Unsafe in America: A Review of the U.S.-Canada Safe Third Country Agreement

Andrew F. Moore
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I. INTRODUCTION

On December 23, 2004, over four hundred men, women and children from many parts of the world crossed the Canadian border at Fort Erie, coming from Buffalo, New York.\(^1\) They waited in sub-zero temperatures on school buses and in a make-shift camp, separated from their luggage and basic necessities.\(^2\) All asserted that they were refugees and sought protection in Canada before they lost the opportunity to do so.\(^3\) Their opportunity to obtain refugee status lapsed on December 29, 2004, when the Safe Third Country Agreement (STCA) between the United States and Canada became effective.\(^4\) Pursuant to this agreement, Canada began turning back those coming through the United States claiming to be refugees.\(^5\) Since the STCA entered into force,

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2. Id.
3. Id. at 26.
4. Id. at 1.
5. Id. at 26.
the number of refugee applicants at the Canadian border has fallen precipitously.\textsuperscript{6} Refugee agencies and shelters that previously facilitated transit are now telling refugee applicants that the Canadian border is closed to them.\textsuperscript{7}

The STCA is part of a comprehensive border security agreement between the United States and Canada initiated in the wake of the September 11, 2001 terrorist attacks.\textsuperscript{8} According to press releases following its enactment, the STCA "allocates responsibility between the United States and Canada whereby one or the other country (but not both) will assume responsibility for processing the claims of certain asylum seekers . . . ."\textsuperscript{9} According to the release, the STCA "enhances the two nations' ability to manage, in an orderly fashion, asylum claims brought by persons crossing our common border."\textsuperscript{10} However, many refugee advocates believe that the STCA's true purpose is to reduce the number of refugee claims made in Canada.\textsuperscript{11}

The assumption behind the STCA is that both the United States and Canada provide protection to refugees in a fashion consistent with international law.\textsuperscript{12} Therefore, conventional wisdom holds that genuine refugees should apply for
protection in whichever country they arrive in first, because both are safe countries, and genuine refugees should be satisfied with the first safe place they find. However, there are good reasons to challenge the assumption that the United States is a safe country for all refugees. There are also good reasons to conclude that Canada will violate its international legal obligations if it returns a refugee applicant to the United States to face a system that does not comport with international refugee protection or human rights obligations.

This article will assess the STCA by evaluating the United States' refugee processing system. It concludes that there are several features of the U.S. system that clearly violate international laws regarding the protection of refugees as well as other human rights norms. Arguable violations of refugee law and human rights norms will also be discussed. These violations raise the possibility of refugee applicants challenging the legality of Canada's participation in the STCA in both domestic and international fora.

This article begins in Part II with an explanation of how safe third country agreements work and an historical review of such agreements. A closer examination of the particular provisions of the United States-Canada agreement will follow in Part III. Part IV describes the framework of international laws protecting refugees and briefly looks at the refugee protection systems operating in the United States and Canada. Part V will review how safe third country agreements may compromise international legal protections. It will also introduce the principle that nations may be held in violation of international law if they return a refugee applicant to a country that fails to provide minimum protections to refugees.

13. Macklin, supra note 9, at 381-82.
15. See infra Part VI.B.1.
17. See infra Part VI.B.2.
18. See infra Part VII.
19. See infra Part II.
20. See infra Part III.
21. See infra Part IV.
22. See infra Part V.
23. See infra Part V.
Part VI will apply these principles to the STCA. This article will assess which aspects of the United States’ refugee processing system fail to provide minimum legal protections, and therefore prohibit Canada from returning a refugee applicant to the United States. Part VII will look at the various fora which may be used to challenge Canada’s participation in the STCA. Finally, this article will propose that calibrating the refugee protection systems of Canada and the United States may be a better way to address the issues that led to the enactment of the STCA.

Before proceeding, a word about terminology. The term “refugee” as used by Canada and the United States refers to a person who fits a definition established in the international treaty concerning refugees, the 1951 Convention Relating to the Status of Refugees (Refugee Convention). However, Canada and the United States use different nomenclature for the same legal protection given to one who meets the definition of refugee. The United States uses the term “asylum” to denote the legal status of protection granted to a person who meets the international definition of a refugee, whereas Canada uses the term “refugee status.”

II. THE EVOLUTION OF SAFE THIRD COUNTRY AGREEMENTS

A. Definition

The STCA’s title is derived from a concept that recently emerged in international refugee law. The concept evolved to address the following situation: a person fleeing from danger leaves the country of persecution (the first country) and ultimately arrives in a country in which she or he wants to receive protection (the second country). However, the quickest route between the first country and the second

24. See infra Part VI.
25. See infra Part VII.
26. See infra Part VIII.
country is not a straight line. The path of flight leads the person through one or more countries before arriving in the second country. These countries through which the person fled are referred to as third countries. Safe third country agreements are concerned with the movement between the third country and the second country.

Essentially, a safe third country agreement provides that once a person fleeing persecution crosses through the territory of a country party to the agreement, that country is responsible for assessing refugee status. If an individual attempts to enter another country party to the agreement (the second country), he or she may be summarily returned to the third country. The second country does not make any determination as to whether the person fleeing deserves refugee protection because the safe third country agreement assigns responsibility to the third country to assess refugee status.

B. History of Safe Third Country Agreements

The United States and Canada are certainly not unique in creating a safe third country agreement. Similar agreements exist among many countries trying to control the movement of people from third countries to second countries. Such agreements were originally developed between countries belonging to the European Union (E.U.).

Between 1985 and 2000, Western European countries were inundated with a wave of over five and a half million people requesting protection from persecution. In order to

29. Id. at 568.
30. See id.
31. Id.
32. See id. at 575.
33. See id.; see also JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 295 (2005).
34. See Legomsky, supra note 28, at 575.
35. See id. at 575.
37. See id. at 490-99; see also Maryellen Fullerton, Failing the Test: Germany Leads Europe in Dismantling Refugee Protection, 36 TEX. INT'L L.J. 231, 232 n.4 (2001). This migration was caused by instability and poor economic conditions in many countries in Eastern Europe as well as Africa, Asia, Central
deal with this influx, as well as to harmonize their immigration policies, several E.U. countries entered into the Schengen Convention in 1990. The Schengen Convention contained provisions on processing asylum claims that limited applicants seeking protection to doing so in a single Schengen country. Several objective criteria would guide decisions on which Schengen country had responsibility for determining refugee status. The Schengen Convention also provided that a party to the Convention could return an asylum seeker to a third country on the basis of these criteria.

Following the Schengen Convention, the Dublin Convention further institutionalized safe third country agreements. The Dublin Convention established that an application for protection should be made in the first E.U. country in which an asylum seeker arrives. Additionally, it authorized the return of an asylum seeker to a non-E.U. state if that state was considered to be safe. Like the Schengen Convention, the Dublin Convention permitted the rejection of an asylum seeker's application on the basis that the application should have been made in a third country. In 2003, the safe third country provisions of the Dublin Convention were codified in an E.U. regulation, making them part of E.U. law.

Concurrently, within individual E.U. countries, changes

38. See Borchelt, supra note 36, at 493-94. The treaty was named after the town in Luxembourg where the treaty was signed. The parties to the Schengen Convention were Belgium, the Netherlands, Luxembourg, the Federal Republic of Germany, and the French Republic. See id. at 494 n.97.

39. Id. at 495.

40. Id. The objective criteria included whether a state had issued a visa or other travel document to the refugee applicant, whether the refugee applicant had proper documents, whether the refugee applicant had already begun proceedings to determine refugee status in another Schengen country, and whether there was a final determination of refugee status in another Schengen country. Id. at 495-96 (citing Convention Applying the Schengen Agreement of 14 June 1985, on the Gradual Abolition of Checks at their Common Borders, art. 30, June 19, 1990, 30 I.L.M. 84).

41. Borchelt, supra note 36, at 496.

42. See id. at 496-97; see also Legomsky, supra note 28, at 578.

43. See Borchelt, supra note 36, at 496.

44. See id. at 497.

45. See id.

in domestic refugee and asylum law occurred due to disproportionate burdens in dealing with the flood of asylum seekers. For example, Germany was compelled to change its domestic law in 1993 in response to the fact that it handled upwards of fifty percent of all refugee applicants in Western Europe between 1983 and 1993. Prior to 1993, Germany codified its commitment to refugees in its constitution, stating: "Persons persecuted on political grounds shall enjoy the right of asylum." However, this protection was sharply curtailed in 1993 with the addition of several provisions, including a safe third country provision. It essentially became impossible to file an asylum claim if one traveled through another country to get to Germany. As a result, the number of asylum applications in Germany decreased by fifty percent in 1994 and has continued on a downward trend ever since.

These developments were accompanied by the evolution of bilateral readmission agreements between E.U. countries and Central and Eastern European countries. Under these agreements, Central and Eastern European countries agreed to take back persons who traveled through those countries to apply for asylum in a Western European state. These agreements allowed the E.U. countries to refuse to consider asylum applications on the grounds that asylum seekers could seek protection in the Central and Eastern European countries through which they passed. As a result, asylum seekers now face the prospect of retracing their path of flight and being sent back by a series of countries, each claiming that another is a safe third country. This practice raises criticisms of safe third country agreements that will be

47. See Borchelt, supra note 36, at 474.
48. See Fullerton, supra note 37, at 232.
49. Id.
50. See id. at 233-34, 243-45. In addition to the E.U. countries, which are presumptively safe countries, Germany identified any non-E.U. country with which it shared a border as a safe country, thereby establishing what has been called a cordon sanitaire around Germany. See id. at 243-44.
52. Legomsky, supra note 28, at 576-77.
53. See Fullerton, supra note 37, at 250.
54. See Legomsky, supra note 28, at 575.
discussed below.  

III. THE STCA BETWEEN THE UNITED STATES AND CANADA

Similar pressures to those in Europe brought about the STCA between Canada and the United States. The number of asylum claims in the United States and Canada between 1985 and 2000 totaled over 1.6 million. The disproportionate number of people seeking asylum in Canada also led to the agreement. In terms of absolute numbers of asylum claims, the United States receives far more claims than Canada. However, when it comes to movement between the two countries, with the United States or Canada serving as the third country, the statistics are clear and revealing. Since at least 1990, the flow of persons leaving the United States to seek refugee status in Canada is almost forty-four times the number of persons leaving Canada to seek asylum in the United States.

There may be many reasons for people to choose Canada over the United States as the country in which to seek refugee protection, but two aspects of Canada's refugee determination system are particularly noteworthy in this respect. First, there is a general perception that asylum applicants are more likely to receive protection in Canada. Statistics suggest that Canada has a higher approval rate of asylum applications than the United States. In addition,
Canada applies a separate "humanitarian and compassionate" consideration which provides an alternate means of attaining permanent residency in Canada if the refugee claim fails.62

Furthermore, the system in the United States contains hurdles which make it more difficult to apply for asylum. Most significant is the requirement that an asylum seeker apply for asylum within one year of his or her arrival in the United States.63 No such requirement exists in the Canadian system.64 There are also several bars and restrictions on receiving protection in the United States not found in the Canadian system, such as a higher burden of proof, and broader grounds of exclusion from protection on the basis of criminal conduct or alleged support to terrorist organizations.65

Secondly, Canada has a far more generous support system for those going through the process of applying for protection. When a person enters Canada to apply for asylum, he or she has access to critical support mechanisms, including social assistance to cover living expenses and comprehensive medical care, free legal representation, as well as permission to seek employment.66 The United States does

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

63. 8 U.S.C. § 1158(a)(2)(B) (2003). There are several narrow exceptions to this rule. See, e.g., id. § 1158(a)(2)(D).


65. See infra Part VI.

not provide similar support, and further, changed its laws to limit the number of asylum seekers who receive permission to work.\textsuperscript{67}

The disproportionate flow of applicants from the United States to Canada led Canadian officials to seek an agreement with the United States similar to the European model.\textsuperscript{68} Thus, the STCA designates Canada and the United States as safe third countries vis-à-vis one another.\textsuperscript{69} Under the STCA, a claim for protection must be made in the first country in which a refugee claimant lands.\textsuperscript{70} Further, the third country must determine whether an applicant fits the definition of a refugee, and must prohibit the removal of that person to another country until a refugee status determination has been made.\textsuperscript{71}

The STCA has several important limitations. The first is its scope of application. The STCA only applies at land border ports of entry on the United States/Canada border.\textsuperscript{72} It does not apply to airports, seaports, or those claims made "inland"; that is, in the interior of Canada rather than at a designated border crossing.\textsuperscript{73} Thus, if a refugee applicant arrives in Canada from the United States by sea or air, or enters at a point other than a designated land border crossing, that applicant can apply for asylum in Canada and will not be retuned to the United States.\textsuperscript{74}

Numerous exceptions to the STCA also limit the agreement. There are several exceptions based on family relationships. Those applicants with family members\textsuperscript{75} who

\begin{itemize}
  \item \textsuperscript{68} See \textit{CLOSING THE FRONT DOOR}, supra note 1, at 1-2; Macklin, \textit{supra} note 9, at 370-71.
  \item \textsuperscript{69} \textit{Safe Third Country Agreement, supra note 12, at art. 1.1(A).}
  \item \textsuperscript{70} \textit{Id.} at art. 4.
  \item \textsuperscript{71} \textit{Id.} at art. 3.1.
  \item \textsuperscript{72} \textit{Id.} at art. 1.1.
  \item \textsuperscript{73} \textit{CLOSING THE FRONT DOOR, supra note 1, at 1 (indicating that the STCA applies to refugees making a claim at the "US-Canada land border"); see also CITIZENSHIP AND IMMIGRATION CAN., supra note 80, at 82.}
  \item \textsuperscript{74} \textit{Id.} (stating that those refugees who apply at a land border will be rejected by Canada and summarily sent back to the United States).
  \item \textsuperscript{75} The term "family member" is defined in a limited fashion, however. \textit{See}, \textit{e.g.}, Immigration and Refugee Protection Act, S.C. 2001 § 121, ch. 27 (Can.); Immigration and Refugee Protection Regulations, SOR/2002-227 § 1(3) (Can.).
\end{itemize}
are citizens of, or who have been granted refugee status or other lawful status by either the United States or Canada are not be subject to the STCA.\textsuperscript{76} Additionally, if the family member in question is eighteen or above, has filed an application for refugee protection, and is eligible to pursue a refugee claim, the STCA will not apply.\textsuperscript{77}

There are also exceptions based on nationality. The STCA excludes United States and Canadian nationals and those who are stateless but who habitually reside in either the United States or Canada.\textsuperscript{78} Persons from certain designated countries who enter and make refugee claims are also excluded from coverage under the STCA.\textsuperscript{79} The Canadian government periodically designates countries to which Canada will not return applicants, and as a result, nationals of these designated countries are not subject to the STCA.\textsuperscript{80} Finally, nationals of countries from which neither the United States nor Canada require a visa to enter and persons with valid travel visas are exempt from the STCA.\textsuperscript{81}

A third group of exceptions is based on public interest grounds. The STCA contains a specific article allowing the United States and Canada, in their own discretion, to consider a refugee application when it is in the public interest to do so.\textsuperscript{82} Additionally, unaccompanied minors without parents in either Canada or the United States are excluded

\textsuperscript{76} Safe Third Country Agreement, supra note 12, at art. 4.2(a).
\textsuperscript{77} Id. at art. 4.2(b).
\textsuperscript{78} Id. at art. 2.
\textsuperscript{79} Id.
\textsuperscript{81} Safe Third Country Agreement, supra note 12, at arts. 4.2(d)(i)-(ii).
\textsuperscript{82} Id. at art. 6.
Despite these exclusions, the STCA has significantly impacted the flow of refugees between the United States and Canada. Between January and November of 2005, nearly three hundred refugee applicants were returned to the United States. The impact of the STCA is also evidenced by the decline of refugee applications in Canada. According to nongovernmental organizations monitoring the implementation of the STCA, the total number of refugee claims fell dramatically in Canada in 2005, resulting in the lowest number of refugee claims since Canada's current refugee determination system took effect in 1989. The number of claims made at the border was fifty percent lower in 2005 as compared to 2004. Thus, the STCA is having a genuine effect on a considerable number of refugee applicants.

Canada's choice to participate in the STCA raises several important questions. What international laws are binding on Canada and the United States with regard to protecting refugees? Given that most of the refugee applicants affected by the STCA are being returned from Canada to the United States, does the United States' refugee processing system comport with international standards? What is Canada's accountability if the U.S. system deviates from these international obligations? These questions are addressed below.

83. Id. at art. 4.2(c). There are several other specific limitations in the regulations of Canada that will be addressed below. See, e.g., infra notes 123, 222-25 and accompanying text.


85. CLOSING THE FRONT DOOR, supra note 1, at 3-4.

86. See id.

87. See id.

88. This decline occurred disproportionately among certain nationalities, most notably Colombians. See CLOSING THE FRONT DOOR, supra note 1, at ii. The reason for this disproportionate impact is not entirely clear. But, contributing factors include the large number of Colombian refugee applicants arriving in Canada prior to the implementation of the STCA and the fact that many Colombians do not qualify for a family exemption from the STCA. Id. at 8.
IV. THE INTERNATIONAL, REGIONAL AND DOMESTIC PROTECTION REGIMES

A. International Protections: Non-Refoulement and Basic Human Rights

This area of law has been addressed previously in textbooks and treatises, so this will be a brief review of the sources of rights refugees enjoy and the mechanisms to implement those protections. The modern foundational international treaty for refugee law is the 1951 Refugee Convention, which was drafted under the auspices of the United Nations and modified by the 1967 Protocol Relating to the Status of Refugees. The Refugee Convention defines who a refugee is and provides certain protections for that person. It defines a "refugee" as one who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country." Thus, an individual must demonstrate that he or she is being persecuted by a government or by someone that the government is unable or unwilling to control, and that the persecution is on account of at least one of the five stated grounds: his or her race, religion, nationality, membership in a particular social group or political opinion.


90. Refugee Convention, supra note 27.

91. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967) [hereinafter Refugee Protocol]. The creators of the 1951 Refugee Convention were responding to the conditions of post-war Europe and limited the protections provided under the Convention to people in Europe who were forced to flee their own countries prior to January 1, 1951. See Joan Fitzpatrick, Revitalizing the 1951 Refugee Convention, 9 HARV. HUM. RTS. J. 229, 232 (1996). The 1967 Protocol recognized that the problem of refugees was a global problem and eliminated the date and time restrictions. Id.

92. Refugee Convention, supra note 27, at art. 1.

93. Id. at art. 1A.

94. See id.
The central protection of the Refugee Convention is called non-refoulement, a word developed from the French verb refouler, which means "to push back." The non-refoulement provision, found in Article 33, states: "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 race, religion, nationality, membership of a particular social group or political opinion." In addition to the Refugee Convention, protection for refugees and the provision of non-refoulement is also found in other international treaties protecting basic human rights. However, it is unclear whether the principle of non-refoulement has evolved into a universal norm that is binding upon all nations.

There is a plethora of other rights contained in the Refugee Convention. The Refugee Convention forbids member nations from penalizing refugee applicants for illegal entry or presence. It also prohibits discrimination against refugees, provides for the equal treatment of nationals with respect to the exercise of religious beliefs, access to elementary education and to the courts within member nations, as well as identity papers. Beyond these basic protections, the Refugee Convention calibrates the rights a refugee enjoys to the lawful status that refugee has in a country.

96. Refugee Convention, supra note 27, at art. 33.
98. HATHAWAY, supra note 33, at 363-64.
99. Refugee Convention, supra note 27, at art. 31; see also HATHAWAY, supra note 33, at 370-88.
100. See Refugee Convention, supra note 27, at art. 3.
101. Id. at art. 4.
102. Id. at art. 22.
103. Id. at art. 16.
104. Id. at art. 27.

These refugee rights are part of a larger web of human rights protections. Foundational in this system is the Universal Declaration of Human Rights (UDHR), which the United Nations adopted in 1948.\footnote{110. For text and information, see Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 14, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948), available at http://www.unhchr.ch/udhr/lang/eng.pdf.} The UDHR was not a binding treaty, but instead represented the common belief of the nations of the world that human beings enjoyed rights, privileges and freedoms based upon their inherent human dignity.\footnote{111. LOUIS HENKIN ET AL., HUMAN RIGHTS 286-92 (1999).} After the UDHR was adopted, many human rights treaties were drafted and enacted under the auspices of the United Nations.\footnote{112. Id. at 320-24.} Of particular importance for the purposes of this article are the International Covenant on Civil and...
Political Rights (ICCPR)\(^{113}\) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).\(^{114}\) Canada has ratified both of these treaties,\(^{115}\) which include protections relevant to the treatment of refugees. In addition, these treaties also contain methods of monitoring and redressing violations, which will be explored below.\(^{116}\)

**B. Regional Protections: The Inter-American Human Rights Protection System**

In addition, countries in the Western Hemisphere created a regional regime of human rights protections. Both the United States and Canada participate in the Organization of American States (OAS), which administers the human rights protection system for the Americas.\(^{117}\) At the heart of this system is an aspirational declaration, the American Declaration of the Rights and Duties of Man (American Declaration).\(^{118}\) This foundational statement gave rise to treaties providing further protection for refugees, the American Convention on Human Rights being the preeminent example.\(^{119}\) Further, under the auspices of the OAS, several enforcement mechanisms operate to monitor and provide a means of redress for violations of these rights.\(^{120}\)

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116. See infra Part VII.


120. See infra Part VII.B.
C. Domestic Protections: Asylum

Both the United States and Canada adhere to the Refugee Convention and the 1967 Protocol,121 and maintain complex administrative systems designed to assess refugee claims. Both countries provide the protection of non-refoulement.122 In addition, the United States and Canada also provide asylum, subject to important restrictions.123 As noted in the Introduction, the protection of asylum permits a refugee to remain lawfully in the country granting asylum until he or she no longer fears persecution or receives another lawful status (e.g., citizenship).124 However, at the present time, asylum is not recognized as a refugee right at the international level.125 While the protection of asylum is recognized in the UDHR and the American Declaration,126 the human rights treaties at both the international and the regional level do not include it. As a consequence, asylum is perceived to be a privilege rather than a human right that the United States and Canada are obliged to provide.127

The receipt of asylum can lead to a more permanent legal status in both Canada and the United States. In Canada,


123. As discussed below, the United States imposes time limitations on filing for asylum. See 8 U.S.C. § 1158(a)(2)(B). There are also exceptions to eligibility if a refugee applicant participated in persecution or committed serious crimes. See id. §§ 1158(b)(2)(A)(i)-(ii). Canada likewise has exclusions based upon an applicant's human rights violations, serious criminality, or security threat. See Immigration and Refugee Protection Act § 100.


125. Legomsky, supra note 28, at 612.

126. American Declaration, supra note 118, at art. 27; Universal Declaration of Human Rights, supra note 110, at art. 14.

127. See Fitzpatrick, supra note 91, at 245-49.
those granted refugee protection may become a legal permanent resident. In the United States, however, a recipient must wait for years before receiving legal permanent residence. In both countries, the receipt of permanent legal status permits an asylum recipient's family members to gain lawful entry to the country granting asylum and further allows for eventual adjustment to citizenship.

Under U.S. and Canadian law, the protection of non-refoulement may be available to a person even if he or she is not entitled to asylum. That is, the United States and Canada may recognize that they may not deport someone to the country from which he or she fled. However, the additional benefits of permanent residence do not apply to those protected by non-refoulement. Restrictions and exclusions found in the Refugee Convention also limit the protection of non-refoulement.

D. Acceptance of Safe Third Country Agreements in the International Protection Regime

Since the Refugee Convention and the 1967 Protocol are focused on the protection of refugees, they do not explicitly address safe third country agreements. However, advocates for safe third country agreements assert that the concept is implicit in the Refugee Convention. They point to Article 31, which forbids countries from punishing refugees.

128. Immigration and Refugee Protection Act § 21(2).
131. For U.S. law, see 8 U.S.C. §§ 1421-1501. For Canadian law, see Citizenship Act, R.S.C., C-29 (1985); Parliamentary Information and Research Service, supra note 130.
133. HATHAWAY, supra note 33, at 301-02.
134. Refugee Convention, supra note 27, at arts. 1(F), 33(2).
135. See generally Refugee Convention, supra note 27; Refugee Protocol, supra note 91.
who, "coming directly from a territory where their life or freedom was threatened," enter a country without authorization.\(^{137}\) The argument is that the phrase "coming directly from the territory" implies that one passing through a third country can be refused the protections of the Refugee Convention if the third country is a safe country. While the UNHCR has yet to formally accept or reject the concept of safe third country agreements, it has rejected an interpretation of Article 31 that suggests the drafters of the Refugee Convention anticipated and recognized safe third country agreements.\(^{138}\) Rather than condemning safe third country agreements, the UNHCR recommends safeguards for their operation.\(^{139}\)

Although safe third country agreements are not specifically prohibited by the Refugee Convention or international law, experience has demonstrated that there a number of ways their operation can result in violations of the Refugee Convention or other human rights protections.\(^{140}\) This prior experience with safe third country agreements has also produced principles for assessing when a country returning a refugee applicant may be responsible for another country’s violation of refugee and human rights. As will be explored in the next section, every country has a duty to ascertain whether another country will provide minimum legal protections before returning a refugee to that country.

V. THE PROBLEMS WITH SAFE THIRD COUNTRY AGREEMENTS: CHAIN REFOULEMENTS, VIOLATIONS OF HUMAN RIGHTS, COMPLICITY, AND THE NEED FOR MINIMUM PROTECTIONS

A. Threats to the Protection of Non-Refoulement

Safe third country agreements may result in what are

\(^{137}\) Refugee Convention, supra note 27, at art. 31.

\(^{138}\) UNHCR, UNHCR REVISED GUIDELINES ON APPLICABLE CRITERIA AND STANDARDS RELATING TO THE DETENTION OF ASYLUM SEEKERS (1999). The UNHCR Guidelines on Detention of Asylum Seekers conclude that the "coming directly" language was intended to exclude only those asylum seekers who had settled temporarily in another country. Id. at intro. ¶ 4. Asylum seekers who merely passed through another country are still protected by Article 31. See id.

\(^{139}\) Borchelt, supra note 36, at 515-16.

\(^{140}\) See supra Part II.B.
referred to as chain *refoulements.*  

A chain *refoulement* occurs when a refugee applicant arrives in a destination country that has a safe third country agreement with a country through which the person seeking refugee status passed. The third country, in turn, has a safe third country agreement with another country through which the refugee applicant passed earlier. The person seeking refuge is forced to retrace his or her path of flight, with each *refoulement* leading closer to the country which he or she fled. This practice could amount to a violation of the Refugee Convention's protection of *non-refoulement* in two ways; either no country along the chain of *refoulement* assesses whether the person should receive the protection of *non-refoulement,* or the countries along the chain have inadequate or unfair refugee protection systems and mistakenly conclude that the person seeking protection does not qualify as a refugee.

The European experience with safe third country agreements reveals that the unfair denial of refugee status may occur because the third country in question has not ratified the Refugee Convention and does not participate in the refugee protection regime administered by the UNHCR. Alternatively, a country may be a party to the Refugee Convention, but its interpretation of the Convention is at variance with international standards regarding the treatment of refugees.

As will be explored below, the danger of chain *refoulement* under the STCA emerges because the United States' refugee processing system is at variance with international standards. These features result in a refugee applicant not receiving the protection of *non-refoulement*

141. Legomsky, *supra* note 28, at 572. Legomsky also identifies another violation referred to as an "orbit" in which an asylum seeker is shuttled back and forth between a destination country and a country through which he or she passed. *Id.* This scenario emerges in the absence of an agreement between the destination country and the third country. *Id.* Thus, safe third country agreements, if observed, are a solution to this problem. *Id.*

142. *Id.*

143. *Id.* at 583.

144. *Id.*

145. *Id.* at 585-86.

146. *Id.*

when they should. As a consequence, refugee applicants may be returned to countries in violation of the Refugee Convention.

B. Threats to Other Refugee and Human Rights

In addition to the protection of non-refoulement, safe third country agreements may jeopardize other rights that protect people seeking refugee status. The prolonged and indefinite detention of refugee applicants is a primary example, implicating rights under the Refugee Convention as well as other human rights treaties, such as the ICCPR. The failure to provide basic human needs like food and shelter is another example. The European experience demonstrates that these rights and many others can be violated when a chain refoulement occurs. As will be discussed below, issues of U.S. detention practices and a lack of basic support for refugees arise under the STCA.

C. The Complicity Principle and Minimum Legal Protections

Before reviewing how the U.S. system is at variance with international refugee and human rights norms, an important question must be addressed: Can Canada be held in violation of its international legal obligations because of U.S. violations of the Refugee Convention or other human rights treaties? The answer is yes. A country's non-refoulement obligation and its obligations to other human rights treaties continue even after it returns an asylum seeker to a third country.

Professor Stephen Legomsky, in an article commissioned by the UNHCR, examined the legal issues involved in the movement of refugees after they leave the

148. HATHAWAY, supra note 33, at 370-88.
149. Legomsky, supra note 28, at 586-87.
150. Id.
151. See id. at 618-21.
152. Professor Stephen Legomsky, a well known expert in immigration and refugee law and policy, is the John S. Lehmann Professor of Law at Washington University Law School. See Wash. Univ. Law, Short Bio: Stephen H. Legomsky, http://law.wustl.edu/faculty/index.asp?id=1656 (last visited Mar. 8, 2007) (providing Legomsky's biography). One of Professor Legomsky's many professional accomplishments is his current position as senior researcher at the headquarters of the UNHCR. See id. He has provided expert testimony before the U.S. Congress and many foreign governments on migration, refugee and citizenship matters. See id.
country of persecution, including movement compelled by safe
third country agreements. 153 In this article, he identified
several principles that frame the analysis of when a country
may properly return a refugee applicant to a third country.
The key principle in his analysis is what he deemed the
"complicity principle."154 The complicity principle holds that a
second country cannot knowingly remove someone seeking
refugee status to any third country which would subject that
person to treatment that would constitute a violation of the
second country's international obligations.155 Many
international bodies, including the United Nations General
Assembly and the UNHCR, agree with this principle.156
Further, the complicity principle is recognized by many
countries,157 including the United States and Canada.158

Professor Legomsky further proposed a set of minimum
legal requirements that a third country must meet before a
person seeking refugee status may be returned by a second
country.159 For the purpose of analyzing the STCA, this
article will focus on four of the minimum requirements he
identifies.160 First, the destination country may not return

153. Legomsky, supra note 28, 567.
154. Id. at 620. Professor Legomsky relied in part upon the Articles on State
Responsibility developed by the International Law Commission to articulate
this principle. Id. He further bolsters this principle through the application of
the object and purpose clause of the Vienna Convention of the Law of Treaties.
Id. That is, the Vienna Convention provides the background for reading the
1951 Convention, and one of its basic principles is that a treaty's provisions
must be read consistently with the treaty's object and purpose. Id. Allowing a
country to avoid its obligations to refugees by simply returning them to another
country that will then return them to a place of persecution would be contrary
to the purposes of the Refugee Convention. Id. Legomsky distilled further
support for the complicity theory from the use of analogous reasoning by
authoritative international bodies in several other specific human rights
contexts. Id.
155. See id.
156. Id. at 618-21.
157. See id.
158. See Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R.
177 (Can.); see also Macklin, supra note 9, at 399 (discussing Canadian law
adopting the complicity principle).
159. Legomsky, supra note 28, at 673-75.
160. Legomsky identifies a total of nine minimum legal requirements. See
id. First, the third country agrees to readmit the refugee applicant. See id. at
673. Second, the applicant has no well-founded fear of persecution in the third
country. See id. For a discussion of the third, fourth, fifth and sixth criteria,
see id. at 673-74. Seventh, the third country will provide effective protection.
See id. at 674. Eighth, family unity is recognized as trumping other interests in
the refugee applicant to the third country if the destination country has interpreted a provision of the Refugee Convention in a way that would forbid refoulement, the third country has a more limited interpretation such that the applicant would not receive the protection of non-refoulement, and the destination country considers the provision to have only one possible interpretation. Second, the destination country knows the third country will violate other Refugee Convention rights. Here, the degree of certainty in the term "knowingly" is inversely related to the importance of the Convention right at stake. Third, the destination country knows the third country will violate an asylum seeker's rights protected under a human rights treaty to which the destination country is a party. Again, the degree of certainty is inversely related to the right at stake. Fourth, the third country will not provide a fair refugee status determination.

Equipped with this framework of minimum legal protections emerging from the complicity principle, we may assess whether Canada will violate its obligations under the Refugee Convention by returning a refugee applicant to the United States. We will explore the ways the U.S. refugee processing system fails to meet the minimum legal protections guidelines.

VI. ASSESSING WHEN CANADA WILL VIOLATE ITS OBLIGATIONS BY RETURNING A REFUGEE APPLICANT TO THE UNITED STATES UNDER THE STCA

This section will apply Professor Legomksy's minimum legal protection principles to identify Canada's accountability if it returns a refugee applicant to the United States when it is not safe to do so. The application of the minimum legal protection principles to the STCA reveals clear violations by the United States as well as features of the U.S. system that

See id. at 674-75. Ninth, the destination country will apply the above criteria on a case by case basis. See id. at 675.

161. See id. at 673.
162. See id.
163. See id.
164. See id. at 674.
165. See Legomsky, supra note 28, at 674.
166. See id. at 674.
may not rise to level of clear violations, but generate concerns that the United States may be unsafe nonetheless.

A. Threats to the Protection of Non-Refoulement

This section explores the ways in which the U.S. refugee protection system may fail to provide the protection of non-refoulement found in the Refugee Convention and in other human rights treaties. A violation of the protection of non-refoulement means that the United States wrongfully returns a refugee applicant to a country where he or she may be persecuted. Hence, Canada would be engaged in a chain refoulement by returning a refugee applicant to the United States under the STCA.

1. Clear Violations of Minimum Protection Principles

a. A Higher Burden of Proof for Receiving the Protection of Non-Refoulement

The United States adopts the definition of "refugee" found in the Refugee Convention for the purpose of assessing who may receive asylum in the United States. However, the United States does not use this same definition of "refugee" when it comes to assessing who may receive the protection of non-refoulement. As a consequence, the United States places a higher burden of proof on those seeking the protection of non-refoulement as compared to those claiming to be refugees. This difference amounts to a violation of the Refugee Convention.

The provision for non-refoulement in U.S. law, commonly known by its former name, "withholding of deportation" (withholding), does not provide protection for those claiming to be refugees. Rather, the United States' non-refoulement provision provides that "[t]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that

167. See supra Part IV.A.
168. See supra text accompanying notes 95-96.
169. See Refugee Convention, supra note 27, at art. 1.
171. Id. § 1231(b)(3) (prior version at 8 U.S.C. § 1253(h) (repealed 1994)) (restricting removal).
172. Id.
country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion. The U.S. non-refoulement provision makes no reference to refugees, only to aliens. There are several important consequences to detaching the refugee definition from the protection of withholding under U.S. law. Most importantly, withholding has a heightened evidentiary burden as compared to asylum.

In order to make a case for withholding, an applicant must demonstrate by a clear probability of the evidence that his or her life or freedom would be threatened. However, to receive the protection of asylum, the applicant must only qualify as a refugee, which requires demonstrating a well-founded fear of persecution. In order to demonstrate a well-founded fear of persecution, an applicant must demonstrate a reasonable possibility of persecution. In numeric terms, an applicant for withholding must show a better than fifty percent chance that his or her life or freedom would be threatened in the country to which he or she would be returned. By contrast, under the asylum system, the risk of persecution could be considerably less than fifty percent, but still satisfy the reasonable possibility of

173. Id.
175. An alien is any person who is not a citizen or a national of the United States. See 8 U.S.C. § 1101(a)(3).
176. See INS v. Stevic, 467 U.S. 407, 422 (1984) (explaining that withholding of deportation is required only if the alien's life or freedom "would" be threatened, but not if the alien "might" or "could" be subject to persecution).
177. The U.S. Supreme Court upheld this interpretation in 1984. See id. U.S. law places a higher evidentiary burden on applicants seeking restriction on removal because Congress's intent when codifying the United States' international obligation was to retain the objective standard of showing it was more probable than not that the applicant's life or freedom would be threatened. See id. at 425-26. Congress, according to the Supreme Court, saw this as consistent with the non-refoulement obligations under the 1951 Refugee Convention. See id. at 426-28.
179. See INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) (holding that, consistent with the 1967 Protocol, it is enough to show that persecution is a reasonable probability).
180. The U.S. Supreme Court articulated this as the standard in INS v. Cardoza-Fonseca. See Cardoza-Fonseca, 480 U.S. at 423 ("[A]n alien must demonstrate that 'it is more likely than not that the alien would be subject to persecution' in the country to which he would be returned." (citing INS v. Stevic, 467 U.S. 407, 429-30 (1984))).
persecution, thereby qualifying the applicant for refugee status.\textsuperscript{181}

Applying Legomsky's proposed minimum legal requirements,\textsuperscript{182} Canada would be prohibited from returning a refugee applicant to the United States if Canada knew the United States would \textit{refoule} that applicant due its differing interpretation of the Refugee Convention.\textsuperscript{183} However, if Canada considered the provision at issue to be susceptible to several interpretations, Canada could return the applicant to the United States if the United States' interpretation of the provision were permissible.\textsuperscript{184} This raises the question of whether the \textit{non-refoulement} provision of the Refugee Convention\textsuperscript{185} has only one permissible interpretation regarding the burden of proof on the refugee to prove a threat to his or her life or freedom.

The Refugee Convention does not articulate the evidentiary burden of proof that an applicant must meet in order to demonstrate a threat to his or her life or freedom.\textsuperscript{186} However, this does not lead to the conclusion that the burden of proof in the Refugee Convention's \textit{non-refoulement} provision is susceptible to multiple interpretations. The Refugee Convention uses the term "refugee" throughout the Convention without qualification.\textsuperscript{187} The Refugee Convention uses the well-founded fear standard consistently.\textsuperscript{188} Scholars and critics point out that the United States is alone in imposing a different burden of proof for \textit{non-refoulement} than for asylum.\textsuperscript{189} These differing burdens of proof result in the United States protecting only a sub-group of refugees from \textit{refoulement}.\textsuperscript{190} In effect, an applicant must show more than a

\textsuperscript{181} See id. Additionally, one who is granted withholding is not entitled to other refugee rights under the Refugee Convention. See Hathaway & Cusick, \textit{supra} note 105, at 515.
\textsuperscript{182} See \textit{supra} Part V.C.
\textsuperscript{183} See \textit{supra} Part V.C.
\textsuperscript{184} See id.
\textsuperscript{185} See Refugee Convention, \textit{supra} note 27, at art. 33.
\textsuperscript{186} See \textit{generally} Refugee Convention, \textit{supra} note 27.
\textsuperscript{187} See Refugee Convention, \textit{supra} note 27, at art. 1(A); see also Hathaway & Cusick, \textit{supra} note 105, at 523.
\textsuperscript{188} See Refugee Convention, \textit{supra} note 27, at art. 1(A).
\textsuperscript{189} Leena Khandwala et al., 05-08 IMMIGR. BRIEFINGS, 11-2 (2005) (citing Joan Fitzpatrick, \textit{The International Dimension of Refugee Law}, 15 BERKELEY J. INT'L L. 1, 3 (1997)).
\textsuperscript{190} See Hathaway & Cusick, \textit{supra} note 105, at 515. Well-known refugee
well-founded fear of persecution in order to receive the protection of withholding under U.S. law. Thus, the United States’ imposition of a higher burden to receive the protection of non-refoulement runs contrary to the burden of proof for the protection of non-refoulement that is set forth by the Refugee Convention.  

Under the complicity principle, Canada cannot return a refugee applicant to the United States if he or she would face the heightened burden of proof to qualify for non-refoulement. A refugee applicant is forced to apply for withholding when he or she cannot ask for asylum in the United States. Refugee applicants are prohibited from applying for asylum in several situations. One large category of people denied the right to request asylum is those who file more than one year after arriving in the United States. Another significant category consists of those applicants barred from asking for asylum because of criminal conduct or ties to terrorist organizations, among other reasons. However, the scope of criminal and terrorism bars generates another ground for concluding that the United States is unsafe because it fails to provide minimum legal protections.

b. Exclusion from Receiving Protection: Criminal Grounds

The United States bars refugee applicants from the protection of asylum and from withholding if the refugee applicant has been convicted of a particularly serious crime and presents a danger to the United States, or if there are reasons to think the applicant committed a serious nonpolitical crime outside the United States prior to his or her arrival in the United States. While the United States follows the language of the Refugee Convention for these exclusions, it diverges from most other countries with

scholar Professor James Hathaway refers to those receiving withholding under U.S. law as “super-refugees.” Id.

191. See id. at 525.
193. See id. §§ 1158(b)(2)(A)-(C).
195. Refugee Convention, supra note 27, at art. 33. Article 33 excludes those reasonably believed to be a danger to the security of the United States, those convicted by a final judgment of a particularly serious crime, and those who constitute a danger to the community of the country in which protection is
regard to the scope of these exclusions. As will be explored below, the United States' interpretation of these exclusions is so broad as to be contrary to the Refugee Convention.

The U.S. provision on withholding denies the protection of non-refoulement if "the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States."\textsuperscript{196} The United States takes a categorical approach when it comes to defining the term "particularly serious crime." United States law declares a set of crimes, referred to in U.S. immigration law as aggravated felonies,\textsuperscript{197} to be "particularly serious" if the alien is sentenced to an aggregate term of imprisonment of five or more years upon conviction.\textsuperscript{198} Despite this guideline, the U.S. government may still determine that the crime is particularly serious even in cases of aggravated felonies in which the sentence is less than five years.\textsuperscript{199}

However, the term "aggravated felony" in U.S. immigration law covers a series of non-violent crimes that are not aggravated or a felony. United States immigration law defines an aggravated felony by means of a list of crimes that has expanded dramatically in recent years.\textsuperscript{200} Receiving stolen property, committing fraud, forging or destroying a passport, and bribery are all aggravated felonies under U.S. immigration law.\textsuperscript{201} Recently, the U.S. administrative agencies concluded that driving a stolen car could be an aggravated felony.\textsuperscript{202}

Further, the United States holds that aggravated felonies are particularly serious crimes, thereby creating a presumption that the person is dangerous to the community.\textsuperscript{203} Therefore, there is no independent assessment

\begin{itemize}
\item \textsuperscript{196} 8 U.S.C. § 1231(b)(3)(B)(ii).
\item \textsuperscript{197} Id. §§ 1101(a)(43)(A)-(U).
\item \textsuperscript{198} Id. § 1231(b)(3)(B).
\item \textsuperscript{199} See id.
\item \textsuperscript{200} See Teresa A. Miller, Citizenship & Severity: Recent Immigration Reforms and the New Penology, 17 GEO. IMMIGR. L.J. 611, 631-35 (2003).
\item \textsuperscript{201} 8 U.S.C. §§ 1101(a)(43)(G), (M), (P), (R); see also Kathleen Keller, A Comparative and International Law Perspective on the United States (Non)Compliance with Its Duty of Non-Refoulement, 2 YALE HUM. RTS. & DEV. L.J. 183, 198-200 (1999).
\item \textsuperscript{202} In re Brieva, 23 I. & N. Dec. 766 (B.I.A. 2005) (sentencing an alien to five years).
\item \textsuperscript{203} Keller, supra note 201, at 196-97.
\end{itemize}
of whether a person presents a danger to the United States based upon the crime. The applicant is simply denied the protection of asylum or withholding and faces removal from the United States even if he or she can establish a likelihood of persecution or a threat to life or freedom.\textsuperscript{204}

Under the second ground of criminal exclusion from protection, the United States will deny asylum and withholding if there are "serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States."\textsuperscript{205} When applying this exclusion, the United States refuses to balance the risks of persecution against the seriousness of the crime.\textsuperscript{206} This approach was upheld by the U.S. Supreme Court.\textsuperscript{207}

The U.S. approach runs contrary to the accepted understanding of the Refugee Convention, as articulated by the UNHCR guidelines and the practices of other countries, including Canada.\textsuperscript{208} Scholars such as Professor James Hathaway have noted that the term "serious crime" was intended to capture acts that involve violence against persons, such as murder, rape, child molesting, and drug trafficking.\textsuperscript{209} Further, the crime should be assessed by taking into account all mitigating factors and other circumstances,\textsuperscript{210} including the risk of persecution the applicant would face if returned.\textsuperscript{211} Lastly, the Refugee Convention requires that a country make an independent assessment as to whether the refugee applicant is a danger to the community.\textsuperscript{212} Refoulement on the basis of criminality is a "last resort" when the applicant poses an extremely high risk to the community and there is no other way to protect it.\textsuperscript{213}

Thus, the U.S. practices of ignoring the circumstances and

\begin{itemize}
  \item \textsuperscript{204} Id.; see also LEGOMSKY, supra note 132, at 1070-73 (citing Matter of Carballe, 19 I. & N. Dec. 357 (B.I.A. 1986)).
  \item \textsuperscript{205} 8 U.S.C. § 1231(b)(3)(B)(iii).
  \item \textsuperscript{206} Keller, supra note 201, at 200-01.
  \item \textsuperscript{207} INS v. Aguirre-Aguirre, 526 U.S. 415 (1999).
  \item \textsuperscript{208} HATHAWAY, supra note 33, at 349-55; see also Keller, supra note 201, at 189-90 (citing Re Chu and Minister of Citizenship and Immigration, 161 D.L.R. 4th 499 (Fed. Ct. 1998)).
  \item \textsuperscript{209} HATHAWAY, supra note 33, at 349.
  \item \textsuperscript{210} Id. at 350.
  \item \textsuperscript{211} Keller, supra note 201, at 201, 207.
  \item \textsuperscript{212} HATHAWAY, supra note 33, at 351.
  \item \textsuperscript{213} Id. at 352.
\end{itemize}
taking a categorical approach to defining particularly serious crimes (which include non-violent and property offenses), rejecting any separate analysis of whether a refugee applicant is a threat to the community, and not considering the risks of persecution the applicant faces, are all inconsistent with the Refugee Convention.

The United States' overly broad criminal exclusions violate the minimum legal requirements criteria. Canada may not send back a refugee applicant if the United States' interpretation of the Refugee Convention is narrower than Canada's and pertains to a matter on which Canada considers there to be one standard. While Canada may consider the criminal exclusion grounds of the Refugee Convention to be susceptible to more than one interpretation, international law places limits on how nations interpret their treaty obligations.

The Vienna Convention on the Law of Treaties (Vienna Convention) was created to codify international law on treaty formation, observance and interpretation. Canada ratified the Vienna Convention and is therefore bound by its provisions. According to the Vienna Convention, state parties must interpret a treaty in "good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Thus, Canada cannot interpret its obligations under the Refugee Convention in a manner that is inconsistent with its object and purpose. Further, under the complicity principle, Canada must ensure that the United States' interpretation of the Refugee Convention is in good faith and in a manner consistent with its object and purpose.

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214. Legomsky, supra note 28, at 673-77.
before returning a refugee applicant to the United States.\textsuperscript{218}

The United States' interpretation cannot be considered in good faith given the object and purpose of the Refugee Convention. The object and purpose of the Refugee Convention is to provide protection to refugees.\textsuperscript{219} This should only be denied if the refugee truly represents a threat to the community based upon the commission of a violent crime.\textsuperscript{220} The United States' interpretation of the criminal exclusion includes non-violent crimes and presumes that a refugee applicant is a danger to the community, rather than providing for a case by case assessment of danger posed by the applicant. Additionally, the U.S. criminal exclusion grounds do not consider the circumstances of each case to determine if there are alternatives to denying the protection of non-refoulement.\textsuperscript{221} As a result, Canada cannot uphold its obligations under the Refugee Convention if it returns a refugee applicant to the United States who would then be barred from protection because of exclusions inconsistent with the object and purpose of the treaty. If it does, Canada becomes complicit in the United States' bad faith interpretation and violates the Refugee Convention.

It should be noted that Canada's regulations implementing the STCA already recognize a limited application of the complicity principle in this area. The Canadian procedural manual for processing refugee claims states that the STCA will not be applied to someone who would be "denied deferral of removal by the United States due to serious criminality."\textsuperscript{222} The protection of deferral of

\textsuperscript{218} See Vienna Convention, supra note 215, at art. 31(1) (setting out the general rule of treaty interpretation).
\textsuperscript{219} Refugee Convention, supra note 27, at preamble.
\textsuperscript{220} See HATHAWAY, supra note 33, at 352.
\textsuperscript{221} Keller, supra note 201, at 201.
\textsuperscript{222} See CITIZENSHIP AND IMMIGRATION CAN., supra note 80, at 10-11 (designating such person a "[p]erson in need of protection"). Deferral of removal is permitted under U.S. law when an alien can show it is more probable than not he or she will be tortured. See 8 C.F.R. § 208.17 (2005). This provision was enacted to make U.S. law consistent with its intentional legal obligations under the Convention Against Torture. See Regulations Concerning the Convention Against Torture; Interim Rule, 64 Fed. Reg. 8278, 8479 (1999) (to be codified at 8 C.F.R. pt. 208) (stating that the rule's purpose was to ensure that alien removal in the United States was consistent with Article 3 of the Convention Against Torture). However, the provision in the Canadian processing manual is odd because there are no criminal bars to deferral of removal. See CITIZENSHIP
removal in U.S. law applies to those who would face torture if returned to their own country. Thus, if someone faces the probability of torture if returned to his or her own country, and the United States would deny them the protection of non-refoulement due to serious criminality, Canada will not apply the STCA. Instead, Canada will process the application for protection. Presumably, this exception to the STCA is based upon the recognition that U.S. laws limiting protection on criminal grounds are inconsistent with international law. However, this exception as worded only applies to those facing torture. Canada must address this lacuna in its regulations and broaden this provision to cover everyone who should receive the protection of non-refoulement in the United States, but will be denied under the criminal exclusions.

c. Exclusion from Receiving Protection: The Terrorism Provisions

The United States also bars those who engage in, or have engaged in, terrorist activities from receiving the protection of non-refoulement. The Refugee Convention does not contain a specific exception for terrorism. However, it does contain an exception to protection for those who pose a security threat to the country in which they seek protection. Although such a bar does not seem unreasonable, the definition of "terrorist activity" in U.S. immigration law goes well beyond the activities and individuals the drafters of the Refugee Convention would have considered a threat to security.

AND IMMIGRATION CAN., supra note 80, at 83 (stating only that persons denied admission to the United States could face a report of inadmissibility if criminality is involved). In fact, deferral of removal is a protection that exists in the event someone is denied withholding of removal because of criminality. See 8 C.F.R. § 208.17(a).

223. 8 C.F.R. § 208.17.
224. See CITIZENSHIP AND IMMIGRATION CAN., supra note 80, at 82-83.
225. As noted above, deferral of removal in U.S. law protects those who face torture if returned to their country of origin. See 8 C.F.R. § 208.17. It is possible the Canadian processing manual did not intend to use the word in the same way it is used in U.S. law. However, taking the manual as worded, it does not broadly apply to those denied non-refoulement.

226. See 8 U.S.C § 1182(a)(3)(B)(i)(V) (2005). As with the criminal bars, there is a limited exception to these bars—when it is more likely than not that the person will be tortured if returned to first country. See infra notes 608-09.
227. Refugee Convention, supra note 27, at art. 33(2).
228. Hathway & Cusick, supra note 105, at 536-37; Keller supra note 201, at 202-03.
Under U.S. law, terrorist activity includes a very wide range of conduct. For instance, it includes the use of a "dangerous device . . . with the intent to endanger" individuals or property other than for mere personal gain. However, this definition could easily include conduct that does not represent a threat to U.S. security.

Further, membership in a terrorist organization generally bars admissibility to the United States, and U.S. law does not distinguish organizations based the context of the conflict. Thus, groups defending themselves from systematic discrimination, crimes against humanity or genocide could fall within this definition. Additionally, a refugee applicant has little opportunity to demonstrate that he or she lacked knowledge about the organization's terrorist purposes, and even then this lack of knowledge must be proven by "clear and convincing evidence."

Lastly, the terrorism bar includes providing material support to a terrorist organization. If a refugee applicant is found to have knowingly provided aid to a terrorist organization, he or she is barred from the protection of non-refoulement. The list of types of aid is not exhaustive,


230. Hathway & Cusick, supra note 105, at 536-38; Keller, supra note 201, at 202-03.


233. Id.

234. The term "terrorist organization" is defined by reference to three types of groups: (1) those designated under 8 U.S.C. § 1189; (2) those designated by the Secretary of State and published in the Federal Register; and (3) those in which two or more members engaged in terrorist activities. See 8 U.S.C. § 1182(a)(3)(vi) (2005 & Supp. 2006).

235. 8 U.S.C. § 1182(a)(3)(B)(vi) (2005) (stating that a person can only claim lack of knowledge to avoid the terrorism bar if he or she is allegedly a member of a terrorist "organization," defined in 8 U.S.C. § 1182(a)(3)(B)(vi)(III) as a "group of two or more individuals").


237. Id. Material support includes "a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological,
however, and could include humanitarian assistance. More importantly, the bar for providing material support does not contain an exception for support given under duress or an exception for *de minimis* support. It does not matter how far in the past the support was given or whether the refugee intended to support a terrorist organization. The material support bar has significantly reduced the number of refugees receiving protection in the United States. Studies demonstrate that legitimate refugees have been denied protection even though they were victims of governmental persecution and did not pose a threat to the security of the United States.

As with the criminal exclusions to protection, the terrorism bar in U.S. law violates the minimum legal requirements criteria. Canada cannot return a refugee applicant to the United States if the United States interprets the Refugee Convention in a fashion contrary to the object and purpose of the Refugee Convention. The U.S. terrorism grounds deny the protection of *non-refoulement* to bona fide refugees who pose no threat to the United States. Consequently, Canada cannot fulfill its obligations under international law when it returns a refugee applicant who faces *refoulement* under the terrorism bar.

The United States' "war on terror" has also spawned practices which create further cause to fear that refugee applicants will be sent back to the county of origin without consideration of their refugee claim. A prime example is the

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238. HARVARD STUDY, *supra* note 232, at 2. The Harvard Study cites a case in which a refugee was barred from protection because he gave food and shelter to members of a terrorist organization participating in a religious gathering. *Id.* at 2 n.8 (citing Singh-Kaur v. Ashcroft, 385 F.3d 293 (3d Cir. 2004)).


242. See generally GEORGETOWN STUDY, *supra* note 239 (examining the impact of the material support bar on Colombian refugees); HARVARD STUDY, *supra* note 232 (examining the impact of the material support bar on Burmese refugees). An exception was granted to a limited number of Burmese refugees who opposed the government. See Swarns, *supra* note 241.
United States' policy of rendition, a practice in which non-citizens are sent from the United States to countries where there is significant risk they will be tortured.\textsuperscript{243} Rendition is a term covering a process whereby one country sends an individual to another country for any number of purposes in disregard of domestic and international law.\textsuperscript{244} In the context of the war on terrorism, the United States has used rendition to detain and interrogate individuals outside of the international criminal law framework.\textsuperscript{245} The victims of this practice number in the thousands.\textsuperscript{246}

In a recent well-known case of rendition, Maher Arar, a Canadian citizen, arrived in the United States en route to Canada.\textsuperscript{247} Instead of allowing him to travel on, the United States sent him to Syria, his birthplace.\textsuperscript{248} Arar was tortured in Syria in an attempt to determine whether he knew anything about terrorist plans.\textsuperscript{249} While Arar was not seeking refugee protection in the United States, and rendition is forbidden under the STCA,\textsuperscript{250} this incident demonstrates the willingness of United States to flout its international obligations under human rights laws and potentially the STCA's ban on rendition. The International Covenant on Civil and Political Rights (ICCPR)\textsuperscript{251} and the Convention Against Torture,\textsuperscript{252} both of which the United States and Canada ratified,\textsuperscript{253} forbid this practice. The U.S. government


\textsuperscript{244} See Joan Fitzpatrick, \textit{Rendition and Transfer in the War Against Terrorism: Guantánamo and Beyond}, 25 LOY. L.A. INT'L & COMP. L. REV. 457 (2003).

\textsuperscript{245} Id. at 467-68.

\textsuperscript{246} Id. at 459-60.

\textsuperscript{247} See Shane, supra note 243.

\textsuperscript{248} Mayer, supra note 243, at 106.

\textsuperscript{249} See Shane, supra note 243.

\textsuperscript{250} Safe Third Country Agreement, supra note 12, at art. 3.

\textsuperscript{251} ICCPR, supra note 113, at art. 7.

\textsuperscript{252} CAT, supra note 97, at art. 3.

contends that such renditions occurring in the context of the war on terrorism are lawful. This argument could just as easily be applied in the refugee context under the STCA.

The Arar case also demonstrates an application of the complicity principle. The international body established to monitor the CAT, the Committee Against Torture (CAT), found that Canadian authorities played a role in Arar's rendition, implicating Canada's responsibility under the CAT. According to the Committee Against Torture, Canada had an obligation to do more to prevent Arar's rendition even though the United States actually engaged in the practice. This obligation arose because Canada's obligation under the CAT prevents Canada from assisting in a violation of its provisions.

2. Arguable Violations of the Minimum Legal Requirements

The above features of the U.S. refugee processing system reveal clear violations of the minimum legal requirements criteria because of the United States' impermissible interpretations of the Refugee Convention. The following features of the U.S. refugee protection system are more difficult to analyze under the minimum legal requirements criteria. However, these features also generate questions of whether the United States employs an impermissibly narrow interpretation of the Refugee Convention. Additionally, the features discussed below will raise questions as to whether the U.S. refugee protection system as a whole functions so unfairly as to deprive applicants of an accurate determination of their refugee status.

254. See Fitzpatrick, supra note 244, at 461.
256. See CAT, supra note 97, at art. 9.
a. Corroborating Evidence and Credibility Determinations

In 2005, the U.S. Congress enacted the REAL ID Act (REAL ID), which changed the evidentiary burdens that refugee applicants face when trying to prove their refugee claims before U.S. immigration judges.\(^\text{257}\) It allows immigration judges to require a refugee applicant to provide corroborating evidence even if the applicant already presented credible testimony regarding his or her claim.\(^\text{258}\) REAL ID also permits an immigration judge to base credibility determinations on the demeanor, candor or responsiveness of the applicant or witnesses, as well as factors such as the "inherent plausibility" of an applicant's or a witness's account.\(^\text{259}\) Further, immigration judges may make adverse credibility findings based upon inconsistencies and inaccuracies in a refugee applicant's claim even if those inconsistencies and inaccuracies are not central to the claim.\(^\text{260}\) An adverse credibility finding or a failure to provide corroborating evidence results in a denial of the refugee applicant's claim and a denial of protection.\(^\text{261}\)

Determining the credibility of a refugee applicant is crucial to the process of providing refugee protection.\(^\text{262}\) As courts and scholars have noted, genuine refugees will rarely be able to offer direct corroboration of threats or incidents of persecution.\(^\text{263}\) Often, refugee applicants will have little but their testimony to support their assertions of persecution.\(^\text{264}\) For this reason, the UNHCR provides guidelines that balance the interest of accurate adjudication with the practical difficulties that refugees face in providing evidence other than their own testimony.\(^\text{265}\)

A recent study of the STCA by the Harvard Law School asserts that the REAL ID provisions run afoul of


\(^{258}\) Id.

\(^{259}\) Id.

\(^{260}\) Id.

\(^{261}\) Id.

\(^{262}\) LEGOMSKY, supra note 132, at 1057.

\(^{263}\) Id. at 1056 (citing Turcios v. INS, 821 F.2d 1396, 1402 (9th Cir. 1987)).


\(^{265}\) See HANDBOOK, supra note 109, ¶ 189-205.
international standards reflected in the UNHCR guidelines.\(^\text{266}\) First, the UNHCR guidelines state that an applicant's untrue statements, by themselves, should not be the basis for a denial of protection.\(^\text{267}\) Second, the guidelines articulate the general principle that the benefit of the doubt should be given to an applicant because it is impossible to substantiate every aspect of his or her story.\(^\text{268}\) The provisions of REAL ID, the study argues, allow untrue statements to be the basis of a denial of protection and permit judges to require corroboration in cases in which it is not possible.\(^\text{269}\)

Applying the minimum legal requirements criteria to this issue, it is debatable whether the REAL ID provisions are an impermissibly narrow interpretation of the Refugee Convention. The REAL ID provision on corroborating evidence does not require such evidence in all cases and recognizes that an applicant's testimony alone may be sufficient if it is credible, persuasive and specific.\(^\text{270}\) Further, an applicant may demonstrate that corroborating evidence is unavailable when it is requested by the immigration judge.\(^\text{271}\) Determinations of credibility, according to REAL ID, are made on the totality of the circumstances, which may include false statements as well as other factors.\(^\text{272}\) The REAL ID provisions give the immigration judge a variety of factors upon which to base a credibility determination.\(^\text{273}\) This is consistent with UNHCR guidelines which state that the benefit of the doubt given to refugee applicants applies only after all available evidence is obtained and verified, and general credibility is established.\(^\text{274}\)

b. Limitation on Protection: Gender-Based Claims

Critics of the STCA assert that the U.S. refugee protection system departs from international standards in its

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\(^{266}\) BORDERING ON FAILURE, supra note 84, at 13.

\(^{267}\) Id. (citing HANDBOOK supra note 109, ¶ 199).

\(^{268}\) Id. (citing HANDBOOK supra note 109, ¶ 196).

\(^{269}\) Id.


\(^{271}\) See id.

\(^{272}\) Id.

\(^{273}\) Id.

\(^{274}\) HANDBOOK, supra note 109, ¶ 204.
treatment of gender-based refugee claims. As will be explored below, the particular concern is that the United States will not adequately protect victims of domestic violence and, more broadly, will deny gender-based refugee claims that would be successful in Canada.

The Refugee Convention's definition of a refugee does not include gender as a ground under which a person can claim protection from persecution. Women facing gender-based persecution must therefore fit their claims into one of the Refugee Convention's identified grounds for persecution that establishes refugee status: race, religion, nationality, membership of a particular social group and political opinion. There are a wide variety of ways women can be particularly vulnerable to persecution or threats to life or freedom, including domestic abuse. Domestic abuse claims are particularly complicated because the persecutor is more likely the spouse rather than a government official and the refugee applicant must show that the persecution is on account of one of the enumerated grounds.

To help nations adhere to their Refugee Convention obligations, the UNHCR established guidelines on gender related claims, most recently in 2002. These guidelines designate domestic violence as a particular way in which women and girls can become refugees. The UNHCR guidelines also assert that persecution can occur at the hands

276. See Refugee Convention, supra note 27, at art. 1.
277. See generally Refugee Convention, supra note 27.
278. Guidelines on Gender-Related Persecution, supra note 109, at 3.
279. See HANDBOOK, supra note 109, ¶ 65. The Refugee Convention normally considers government action as amounting to persecution rather than the purely private conduct of non-governmental actors. See id.
281. Guidelines on Gender-Related Persecution, supra note 109, at 1.
of a non-state actor, such as an abusive husband. Finally, the guidelines explicitly recognize that sex can be a characteristic that comprises a particular social group and that women, as a gender, can be a subset of this particular social group.

Canada's domestic refugee processing system conforms closely to these guidelines. Canada recognizes battered women as refugees when their country of nationality or residence refuses to protect them from an abusive spouse or partner. Thus, persecution can occur at the hands of non-governmental actors if the government is not willing to protect women from domestic abuse. Further, battered women comprise a particular social group, which is one of the recognized grounds for persecution in the Refugee Convention. As a result, Canada has a well-established acceptance of gender-based claims on the basis of domestic violence.

The United States, on the other hand, is currently unsettled on whether women who suffer from domestic violence can be considered members of a particular social group. In 1999, the Board of Immigration Appeals (BIA) rendered a decision that is arguably contrary to the aforementioned guidelines. In *In re R-A*, a Guatemalan woman sought refugee status because she was abused by her husband and the government failed to protect her. Overruling the immigration judge, the BIA held that the refugee applicant was not a member of a particular social group and that therefore, the severe harm she suffered was not on account of a ground recognized by the Refugee

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283. Id. at 964; see also Guidelines on Gender-Related Persecution, supra note 109, at 5.
285. Arnett, supra note 282, at 967.
286. Id. at 965-70.
287. Id.
288. Id.
289. Id. at 970.
290. See Martin & Lamoureux, supra note 280.
291. The Board of Immigration Appeals is the U.S. administrative agency that hears appeals from the immigration courts. LEGOMSKY, supra note 132, 641-42.
293. Id.
294. Id.
Convention. However, the decision was withdrawn pending the establishment of guidelines that have yet to be released. Although there are BIA decisions that recognize that domestic violence situations can give rise to refugee status, an argument may be made that the lack of clear precedent and guidelines in the U.S. system leads to inconsistent results.

Concerns regarding inconsistent results reveal a larger issue beyond the treatment of domestic violence claims. Critics assert that there is a disparity in approval rates between the United States and Canada with regards to gender-based asylum claims, and as a result, women will lose claims for protection in the United States that they would have otherwise won in Canada because the United States is less willing to acknowledge gender-based refugee claims. The Canadian government was concerned about such a result when it drafted its implementing regulations, and commissioned a study by refugee law scholar, Professor David Martin, to examine this issue. Professor Martin concluded that gender-based violence claims filed in the United States have a high rate of success based upon the data available.

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295. *Id.* The applicant, Rodi Alvarado, asserted that she belonged to the particular social group of Guatemalan women who have been involved intimately with male Guatemalan companions, who believe that women are to live under male domination. *Id.* at 907. The immigration judge agreed and held that Ms. Alvarado was persecuted by her husband on the basis of her political opinion that she objected to male domination. *Id.* at 911. The BIA overturned the immigration judge's decision on the basis that Ms. Alvarado did not establish the existence of particular social group of Guatemalan women, nor was her husband persecuting her because of her political opinion that women should not be dominated by men. *Id.* at 907. The BIA did not doubt that Ms. Alvarado's husband's abuse rose to the level of persecution or that the government failed to protect her. *Id.* at 914. A representative of the UNHCR wrote to the then-Attorney General, John Ashcroft, expressing the view that Rodi Alvarado clearly fit within the definition of refugee, entitled her to protection. Arnett, *supra* note 282, at 961-65.

296. See CLOSING THE FRONT DOOR, *supra* note 1, at 17.


302. See *id.* The data came from a website maintained at the University of California Hastings College of Law by the Center for Gender and Refugee
Other refugee scholars contest this conclusion. Professor Karen Musalo, the Director of the Center for Gender and Refugee Studies, disagreed with these findings.\textsuperscript{303} In her view, the data Professor Martin based his report upon is not representative of all gender-based claims because it is skewed toward successful cases, as unsuccessful cases often go unreported.\textsuperscript{304}

It is debatable whether Canada will violate its international legal obligations by returning a refugee applicant with a gender-based claim to the United States. Under the minimum legal requirements criteria, Canada may not send a refugee applicant back to the United States if Canada considers there to be one permissible interpretation of the Refugee Convention for the treatment of domestic violence cases and the United States fails to adhere to that interpretation. Canada follows the UNHCR guidelines\textsuperscript{305} and considered the United States' failure to do so a problem.\textsuperscript{306} However, the United States does not outright reject the UNHCR guidelines, and has recognized domestic violence as the basis of a refugee claim.\textsuperscript{307} Moreover, after Professor Martin's study, Canada declared that the two countries have substantially similar laws on the subject of gender-based claims.\textsuperscript{308} Canada committed to reviewing the STCA after one year, with particular focus on gender claims.\textsuperscript{309} At a minimum, Canada should ensure that U.S. treatment of gender-based claims is satisfactory.

c. Expedited Removal

This article has examined whether the United States' interpretation of the Refugee Convention results in an impermissible failure to meet the minimum legal requirements criteria. In this section, this article will

\begin{footnotesize}
\begin{enumerate}
\item Studies. \textit{Id.}
\item \textsuperscript{303} 6 MONTH REPORT, \textit{supra} note 275, at 9 n.26.
\item \textsuperscript{304} \textit{Id.}
\item \textsuperscript{305} Arnett, \textit{supra} note 282, at 965.
\item \textsuperscript{306} See 6 MONTH REPORT, \textit{supra} note 275, at 10.
\item \textsuperscript{307} Martin & Lamoureux, \textit{supra} note 280.
\item \textsuperscript{309} \textit{Id.}
\end{enumerate}
\end{footnotesize}
address whether the processes the United States employs to assess refugee claims is so unfair as to violate the minimum legal requirements criteria.

Expedited removal is utilized when people arrive in the United States without travel documents—passport or visa—or with fraudulent documents. Under expedited removal, a person arriving in the United States is returned to his or her home country without a hearing unless he or she expresses a fear of persecution, or requests asylum. The decision to return a traveler to his or her home country is made by an immigration officer. The expedited removal process therefore presents the possibility of a refugee applicant not receiving a full hearing before an officer trained to assess refugee status.

According to the STCA, those returned to the United States from Canada are entitled to a “refugee status claim examined by and in accordance with the refugee status determination system of the United States.” Furthermore, the U.S. Department of Homeland Security (DHS) considers those sent back from Canada under the STCA as having never left the United States. Thus, according to DHS, such persons should not be subject to expedited removal, with rare exceptions, given that they are considered to be in the United States. Presumably, this means that a person returned to

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311. Id. § 1225(b)(1)(A)(i). Additionally, those who claim lawful status in the United States are entitled to more procedures. Id. § 1225(b)(1)(C).
312. Id. § 1225(b)(1)(A)(i).
314. The Department of Homeland Security expressed this view in the supplementary information included in the implementing regulations to the STCA. See Implementation Regulations, supra note 313.
315. Id. This follows from the fact that expedited removal applies only to arriving aliens. See 8 U.S.C. § 1225(b)(1)(A) (2005). The Department of Homeland Security takes the position that those returned to the United States from Canada under this agreement are not arriving aliens. Implementation Regulations, supra note 313, at 69,484. The supplementary notes offer an example of an exceptional case, a person granted parole. Id. Parole means a person is allowed into the country but is legally not admitted, see 8 U.S.C. § 1101(a)(13)(B), so they stay in a state of arriving in the United States no matter how long they actually remain in the United States. See, e.g., Altamirano v.
the United States from Canada should receive a full hearing before an immigration judge to assess his or her claim to refugee status.

However, there is strong anecdotal evidence that the expedited removal process is being applied to refugee applicants returned to the United States. First, while DHS took the position that few, if any, refugee applicants should be subject to expedited removal, the United States refused to exclude refugee applicants returned under the STCA from the expedited removal provisions. Second, starting on January 30, 2006, the United States began to apply the expedited removal provisions to the U.S.-Canadian border. As a result, anyone within one hundred miles of the border who cannot show presence in the United States for more than fourteen days will be subject to expedited removal. Third, organizations monitoring the implementation of the STCA report detention of refugee applicants sent back to the United States. Detention is part of the expedited removal process, suggesting that those refugee applicants may have been subject to the expedited removal process. Lastly, the United States applies the expedited removal process to those refugee applicants who are attempting to enter the United States from Canada who the United States may send back to Canada. It is likely, therefore, that the United States is

Gonzales, 427 F.3d 586, 590-91 (9th Cir. 2005) (holding that parole status was not “admission” under 8 U.S.C. § 1101(a)(13), and a Mexican parolee was considered an applicant for admission upon reentry into the United States). If a person’s parole period expires (the United States places time limits on how long parole lasts) before they are sent back to the United States by Canada, they are subject to expedited removal. Implementation Regulations, supra note 313, at 69,484.

316. Implementation Regulations, supra note 313, at 69,484.
318. Id.
319. BORDERING ON FAILURE, supra note 84, at 20.
321. Detention of refugee applicants does not definitively prove they were subject to the expedited removal process. U.S. law allows for the detention of any alien pending a decision as to whether he or she should be removed from the United States. See id. § 1226(a).
applying the expedited removal process to refugee applicants returned to the United States under the STCA.

The issue under the minimum legal requirements criteria is whether expedited removal is a sufficiently fair process for assessing refugee status. The UNHCR established guidelines identifying core elements of fair and efficient asylum processes.\(^{323}\) The UNHCR's minimum standards for accelerated asylum procedures require three safeguards.\(^{324}\) First, an applicant should have a complete interview with a qualified official.\(^{325}\) Second, an authority competent to assess refugee status should decide whether a claim is manifestly unfounded or abusive.\(^{326}\) Third, an unsuccessful applicant should have the opportunity to have a negative determination of refugee status reviewed before being deported.\(^{327}\) These procedures may be used in cases in which a refugee claim is manifestly unfounded under the Refugee Convention or is clearly fraudulent.\(^{328}\)

The United States' expedited removal process provides an opportunity for an individual to request protection. This opportunity arises at the initial stage of inspection in which an immigration inspector decides that someone may not be admissible into the United States.\(^{329}\) The applicant is then placed in secondary inspection, in which the inspector must inform the individual that if he or she has fears of being returned home, U.S. law provides certain protections from persecution.\(^{330}\) In addition, the inspector should ask questions to assess the applicant's eligibility for refugee


\(^{324}\) Id. ¶ 32. For a discussion of UNHCR standards, see David A. Martin, Two Cheers for Expedited Removal in the New Immigration Laws, 40 VA. J. INT'L L. 673, 692-94 (2000).

\(^{325}\) Asylum Processes, supra note 323, ¶ 32.

\(^{326}\) Id.

\(^{327}\) Id.

\(^{328}\) Id. ¶ 27.


\(^{330}\) Id.
If the individual expresses fear of being returned to his or her country or requests asylum, the person has a personal interview with a U.S. immigration official trained in asylum law. The individual is given what U.S. law calls a "credible fear hearing" to determine if there is a significant possibility that the applicant could establish eligibility for protection. Detention is mandatory pending the credible fear hearing. If the hearing results in a negative determination the applicant may request de novo review by an immigration judge. United States law also allows U.S. immigration officials to reconsider their decision to deny a person's claim of credible fear even after an immigration judge upholds an initial negative determination. A positive finding of credible fear entitles the refugee applicant to a full hearing before an immigration judge.

While it appears that expedited removal meets the UNHCR standards, fairness is not simply established by the procedures that exist on paper. Scholarship criticizing expedited removal has focused on deficiencies in these procedures that lead to an increased likelihood of errors. Professors Phil Schrag and Michele Pistone, in a thorough analysis, point first to deficiencies in the secondary inspection stage when an immigration official determines whether an individual may be eligible to receive protection. This stage is critical since there is no judicial review of the inspector's decision. Shortcomings that may occur at this stage include inadequate interpreters and physical conditions during secondary inspections. Interpreters are not required in all cases and are not required to have professional

331. 1 U.S. COMM'N ON INT'L RELIGIOUS FREEDOM [USCIRF], REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL: FINDINGS & RECOMMENDATIONS 21 (2005).
332. Musalo et al., supra note 329, at 5-6.
333. Id. at 6.
334. Id. at 7.
335. Id. at 8.
336. Id. at 7.
338. Musalo et al., supra note 329, at 7.
339. Pistone & Schrag, supra note 337, at 32-36.
340. Id. at 38.
341. Id. at 40.
342. Id. at 53-65.
During secondary inspection, when an applicant is expected to express fear of return, the conditions do not facilitate trust because the interviews are semi-private, and the applicant is often restrained and treated with hostility. 

Deficiencies also exist when a non-citizen is interviewed to determine whether they have a credible fear of persecution. Professors Pistone and Schrag identified problems such as the use of telephonic interpretation, and the limited role of counsel if there is a negative determination of credible fear. Telephonic interviews increase the likelihood of translation errors since body language and demeanor are not available to the translator. Legal counsel is permitted to be present during credible fear interviews, but immigration judges may forbid their presence during the review of a negative credibility finding. Professors Pistone and Schrag also observed that detention throughout the credible fear process hampers the ability of applicants to obtain counsel and persevere in their refugee protection claims.

Several recent studies of the expedited removal process have produced a variety of statistics on the expedited removal process. This data provides detail on the actual functioning of the expedited removal procedures which allows for an assessment of the fairness of the process. The most recent study, conducted by the U.S. Commission for International Religious Freedom (USCIRF), reveals that the expedited removal procedures are not consistently followed at the secondary inspection stage. The USCIRF study states that in the secondary inspections it observed, over half of the individuals were not informed of their right to request refugee status. Fifteen percent of individuals who

343. Id. at 54-55.
344. Id. 61-63.
345. Pistone & Schrag, supra note 337, at 40-42.
346. Id. at 41-42.
347. Id. at 66-68.
348. Id. at 70.
349. See id. at 61-65, 70-73.
350. See Musalo et al., supra note 329; see also 1 USCIRF, supra note 331; U.S. GEN. ACCOUNTING OFFICE, OPPORTUNITIES EXIST TO IMPROVE THE EXPEDITED REMOVAL PROCESS, Pub. No. GAO/GGD-00-176 (2000).
351. USCIRF is a bipartisan federal agency created by Congress. 1 USCIRF, supra note 331, at 1.
352. Id. at 6.
expressed fear of returning were not given credible fear interviews. In addition, interviews with refugee applicants revealed that a number of persons received a credible fear hearing only after attempting to enter the United States several times. A recent scholarly analysis of the USCIRF report asserts that the failure to follow the proper procedures during secondary inspection has resulted in tens of thousands being improperly denied a refugee status hearing and thousands of bona fide refugees being denied protection.

Data is also available on the credible fear hearings. The USCRIF study, as well as a preceding study, revealed that the vast majority of those who received a credible fear hearing were found to have a credible fear and were granted full hearing before an immigration judge. However, USCIRF also examined immigration judges' decisions subsequent to credible fear hearings. In forty percent of the cases in which refugee status was denied, the immigration judge cited inconsistencies between the applicant's credible fear interview and the testimony given in the hearing before the judge. The USCIRF study concluded that this was very troubling because it found that the records of the credible fear interview were often inaccurate and incomplete. The credible fear hearing is not meant to be an in-depth interview, and in nearly three-quarters of the cases, the applicant did not review the transcript even though the asylum officer indicated that the applicant had done so. Yet, immigration judges in nearly a quarter of the cases cited an applicant's additional testimony in the subsequent hearing as a basis for denying the refugee claim. Therefore, in

353. Id.
354. Id.
356. The USCIRF found that ninety percent of those who went through a credible fear hearing were found to have a credible fear. 1 USCIRF, supra note 331, at 57. Another study, headed by Professor Musalo, found that the credible fear approval rate was eighty-eight percent for fiscal years 1997-1999, with a four percent denial rate. Musalo et al., supra note 329, at 59. All other cases were withdrawn or otherwise terminated. Id.
357. 1 USCIRF, supra note 331, at 7.
358. Id. at 57.
359. Id.
360. Id.
many cases, immigration judges based their decisions on incomplete credible fear transcripts that the applicant had not reviewed for errors.

Clearly, there are serious problems with the expedited removal process. Yet in assessing this process under the minimum legal requirements criteria, it is unclear how much of an impact the expedited removal process is having on those returned under the STCA. A recent scholarly analysis concluded that thousands of improper *refoulements* occurred due to failures in the secondary inspections process.\(^{361}\) However, those returned under the STCA should not be subjected to secondary inspection. They should receive credible fear hearings because it is clear they fear persecution.\(^{362}\) However, with the USCIRF study reporting a fifteen percent failure rate in referring applicants to credible fear hearings,\(^{363}\) there is some risk of improper *refoulement* occurring to refugee applicants returned to the United States under the STCA.

In addition, refugee applicants returned to the United States under the STCA also face the risk of an inaccurate credible fear hearing transcript impacting subsequent proceedings before an immigration judge. However, the USCIRF study did not attempt to identify whether immigration judges made erroneous decisions based upon inaccurate credible fear transcripts.\(^{364}\) This leads to an unsatisfactory conclusion that the expedited removal process creates a risk of non-*refoulement*, but the data is insufficient to assess whether actual violations occurred, proving that the system is so unfair as to violate the minimum legal requirements criteria. As will be explored below, however, the detention aspect of expedited removal makes this process a clear violation of the minimum legal requirements criteria.\(^{365}\)

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362. *See* 1 USCIRF, *supra* note 331, at 22 (stating that a hearing is held within 48 hours, during which the asylum officer determines whether the fear expressed by the alien is "credible").
363. *Id.* at 6.
364. *Id.* at 5.
d. Evidence of Systemic Unfairness

Along with the expedited removal process, there are other features of the U.S. refugee protection system that arguably are so unfair that they make the United States unsafe. Unlike expedited removal, however, the features examined below suggest that the entire system is unsafe for any refugee applicant.

i. Lack of Publicly Financed Representation

United States law provides refugee applicants with the privilege of obtaining an attorney at the refugee applicant's expense. However, this privilege arises only in the event that a refugee applicant is placed in removal proceedings. There is no duty on the part of the U.S. government to provide an attorney. The U.S. government has a long and troubling history of attempting to prevent refugee applicants from retaining attorneys, particularly for those applicants in detention. This practice eventually led to litigation that established that refugee applicants have the privilege of representation free from governmental interference.

The U.S. government maintains statistics on the percentage of aliens in removal proceedings who are represented. Using these statistics, one scholarly analysis reveals that two-thirds of all refugee applicants were represented in removal proceedings from 1999 to 2000.

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367. Id. U.S. immigration law replaced the word “deportation” with “removal” in 1996. Id. The privilege of an attorney arises only in removal proceedings before an immigration judge. See 1 USCIRF, supra note 331, at 59. Thus, in expedited removal, the refugee applicant usually faces the initial interview and credible fear hearing without the benefit of an attorney. See id. at 21, 45 (“Aliens seeking admission are not entitled to counsel, even at their own expense, in primary or secondary inspection, unless they become subject to a criminal investigation.”). A detained alien in expedited removal may consult with someone of their choosing. See id. at 22, 45.
370. Id. at 1675-78.
However, rates of representation varied widely based on geography and national group. A more recent study of all asylum cases decided by immigration judges from 1994 to 2005 demonstrates that eighty-two percent of refugee applicants were represented. However, this study only included cases that were heard by immigration judges. Nearly half of all claims are withdrawn, abandoned or otherwise resolved, so the representation rate may be much lower.

Canada, on the other hand, provides legal assistance to refugee applicants through a province-based system. The availability of legal aid varies from province to province. Some provinces have been accused of failing to provide legal representation, particularly to detained asylum seekers. One report regarding this system asserts that it is practically impossible for applicants to find representation because few attorneys are “willing to take on a detention case on a legal aid certificate and travel to the detention centre or jail.”

Studies comparing represented and unrepresented refugee applicants in the United States demonstrate that being represented by an attorney greatly increases an

373. Id. at 742-43.
374. See TRAC Immigration, Immigration Judges, http://trac.syr.edu/immigration/reports/160/ (last visited Mar. 8, 2007). The Transactional Records Clearinghouse (TRAC), a data clearinghouse at Syracuse University, reviewed all recorded cases in which judges decided asylum cases from 1994 until early 2005. Of the 297,240 cases reviewed, 245,982 applicants had representation. Id.
375. Id.
377. Clark, supra note 66, at 218.
378. Id. at 222. For example, in the Province of New Brunswick, there is no legal aid available, and in Quebec, there is some access to legal aid that is supported by a government fee. Id.
380. CANADIAN COUNCIL FOR REFUGEES, REFUGEES AND NON-CITIZENS IN CANADA: KEY CONCERNS REGARDING CANADA’S COMPLIANCE WITH THE COVENANT ON CIVIL AND POLITICAL RIGHTS (CCPR), SUBMISSION TO HUMAN RIGHTS COMMITTEE OF THE UNITED NATIONS 8 (2005), http://www.kairoscanada.org/e/refugees/detention/CCR_Submission_UNHRCtte e_Sept05.pdf.
applicant's chances of success. However, these studies lack information about the merits of the underlying claims. It is impossible to assess how many of the unsuccessful claims of unrepresented refugee applicants would have proven meritorious with the benefit of an attorney. While some of these claims may have been successful, it is reasonable to assume that some would still fail and that an applicant's meritless claim was, in fact, the reason for the applicant's lack of representation.

Under the minimum legal requirements criteria, it is arguable whether the absence of publicly financed representation means the U.S. system is so unfair as to make it unsafe. On the one hand, legal representation greatly impacts the outcomes of cases, and statistics reveal that many applicants do not receive legal representation. It is reasonable to assume that the United States has denied legitimate refugee claims as a result.

Arguments to the contrary can be made, however. The UNHCR does not mandate free legal aid, but only requires that refugee applicants should have access to it if it exists. Further, the UNHCR recommends that refugee applicants receive advice and guidance at all stages of the refugee determination process, and have access to legal counsel. Both the United States and Canada have problems with geographic variation in representation rates and difficulties with refugee applicants receiving legal assistance. It is

381. HUMAN RIGHTS FIRST, IN LIBERTY'S SHADOW: U.S. DETENTION OF ASYLUM SEEKERS IN THE ERA OF HOMELAND SECURITY 39 (2004). This report referenced a study done by Georgetown University's Institute for the Study of International Migration, which revealed that a represented asylum seeker in the United States is up to six times more likely to be granted asylum. See id. at 39. A study of asylum seekers in expedited removal proceedings by the USCIRF revealed that asylum seekers without counsel had a two percent chance of being granted asylum as compared to the twenty-five percent success rate with representation. Id. at 4, 56.

382. Both studies simply compare success rates of unrepresented applicants with the success rates of represented applicants. See, e.g., HUMAN RIGHTS FIRST, supra note 381, at 39; 1 USCIRF, supra note 331, at 7, 34, 59. The USCIRF specifically stated that it did not determine whether the correct result occurred in the cases it examined. 1 USCIRF, supra note 331, at 5.

383. See supra Part VI.A.2.d.i.

384. 1 USCIRF, supra note 331, at 45 (citing Asylum Processes, supra note 323, ¶ 50).

385. Id.

386. Compare Schoenholtz & Jacobs, supra note 372, at 742-43 (illustrating
therefore difficult to assert that the United States is unsafe if Canada has similar problems.

ii. Disparity in Approval Rates

A second concern regarding fairness in refugee determination is the disparity in approval rates of refugee claims between the United States and Canada. According to a recent UNHCR study, the United States had a 34.9% refugee recognition rate in 2002, while Canada had a 57.8% recognition rate.\textsuperscript{387} It should be noted that Canada and the United States are two of the most generous nations in the world in terms of recognizing claims, as both surpassed the 2002 worldwide average refugee recognition rate of thirteen percent.\textsuperscript{388} However, given that both countries adhere to the Refugee Convention and apply the same international definition of the term "refugee",\textsuperscript{389} it would be reasonable to expect the difference in recognition rates between the United States and Canada to be less drastic. Obviously, the issues raised above play some role in the United States' lower recognition rate, but there are many other factors in both countries that also contribute to this significant disparity.

The aforementioned UNHCR study explored a number of factors that have impacted the disparate refugee recognition rates among the various countries.\textsuperscript{390} Some of the variables include the composition of the population seeking refugee protection for each receiving country,\textsuperscript{391} the overall asylum

\textsuperscript{387}. Kate, supra note 61, at 1.

\textsuperscript{388}. Id. at 1. Canada and the United States rank number one and two respectively in terms of refugee recognition. Id. However, the study went on to include recognition rates on humanitarian grounds, in which an applicant would not need to demonstrate that he or she is a refugee. Id. If these recognition rates are included, Canada remains number one, but the United States falls to third in the world. Id.


\textsuperscript{390}. Kate, supra note 387, at 2-3. The study noted that an asylum seeker in Canada was 145 times more likely to be found to have experienced persecution than the country with the lowest recognition rate, Greece. Id.

\textsuperscript{391}. It should be noted that the United States and Canada share three countries in common when looking at a list of the top ten countries of origin for
burden each country carries,392 political ideology,393 foreign policy concerns,394 cultural views and economic conditions of each receiving country.395 These factors may explain the discrepancy in rates between the United States and Canada to some extent. However, overall, the United States is criticized for not maintaining international standards and wrongfully denying refugee claims, and Canada is criticized for being too generous with a system that produces false positives, granting refugee status to those that should not receive it.396

Some scholars challenge the accuracy of data suggesting a disparity in the recognition rate between the United States and Canada. Professor Audrey Macklin, in a review of the STCA, drew statistics from a non-governmental organization that placed United States and Canada much closer in their respective approval rates: fifty-eight percent for Canada compared to forty-eight percent for the United States in 2001.397 She asserts that Canada is not radically more

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392. Kate, supra note 387, at 3.
393. Id.
395. Kate, supra note 387, at 3.
397. Macklin, supra note 9, at 412. Professor Macklin is a recognized refugee law expert at the University of Toronto. Professor Macklin cited statistics from the U.S. Committee for Refugees and Immigrants to support her contention that there is only a ten percent difference. Id. The difference may be explained by the fact that the United States has two different systems for processing refugees, an affirmative process whereby a refugee applicant approaches the U.S. government and asks for asylum. See LEGOMSKY, supra note 132, at 940. A second process is called defensive asylum, in which a refugee applicant facing deportation by an immigration judge asks for asylum as relief from deportation. See id. Canada only has one process before an Immigration and Refugee Board. See Parliamentary Information and Research Service, supra note 130. It may
generous than the United States and that both countries have become much less generous over the past few years, further closing the gap. In addition, studies by other non-governmental entities reveal no significant difference between the United States and Canada. Professor Macklin raised this point to challenge one of the justifications for the STCA—that it improves security because the U.S. system is tougher to exploit. However, these statistics also challenge the alleged disparity in approval rates between the United States and Canada. With no great disparity, it is difficult to argue that the disparity reveals unfairness in the U.S. refugee processing system.

Given this disagreement over recognition rates and whether Canada is more generous, it is difficult to conclude that the United States' system is so unfair as to violate the minimum legal requirements criteria. The entire U.S. system cannot be deemed non-compliant so as to make any return a violation of Canada's obligations under the Refugee Convention. However, this issue should encourage the United States and Canada to examine the factors that affect recognition rates to more precisely determine whether there is a disparity between the two nations and, if so, how to resolve it.

iii. Reversal of Administrative Claims by U.S. Courts

The growing frequency and vituperative tone with which federal judges are reversing decisions by the immigration courts evokes perhaps the greatest concern over the fairness of the entire U.S. refugee protection system. The U.S. system is structured such that the federal circuit courts of appeal are the last bodies to which a refugee applicant can appeal as of right after a hearing before the immigration judge and an

be that some estimates of U.S. approval rates include the affirmative process as well as the defensive claims, whereas others only compare the defensive claims because they are comparing approval rates by U.S. immigration courts with the Canadian panel decisions.

398. Macklin, supra note 9, at 413.
400. See Macklin, supra note 9, at 412-13.
appeal before the BIA. Recently, federal courts have experienced a dramatic upsurge in appeals from the BIA. There are two causes for this phenomenon. First, the U.S. Department of Justice changed the BIA's procedures in 2002 to alleviate a large backlog of cases at the BIA. The streamlining of BIA procedures created a large volume of decisions that could be appealed to the federal courts. Second, the surge is the result of an increase in the appeal rate, as a higher percentage of cases are being appealed to the federal courts after the completion of administrative appeals.

Statistics on this phenomenon are remarkable. Nationwide, the number of appeals to the federal courts from the immigration system shot upward from approximately 270 per month in April 2002 to approximately 1100 per month in April 2004. Several circuits in particular have been hit hard, with appeal rates soaring 1000 percent in the same time frame. Asylum cases comprise the majority of these appeals and reversals.

With this flood of cases, a number of federal judges have expressed their exasperation at the quality of administrative justice in the U.S immigration system. Most notably, Seventh Circuit Court of Appeals Judge Richard Posner stated in a recent opinion that "the adjudication of these cases at the administrative level has fallen below the

403. Id. at 3-4.
404. Id. The streamlining features included reducing the size of the BIA, providing for a review by a single member of the BIA rather than the usual panel of three judges, and allowing a single BIA member to affirm an immigration judge without writing an opinion. See U.S. Dep't of Justice, Fact Sheet: BIA Streamlining, Sept. 15, 2004, available at http://www.usdoj.gov/eoir/press/04/BIAStreamlining2004.pdf.
406. Id. at 44.
408. See Palmer et al., supra note 402, at 71-72 (stating that the Second and Eleventh Circuits, specifically, are "dominated by asylum claims").
409. See Liptak, supra note 407.
minimum standards of legal justice." Judge Posner further drew attention to the problem by noting that forty percent of immigration appeals were reversed by the Seventh Circuit in 2005.

There are numerous reasons for the federal judges' frustrations. Factual errors, legal errors in procedure and substance, extreme bias, unsupported conclusions, and unreadable opinions have been identified in various decisions. Some federal judges have gone so far as to name individual immigration judges in their opinions for what they consider to be inappropriate behavior toward refugee applicants. As a result of the mounting criticism from the federal bench, Attorney General Alberto Gonzales ordered a review of all immigration courts and the BIA to address those "whose conduct can aptly be described as intemperate or even abusive and whose work must improve." In August of 2006, the Attorney General ordered the implementation of twenty-two measures designed to improve the functioning of the immigration court, including performance evaluations, improved training for immigration judges and BIA members, and alterations to the streamlining procedures to identify and address improper decisions.

Do these publicly acknowledged problems in the adjudication of immigration cases indicate that the U.S. system is so flawed as to be unfair to any refugee applicant who is returned under the STCA? The answer to this question turns partly on whether the federal judges' complaints reflect a systemic problem or a problem with

410. Benslimane v. Gonzales, 430 F.3d 828, 830 (7th Cir. 2005) (referring not only to asylum cases, but to all appeals of immigration cases on the merits).
411. Id. at 829.
412. Id. at 828 (citing to several Seventh Circuit decisions as well as decisions from other circuits); see also Chen v. U.S. Dep't of Justice, 426 F.3d 104, 115 (2d Cir. 2005); Fiadjoe v. Attorney General, 411 F.3d 135, 154 (3d Cir. 2005); Korytnyuk v. Ashcroft, 396 F.3d 272, 292 (3d Cir. 2005); Lopez-Umanzor v. Gonzales, 405 F.3d 1049, 1054 (9th Cir. 2005); Wang v. Attorney General, 423 F.3d 260, 269 (3d Cir. 2005).
413. See Wang, 423 F.3d at 262.
several specific immigration judges. Judge Posner cited a list of cases demonstrating that other federal courts have acknowledged the problem.\textsuperscript{416} However, most of the cases that Posner cited only identified a particular judge's inappropriate or biased behavior rather than a systemic problem.\textsuperscript{417} In response to federal judges' criticisms, the U.S. government asserted that most immigration judges and the BIA performed their duties properly, and that consequently the government won most appeals in federal court, citing a ninety percent success rate.\textsuperscript{418} While both Posner's forty percent figure and the U.S. government's ninety percent figure are more than anecdotal, neither provides a complete picture of just how often federal courts overturn immigration judges or the BIA.

A recent study explored why the rate of appeals rose along with the number of appeals. One possible explanation the study explored was an increase in the number of erroneous decisions, which could lead more people to appeal to the federal courts.\textsuperscript{419} Acknowledging the difficulty in determining the error rate, the study used a sampling of BIA decisions and federal cases, and calculated the reversal rate.\textsuperscript{420} The reversal rate was calculated by the proportion of appeals filed in a given month that were ultimately reversed, vacated or remanded on the merits.\textsuperscript{421} The authors concluded that the reversal rate, while fluctuating widely in the past, has not increased.\textsuperscript{422} Instead it has hovered between five and fifteen percent between October 1994 and October 2002.\textsuperscript{423} However, the authors cautioned that the study did not examine all BIA decisions, but only those appealed to federal courts.\textsuperscript{424} Furthermore, the study covers only a short period after the streamlining measures took effect in 2002.\textsuperscript{425} Thus,

\begin{thebibliography}{9}
\bibitem{416} See Benslimane, 430 F.3d at 829.
\bibitem{417} See id.
\bibitem{418} Liptak, \textit{supra} note 407.
\bibitem{419} Palmer \textit{et al.}, \textit{supra} note 402, at 54 (describing the ABA Commission's proposal that the increase in appeal rate is due to the increase in summary decisions, "which are more likely to be either erroneous, perceived as erroneous, or simple unacceptable to the litigants").
\bibitem{420} \textit{Id.} at 57.
\bibitem{421} \textit{Id.} at 58.
\bibitem{422} \textit{Id.}
\bibitem{423} \textit{Id.} at 60.
\bibitem{424} \textit{Id.} at 32.
\bibitem{425} Palmer \textit{et al.}, \textit{supra} note 402, at 59. The authors of the study did not go
it does not cover the period of time in which Judge Posner made his observation about the reversal rate in the Seventh Circuit.\footnote{\textsuperscript{426}}

The lack of a more thorough study makes it impossible to conclude that the rate of error is so high that the U.S. refugee processing system is fundamentally flawed. Assuming a more complete study can be done, a question that needs to be addressed is, what constitutes an acceptable error rate. It may be easier to conclude what constitutes an unacceptable error rate; e.g. the forty percent reversal rate cited by Judge Posner.\footnote{\textsuperscript{427}} However, that figure comes from a single federal judge, sitting on a single court, regarding a single year.\footnote{\textsuperscript{428}} Clearly, a more thorough study is needed on the recent surge of cases and whether the trend demonstrates that the immigration courts and the BIA are making too many errors.

The reversals by federal judges may also be evidence that the U.S. system is fair and meets international standards. The federal courts are arguably performing their role by identifying errors made by the administrative agencies and using their opinions to send a message when the agencies produce an unacceptable number of mistakes.\footnote{\textsuperscript{429}} From this perspective, Canada may assert that it is not complicit in a violation of international law by the United States because the U.S. system is regulating itself properly. However, the argument could be made that these cases revealing bias and error by immigration judges are the tip of the iceberg since many cases are not appealed. While this counter-argument has intuitive appeal, there is no data on which to base such a conclusion.

All three issues—lack of counsel, disparity in approval rates, federal courts overturning the BIA—highlight problems with the U.S. refugee processing system. All three raise concerns that a refugee applicant will be improperly refouled. However, the evidence in all three cases is inconclusive with

\footnote{\textsuperscript{426}} Posner's forty percent reversal figure applied to appeals heard by the Seventh Circuit in 2005. \textit{See} Benslimane v. Gonzales, 430 F.3d 828, 829 (7th Cir. 2005).

\footnote{\textsuperscript{427}} \textit{Id.}

\footnote{\textsuperscript{428}} \textit{Id.}

\footnote{\textsuperscript{429}} \textit{See} Niam v. Ashcroft, 354 F.3d 652, 653 (7th Cir. 2003).
regard to how much of a problem exists. There is also a lack of international benchmarks against which to measure the U.S. system. Thus, these issues are best described as arguable violations of the minimum legal requirements criteria by the United States.

B. Threats to Other Refugee and Human Rights

An application of the minimum legal requirements criteria to other rights protected by the Refugee Convention and other human rights treaties reveals more problems with Canada's participation in the STCA. These problems can again be broken down into clear violations and those that are debatable.

1. Clear Violations of the Minimum Legal Requirements: Detention

As discussed above, the United States began using the process of expedited removal in 2006. Detention is mandatory under the expedited removal process until an applicant demonstrates a credible fear of persecution. This policy applies along the U.S.-Canada border. As a consequence, almost all refugee applicants facing expedited removal will experience detention for some period of time. The number of refugee applicants detained is a small percentage of the total number of refugee applicants in the United States, and many applicants are eligible for

430. See supra Part VI.A.2.c.
434. See Hansen et al., supra note 396, at 806. This is due to the fact that most claims are raised by aliens who have already entered the United States lawfully or are otherwise not subject to expedited removal. See id. In 2002, there were 100,690 refugee applicants, 80,097 of whom filed affirmatively with the government, meaning they had already entered the United States. See Bill Frelick, US Detention of Asylum Seekers and Human Rights, MIGRATION POL’Y INST., Mar. 1, 2005, http://www.migrationinformation.org/Feature/print.cfm?ID=296. Of the 100,690 applicants in 2002, only 18,450 were detained. Id.
However, a significant percentage of refugee applicants subjected to expedited removal are detained for a significant length of time.\textsuperscript{436} For example, in 2003, the average length of detention for a refugee applicant in the expedited removal process was longer than two months,\textsuperscript{437} and nearly half were detained for one to six months.\textsuperscript{438} Some remained in detention for the full period in which they were in proceedings, which may last months or even years.\textsuperscript{439}

There are other examples of refugee applicants facing mandatory detention in the United States. For a brief period in 2003, the United States stated that it would extend mandatory detention to nationals of countries in which "al-Qaeda, al-Qaeda sympathizers and other terrorists groups" were known to have operated (mostly Middle Eastern and Islamic countries).\textsuperscript{440} Additionally, after September 11, 2001, the United States announced it would detain all Haitians attempting to enter the United States without documents, regardless of their intent to request asylum.\textsuperscript{441} As a result of expedited removal and these other mandatory detention policies, tens of thousands of refugee applicants have been

\textsuperscript{435} 8 U.S.C. §§ 1226(a)-(c). Parole decisions are not reviewable by any court. \textit{Id.} § 1226(e). There is no official regulation on granting parole. Refugee applicants going through the expedited removal process are eligible for parole if: (1) they establish that they have a credible fear of persecution; (2) there is no question about their identity; (3) a U.S. citizen or other family members with lawful presence in the United States are willing to house and support them while their claim is pending; (4) they pose no danger to the United States; and (5) they are not otherwise ineligible for asylum. \textit{See} HUMAN RIGHTS FIRST, \textit{supra} note 381, at 8.

\textsuperscript{436} Fleming & Scheuren, \textit{supra} note 433, at 337. In fiscal year 2003, 2933 of the 6005 refugee applicants referred for a credible fear hearing were detained for thirty days or less (forty-nine percent), 1123 were detained for 30 to 90 days (nineteen percent), 856 were detained for 90 to 180 days (fourteen percent), and 897 were detained for more than 180 days (fifteen percent). \textit{Id.} The study indicated that 196 completely avoided detention (three percent), but the authors of the study believe this is an error and that in fact, all refugee applicants were detained at some point. \textit{Id.} at 329. A total of 160 remained in detention in 2005, when the USCIRF report was published. \textit{Id.} at 337.

\textsuperscript{437} \textit{Id.} at 330.

\textsuperscript{438} \textit{Id.} at 337.

\textsuperscript{439} \textit{Id.} at 332-33, 371-78.


detained over the past several years.442

The United States gives several justifications for its detention policy. The first is a high absconding rate for aliens who are not detained.443 In a 2003 strategic plan, the DHS asserted that only fifteen percent of non-detained aliens appeared for their immigration proceedings, leaving eighty-five percent to remain unlawfully in the United States.444 Second, the United States asserts a need to protect the public from aliens who may commit crimes or otherwise pose security threats to the United States.445 As noted above, in the wake of September 11, 2001, national security grounds justified the mandatory detention of refugee applicants from particular countries.446 Third, detention is meant to deter unlawful entry into the United States.447

In a critique of these rationales, Professor Michele Pistone asserts that the true reason for the broad detention policy in the United States is the deterrence of undocumented immigration.448 Professor Pistone’s research demonstrates that there is little effort in the United States to ensure that the absconding and safety rationales govern choices regarding the release of refugee applicants.449 For example, huge discrepancies exist in the rates of refugee applicants released from detention in various parts of the United States, demonstrating a geographic inconsistency in the application of the rationales.450 Recent studies support this observation.451 Further, those charged with granting parole to refugee applicants express little interest in discovering whether their parole decisions result in a decreased

442. HUMAN RIGHTS FIRST, supra note 381, at 7.
444. IMMIGRATION AND CUSTOMS ENFORCEMENT, U.S. DEP’T OF HOMELAND SEC., ENDGAME: OFFICE OF DETENTION AND REMOVAL STRATEGIC PLAN, 2003-2012, at 2-6 (2003); see also Frelick, supra note 434. This figure is for all aliens who are in removal proceedings, not just refugee applicants. Id.
446. See supra notes 440-42.
447. Pistone, supra note 443, at 224.
448. Id.
449. Id. at 224-31.
450. Id. at 228. The variance runs between a ninety-seven percent parole rate in Harlingen, Texas, to a parole rate below four percent in Newark, New Jersey. Frelick, supra note 434.
451. 1 USCIRF, supra note 331, at 62.
absconding rate.\textsuperscript{452}

Additionally, Professor Pistone's research demonstrates that the availability of bed space in detention facilities frequently governs parole decisions rather than concerns about the likelihood of absconding or public safety.\textsuperscript{453} If a detention facility has bed space, refugee applicants are denied parole and remain incarcerated, regardless of the fact that they present no danger and have a great likelihood of appearing in immigration court.\textsuperscript{454} This de facto policy supports Professor Pistone's conclusion that deterrence lies at the heart of U.S. detention policy because filling all available detention beds keeps as many aliens detained as possible.\textsuperscript{455}

Professor Pistone also points out that expedited removal has greatly reduced the need for detention to deter undocumented entry into the United States.\textsuperscript{456} Most persons who arrive in the United States without documents are immediately removed without a hearing.\textsuperscript{457} Thus, immediate removal now serves as the primary deterrent against traveling to the United States without valid documents. Given that the people who avoid expedited removal are those who demonstrate a credible fear of persecution, there is no reason to use detention to deter them.\textsuperscript{458} Those with a credible fear of persecution are people to whom the United States owes a duty to assess their refugee status.

The implementation of expedited removal also undermines the absconding rationale for detention, even though it does not actually guide detention policy. Professor Pistone asserts that since those remaining in the United

\textsuperscript{452} Pistone, \textit{supra} note 443, at 228-29. The term "parole" in the immigration context refers to the decision to release an alien into the United States pending a decision about whether he or she may be legally entitled to enter. 8 U.S.C. § 1226 (2005).
\textsuperscript{453} Pistone, \textit{supra} note 443, at 230-31.
\textsuperscript{454} Id. at 228-32.
\textsuperscript{455} Id.
\textsuperscript{456} Id. at 232. In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Prior to 1996, anyone arriving in the United States could request protection as a refugee. They would be admitted into the United States and given work authorization while waiting for months to years for their refugee claims to be adjudicated. \textit{Id.} at 235. The U.S. government began using detention in the 1980s to address an influx of refugee applicants from the Caribbean. \textit{Id.} at 227.
\textsuperscript{457} Pistone, \textit{supra} note 443, at 233-34.
\textsuperscript{458} Id. at 237.
States have a credible fear of persecution, they have a strong incentive not to abscond, but instead to appear at the hearing to determine their refugee status.\textsuperscript{459} Thus, again, there is little reason to detain these refugee applicants.

This assertion is supported by a recent statistical analysis that challenges the absconding rate asserted by the U.S. government. A distinction between aliens who are in proceedings—e.g., those with pending asylum and withholding claims—and those with final removal orders must be made. Once those two groups are separated, the absconding rate drops dramatically. The USCIRF study on expedited removal\textsuperscript{460} determined that refugee applicants who demonstrated a credible fear of persecution had an absconding rate of only twenty-two percent.\textsuperscript{461} In response to the USCIRF report, the U.S government subsequently released figures indicating a thirty percent absconding rate.\textsuperscript{462} The U.S. government acknowledged that the higher figure of eighty-five percent in the 2003 DHS strategic plan\textsuperscript{463} represents those who have completed their cases and have an order for removal issued against them.\textsuperscript{464} Some analysts assert that the actual absconding rate for refugee applicants may be even lower, around 5.7\%.\textsuperscript{465} These statistics support Professor Pistone's conclusion that the use of expedited removal undercuts the absconding rationale for the detention of refugee applicants who are in proceedings. Since those who demonstrate a credible fear receive a hearing regarding their refugee claim before an immigration judge, they are far more likely to appear rather than abscond. Therefore, they do not, as a general matter, need to be detained.

Finally, regarding the public safety rationale, Professor Pistone noted the lack of statistical evidence that refugee applicants posed a significant risk to the safety of U.S.

\textsuperscript{459} Id. at 238-39.
\textsuperscript{460} See supra note 351 and accompanying text.
\textsuperscript{461} See Fleming & Scheuren, supra note 433, at 379.
\textsuperscript{462} See Frellick, supra note 434.
\textsuperscript{463} See supra note 444 and accompanying text.
\textsuperscript{464} See Frellick, supra note 434.
\textsuperscript{465} See id. Bill Frelick of Amnesty International calculated this figure for EOIR data. Id. However, he noted that his statistics are for all refugee applicants, whereas the USCIRF study only included refugee applicants going through expedited removal. Id.
citizens. Further, there does not seem to be any interest in assessing the risks an individual applicant poses. For example, the U.S. policy of mandatory detention for aliens from designated countries in which al-Qaeda operates did not require any evidence of a link between the refugee applicant and a terrorist organization. The United States officially ended the mandatory detention policy for such aliens one month after it began. However, the mandatory detention of Haitians continues, and many assert there is an unofficial practice of mandatory detention for Muslims and those from the Middle East.

Not only must the U.S. rationale for detention be examined, but the conditions of detention must also be explored. Many studies demonstrate the damaging effect detention has on refugee applicants. Refugee applicants are often subjected to prison-like conditions, and in a significant number of cases, they are housed in state and local jails. These conditions can exacerbate the trauma that a refugee applicant already suffers from the persecution endured in his or her own country. There is limited or no mental health care available to refugee applicants in detention to help them address these issues. As result, refugee applicants may be handicapped in their ability to present their claim for protection. The post-traumatic stress of persecution can make it very difficult for refugee applicants to even discuss the persecution, yet the burden

466. Pistone, supra note 443, at 239.
467. See supra note 440.
468. See HUMAN RIGHTS FIRST, supra note 381, at 24.
470. See supra note 441.
471. See HUMAN RIGHTS FIRST, supra note 381, at 25.
472. Id. at 33; see also Fleming & Scheuren, supra note 433, at 180-99; Pistone, supra note 443, at 207-11.
473. 1 USCRF, supra note 331, at 60.
474. Fleming & Scheuren, supra note 433, at 358. In fiscal year 2003, nearly one-quarter of detained refugee applicants were held in state and local jails. Id.
475. HUMAN RIGHTS FIRST, supra note 381, at 34 (citing a 2003 report from Physicians for Human Rights and the Bellevue/New York University Program for Survivors of Torture that documents high levels of anxiety, depression and Post-Traumatic Stress Disorder among detained refugee applicants).
476. Id.
rests on them to prove they fit the definition of a refugee.478

There are several other problems with the detention of refugee applicants in the United States. As mentioned above, the location of some detention facilities hampers refugee applicants from obtaining and maintaining contact with attorneys.479 Further, detention in state and local jails results in refugee applicants being housed with potentially dangerous people and treating applicants as though they were criminals for requesting refugee protection.480 Lastly, studies have documented the abuse of refugee applicants by detention facility employees,481 triggering governmental investigations of several facilities.482

An application of the minimum legal requirements to U.S. detention policies and conditions reveals that the United States clearly violates the Refugee Convention and the ICCPR. Article 31 of the Refugee Convention forbids the imposition of penalties on refugees who have come unlawfully into the territory of a country that is party to the Refugee Convention.483 Further, the Refugee Convention prohibits restrictions on the physical movement of refugees, except those restrictions necessary and only upon those whose status is not yet regularized.484 The UNHCR also issued guidelines on the detention of asylum seekers which state that such persons should not be detained absent exceptional reasons.485

478. Id. at 217.
479. Pistone & Schrag, supra note 337, at 51-52.
480. 1 USCIRF, supra note 331, at 7. None of the refugee applicants detained are criminals simply because they arrived in the United States without documents as long as they presented themselves to an immigration inspector at a place designated as a point of lawful entry into the United States. See 8 U.S.C. § 1325(a) (2006).
481. PHYSICIANS FOR HUMAN RIGHTS & BELLEVUE/NYU PROGRAM FOR SURVIVORS OF TORTURE, FROM PERSECUTION TO PRISON: THE HEALTH CONSEQUENCES OF DETENTION FOR ASYLUM SEEKERS 105-28 (2003) [hereinafter FROM PERSECUTION TO PRISON]; see also HUMAN RIGHTS FIRST, supra note 381, at 36-37.
482. HUMAN RIGHTS FIRST, supra note 381, at 36.
483. Refugee Convention, supra note 27, at art. 31.
484. Id. However, the Convention seems to imply that penalties are permissible if refugees do not present themselves “without delay” and provide and “show good cause” for their unlawful presence. See id.
485. UNHCR, Geneva, UNHCR Revised Guidelines on the Detention of Asylum Seekers, at guidelines 2-3 (Feb. 1999) [hereinafter Detention Guidelines]. Exceptional reasons include verifying identity, determining whether there is a valid claim for refugee status, dealing with asylum seekers deliberately trying to mislead authorities, or to protect national security or
A refugee applicant's possession of fraudulent documents or a failure to have travel documents should not, by itself, lead to detention.\textsuperscript{486} Instead, the guidelines state that alternatives to detention should be considered.\textsuperscript{487}

Along with these limited justifications for detention, the UNHCR guidelines propose procedural guarantees.\textsuperscript{488} These guarantees include informing the refugee applicant of the reasons for detention, allowing him or her to challenge the individual determination for detention, and giving him or her the right to contact the local UNHCR office.\textsuperscript{489} The Executive Committee of the UNHCR issued conclusions to further clarify the guidelines and identify when detention of a refugee applicant becomes arbitrary, thereby violating the Refugee Convention.\textsuperscript{490} Arbitrary detention occurs when refugee applicants are detained on the basis of broad criteria that do not allow for individualized determinations of the need for detention, when there is no administrative or judicial review, or when detention occurs for disproportionate or extended periods.\textsuperscript{491}

Finally, the UNHCR guidelines address the conditions of detention. The guidelines provide that conditions should be humane, respecting the inherent dignity of refugee applicants.\textsuperscript{492} There should be an initial screening to discover torture and trauma victims.\textsuperscript{493} These victims should not be detained unless a qualified medical practitioner certifies that they will not be adversely affected by detention.\textsuperscript{494} Refugee applicants should be accommodated separately from convicted criminals if they are housed in prisons and they should

\begin{footnotes}
\footnote{486. Id. at guidelines 3(i)-(iv).}
\footnote{487. Id. at guideline 3(iii).}
\footnote{488. Id. at guidelines 5(i)-(v).}
\footnote{489. Id. at guidelines 5(i), (iii), (v).}
\footnote{490. UNHCR, ExCom, Detention of Asylum-Seekers and Refugees: The Framework, the Problem, and Recommended Practice, ¶ 25-26, U.N. Doc. EC/49/SC/CRP.13 (June 4, 1999) [hereinafter Recommended Practice]. The Executive Committee is composed of seventy member states that review and approve the UNHCR’s budget, discuss its programs, and assist the High Commissioner in his or her responsibilities. See UNHCR, Executive Committee, http://www.unhcr.org/excom.html (last visited Mar. 9, 2007).}
\footnote{491. Recommended Practice, supra note 490, ¶ 25.}
\footnote{492. Detention Guidelines, supra note 485, at guideline 10.}
\footnote{493. Id. at guideline 10(i).}
\footnote{494. Id. at guideline 7.}
\end{footnotes}
have the possibility of regular contact with family, friends and legal counsel.\textsuperscript{495}

In addition to the Refugee Convention, there are other human rights treaties binding on Canada which prohibit detention except under certain circumstances. The ICCPR,\textsuperscript{496} to which both the United States and Canada are party,\textsuperscript{497} forbids arbitrary arrest and detention.\textsuperscript{498} Further, both the ICCPR and the Refugee Convention forbid discrimination on the basis of race, religion or country of origin in the application of their provisions.\textsuperscript{499} The ICCPR applies to everyone within the territory of a country that is a party to the treaty.\textsuperscript{500} Its provisions are also part of the minimum legal requirements binding on Canada.\textsuperscript{501} Thus, we must examine the U.S. detention policy of refugee applicants in light of both the Refugee Convention and the ICCPR.

First, detention in the United States under the expedited removal process is mandatory rather than exceptional in contravention of Article 31 of the Refugee Convention and the UNHCR detention guidelines.\textsuperscript{502} Further, the expedited removal process mandates detention for refugee applicants possessing false documents or no documents even though the detention guidelines state that this alone is an insufficient reason.\textsuperscript{503} The United States' claim of a need for a brief period of mandatory detention upon a refugee applicant's arrival does not justify the fact that many refugee applicants are detained for extended periods.\textsuperscript{504} The United States' rationales for its mandatory detention policy, such as preventing absconding or security, are unconnected to detention or parole decisions.\textsuperscript{505} Therefore, the United States fails to meet the standard of necessity established by the

\begin{footnotes}
\footnote{495. Id. at guidelines 10(iii)-(iv).}
\footnote{496. ICCPR, supra note 113.}
\footnote{497. Id.}
\footnote{498. Id. at art. 9.}
\footnote{499. Id. at art. 26; Refugee Convention, supra note 27, at art. 3. The ICCPR also forbids discrimination on several other grounds such as sex, political or other opinion language, etc. ICCPR, supra note 113, at art. 26.}
\footnote{500. ICCPR, supra note 113, at art. 2.}
\footnote{501. See supra note 115 and accompanying text.}
\footnote{502. See supra note 335.}
\footnote{503. See supra notes 486-87.}
\footnote{504. See supra notes 436-39 and accompanying text.}
\footnote{505. See supra notes 443-46.}
\end{footnotes}
Refugee Convention to justify detention. 506

Instead, the U.S. system detains refugee applicants on the arbitrary basis of the availability of detention space. 507 The vast geographic disparities in detention rates and inconsistent applications of parole policies demonstrate that parole decisions are often not made based on individual circumstances. 508 Further, there is no judicial review of the decision to detain. 509 As a result, a significant number of refugee applicants in the expedited removal process face prolonged detention in violation of the Refugee Convention, the detention guidelines and the ICCPR. 510

United States detention policies also run afoul of the prohibition on discrimination in the Refugee Convention and the ICCPR. 511 When the United States mandated the detention of refugee applicants from more than thirty designated countries, the UNHCR declared that this policy varied from international human rights norms and standards. 512 While the United States ended the policy shortly after it began, mandatory detention still applies to Haitians, 513 which clearly constitutes discrimination on the basis of nationality.

Lastly, some aspects of detention conditions in the United States constitute clear violations of international standards established by the UNHCR. The expedited removal process’s mandatory detention policy does not have an exception for those suffering from trauma or torture. 514 And while the practice of detaining refugee applicants in prison is not absolutely forbidden, 515 refugee applicants should not be commingled with regular criminals. 516 One

506. See Refugee Convention, supra note 27, at art. 31(2) ("The Contracting States shall not apply . . . restrictions other than those which are necessary . . . ").

507. See supra text accompanying note 453.

508. See supra notes 298-99.


510. See, e.g., supra notes 436-39 and accompanying text.

511. See supra notes 100, 499.


513. See supra note 441.


515. Detention Guidelines, supra note 485, at guideline 10(iii).

516. Id.
study found a violation of this detention guideline.\textsuperscript{517} With the large number of facilities used to house refugee applicants,\textsuperscript{518} there are reasons to be concerned that there is widespread commingling. These are clear violation of UNHCR guidelines.

Other aspects of detention conditions raise arguable violations of international standards. The studies cited above document numerous cases of inhumane treatment of refugee applicants despite the U.S. government's responses to claims of pervasive problems.\textsuperscript{519} It is unclear whether these incidents reveal a systemic problem large enough to declare the entire U.S. refugee processing system to be in violation of international standards. The studies on detention suggest that inhumane treatment is not a widespread problem.\textsuperscript{520} Likewise, detention, which effectively prevents applicants from accessing attorneys, raises concerns but the scope of the problem is unclear based on current data.

Given the clear violations of international standards by the United States, Canada may not send a refugee applicant back to the United States if he or she would face detention as part of the expedited removal process. It may seem odd that this article identifies detention under expedited removal as a clear violation of the minimum legal requirements criteria, but concludes that other parts of the expedited removal process are arguable, as opposed to clear, violations.\textsuperscript{521} This is because the international standards concerning detention are more specific and the United States' failure to abide by them is more obvious. The international standards concerning fair refugee determination processes are more general, and the evidence on U.S. practices reveals a risk of erroneous refoulement, but no data documents actual violations.\textsuperscript{522} Therefore, it is not possible to identify the entire expedited removal process as a clear violation of the minimum legal requirements criteria; only the detention provisions that are part of that process.

\begin{footnotes}
\item[517] \text{FROM PERSECUTION TO PRISON, supra note 481, at 106.}
\item[518] Fleming & Scheuren, \textit{supra} note 433, at 359-66.
\item[519] \text{FROM PERSECUTION TO PRISON, supra note 481, at 105-28.}
\item[520] \textit{Id. at 106. This study indicated that seventy-six percent of detained refugee applicants reported found their treatment to be neutral or good. Id.}
\item[521] \textit{See supra Part VI.A.2.}
\item[522] \textit{See Asylum Processes, supra note 323.}
\end{footnotes}
2. Arguable Violations of the Minimum Legal Requirements: Basic Human Needs

The return of a refugee applicant to the United States under the STCA implicates the provision of basic needs to refugee applicants, including housing, medical attention and food. The question which arises is whether Canada has an obligation under the minimum legal requirements criteria to provide such basic material support to refugee applicants. As this section will show, Canada arguably has this obligation and is therefore complicit in a violation by the United States.

Since 1996, refugee applicants in the United States have been barred from receiving federal public assistance.523 They are not able to receive state benefits, either.524 In addition, refugee applicants are not permitted to work for the first six months that their applications are pending.525 They must instead rely upon the generosity of relatives, friends and nongovernmental organizations, and are effectively treated as undocumented aliens.526 If refugee status is granted, welfare benefits and work authorization become available.527

These restrictions on public support and work authorization are in place to curb what the U.S. government perceived to be the abuse of the refugee processing system.528 Initially, the U.S. Department of Justice, and subsequently, the U.S. Congress, changed the laws on granting work authorization in response to the perception that the process was rife with frivolous refugee claims filed only to obtain work authorization.529 By denying the applicant the opportunity to work for six months, and then gearing the administrative system to produce a decision on a refugee application in six months, Congress hoped to eliminate work authorization or the receipt of public benefits as an incentive for filing a refugee application.530 However, the average

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523. See Fredriksson, supra note 67, at 760.
524. Id. at 769.
526. Fredriksson, supra note 67, at 760, 769.
527. See Refugee Convention, supra note 27, at arts. 23-24 (describing the benefits that Contracting States should make available to refugees); Fredriksson, supra note 67, at 769.
528. LEGOMSKY, supra note 132, at 1110-11.
529. Id.
530. Id. The provisions on the consideration of asylum applications and work authorization are located at 8 U.S.C. § 1158(d)(1)-(7).
A refugee applicant must wait a year or more for the full processing of an application claim, including appeals, and must eat, clothe him or herself and attend to health care needs in the meantime.\textsuperscript{531} Even if a refugee applicant obtains refugee status, his or her receipt of benefits is time-limited. Successful applicants may receive public benefits for only seven years, after which they are cut off regardless of need.\textsuperscript{532}

Canada utilizes a dramatically different system. Once an alien is deemed eligible to apply for refugee protection, he or she receives health insurance, access to education, and social assistance.\textsuperscript{533} This support continues while a claim is pending.\textsuperscript{534} If refugee protection is granted, public benefits become available as they would for any Canadian citizen.\textsuperscript{535}

Canada's system of providing for the basic needs of refugee applicants seems to reflect the human rights obligations she has undertaken in international treaties. This obligation is not found, however, in the Refugee Convention. The Refugee Convention states that refugees have a right to employment authorization, housing, and public support once refugee status has been determined.\textsuperscript{536} Thus, the failure to grant benefits or work authorization prior to deciding a claim is not a violation of the Refugee Convention.

Canada is party to another international human rights treaty that addresses basic human needs, the International Covenant on Economic, Social and Cultural Rights (ICESCR).\textsuperscript{537} The ICESCR protects economic and social rights as well as the civil and political rights covered by the

\begin{itemize}
  \item \textsuperscript{531} Fredriksson, \textit{supra} note 67, at 760.
  \item \textsuperscript{532} 8 U.S.C. § 1612(a)(2)(A) (2005); Fredriksson, \textit{supra} note 67, at 762.
  \item \textsuperscript{535} \textit{Id.}
  \item \textsuperscript{536} Legomsky, \textit{supra} note 28, at 652. The Refugee Convention gives such benefits to refugees lawfully staying in the territory. Refugee Convention, \textit{supra} note 27, at arts. 17, 21, 23.
  \item \textsuperscript{537} International Covenant on Economic, Social and Cultural Rights [ICESCR], Dec. 16, 1966, 3 U.N.T.S. 993.
\end{itemize}
To that end, countries which ratify the ICESCR recognize a right to work, a right to social security, a right to an adequate standard of living, including adequate food, clothing, and enjoyment of the highest attainable standard of physical and mental health. These rights are to be exercised without distinction to national or social origin and extend to everyone, not just citizens. Thus, the ICESCR creates a definite international obligation on the part of Canada to provide for the basic needs of refugees and immigrants.

However, the ICESCR declares that its provisions should be implemented to the maximum extent of a country's resources to ensure a progressive realization of its benefits. This limiting language generates an ambiguity as to the scope of obligations undertaken by Canada. It is unclear whether Canada's positive legal obligations under the ICESCR extend to those who are in the process of applying for refugee status as well as those granted refugee status.

While the United States has not ratified the ICESCR, the complicity principle prohibits Canada from returning refugee applicants if the ICESCR includes an obligation to provide basic support to refugee applicants. One could argue that

538. See id. at preamble.
539. Id. at arts. 6-7, 11-12.
540. Id. at arts. 2, 11.
541. Id. at art. 2(1). Professor Stephen Legomsky asserted that the progressive nature of the ICESCR makes it a "thin reed" for asserting that the return of an asylum seeker would violate rights to subsistence. See Legomsky, supra note 28, at 652. However, his conclusion was made in the context of cases in which the third country was a developing country struggling to support its own citizens. Id. Since Canada and the United States are not developing countries, it could be argued that the obligations under the ICESCR take on a more definite quality. ICESCR, supra note 537, at art. 2(3).
542. The body established to monitor the ICESCR, the Committee on Economic, Social and Cultural Rights (CESCR), pursuant to the authority granted to it by the U.N., issued general comments on the nature of the obligations undertaken by parties to the ICESCR. UNHCR, Committee on Economic, Social and Cultural Rights [CESCR], General Comment 3: The Nature of States Parties Obligations (art. 2, para. 1 of the Covenant), U.N. Doc. E/1991/23 (Dec. 14, 1990), available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/94dbbfaf59b43a424c12563ed0052b664?OpenDocument. It declared that while the obligations are progressive in nature, and there is flexibility in deciding appropriate means, state parties are under a definite legal obligation to ensure full realization of economic, social and cultural rights. Id. ¶ 9.
543. HATHAWAY, supra note 33, at 370-88.
once Canada decides to give benefits to refugee applicants, it has an obligation under the ICESCR to provide benefits to all refugee applicants. Canada cannot avoid this obligation by returning some applicants to the United States. The difficulty is in finding support in international law to substantiate such a claim. Thus, it is not a clear violation of the minimum legal requirements criteria for Canada to return a refugee applicant to the United States when the refugee applicant will not receive work authorization or public benefits while his or her refugee application is pending.

VII. CHALLENGING THE STCA

The above analysis demonstrates that there are clear ways in which Canada will violate its international legal obligations through the complicity principle if it sends a refugee applicant back to the United States under the STCA. The increased burden of proof to obtain the protection of non-refoulement, the exclusions from protections under criminal and terrorism grounds, and mandatory detention are all clear violations of the minimum legal requirements criteria.544 Other provisions reviewed above, such as the treatment of gender-based claims,545 the expedited removal process,546 and overall questions of fairness of the U.S. refugee processing system547 are arguably, though not clearly, violations. These features collectively result in less protection for those seeking refugee status. Lastly, there are other features of the U.S. system which demonstrate a lack of concern for the well-being of refugee applicants, such as the absence of material support.

Canada was aware of these issues when it entered into the STCA. Many organizations sent comments to the Canadian government echoing many of these concerns prior to the enactment of the agreement.548 Refugee advocates

544. See supra Part V.C (setting forth minimum legal requirements); see also Macklin, supra note 9, at 425.
545. See supra Part VI.A.2.b.
546. See supra Part VI.A.2.c.
547. See supra Part VI.A.2.d.ii.
asserted that Canada needed to amend the STCA or exercise its authority in promulgating regulations to exclude certain groups from coverage under the STCA.\footnote{549} Despite these warnings, Canada did not do either of these things.\footnote{550} This leads to the question—what can be done to address the concerns raised above about the STCA?

A. Domestic Remedies

A coalition of non-profit agencies brought a civil suit in a domestic Canadian court on the one year anniversary of the STCA's enactment.\footnote{551} The central contention of the agencies is that the STCA is inconsistent with the Canadian Charter of Rights and Freedoms, principally Section 7,\footnote{552} which protects life, liberty and security and prohibits deprivation except "in accordance with principles of fundamental fairness."\footnote{553} This argument is strengthened by a Canadian Supreme Court decision recognizing that Section 7 applies to all humans within Canada, including those seeking refugee protections.\footnote{554} The plaintiffs are calling upon the Federal Court of Canada to overturn the designation of United States as a safe third country.\footnote{555} The Federal Court agreed to hear the case in June 2006.\footnote{556} Oral arguments were heard on February 5, 2007.\footnote{557}

\footnote{549} See AILA, supra note 548; Canadian Council for Refugees, supra note 548.

\footnote{550} Canada did recognize in its regulations that it cannot send an asylum seeker back to the United States under the STCA if that person risked facing the death penalty. \textit{Immigration and Refugee Protection Act}, supra note 75.


\footnote{552} Macklin, supra note 9, at 424.


\footnote{554} Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177 (Can.); Macklin, supra note 9, at 424-25.

\footnote{555} Singh, 1 S.C.R. 177; Macklin, supra note 9, at 425-26.

\footnote{556} Nicholas Keung, \textit{Man Loses His Bid to Come to Canada}, \textit{TORONTO STAR} (Can.), Aug. 31, 2006, at A19.

\footnote{557} See Canadian Council for Refugees, Amnesty Int'l & Canadian Council of Churches, \textit{Media Advisory: Court and Parliament to Hear Safe Third Country
B. Regional Remedies

The STCA may also be challenged at the regional and international levels. The regional and international human rights protection regimes discussed above provide monitoring and enforcement mechanisms to which Canada has made itself accountable. As will be explored below, there are important limitations on the use of these fora.

At the regional level, two mechanisms that monitor human rights in the Americas are the Inter-American Commission on Human Rights (Commission), and the Inter-American Court on Human Rights. However, the Inter-American Court on Human Rights depends upon the consent of the parties before it can exercise its jurisdiction, and neither Canada nor the United States currently appears before it.

The Commission, on the other hand, is empowered to examine whether a party is abiding by its duties as set forth in the American Declaration of the Rights and Duties of Man, which was adopted at the time the OAS was established in 1948. Comprised of seven experts, the Commission can receive petitions from individuals and non-governmental organizations asserting that a right under the American regime has been violated. The Commission Challenge (Feb. 1, 2007), at http://www.web.net/~ccr/advisoryfeb07.html.

558. LEGOMKSY, supra note 126, at 1110-11; see also Singh, 1 S.C.R. 177.
559. See HENKIN, supra note 111, at 523-44.
560. American Convention, supra note 97, 1144 U.N.T.S. at art. 62.
561. The Inter-American Court for Human Rights came into existence with the creation of the American Convention on Human Rights (American Convention), the foundational treaty for the American human rights regime. See American Convention, supra note 97, 1144 U.N.T.S. at arts. 52-73.
562. See Refugee Convention, supra note 27, at arts. 3, 4, 16, 22, 27.
563. Unlike the Inter-American Court, the Commission existed prior to the establishment of the American Convention, and its monitoring and enforcement responsibilities are not limited to the human rights contained in the American Convention. See HENKIN, supra note 111, at 342, 523; see also Inter-Am. Comm'n on Human Rights [IACHR], What is the IACHR?, http://www.cidh.oas.org/what.htm (last visited Mar. 9, 2007).
564. Statute of the IACHR, O.A.S. Res. 447 (IX-0/79), at arts. 1-2 (Oct. 1979), available at http://www.cidh.org/Basicos/basic15.htm; see also IACHR,
determines the admissibility of the petition and then works toward a friendly settlement of the dispute. If a settlement is not possible, the Commission will issue findings of fact and declare whether or not a country party has violated its obligations.

Canada's return of refugee applicants to the United States has already been the subject of a petition to the Commission. Prior to the STCA taking effect, Canada returned applicants to the United States out of administrative convenience, claiming it did not have enough officers to conduct refugee interviews. Refugee applicants were temporarily returned to the United States with a letter indicating the date and time to return for a refugee determination interview, a policy referred to as a "direct back." Until 2003, this policy required Canadian immigration officials to obtain a promise from U.S. immigration officials that the applicant would be permitted to return to Canada for the appointment. When this requirement was eliminated, a group of non-governmental organizations submitted a petition to the Commission asserting that the direct back policy violated two provisions of the American Declaration. First, Article XXVII establishes that "every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in a foreign territory, in accordance with the laws of each country and with international agreements." Second, the petition asserted that the direct back policy violated Article


566. Id. at 50; see also IACHR, supra note 563.
567. For the contents of the petition, see Letter from Deborah Anker, Dir., Harvard Immigration and Refugee Clinic, et al., to Santiago Canton, Executive Sec'y for the IACHR (Mar. 31, 2004), available at http://www.web.net/~ccr/IACHRpet.PDF [hereinafter Letter to Santiago Canton].
568. Id. at 2.
569. Id. at 3.
570. Id.
571. Id.
572. Id. at 11. The petition was filed by the Canadian Council for Refugees, Vermont Refugee Assistance, Amnesty International Canada, Freedom House (Detroit, MI), Global Justice Center, Harvard Immigration and Refugee Clinic, and Harvard Law School Advocates for Human Rights. See id. at 1, 22-23.
573. American Declaration, supra note 118, at art. XXVII.
XVII, the right to a fair trial, because the policy lacked an appeal mechanism.\textsuperscript{574}

Canada modified its direct back policy on August 31, 2006, by restricting its use of the practice to exceptional circumstances.\textsuperscript{575} However, the petition filed in the case of Canada's direct back policy serves as a good model for a claim against Canada for \textit{refouling} refugee applicants under the STCA. The claims would be essentially the same as those made in the petition regarding direct backs, namely, that Canada is violating the right of refugee applicants to a refugee determination hearing.\textsuperscript{576} As a consequence of Canada failing to give refugee determination hearings, refugee applicants are ultimately \textit{refouled} by the United States in violation of the Refugee Convention. Likewise, the argument may be made that the right to a fair trial under the American Declaration has been violated because there is no opportunity to appeal a decision to a court.\textsuperscript{577}

A petition challenging the STCA would face significant hurdles. Most importantly, the right to asylum protected by the American Declaration is qualified.\textsuperscript{578} As noted above, Article XXVII states that every person has the right to asylum "in accordance with the laws of each country and with international agreements."\textsuperscript{579} The STCA, being part of Canadian domestic law, qualifies the right to seek and receive asylum in Canada.\textsuperscript{580} It would be difficult, therefore, for a

\textsuperscript{574} Letter to Santiago Canton, \textit{supra} note 567, at 19-20.
\textsuperscript{575} See the Canadian Council for Refugees, \textit{Modified!: CBSA Stops “Direct Backs,”} \textit{1 CHRONICLE, at} \url{http://www.web.ca/ccr/chronicle6.html#directbacks} (last visited Mar. 9, 2007).
\textsuperscript{576} See Letter of Santiago Canton, \textit{supra} note 568, at 1. Under the direct back policy, the argument is that the asylum seeker was detained by the United States and could not make it back to Canada for his or her refugee determination hearing. \textit{See id.} Instead, he or she was \textit{refouled} by the United States in violation of the American Convention and the Refugee Convention. \textit{See id.}
\textsuperscript{577} The Canadian procedural manual provides that a dispute regarding the applicability of the STCA will be reviewed by a separate officer not involved in the original interview of the refugee applicant. \textit{See CITIZENSHIP AND IMMIGRATION CAN., supra} note 80, at 30. However, there is no appeal to a Canadian court. \textit{See id.}
\textsuperscript{578} See American Declaration, \textit{supra} note 118.
\textsuperscript{579} \textit{Id.} at art. XXVII.
\textsuperscript{580} The Commission, in a previous case, held that if a right is established in international, but not domestic law, it would not be recognized as a right under Article XVII of the American Declaration. \textit{See} Haitian Centre for Human
petition to effectively challenge the STCA in its entirety. The Commission is unlikely to conclude that Canada has a positive legal obligation to hold a refugee determination hearing and to grant protection to all who come to its border. However, it may conclude that some aspects of the U.S. refugee processing system violate international law, and forbid return in those limited cases.

The Inter-American Commission would only consider a petition after the resolution of this matter before the Canadian courts. Domestic remedies must be exhausted before the Commission will find a petition admissible, or a petition must explain why domestic remedies did not need to be exhausted. The petition before the Commission on the direct back policy attempts to convince the Commission that domestic remedies do not need to be exhausted. However, with a suit on the STCA pending before the Federal Court of Canada, the Commission will likely wait for the Canadian courts to completely resolve all matters before deciding that a petition on the SCTA is admissible.

C. International Remedies

International fora also exist to challenge the STCA. These fora are established by the human rights treaties ratified by Canada and the United States. These bodies are not courts, but rather committees of experts elected by the parties to a particular treaty. Each human rights treaty establishes a committee to monitor compliance by means of reviewing reports from member nations on their adherence to


581. There are several instances when exhaustion of domestic remedies should not be required: (1) when due process of law is not afforded by domestic legislation; (2) when a party asserting human rights is not granted access to domestic remedies; or (3) there is an unwarranted delay by the domestic legal system in rendering final judgment. American Convention, supra note 97, 1144 U.N.T.S. at art. 46(2).

582. See Letter to Santiago Canton, supra note 567, at 12-16.


584. See supra note 97.

the treaty, and drafting comments on the content of the treaty provisions to explain the obligations contained therein. Additionally, the committees may receive individual communications from persons claiming a violation of treaty obligations if a country that is party to the treaty recognizes the committee's competence to do so. The function of the committees in receiving communications is to determine whether a violation of a treaty occurred. If a violation of a treaty provision has occurred, the committee will direct the offending country to remedy the violation.

The ICCPR established the Human Rights Committee (HRC) to monitor and assist countries in complying with their obligations. The HRC, under an optional protocol to the ICCPR, may receive communications from individuals and groups asserting violations of rights protected by the ICCPR. The HRC then brings the communication to the attention of the country accused of the violation, which must respond within six months with an answer, clarification or statement of remedies offered. The HRC then gives its observations on whether breaches were committed to the country and the author of the communication and notifies the parties of the appropriate action to take in order to remedy any violations.

Decisions by the HRC have already impacted the enforcement of the STCA. The Committee has already adopted the principle that Canada may not be complicit in a

586. See HENKIN, supra note 111, at 491-515.
587. Id.
588. Id.
589. Id.
590. The Human Rights Committee is a body of eighteen independent experts elected by the countries that are party to the ICCPR. See ICCPR, supra note 113, at art. 28. These experts do not represent individual countries, but are selected for their expertise. Id.
592. Id. at art. 4.
593. See id. at art. 5.
violation of the ICCPR by returning someone to the United States. It adopted this view when it concluded that Canada violated the ICCPR by extraditing a person to the United States who faced execution through cyanide gas, a practice which the Committee found to be cruel and inhumane treatment. Thus, in implementing the STCA, Canada’s regulations stated that a refugee applicant cannot be returned to the United States if he or she would face the death penalty in any form.

The precise violation alleged in a communication to the HRC would depend on the particular individual being returned to the United States. However, provisions of the ICCPR most likely to be cited include Article 9, which prohibits arbitrary detention, Article 26, which prohibits discrimination, Article 14, which protects equal access to courts, and perhaps Article 7, which prohibits torture. The HRC has further elucidated the scope and meaning of these articles through general comments published by the United Nations. The HRC issued a comment on the right of persons to liberty and security, making it clear that the prohibition on arbitrary detention applies to detention for immigration purposes. Thus, a refugee applicant sent back


596. Immigration and Refugee Protection Act, supra note 75, at 1621 (presenting section 159.6 of the Regulations Amending the Immigration and Refugee Protection Regulations, SOR/2002-227 (June 11, 2002)).

597. ICCPR, supra note 113, at art. 9.

598. Id. at art. 26.

599. Id. at art. 14.

600. Id. at art. 7.


602. U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural
to the United States under the STCA who faces arbitrary detention may be able to send a communication to the HRC asserting a violation of the ICCPR. As with the Commission in the American human rights protection system, the HRC cannot consider a communication alleging a violation of human rights unless all domestic remedies have been exhausted by the victim and no other international body is considering the matter. 603

Another international body to which a refugee applicant may turn is the Committee against Torture (CAT Committee), which was established by the Convention Against Torture (CAT). 604 The CAT Committee can also receive individual communications and functions in a very similar fashion to the HRC. 605 The core provisions of the CAT are Article 1, 606 which defines torture, and Article 3, 607 which contains the non-refoulement provisions. Refugee applicants facing a return to the United States under the STCA may therefore claim that they will not be able to apply for protection from non-refoulement in the United States, and that they will be returned to a country in which they will be tortured as a result.

Canada may respond to such claims, however, by citing provisions of U.S. law that provide additional protection to those who may be tortured. The United States, after ratifying the CAT, created deferral of removal, a limited ground of protection for those who are barred from asylum and withholding of removal. 608 If a barred refugee applicant


603. Optional Protocol, supra note 591, at art. 5. Thus, the HRC would also wait for the Canadian courts to decide the pending case regarding the STCA before considering a communication. See id.

604. See CAT, supra note 97, at art. 22. Article 22 provides that a state may recognize the competence of the CAT committee to receive individual communications, and Canada has done so. See UNHCHR, Status by Country, http://www.unhchr.ch/tbs/doc.nsf/statusfrset?OpenFrameSet (last visited Mar. 9, 2007) (listing the actions of United Nations countries on a number of United Nations documents).

605. CAT, supra note 97, at arts. 17-24.

606. Id. at art. 1.

607. Id. at art. 3.

608. 8 C.F.R. § 208.17 (2005).
can demonstrate that it is more likely than not that he or she will be tortured in the country to which he or she would be returned, the United States will defer that person's removal.\textsuperscript{609}

Despite this added protection against torture, there may be scenarios in which an applicant returned to the United States under the STCA could successfully submit an application to the CAT Committee. A person subjected to the STCA could face a chain \textit{refoulement}, from Canada to the United States, and from the United States to another third country that may eventually return him or her to the place where torture will occur. Deferral of removal does not give an applicant any right to remain in the United States; rather, it only prohibits the return of a person to a particular country.\textsuperscript{610} Therefore, some applicants granted deferral of removal may assert that the protection from torture provided by the United States is inadequate. Chain \textit{refoulement} remains a possibility if Canada returns a refugee applicant to the United States under the STCA. Another possible claim is that the United States places too high a burden on an applicant to receive the protection of deferral of removal. As discussed above, applicants in the United States face a higher burden of proof to receive the protection of deferral of removal than they would to establish refugee status.\textsuperscript{611} The United States uses the same burden of proof for deferral as it does for withholding, a "more than likely than not" standard.\textsuperscript{612} Thus, an applicant sent back to the United States under the STCA could assert to the CAT Committee that this burden is inconsistent with the CAT.

\section*{VIII. Conclusion}

September 11, 2001, continues to cast a long shadow over immigration on both sides of the U.S.-Canada border. However, the STCA renders Canada complicit in a system that does not satisfy its international obligations. The STCA

\begin{itemize}
  \item \textsuperscript{609} \textit{Id.} Even if an asylum seeker is barred under criminal grounds or terrorism grounds, the United States will not return that person. \textit{See id.} Thus, the United States' overly-broad exclusions, which put it at odds with international standards, would not bar protection. \textit{See id.}
  \item \textsuperscript{610} \textit{Id.}
  \item \textsuperscript{611} \textit{See supra} text accompanying note 65.
  \item \textsuperscript{612} 8 C.F.R. § 208.16(c)(2).
\end{itemize}
weakens refugee protection in North America by forcing more refugee applicants to rely upon the U.S. refugee processing system. Canada and the United States should engage in a cross-border dialogue about refugee flows into North America and how to closely calibrate their refugee processing systems.

More closely calibrating the refugee processing systems between the two countries would require several things. First, and most importantly, the United States must meet minimum legal requirements. Second, Canada and the United States need to address the reasons for the disproportionate flow of applicants. This includes addressing the disparity in recognition rates, reaching an agreement on the treatment of gender-based claims, the provision of legal representation, and basic support such as food and shelter. This dialogue and agreement should not become a race to the bottom so that both systems end up being equally unwelcoming to refugee applicants.

There are incentives for both sides to pursue this strategy. Currently, under the United States’ harsh laws, many who would have traveled to Canada to make a refugee claim remain unlawfully in the United States or enter Canada unlawfully.\(^ {613}\) Canada’s incentive to engage in a more calibrated refugee processing system is the potential reduction of the disproportionate flow northward. The United States’ incentive to do so is to bring those who remain outside the system within the legal process, at the very least, for security purposes. A calibrated system consistent with international legal obligations will result in increased safety for all.

\(^{613}\) Macklin, *supra* note 9, at 422-23.