.S. authorities were planning to deport him to Pakistan.[118]

While the detention of asylum seekers is itself a violation of human rights standards, a number of additional problems have arisen in the jails where asylum seekers are detained. For example, neither Monroe County Jail nor Calhoun County Jail provides a translation mechanism for detainees. Further, at Calhoun County Jail, for example, two inmates died in March 2005 from a methicillin-resistant staphylococcus aureus infection,[119] and at Monroe County Jail, a U.S. Immigration and Customs Enforcement employee was indicted in 2004 for stealing more than $200,000 from detainees.[120] The United States is not only unnecessarily detaining asylum seekers, but also is subjecting the detainees to a risk of inhumane and even life-threatening treatment.

4. Increase in Undocumented Aliens Remaining Underground

The STCA also raises security concerns in both the United States and Canada because the Agreement encourages potential refugee claimants to remain underground. 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. Since the STCA was implemented, however, a substantial number of individuals have been barred from Canada's asylum system.

Refugee claimants stranded in the United States frequently are statutorily barred from applying from 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. Many potential asylum applicants reasonably lack confidence in their ability to obtain a fair hearing in the United States and face bars or cannot obtain legal representation. Confronted with a high risk of removal, many who should be eligible to apply for refugee protection in the United States are not able do so.

5. Promotion of Illegal Border Crossings

Although the U.S. and Canadian governments have stated that a primary goal of the STCA is to reinforce refugee protection by securing the border,[121] preliminary information

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[118] *Id.*

[119] *See, e.g.*, Trace Christenson, *Inmate Deaths Cause Concern at County Jail*, BATTLE CREEK ENQUIRER, Mar. 11, 2005, at A1.

[120] *See, e.g.*, Tamara Audi, *Agent Charged in Prison Thefts*, DETROIT FREE PRESS, July 1, 2004.

[121] According to the Canadian government, "the primary purpose of the Agreement is to reinforce refugee protection by establishing rules for the sharing of responsibility for hearing refugee claims between Canada and the United States." Government Response to the Report of the Standing Committee on Citizenship and Immigration (May 2003), *available at* http://www.cic.gc.ca/english/pub/safe-third.html (May 1, 2003). The U.S. Department of

gathered from NGOs along the United States-Canada border indicates that the border is becoming increasingly disorganized and dangerous. Prior to the STCA, it was estimated that 90% of migrants crossed the border at 20 out of 130 ports of entry along the 5,525-mile (7,000 miles including Alaska) border between the United States and Canada.[122] Because the STCA only applies to land border ports of entry, it creates a perverse incentive to cross the border irregularly at points other than land border ports of entry. Before the Agreement was even signed, Bill Frelick, the former Director of the Refugee Program of Amnesty International USA, warned that the STCA "could foment illegal smuggling and encourage traffickers who prey upon desperate refugees."[123] Fifteen months after implementation of the STCA, the Agreement is already beginning to encourage an underground system of migration. Instead of securing the border, the STCA is causing the border to become increasingly dangerous and disorderly.

While it is difficult to monitor irregular border crossings, information collected from NGOs along United States-Canada border indicates that the STCA has already led refugee claimants to enter Canada illegally, in marked contrast to the pre-STCA regularized movement of claimants.[124] Prior to STCA implementation, David Koelsch, a Freedom House staff attorney, had not been aware of any refugee claimants entering Canada illegally.[125] By the third week of December 2004,[126] after the limit of refugee claimants who would be treated under the pre-STCA rules had been reached, Mr. Koelsch began hearing of anchor relatives entering Canada at points other than land border ports of entry.[127] By March 2005, Mr. Koelsch estimated that he heard of an anchor relative entering Canada illegally once every couple of weeks.[128] In one case, for example, Freedom House screened two cousins from Honduras who used as anchor relatives their respective brothers, who had each entered Canada at a point other than a land border port of entry and filed an inland claim.[129] In another case, Freedom House screened a refugee claimant from Albania who used an uncle who had entered Canada illegally and filed an inland claim as his anchor relative.[130] At the Buffalo-Fort Erie port of entry, also, Theresa Anzovino observed an increase in illegal crossings into Canada in the first three months after the implementation of the STCA.[131]

Homeland Security echoed the goal of increased organization at the border: "The Agreement enhances the two nations' ability to manage, in an orderly fashion, asylum claims brought by persons crossing our common border." Press Release, U.S. Citizenship and Immigration Services, United States and Canada Implement Safe Third Country Agreement on Asylum (Dec. 29, 2004).

[122] Denis Coderre, Minister of Citizenship and Immigration, Address at the Renaissance Club (Mar. 11, 2003), *available at* http://www.cic.gc.ca/english/press/speech/detroit.html (Mar. 11, 2003).

[123] House Hearing, *supra* note 40, at 45 (Prepared Statement of Bill Frelick).

[124] Statistics on inland claims suggest that as yet, there are few irregular border crossings. This is perhaps to be expected, since it will generally take some time for people to find alternate routes across a border that has been closed. Although NGOs are not well-placed to know the details of irregular border crossings, it is known that some individuals are finding ways to cross the border illegally.

[125] Interview with David Koelsch, *supra* note 99.

[126] This was after the pipeline for refugee claimants who could be processed under pre-STCA guidelines at the Detroit-Windsor port of entry had filled up. *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.* In each case, Mr. Koelsch learned that the anchor relatives had not entered Canada at a land border point of entry when he inquired why the anchor relatives did not have any entry documents. *Id.*

[131] Interview with Theresa Anzovino, *supra* note 47.

In some cases, attempts at illegal entry into Canada have turned tragic. For example, in September 2005, a 24-year-old Albanian man drowned in an attempt to enter Canada on a personal watercraft driven by a man believed to be a smuggler.[132] Already, the STCA has led refugee claimants to risk illegal entry and possible death.

V. CONCLUSION

The STCA is based on the faulty premise that both Canada and the United States offer sufficient protection to refugee claimants. In reality, many aspects of the U.S. asylum system violate international legal standards. It was this understanding of the core differences between the Canadian and U.S. systems that spurred refugee advocates in Canada and the United States to strenuously oppose the STCA. This report has confirmed, fifteen months after STCA implementation, that a number of the concerns voiced by refugee advocates are valid. Already, the STCA has endangered thousands of refugee claimants by jeopardizing their ability to receive fundamental protections, has made the border more hazardous for refugee claimants by threatening the existence of NGOs along the United States-Canada border, has subjected refugee claimants to arbitrary detention in the United States, and has encouraged individuals who normally would have entered Canada's refugee determination system to illegally cross the border or remain without status in the United States. The STCA not only fails to accomplish its stated goal of securing the border, but it makes the border less secure, endangering the lives of refugee claimants and threatening the fundamental security of the United States and Canada.

[132] Kelly Patrick, *Deadly Turn for Border Runners: Albanian Man Drowns in Bid to Enter Canada*, WINDSOR STAR, Sept. 7, 2005.