Refugee "Responsibility Sharing" - Challenging the Status Quo: A Special Issue of the PKI Global Justice Journal

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Refugee "Responsibility Sharing" - Challenging the Status Quo

By: Sharry Aiken & Alex Neve

Facing unprecedented numbers of people fleeing violence and persecution, refugee receiving states are increasingly relying on what are euphemistically termed refugee responsibility-sharing agreements. The earliest incarnation was the *Dublin Convention*, implemented as an arrangement between 12 EU member states in 1997. Since then, these pacts have proliferated – often accompanied by other unilateral measures predicated on a concept of “safe country of arrival” or “country of first entry.” Broadly, these agreements and policy tools bar entry to asylum seekers who, prior to their arrival in the country where they are seeking asylum, have travelled through a “safe” country that could have adjudicated their asylum claim.

Governments present responsibility sharing agreements as a means of ensuring an orderly approach to asylum claims through international cooperation. However, they are often thinly veiled attempts to deter migration and consequently shirk responsibilities under the *1951 Refugee Convention*. In practice, these measures are positioned as key planks of border enforcement strategies that target transnational human smuggling, as well as illicit trafficking in drugs and weapons. Canada’s Anti-Crime Capacity Building Program, a long-running initiative of Global Affairs, is but one example of the conflation of irregular migration with organized crime. As E. Tendayi Achiume has observed in “ Empire, Borders, and Refugee Responsibility Sharing”, the normative claims for inclusion by asylum

seekers and other migrants are entirely neglected. As things currently stand, there is just one "carve out" or exception in international law to the sovereign right of states to manage their own borders and admissions policies as they wish. Signatories to the *1951 Refugee Convention* and its *1967 Protocol* ("Refugee Convention") agree not to return a refugee to a country where their life or freedom is threatened. They also agree not to impose penalties on asylum seekers for irregular border crossing. While the United Nations High Commissioner for Refugees has endorsed approaches "by which responsibilities might reasonably be rationalized and shared", the refugee agency has emphasized that asylum should not be refused solely on the grounds that it could have been sought elsewhere (see, Background Note on the Safe Country Concept and Refugee Status, paras 1, 12).

Rather than respecting the choices of asylum seekers themselves, governments are increasingly adopting externalization practices and a "country of first entry" rule, which effectively strip away all agency from asylum seekers as to where they will seek protection while offering states significant discretion to shut their doors to refugees. Reports examining these practices have detailed surging deaths in transit on land and at sea, as well as mass human rights violations, including punitive detention, *refoulement*, and disproportionate impacts on women and LGBTQI+ migrants.

Both James Hendry and Alex Neve have written insightful commentaries in this Journal on the early stages of the recent legal challenge to the *Canada-US Safe Third Country Agreement* (STCA). The aim of this special issue, is to provide readers with an update on this litigation in the wake of the recent rulings of the Canadian Supreme Court, and also to place the Canada-U.S. refugee pact in the wider context of international refugee law and developments globally.

The opening contributions of James Milner, James Hathaway and Kathleen Motluk provide important framing for this special issue. Milner emphasizes the profound protection gap inherent in the fact that international cooperation and responsibility sharing in relation to refugees are aspirational and discretionary – not legally binding obligations for states. Milner concludes that it is critical to leverage the interests of states to achieve more reliable cooperation, protection, and rights-based solutions for refugees.

The starting point for Hathaway's contribution is the important distinction, embedded in the *Refugee Convention*, between ensuring asylum seekers have choice regarding where they will initiate a refugee claim versus the prerogative of signatory states to decide amongst themselves where refugees settle once legal protection has been afforded. With this distinction in mind, Hathaway emphasizes that all the various manifestations of current refugee responsibility sharing arrangements fail to reconcile refugee rights with the legitimate concerns of over-burdened asylum states. The lack of a "fair-shares" system has yielded a critical and growing protection gap.

Kathleen Motluk's article offers a closer look at the dynamics of notable responsibility sharing arrangements currently in place between Italy-Libya, the EU and Turkey, as well as Australia's off-shore processing agreements with Papua New Guinea and Nauru, to highlight the need for coordinated opposition to what the author describes as "refugee dumping arrangements" that risk eroding access to rights and protections for vulnerable migrants.

The remaining contributions to this special issue offer rich and detailed observations of responsibility sharing regimes implemented in various regions of the world. Beginning with a spotlight on the Eastern Mediterranean, Nergis Canefe examines how the designation of Turkey as a safe third country has led to relentless cycles of dispossession, detention, suffering and death for racialized asylum seekers from the Middle East, Africa and Asia; while Minos Mouzourakis offers a legal analysis of the Greek Council of State's February 2023 judgment on the legality of Greece's designation of Turkey as a safe third country for certain categories of asylum seekers. As Mouzourakis explains, a large majority of the Greek Court found Turkey's designation problematic but referred some preliminary questions to the European Court of Justice for resolution.

Alice Massari offers a comparative analysis of Europe and Canada, drawing on the Canada-US STCA, the EU-Turkey Statement, the Memorandum of understanding between Libya and Italy as well as the 2020 Pact on Migration and Asylum (not yet fully implemented) and the European Commission's interim "four-point plan", introduced earlier this year, as examples of restrictive measures that curtail refugee rights. Framed as measures to strengthen the fight against irregular migration, the operative measures in the European context bar entry to the EU country where an asylum claim can be initiated, and accordingly, preclude the possibility of asylum itself. In the Canadian case, Massari points to the recent extension of the STCA across the entire shared land border between Canada and the US, to highlight the shrinking of legal pathways for asylum seekers coming from the US to Canada and growing conditions of vulnerability and "irregularity" for asylum seekers.

Amin Sadiqi's contribution, unique in this special issue, offers the perspectives and insights of a person with lived experience as a refugee in two different contexts. Stamped with the label of an "illegal border crosser", Sadiqi provides a compelling personal account of his journey into Canada via Roxham Road, the story behind the statistics, as well as a careful analysis of the problematic assumptions embedded in contemporary refugee responsibility sharing agreements.

Nicole Ramos examines the web of restrictive border policies at the US-Mexico border. While many of these policies were initiated by the Trump administration, President Biden has resurrected the "transit" ban which barred asylum seekers arriving at the US border from Mexico from accessing a protection hearing in the United States unless they could demonstrate that they sought asylum in their "transit" country and were refused. Just as public health related border lockdowns were finally ending in May of this year ("Title 42"), the Biden administration has imposed a one-way arrangement on Mexico. This new "Pathways rule" not only strips asylum seekers of choice as to where they pursue their protection claim, it effectively eliminates asylum for most non-Mexican asylum seekers arriving at the US border from Mexico – unless they are able to use the government's new CBP One smartphone app, to make a prior appointment to present themselves at a port of entry at a specified date and time (or can establish that they tried but were unable to make the appointment), or meet a narrow set of other exceptions.

While this special issue of the Journal was already in production, a US District Court in California blocked implementation of the Pathways rule with a searing critique: conditioning asylum eligibility on presenting at a port of entry, or having been denied protection in transit, was "contrary to law" as well as "arbitrary and capricious." The case is currently pending appeal and the lower court's ruling has been stayed. Across the Atlantic, the United Kingdom's safe third country agreement with Rwanda, successfully overturned at the Court of Appeal, is pending appeal in the UK Supreme Court.

The final group of contributions, from scholars and advocates on both sides of the Canada-US border, examine various dimensions of the STCA, the recently implemented protocol extending the agreement across the entire shared border, the growing role of digital data sharing, and the implications of the Canadian Supreme Court's June 2023 ruling, which left the deal intact pending further review by the Federal Court of the equality rights issues raised in the complex constitutional challenge.

After tracing the history of the STCA, its recent expansion, and Canada's precursor "direct back" policy, Sabi Ardalan and Alexandra Kersley shift their focus to US asylum law. In addition to the Pathways rule, the inhumane and discriminatory treatment of Haitians, expedited deportation policies, and "notoriously bad" detention conditions, Ardalan and Kersley draw on recent examples to cite ongoing concerns with the treatment of gender-based persecution by the courts. The authors definitively conclude that the US is not, in fact, a safe third country.

Claire Ellis provides an overview of the rise of safe third country agreements globally – starting with the *Dublin Convention* in the 1990s through to more recent policies adopted in Australia, South Africa, and the United States (short-lived safe third country agreements with Guatemala, Honduras and El Salvador) as well as the Canada-US STCA. Ellis explains how a combination of information sharing agreements with expanded data collection and sharing have effectively positioned safe third country agreements as "stagnant instruments of deflection rather than a receptive global response to refugee migration". In the Canadian context, Ellis points to the introduction of a new ineligibility ground in 2019, barring access to a refugee hearing for asylum seekers who had previously initiated a claim in another country with which Canada shares an information sharing agreement. As Ellis, explains, the existence of paperwork, rather than actual protection or even the existence of a safe third country agreement with safeguards against *refoulement*, triggers ineligibility.

Christina Clark-Kazak highlights recent regional and global initiatives that substitute responsibility-sharing for a rights-based approach that respects the right to seek asylum. A politics-based approach privileges "invited refugees" and managed resettlement, rather than self-selected or spontaneous arrivals. Clark-Kazak carefully exposes the contradictions in recent Canadian policy responses as well as their legal, practical, and financial consequences.

Amidst the unravelling of the post-World War II refugee protection regime, Denise Bell's contribution sounds a hopeful note. Bell points to the *Los Angeles Declaration on Migration and Protection* ("LA Declaration"), an agreement endorsed by 20 countries in the Americas last year, as a potential roadmap for more meaningful responsibility sharing at a regional level. While the LA Declaration is non-binding, and most of the pledged "deliverables" are relatively modest, Bell elaborates on the

recent initiative of “Safe Mobility Offices” established in Colombia and Guatemala to signal its transformative promise (in addition to offering some important cautions).

The next (and final) contributions in this special issue by co-authors Michael Bossin and Laïla Demirdache (“Safe Third Country Litigation: Concealing Deficiencies in the U.S. Asylum System”)and Jamie Liew and Cheryl Milne (“The Canada-U.S. Safe Third Country Agreement: A Lifeline from the Supreme Court”) provide an overview of the STCA’s litigation history, a high-level summary of the voluminous evidence and arguments presented by the applicants, as well as an analysis of the decisions by the reviewing courts. Bossin and Demirdache provide an in-depth discussion of the central concern of the litigation – namely that the U.S. is not safe for refugees and accordingly, the STCA cannot fulfill its stated aims. Their analysis focuses principally on the section 7 *Charter* challenge – the provision that protects an individual’s right to life, liberty and security of the person. Liew and Milne wrap up this special issue with an account of the equality rights challenge (section 15 of the *Charter*) and some observations on the important, but constrained, role of public interest interveners in Canadian Supreme Court proceedings.

Together, these two articles are an excellent primer on the ins and outs of the litigation and where things stand today: a ruling from Canada’s apex court that the return of asylum seekers to the U.S. pursuant to the STCA does not violate returnees’ rights to liberty or security of the person. The availability of legislative “safety valves” were “sufficient to ensure that no deprivations contrary to the principles of fundamental justice occur” (para 149). At the same time, the Court left open the possibility that the agreement may still be found unconstitutional on the basis that women are disproportionately harmed by restrictive provisions in US asylum law and by the inconsistent recognition of gender-based claims. The Supreme Court sent this part of the case back to the Federal Court as the equality rights dimension of the case had been improperly overlooked at first instance and on appeal.

Forced migration poses many challenges for receiving states, particularly for states that host the largest numbers of refugees – currently, Turkey, Iran, Colombia, Germany and Pakistan (UNHCR: Key Indicators). Large refugee influxes place strains on urban and social systems, but these challenges call for resilient, evidence-based strategies which position refugee rights and protection at their core (Abu Alrob and Shields, 2020). Responsibility sharing agreements have been at the centre of policy efforts to seal and externalize national borders, to privilege refugees arriving through managed resettlement initiatives, and bar entry, to the extent possible, for self-selected refugees. Yet, the architecture of international refugee law insists on making space for asylum – for self-selected refugees to request and receive access to a protection hearing. The *Refugee Convention* does not preclude inter-state arrangements that share-out the responsibility to protect refugees – but as James Hathaway reminds us in this special issue, the “failure to act collectively to oversee refugee responsibility-sharing has created a protection gap which rich countries have exploited in self-serving ways.”

As all the authors in this special issue suggest, these agreements do not in any meaningful and genuine way live up to their professed promise of responsibility-sharing. That language is clearly revealed to be, at best, empty rhetoric that comes up short and, at worst, a cynical disguise to policies intentionally set on avoiding responsibility and blocking access to asylum. The drafters of the *Refugee Convention* knew that refugee protection must be premised on "international cooperation". Responsibility sharing agreements have, however, taken states ever further from that aspiration and necessity. The authors of this rich collection of articles offer a clarion call for an approach to responsibility sharing that actually represents good faith international cooperation and does so by fully respecting the legally enshrined rights of refugees.

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The Principle, Practice and Politics of Responsibility-Sharing

By: James Milner

Image of front headquarters of the United Nations officeIt wasn't supposed to be this hard.

When states came together at the end of World War II to design a new global refugee regime, they agreed that refugee responses should be rights-based and lead to solutions. They also recognized that they needed to cooperate with each other and with the Office of the United Nations High Commissioner for Refugees (UNHCR) to achieve these important goals.

For the system to work, states need to cooperate.

While international cooperation and responsibility-sharing are essential, even the most cursory glance at international refugee protection today shows that states are more likely to shift responsibility than share it. This reality is painfully evident in UNHCR's latest Global Trends report:

- 76% of the world's refugees are hosted in low and middle-income countries. This means that some of the poorest countries in the world host the vast majority of the world's refugees.
- While some 2 million refugees were found to be in urgent need of resettlement to a third country, the more affluent countries of the world resettled just 114,300 refugees in 2022.
- 67% of the world's refugees were in situations of protracted displacement, meaning that they had been in exile for more than five years with no prospect of a solution.

These trends illustrate how states are not cooperating with each other to ensure protection for refugees and to find solutions. Instead most states in the global North, the most powerful and affluent states in the international system, are engaged in the policy and practice of externalization to contain

refugees in their region of origin and to prevent them from arriving on their territory.

The case of the European Union (EU) provides one of the more striking examples of this practice. In response to an increase in the number of individuals seeking protection in Europe in 2015, the EU and its Member States failed to act collectively. Instead, they reinforced national borders and entered into controversial agreements with neighboring states to contain refugees and prevent their onward movement to Europe. One such agreement was the EU-Turkey deal, which seeks to prevent the movement of refugees from Turkey to Greece, a member of the EU. It is, therefore, no accident that Turkey continues to be the largest refugee-hosting state in the world, with 3.6 million refugees.

Such agreements reflect a logic of responsibility-shifting, not responsibility-sharing. They are the opposite of what was agreed when the refugee regime was created. How can this be? And what can be done about it?

The Principle of Responsibility-Sharing

The importance of international cooperation and responsibility-sharing has been articulated in a range of documents since the creation of the global refugee regime. The Preamble of the *1951 Convention relating to the Status of Refugees* notes that "… the grant of asylum may place unduly heavy burdens on certain countries, and … a satisfactory solution … cannot therefore be achieved without international cooperation." Similar statements have been included in more than 30 Conclusions of UNHCR's Executive Committee over the past 35 years and a similar number of UN General Assembly Resolutions. Broad support for the principle was also highlighted by the Global Consultations on International Protection and the *Agenda for Protection*, adopted by states in 2002.

One of the clearest articulations of the principle was in the 2001 *Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, which stated that: "respect by States for their protection responsibilities towards refugees is strengthened by international solidarity involving all members of the international community and … the refugee protection regime is enhanced through committed international cooperation in a spirit of solidarity and effective responsibility and burden-sharing among all States."

These statements illustrate that there is broad agreement by states on the principle of responsibility-sharing**.** These statements do not, however, constitute binding obligations on states. In fact, international law does not include an explicit duty to engage in responsibility-sharing.

For many, the lack of a binding commitment to cooperate is the greatest structural deficiency in the global refugee regime. This point was made clear by António Guterres, currently the UN Secretary-General, in his last opening statement as High Commissioner for Refugees to UNHCR's Executive Committee. In October 2015, in the immediate aftermath of the EU's chaotic response to the arrival of asylum seekers that summer, Guterres remarked:

> "As we face the highest levels of forced displacement in recorded history, the institution of asylum must remain sacrosanct, honoured as one of the deepest expressions of humanity – especially now as it is being so severely tested in many parts of the world. It is my conviction that the best way to do this is through genuine international cooperation and equitable burden and responsibility sharing. In fact, if there is one Protocol that is yet to be drafted to complement the 1951 *Convention*, it is one on international solidarity and burden sharing."

From Principle to Practice

In the absence of such an agreement, contributions to support protection and solutions for refugees in other states are entirely discretionary. Yet, states can and do make such contributions in two ways.

First, states may engage in financial responsibility-sharing with countries of first asylum through bilateral assistance or multilaterally through contributions to UNHCR or non-governmental organizations (NGOs). Given that UNHCR's budget for 2023 is more than US$10 billion, and that almost all contributions to UNHCR's budget are voluntary, it may be concluded that substantial financial responsibility-sharing does, in fact, take place. But the scale of financial contributions to UNHCR hides a deeper political reality.

Chapter III (20) of UNHCR's 1950 Statute specifies that "no expenditure other than administrative expenditures relating to the functioning of the Office of the High Commissioner shall be borne on the budget of the United Nations and all other expenditures relating to the activities of the High Commissioner shall be financed by voluntary contributions." As a result, UNHCR is dependent on voluntary contributions to meet some 97% of its annual budget.

The implications of this dependence are compounded by the priorities of UNHCR's largest donors. In 2021, for example, the US government and the EU and EU Member States alone accounted for 71% of all contributions to UNHCR. While this meant that these donors contributed billions of dollars to UNHCR's work, they also specified where and how this money could be used. In this way, donors have significant material power over the work of UNHCR, often using their influence to advance their priorities of ensuring that refugees remain in their regions of origin. This is especially true in the case of the US, which has a long history of pursuing its own interests through its global leadership on refugee issues. These financial realities also inevitably – in reality or as a matter of perception – influence UNHCR's willingness to criticize those donor states for their own refugee protection records.

The second way that states can engage in responsibility-sharing is to physically share responsibility, primarily through resettlement to a third country, defined by UNHCR as "the transfer of refugees from an asylum country to another State, that has agreed to admit them and ultimately grant them permanent residence." While no country is legally obliged to resettle refugees, UNHCR promotes resettlement as a way to "translate the aspirations of greater solidarity and responsibility-sharing into tangible results in the form of protection-led solutions for refugees."

As noted above, however, annual resettlement activities fall well below the level of identified need. In June 2023, UNHCR reported that there were more than 2 million refugees in urgent need of resettlement. Given that refugees with a lack of a foreseeable alternative durable solution are also eligible for resettlement according to UNHCR's *Resettlement Handbook*, and given that 67% of refugees under UNHCR's mandate are in a protracted refugee situation with no viable solution, it could be argued that there are some 19.7 million refugees in the world today who are eligible for resettlement. With just 114,300 refugees resettled in 2022, this means that it would take more than 172 years to meet current resettlement needs at current resettlement levels.

From Practice to Politics

In light of these structural deficiencies of the refugee regime, several efforts have been made over the decades to develop more reliable approaches to responsibility-sharing. One of the most ambitious efforts was the six-year *Towards the Reformulation of International Refugee Law* project in the mid-1990s.

Despite the potential merits of such proposals, states have consistently opposed proposals for more formalized responsibility-sharing arrangements. Shortly after the publication of the proposals from the Reformulation Project, for example, the 1998 meeting of UNHCR's Executive Committee (ExCom) adopted "International Solidarity and Burden Sharing in all its Aspects" as its annual theme. The Chair's summary of the debate recognized that the theme was challenging "even though international solidarity and burden sharing are not new concepts." There was widespread support for the concept of responsibility-sharing, but not for the systemization of a mechanism or for the introduction of obligations in addition to those of the 1951 *Convention*. The Chair noted that while there was support for increased "institutional collaboration at the operational, advocacy and fundraising levels", there was "less support for global mechanisms."

The experience of enhancing responsibility-sharing arrangements in the 1990s holds two key lessons for similar efforts today.

First, states remain unwilling to assume additional binding commitments to engage in responsibility-sharing. Despite a clear commitment to the principles of international cooperation and responsibility-sharing, states continue to exercise their power and political prerogative to ensure that contributions to refugees outside their territory remain voluntary. In this way, agreement on the norm of responsibility-sharing is not sufficient to ensure the implementation of that norm.

Second, the practice of responsibility-sharing remains deeply political. Any effort to change the *status quo* must, therefore, consciously and systematically engage with the interests of those states that hold power in the global refugee regime and learn lessons from where and how these interests have been leveraged to enhance protection and solutions for refugees.

While the principle of international cooperation and responsibility-sharing have been accepted since the origins of the global refugee regime, the practice remains deeply political and reliant on the

interests of states. The results are increasing global inequality in the hosting of refugees and profound gaps in protection and solutions for refugees. All of that, of course, jeopardizes the rights of refugees.

And while this reality should provoke moral outrage from all who want to see decades-old commitments to refugees finally implemented, we need to understand that this reality is baked into the design of the regime itself. So long as there is no binding obligation to engage in international cooperation and responsibility-sharing, any contribution from states remains discretionary and subject to the interests of states.

It is, therefore, critical to engage systematically with the politics of responsibility-sharing and leverage the interests of states that can contribute to more reliable cooperation, protection and right-based solutions.

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Rights-Stripping by Agreement

By: James C. Hathaway

Image of passports and other travel documentsRefugees have the right to decide where they will seek asylum. But they do not have the right to decide where they will ultimately be protected.

States frequently reject the first part of this equation, while refugees and their advocates often contest the second. Yet this delicate balance – ensuring that refugees are able to reach safety in whatever way is open to them, even as states are not subjected to unlimited responsibilities – is key to the workability of the *United Nations Refugee Convention*.

To explain: the drafters of the *Refugee Convention* knew that accessing an asylum state would often be messy and sometimes dangerous. Determined to minimize the hardships for refugees, the *Refugee Convention* requires that as soon as a refugee reaches the jurisdiction of a state party – any state party – she or he must be allowed in without fuss or difficulty, with an absolute bar on imposing any penalty for "illegal" border crossing to reach safety.

But this right of refugees to decide where to seek protection is balanced by the right of state parties to share-out the responsibility to protect refugees among themselves once refugees have made it to safety. After all, it's easy to see that giving refugees absolute agency over not only where they will seek protection but also *where they will settle* until and unless able safely to go home could impose a real hardship on at least some countries. With half of refugees today living in just 10 asylum states – almost all of them poor – there is clearly the potential for interstate unfairness if states are barred from making arrangements for at least some of the refugees coming to their borders to be protected somewhere else.

The possibility of interstate arrangements under which refugees are assigned to receive protection in other than their state of arrival is accommodated by the *Refugee Convention*. Because refugees are owed rights of protection, not a right to immigrate to any particular state, they may lawfully be required to move on from their first asylum state to another state party. But there are critical constraints built into the treaty to ensure that this is done in a rights-regarding way: (1) onward movement must be ordered before a refugee is formally admitted into a status assessment process so as to guard against needless uprooting; (2) the destination country must verifiably respect all refugee rights which the *Convention* stipulates be delivered at or before the point of lawful presence; and (3) the receiving country must over time also honor all of the more sophisticated rights of refugees as and when due.[1]

The bottom line is that sharing of protection responsibilities must be just that. Sharing is only allowed with a country that has both bound itself to respect refugee rights, and which in practice does what the *Convention* requires of it. Refugee responsibility-sharing may never be the basis for rights-stripping.

The balanced nature of the *Refugee Convention's* regime – refugees get to decide where to access the protection system without hindrance, even as state parties may share-out protection responsibilities among themselves – is of course not perfect for anyone. States must keep their doors open to refugees in other than the most dire circumstances. And refugees must live with the fact that their choice about where to seek asylum is only provisional, not amounting to a right to immigrate to that country. But even if imperfect, the principle arguably reflects a fair compromise in the interest of keeping asylum alive.

In my view, the problems arise not from the principle, but rather from the way that this compromise has been implemented in practice. In short, what should have been a managed and supervised system for the allocation of responsibilities has become a free-for-all in which refugee rights are not at the core as the *Refugee Convention* requires.

The drafters of the *Refugee Convention* intended that the two main pillars of that treaty – a non-negotiable definition of who is entitled to refugee status and a binding catalogue of rights that must be respected – would be complemented by a third pillar: a global system fairly to share the burdens and responsibilities of protection. Yet more than 70 years after the commitment to constructing that third pillar was made, it has still not seen the light of day: neither states nor the UN's refugee agency (UNHCR) have risen to the challenge of designing a transnational mechanism to implement and oversee a fair-shares system that ensures that any sharing of responsibility really responds to unfair allocations of protective duties and is strictly conditioned on rigorous and verifiable respect for refugee rights.

This failure to act collectively to oversee refugee responsibility-sharing has created a protection gap which rich countries have exploited in self-serving ways.

Under a first generation of arrangements, wealthy states took advantage of their prerogative to distribute refugees among themselves in order to further migration management goals. Knowing that they are subject to no international checks and balances, European Union states have for nearly 40 years required refugees to accept protection in their "first country of arrival" – a mechanistic notion that includes no serious scrutiny of the quality of rights in the destination state. While courts have over the years injected modest limits on this authority to treat refugees simply as unwelcome burdens, the constraints are minimal indeed – the main focus of concern being only whether the destination state will guard against sending the refugees back to persecution and refrain from exposing them to torture or inhuman or degrading treatment. The authentic requirements for responsibility-sharing under the *Refugee Convention* – verifiable respect for affirmative rights, including powerful socioeconomic rights – are largely ignored in practice because nobody is supervising the deals.

Much the same migration management goals inform the agreement between Canada and the United States. Emulating the European model, the Canada-US deal simply assumes that both countries in practice respect all refugee rights (an assumption that is in fact empirically false, as the Canadian Federal Court has so cogently determined on two occasions and appeal courts, now including the Supreme Court of Canada, have failed meaningfully to take seriously) and forces most refugees to seek asylum in the country where they first arrived. The legislation implementing the deal in Canada is moreover insufficiently constrained to meet the true requirements of international law. First, rights scrutiny is artificially narrowed to the question of whether the US might send refugees back to persecution or torture. And second, even that highly selective duty of scrutiny was eviscerated by the Federal Court of Appeal's shocking determination, essentially upheld by the Supreme Court, that there is no need really to verify whether these limited risks exist; it is rather enough for the federal Cabinet to have gone through the motions of considering those questions, even if their assessment of conditions in the US flies in the face of facts on the ground.

Sadder still, this first generation of accords, including the European Union and Canada-US allocation arrangements, is not the worst manifestations of the failure of the international community to operationalize a fair system for genuine refugee responsibility-sharing among states. A second

generation of allocation arrangements goes beyond the control fixation of earlier deals, exploiting the operational flexibility of the *Convention* actually to justify buy-outs of protection duties. For example, Australia has for many years trafficked refugees arriving at its territory to the tiny island nation of Nauru, Europe paid Turkey to hold all Syrian refugees headed its direction, and the United Kingdom is presently scheming summarily to deport all refugees arriving on small boats to Rwanda. In not one of these cases are the responsibility-sharing goals of the *Refugee Convention* being served. To the contrary, these agreements are designed to further the narrowly conceived self-interest of comparatively wealthy and under-burdened states of the developed world – countries that collectively offer protection to less than 20% of the world's refugee population.

The goal of these second generation deals, effectively turning poorer countries into long-term holding places for refugees, of course goes substantially beyond the migration management objectives of the first generation EU and Canada-US systems. But what all of these arrangements have in common is that none of them advances refugee protection. Whether by treating the denial of refugee rights as tolerable collateral damage in pursuit of enhanced domestic asylum management (the first generation) or as an acceptable cost to buy-out protection responsibilities (the second generation), the bottom line is much the same: the operational flexibility that the drafters of the *Convention* saw as a means of reconciling refugee rights and the legitimate concerns of over-burdened asylum states is instead being used to limit, and sometimes even to eliminate, access to protection.

[1] See generally Hathaway, James C. *The Rights of Refugees under International Law*, 2d ed (Cambridge: Cambridge University Press, 2021) at Ch. 4.1.2.6.

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Refugee Responsibility-Sharing Deals Are Eroding Access to Asylum

By: Kate Motluk

Image of small boat filled with immigrants **Introduction**

As the number of displaced people increases worldwide, so too have the variety and intensity of mechanisms aimed at preventing them from reaching wealthy, developed countries. In 2021, the UNHCR found that the number of people forcibly displaced has exceeded 100 million, underscoring the vast and complex asylum needs across the globe. Yet amidst this need, wealthy states rely on immigration externalization as a framework for preventing “undesirable” migrants from arriving or remaining. Central to many efforts to externalize obligations to migrants are refugee “responsibility-sharing” agreements. These arrangements between states facilitate efforts to control migration. Given the scale of need, and the ways in which geography affects the location of migrants, responsibility-sharing efforts are a necessary element of the global refugee regime. So long as state sovereignty, and along with it border controls, retain legitimacy and inform how human mobility is regulated, some kind of international cooperation across states is required. Increasingly, however, responsibility-sharing agreements prioritize interdiction, detainment, and “refugee deals” over meaningful responsibility-sharing arrangements that translate into durable refugee resettlement.

Refugee “deals” entail agreements between states that prioritize preventing vulnerable migrants from arriving to wealthy, developed countries. These include deals that police surrounding waters, like those unfolding across the Mediterranean, and deals that offer incentives for other states to take on the obligations to refugees that are enshrined in the *1951 Refugee Convention*. These refugee deals offer an example of what Linos & Chacko call a regressive model of refugee responsibility-sharing, and suggest that these types of arrangements are better understood as responsibility-*dumping*. Exploring several recent refugee deals demonstrates the harm and violence that these refugee responsibility-dumping arrangements cause, and highlights why efforts to expand these types of arrangements are deeply concerning.

The Italy-Libya Deal

The refugee deal between Italy and Libya is one of a suite of policies and practices by the European Union (“EU”) to stem the arrival of vulnerable migrants. This particular arrangement emphasizes intercepting migrants journeying from Libya to the EU via the Mediterranean. Italy is particularly concerned about this migration route because of the Italian island of Lampedusa, which is geographically closer to Africa than mainland Europe.

In 2017, Italy and Libya signed a memorandum of understanding in response to "continuous and high flows of clandestine migrants”. As neither party sought to end the agreement, it was tacitly renewed for another three years in February 2020, and re-upped for yet another three years in February 2023. The

memorandum was signed by the Government of National Accord, one of two governments vying for power amidst significant political turmoil in Libya. Under this arrangement, Italy provides training, equipment, and support to the Libyan maritime authorities to stop boats from reaching Europe, and to authorities within Libya to detain migrants. By 2020, the training of personnel, provision of equipment, and support to Libya was valued at $66 million. The Libyan coast guard has routinely interdicted thousands of migrants each year since the arrangement was implemented. In 2022, more than 24,684 people were intercepted at sea and returned to Libya.

Upon return to Libya, many migrants have been placed in arbitrary immigration detention. In addition to the deprivation of liberty, the detention centres in Libya are "nightmarish"; they are overcrowded, unsanitary, and supply inadequate food, water, and healthcare. There have been substantive reports of violations of international law within the detention centres, including instances of torture, sexual violence, forced labour, and murder. In addition to the violations occurring within detention centres, there are reports of extensive raids within Libya to locate migrants, and detain those who are found. Thousands of people were detained in the fall of 2021 and sent to detention centres already well over capacity. Médecins Sans Frontières observed detention centres so full, those detained there were forced to stand. The International Organization for Migration reported that guards opened fire on migrants in a crowded centre in Tripoli, killing six people. The dangers of detention in Libya, particularly due to overcrowding, are exacerbated as it unfolds in the midst of the ongoing global COVID-19 pandemic.

Libya is not a signatory to the 1951 *Convention*, and has no asylum system of their own. In 2021, more than 10,000 migrants in Libya requested to be returned to their country of origin. This alone is demonstrative of how bleak the situation within Libya is for migrants. It is necessary to recognize migrants do have agency when selecting to be voluntarily repatriated, but it also must be recognized that for many the "choice" is between the mouth of a lion or of a tiger – return to their country of origin from which they fled, or remain in Libya with no prospect of safety or a durable solution. The dire situation for migrants in Libya cannot be entirely attributed to the bilateral agreement with Italy and policies pursued by the EU, but the memorandum has created the impetus for much of this violence. It is recognized that both Italy and Libya are complicit in violating the principle of *non-refoulement*. Despite international outcry over the treatment of migrants within Libya, the agreement remains in place, alongside other migration arrangements in pursuit of rendering the EU's border impermeable to irregular migrants.

The EU-Turkey Deal

In 2016, the EU and Turkey struck an agreement to prevent migrants from entering the EU via Greece. This deal intercepts migrants bound for Greek islands and returns them to Turkey, while Turkey is simultaneously engaged in efforts to curb the establishment of any new migratory routes. The EU, in turn, committed to resettle up to 72,000 of the nearly 3 million Syrian refugees in Turkey and provide aid for Syrian refugees that remain in Turkey to the tune of 6 billion euros. Turkey was also promised reduced visa restrictions for Turkish citizens, and the re-animation of discussions about

the possibility of Turkey joining the EU. This deal, particularly as a result of the "one-to-one" exchange of migrants (one Syrian from Turkey resettled to the EU per one migrant prevented from crossing into Greece), quickly became one of the most controversial and high-profile bilateral immigration agreements.

Following the EU-Turkey deal, Greece suspended the processing of asylum-seekers who arrived irregularly. Thousands of refugees and asylum-seekers remain stranded in Greece, living in horrific, unsafe conditions. A refugee camp on the Greek island of Lesbos built for 2,000 people had more than 18,000 people living there by 2019. The conditions in Greece, and the efforts by Turkey and the EU to prevent migrants from reaching Europe, have substantially eroded the right to seek asylum. In 2017, on the one-year anniversary of the EU-Turkey deal, Amnesty International's Europe Director, John Dalhuisen, said:

> "Today marks a dark day in the history of refugee protection – one in which Europe's leaders attempted to buy themselves out of their international obligations, heedless of the cost in human misery. A year ago, the Greek islands were transformed into de facto holding pens, as Europe's shores went from being sites of sanctuary into places of peril. One year on, thousands remain stranded in a dangerous, desperate and seemingly endless limbo."

Within Turkey, the deal has similarly contributed to hardship for migrants. While aid for refugees was built into the deal, Turkey has criticized the EU for releasing funds too slowly, and providing too little support directly to refugees. Similarly, the commitment to resettle one Syrian refugee from within Turkey for each Syrian refugee that Turkey prevented from reaching Europe has not been fully realized. By March of 2023, just over 32,400 Syrians have been resettled from Turkey to the EU. This opportunity for resettlement undoubtedly will have profound impacts on those who have received it, but it falls short of the 72,000 the EU committed to resettling in the deal, and woefully short of assisting the over 3.6 million Syrian refugees in Turkey in need of a durable solution. Turkey has made it clear they do not feel the EU has provided the refugee supports that were promised in the deal. As a result, in 2020, after an influx of refugees from Syria's Idlib province, Turkey declared they were "opening the doors" to Europe. Thousands of migrants sought to cross into Greece and were met by riot police armed with teargas and water cannons. Tensions between the EU and Turkey related to this migration agreement remain high, especially between Greece and Turkey.

The response to the EU-Turkey deal garnered significant international criticism and push-back from refugee protection actors. The UNHCR suspended many of their activities on Greek islands, and Médecins Sans Frontières rejected funding from EU member states in a principled stand against the deal. Despite these displays of condemnation, leading protection actors continue to work with these states. Although suspending some activities, the UNHCR still operates in both Greece and Turkey. This is in large part because the UNHCR, and the rest of the global refugee regime, are reliant on state contributions and must manage political relationships with state actors. As a result, the same actors who are violating core norms of the regime are nonetheless able to participate within the

regime. Much like the arrangement with Libya, this deal has undeniably contributed to migrant suffering. Refuge responsibility-sharing agreements have effectively transformed the Mediterranean into a moat, and the EU seeks to have every drawbridge raised.

Australia's "Pacific Solution"

Australia, much like the EU, is also known for its highly controlled border and harsh response to irregular migration. Australia's policies of externalization and border enforcement are often traced back to the 2001 Tampa Affair and the ensuing Pacific Solution and Operation Sovereign Borders. The *MV Tampa* was a Norwegian freighter ship whose crew responded to a distress signal and rescued 433 asylum-seekers as their boat sank in international waters. International law dictates that those rescued at sea be brought to the nearest port, which in this case was the sovereign Australian territory of Christmas Island. The Australian government refused access, however, in violation of international law, and sent 45 Special Air Service troops onboard to seize control of the vessel. The Tampa Affair unfolded over eight days, during which many of the asylum-seekers on board grew increasingly ill. Australia hurriedly cobbled together new policies and agreements while holding back the *MV Tampa*, including a resettlement agreement with New Zealand and a detention agreement with Nauru, the latter representing the birth of Australia's infamous offshore detention program.

While 150 of the refugees onboard were resettled in New Zealand, the majority of the *MV Tampa*'s passengers became the first of hundreds to be detained by Australia on Nauru, a small island nation in the Central Pacific. Some, demoralized by the arbitrary and indefinite detention, returned to Afghanistan. At least 20 were killed upon their return. An anti-Taliban fighter, Mohammad Hussain Mirzaee, was thrown down a well by insurgents, followed by a hand grenade. This graphic story emphasizes the violent risks these refugee deal policies produce. The brutality experienced by those who returned to Afghanistan is precisely the reason the principle of *non-refoulement* guides the global refugee regime, yet states continue to find increasingly severe methods of driving refugees to "voluntarily" repatriate themselves. States can maintain they did not violate *non-refoulement*, yet it is perfectly clear that many of these returns were not truly voluntary at all.

The Tampa Affair was the catalyst for several critical changes to Australian immigration policy. Notably, the excision of Christmas Island and other Australian territories from the Australian migration zone, and the bilateral offshore processing agreements with Manus Island (Papua New Guinea, hereafter "PNG") and Nauru. The excision of territory made it such that even if migrants were able to land on Christmas Island, a major transit point for migrants due to its proximity to Indonesia, they could not apply for asylum. By 2013, Australia removed all of its mainland from the migration zone, meaning anyone who arrived in Australia without a valid visa was subject to detention and unable to claim asylum. This kind of legal loophole allows Australia to claim that migrants can still claim asylum in the migration zone, it just so happens the migration zone conveniently does not encompass multiple Australian islands nor the Australian mainland.

The memorandums of understanding signed with PNG and Nauru not only began Australia's use of offshore detention, but also enlivened Australia's campaign of interdiction by providing somewhere for

intercepted migrants to be held. The Australian Border Force polices the ocean surrounding Australia, preventing migrant boats from landing on Australian territory. Intercepted boats may be turned back, or those on board are subjected to immigration detention, often offshore. The average length of migrant detention by Australia is over 732 days, a staggering figure that is markedly higher than any comparable jurisdiction. Australia's offshore detention centres have infamous reputations. Organizations attempting to monitor conditions at these detention sites, including Médecins Sans Frontières and Amnesty International, have sometimes been denied access, only heightening concerns about this mistreatment of migrants held there.

The information that has been made public is harrowing. Leaked incident reports from the detention centre on Nauru detail squalid living conditions, violence against detainees by guards, and incidents of children self-harming. Migrants detained there have engaged in protest, including hunger strikes and sewing their own lips shut. Despite concerted efforts to hide the reality of these carceral spaces, the stories that have escaped demonstrate an environment of brutality, horror, and despair.

While Manus, Christmas Island, and now Nauru, have closed their detention facilities, Australia has re-opened the facilities on Manus and Christmas Island at various points. The last refugee detained on Nauru was evacuated in June 2023, but Australia will continue to pay $350m to Nauru as a 'contingency' to ensure Australia's capacity to detain on Nauru remains an option. Given the cycles of closures and re-openings across these detention centres, and Australia's continued financial commitment to Nauru, it seems clear that Australia has not completely closed the door to offshore detention.

Conclusion

Across all these examples, a critical power imbalance is clear. In the cases of Italy and Libya, Australia, PNG, and Nauru, these agreements are forged between former colonizers and former colonies. Longstanding political relationships and economic dependence undoubtedly contributed to the willingness of Libya, PNG, and Nauru to enter into these agreements. The EU exercises power over Turkey, holding the possibility of membership to the union as a tantalizing carrot. While Turkey has made critical errors in their treatment of migrants, they are the host country with the largest refugee population in the world and are in need of assistance to provide aid or third-country resettlement opportunities to the still-growing Syrian refugee population. These power imbalances do not absolve these countries of their involvement and the mistreatment of migrants, but they expose why such deals are struck in the first place. Refugee responsibility-dumping countries can play judge, while engaging other countries to act as jailer.

These kinds of arrangements continue to proliferate and are increasingly normalized as a tool of mobility management. It is thus all the more urgent to pay attention to these arrangements and the harms they produce. New arrangements are being created, expanded, and upheld right now. Canada's Supreme Court recently held that the Safe Third Country Agreement between Canada and the United States does not infringe refugee claimants' rights to liberty and security of the person. While the British court of appeals recently found the proposed plan to send asylum seekers to Rwanda

is unlawful, noting Rwanda does not constitute a safe third country, Prime Minister Rishi Sunak has already noted his intent to appeal the decision at the supreme court. Several other EU states are also keen to set up their own version of the Rwanda deal. Refugee responsibility-sharing arrangements, particularly those better understood as responsibility-dumping arrangements, will only grow and intensify without sustained opposition, eroding access to rights and protections for vulnerable migrants.

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Return to Sender? Cycles of Dispossession in the Eastern Mediterranean

By: Nergis Canefe

Original Artwork by Nergis Canefe
This essay highlights the dangerous normalization of “burden-sharing arrangements” at the expense of individuals seeking international protection in one of the most heavily affected regions by steady refugee flows: the Eastern Mediterranean. Even the hotspot systems developed by Greece and Italy, databases set up by human rights groups, or International Organization for Migration (IOM) estimates for yearly deaths, fail to constitute enough of an alarm. The Mediterranean, otherwise known as “Our Sea”, *Mare Nostrum*, gradually became a regular scene for the military-humanitarian operations conducted by different European states for the sole purpose of curtailment of the arrival of asylum-

seekers.

The scenario of the invasion of Europe by unwanted migrants became the justification for the failure to rescue drowning people and saving lives. Under the auspices of the Frontex Agreement, the unfolding refugee crisis since 2011 has been engulfed by organized state criminality across the outer borders of the European Union, particularly at sea. The essay posits that Safe Third Country Agreements constitute an important aspect of this new institutional and legal arrangement indirectly targeting human lives in the Eastern Mediterranean.

Border deaths are now part of the topography of the Eastern Mediterranean, to the point that the sea itself came to be renamed as a "maritime cemetery" since the early 2000s. Even the semi-forensic determination of the numbers of the dead and disappeared people gradually became a regular part of the policy debates in the European Union, and for all the wrong reasons. In addition to border deaths being directly related to migration governance practices, migrant deaths at sea have an additional component of the disappearance of the deceased, and thus amount to the removal of an important aspect of accountability. The dimensions of this problem are immense, considering the fact that since 2014, registered migrant deaths in the Mediterranean passed 27,633 people. These deaths should be considered part of the current international refugee regime marked by a widening gap between the principles and provisions of the *1951 Refugee Convention* and the *1967 Protocol*, and state-based and yet often regionalized practices that externalize asylum. The purpose of this essay is to examine the extent to which the Safe Third Country designation of Turkey has led to cycles of dispossession, detention, suffering and death of asylum seekers in the Eastern Mediterranean from designated and racialized national groups from the Middle East, Africa and Asia.

The safe third country concept constitutes recognized grounds for inadmissibility of asylum seekers. In the specific context of the EU asylum acquis, the notion of a "safe country of origin" and its derivative "safe third country" are both built on the presumption that select countries can be designated under specific circumstances as generally safe for their nationals, individuals seeking international protection, or stateless persons who were or became habitual residents in that country, or, in the latter case, who arrived or were in transit in a third country *en route* to making an asylum application elsewhere. In its applications to Turkey, this concept led to ever growing cycles of dispossession as it is used to restrict access for asylum seekers to substantive asylum procedures within the territory of the European Union. This is despite the otherwise robust and well-endowed asylum regime which is effective in several European countries. As a bare minimum, the pillars upon which this particular practice are to be sustained are the following. The countries which are a party to the agreement respect the principle of *non-refoulement*, in accordance with the *Refugee Convention* and *1967 Protocol*; the applicant is in no risk of suffering serious harm if returned; and the country named as "safe third country" prohibits the removal of an applicant to a country where he or she risks to be subject to torture or cruel, inhuman or degrading treatment or punishment, as defined in international law.

In 2015, member states of the EU sought out a mutually acceptable way to stop the "uncontrolled flow of refugees and migrants" from Turkey as the largest refugee hosting state worldwide bordering the EU. The EU designated Turkey as a safe third country *vis-à-vis* a specific national list for asylum seekers originating from Syria, Afghanistan, Pakistan, Bangladesh and Somalia, without providing any legal reasoning other than the basic arguments listed above. This practice is based on bilateral and multilateral inter-governmental agreements with the European Union and its individual member states, and the designated safe third country. The main point of maritime entry between Turkey and the EU is the Aegean Sea and Greek sea borders extending to the Eastern Mediterranean. Thus, the most direct exercises of this arrangement have been taking place in Greece.

The resultant EU-Turkey statement dictates the inadmissibility of these applications for international protection on the basis of recognition of Turkey as a Safe Third Country. However, as neither the EU institutions nor Greek determining authorities purposefully evaluated Turkey by the strict application of the Safe Third Country criteria, they continue to utilize pre-defined templates to serve inadmissibility decisions. There is an urgent need to suspend the EU-Turkey statement's implementation and resultant violations of obligations imposed on Greece and the EU in general by international agreements, customary international law and EU law. On this matter and its increasingly aberrant aspects to international refugee and human rights law, the following article in this special issue, " Litigating STC in Europe: The Greek Case before the EU Court of Justice" discussing in detail Greek Council of State rulings by Minos Mouzourakis provides an exemplary analysis.

However, as of July 2023, applications lodged by aforementioned nationalities can be and still almost always are rejected as "inadmissible" without their applications being examined on their merits. Asylum applications must be assessed in each individual case, except where a third country has been declared as generally safe through which the asylum seeker arrives. Therefore, the very attribution of "safe third country arrivals" derogates the receiving state's duty to carry out an individualised assessment of the safety criteria. The detrimental results of these practices were once more brought to light with the Messenia migrant boat disaster on June 14th, 2023. This time, most likely in order to avoid the Safe Third Country stipulation related to Turkey, an estimated 400-750 asylum seekers boarded a fishing boat from Tobruk, Libya, heading initially to Italy, but then to mainland Greece via the international waters of the Ionian Sea. Only 104 survivors have been reported, and of the many hundreds of dead bodies, only 82 have been identified as being on board of the capsized unseaworthy vessel. As the North Africa to Italy sea route is heavily patrolled by Italian border guards and there have been regular efforts to push back human smugglers in or near Italian waters, the Eastern Mediterranean route around Greece remains the number one choice.

As the main route of entry from Turkey to the EU, since 20 March 2016 and subject to the EU- Turkey Agreement *vis-à-vis* Syrians, those who have entered Greece via the Greek Aegean islands and arriving from Turkey are subjected to a geographical restriction being imposed to them. As of June 2021, all applications for international protection submitted by nationals of Syria, Afghanistan, Somalia, Pakistan and Bangladesh throughout the Greek islands and territory are examined under the safe third country concept. They are presumed to be safe in Turkey, and thus their applications are

deemed inadmissible.

Meanwhile, Turkey currently maintains the suspension of returns from the Greek islands that it put in place in March 2020 in the context of an international Covid-19 response. The return of irregular migrants particularly, from the Greek islands under the EU-Turkey Statement, continues to be suspended. Responding to repeated requests from the Greek authorities and the European Commission regarding the resumption of return operations, Turkish state authorities stated that no return operation would take place unless the alleged pushbacks along the Turkish-Greek border stop and Greece revokes its decision to consider Turkey a "Safe Third Country". Despite the absence of any prospect of removal of refugees from the Eastern Aegean islands to Turkey, and while Greek Administrative Courts on judicial review of detention affirm the manifest lack of prospects of readmission to Turkey, there has been no movement for proceeding with action to execute the readmission. This phenomenon led to a large increase in the detention of the nationals of these aforementioned countries. Neither have been requests made for the readmission of the third-country nationals to Turkey or relevant return applications have been made by competent Greek authorities. This causes applicants for international protection to remain in an extended a legal limbo. While they are not granted access to an examination of their applications on the merits of it, and while this is contrary to the purpose of the general intent of international refugee law, they are also excluded from basic reception provisions, resulting in no access to dignified living standards or meeting of their basic subsistence needs, including health care and food. This is despite the fact that Article 38(4) of the *EU Asylum Procedures Directive* provides that "where the third country does not permit the applicant to enter its territory, Member States shall ensure that access to [an asylum] procedure is given." According to the provision, applicants whose application has been declared inadmissible based on the safe third country provision should be able to apply again if the conditions of the provision cannot be met.

According to the findings of the Asylum Information Database (AIDA) and European Council on Refugees and Exiles (ECRE), which contain information on asylum procedures, reception conditions, detention and aberrations of international protection across 23 countries including 19 EU Member States and 4 non-EU countries (Switzerland, Serbia, Turkey, United Kingdom), the results of the safe third country agreement with Turkey are becoming increasingly disastrous. In 2022 alone, the Greek Asylum Services issued 8,611 first instance decisions regarding applications lodged by Syrian, Afghans, Somalis, Bangladeshis and Pakistanis applicants, including third country nationals of Palestinian Origin with previous habitual residence in Syria. All these applications were examined under the safe third country concept. Based on the official figures provided by the Ministry of Migration and Asylum to the Hellenic Parliament, the Asylum Service outright dismissed 3,409 claims as inadmissible based on the safe third country concept. A further round of dismissals took place in the second instance admissibility applications: 2.709 decisions were issued by the Appeals Committee, and 2.696 applications of Syrians, Afghans, Somalis, Pakistanis and Bangladeshis nationals, were again deemed inadmissible. These rejections were justified based on the provisions of Turkish legal regime in force, including the Turkish Law on Foreigners and International Protection (LFIP**)**, published on 4 April 2013, the Turkish Temporary Protection Regulation (TPR), published on 2014 and the

Regulation on Work Permit for Applicants for and Beneficiaries of International Protection, published on 26 April 2016.

Unfortunately, the readmission agreement between the European Union and Turkey, which should be considered as both a legal and a political arrangement to curtail increasing migration movements to Europe, is now used as a template for regional cooperation in the management of refugee flows. Since it took effect, the EU-Turkey refugee statement has been presented as a necessary framework to avert both a humanitarian crisis in Greece and the collapse of the Schengen system. Due to the unwillingness of EU member states to share responsibility, new EU migration agreements with third countries to declare them as Safe Third Country in the East, including Russia, and across the Eastern Mediterranean has now emerged as the new norm in migration governance. Furthermore, there are replicas of the cash-flows and direct payments made to the designated “safe third countries” surrounding the sea borders of the EU modelled on the Turkish case. The European Union already disbursed the 3 billion Euros in Turkey for refugee containment purposes. In addition, the European Commission created an “” of €348 million starting from October 2016 with the stated aim of the basic needs of the most vulnerable refugees being met via monthly cash transfers in situ in the designated safe third countries. Similar arrangements have been made with Libya and Jordan with the sole aim of eliminating the use of Eastern Mediterranean Sea routes as passage to the EU to make asylum claims. Though not directly taking the form of Safe Third Country agreements, the transfer of financial resources and migration governance have become the key tools for ensuring that Fortress Europe is protected at all cost in this unending war against the arrival of asylum seekers from the southern and eastern shores of what was once *Mare Nostrum*.

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her academic publications.

Litigating STC in Europe: The Greek Case before the EU Court of Justice

By: Minos Mouzourakis

Image of European Court of JusticeIn 2005, as the European Union (“EU”) adopted its first-ever refugee status determination (“RSD”) standards under the *Asylum Procedures Directive*. Cathryn Costello noted that "[t]he practice of returning asylum-seekers to STCs is a European invention.”[1] This came both as a reminder and a warning of the prominence of the safe third country (“STC”) concept in the determination of European countries to deflect their refugee protection responsibilities.

STCs gained renewed infamy in Europe in 2016 after the controversial informal arrangement between the EU and Turkey, commonly known as the “EU-Turkey Statement”, aimed primarily at stopping refugees from leaving Turkey *en route* to Greece in search of safety and at returning those who had. The concept has become a centrepiece of the Greek asylum system over the past seven years, with over 15,000 asylum claims dismissed by the country’s Asylum Service as inadmissible on STC grounds without any assessment on the merits. Its application was initially restricted to Syrian refugees on the Eastern Aegean islands, explicitly cited in the EU-Turkey Statement. As of 2021, however, Greece applies the concept countrywide based on a “national list of safe third countries” designating Turkey as a STC for asylum seekers originating from Syria, Afghanistan, Somalia, Pakistan and Bangladesh, even though Turkey has suspended all returns from Greece since 2020 and maintains its position at the time of writing. Albania and North Macedonia have also been designated as STCs.

Since the EU-Turkey Statement, STC has also served as a blueprint for the EU’s attempt at a third iteration of refugee protection standards through a reform of its Common European Asylum System, initiated in 2016 and still pending. The EU legislators – the Council composed of 27 national governments and the European Parliament of elected representatives – have been presented with over ten related bills by the European Commission. These include a new *Asylum Procedures Regulation* which would introduce watered-down STC criteria to facilitate Member States in denying their responsibility to hear protection claims on substance by sending asylum seekers to third countries for processing.

A recent Council agreement thereon has sought to lower those standards even further, in what appears to be one of the few areas of convergence between the EU's 27 governments. EU heads of state have also doubled down on plans to expand the use of STCs throughout the continent by requesting the EU Asylum Agency, the bloc's operational support agency, "to provide guidance to increase the use of the concepts of safe third countries" in early 2023.

Against that backdrop, the Greek Council of State (*????????? ??? ???????????*), the highest court of the land, delivered last February a timely and anticipated judgment on STCs (Council of State, 177/2023, 3 February 2023), nearly six years after a seminal 2017 ruling on STC handed down in the aftermath of the EU-Turkey Statement (Council of State, 2347/2017, 22 September 2017). The 'Greek case' was brought by way of judicial review proceedings against the national STC list by civil society organisations Refugee Support Aegean and the Greek Council for Refugees.

This article offers a glance at the Greek Council of State ruling as an updated position on STC standards in the current European context. It looks at the Court's reiteration of its interpretation of safety criteria, its position on the required methodology for applying STCs in its asylum process, and its request for clarification from the Court of Justice of the European Union ("CJEU") on whether a country's refusal to readmit asylum seekers should preclude its designation as a STC, in the first ever Greek preliminary reference to the EU Court on matters of asylum (CJEU, C-134/23 *Elliniko Symvoulio gia tous Prosfyges*).

Safety Considerations

Required Level of Protection in a STC

Article 38 of the EU's recast *Asylum Procedures Directive* defines a STC as a non-EU country where a refugee is not at risk of persecution, serious harm or onward *refoulement*, and may request refugee status and "receive protection in accordance with the [1951] *Geneva Convention*". The Greek Council of State (177/2023, para 36) reaffirmed its earlier position that a STC can offer "protection in accordance with the *Refugee Convention*" without in fact ratifying and implementing the *Convention*, so long as it observes the principle of *non-refoulement* and guarantees certain rights such as access to health care and employment. This was based on a literal juxtaposition of the provision against Article 39, a dormant provision allowing for the designation of "European STC" subject to full ratification of the *Geneva Convention*.

In view of Turkey's geographical restriction of the *Convention vis-à-vis* non-European refugees, this reading had allowed the Court to declare the country's domestic "temporary protection status" for Syrian refugees as being "in accordance with the *Geneva Convention*" in 2017; a request for a preliminary reference to the EU Court on the interpretation of the level of protection criterion had been dismissed by a slim majority. The 2023 judgment followed suit, relying on the "conditional refugee status" offered to non-Syrian refugees in Turkey.

As put by UNHCR, "[t]o ensure access to protection is effective and enduring, being a state party to the 1951 *Convention* and/or its 1967 Protocol and basic human rights instruments without any limitations is a critical indicator." Yet, the Council of State reads EU asylum standards, expressly premised on the 1951 *Refugee Convention* (Article 78(1) of the *Treaty on the Functioning of the European Union*, as permitting transfers of responsibility for refugee protection to non-signatory states. This reasoning is an unfortunate acquiescence of double standards in refugee protection that undermines the value of the *Refugee Convention* as the bedrock of the international refugee regime.

Rules for Assessing Safety

EU law has left the definition of "STC methodology" at the discretion of individual Member States. The *Asylum Procedures Directive* only requires them to introduce domestic law provisions that clarify how the STC concept should be applied "on a case-by-case basis, in relation to the individual circumstances of the applicant" (CJEU, C-564/18 *LH*, 19 March 2020, para 48). To comply with the principle of *non-refoulement*, such a methodology should involve a "thorough assessment" of the adequacy of the country's asylum system and of the safeguards it offers to refugees based on available authoritative evidence, according to the case law of the European Court of Human Rights (ECtHR, *Ilias & Ahmed v. Hungary*, App No 47287/15, 21 November 2019, paras 141, 152 and 154).

The Greek Asylum Code provides that the designation of STCs by way of a national list shall take into consideration the legal framework, bilateral or multilateral agreements, and practice of the countries concerned, based on up-to-date, authoritative sources such as diplomatic authorities, the EU Asylum Agency, the Council of Europe and the UNHCR. For its part, the STC list in force only succinctly designates Turkey as a STC for people originating from Afghanistan, Syria, Somalia, Pakistan and Bangladesh – representing the main nationalities of people seeking asylum in Greece, based on an unpublished opinion of the Greek Asylum Service. This opinion is a mere collation of sources on the Turkish refugee protection system and is not made available to asylum seekers even upon request.

In the proceedings before the Greek Council of State, the applicants submitted that the above provisions fall short of a methodology on STCs insofar as they do not lay down the necessary framework and procedural steps to be followed by domestic authorities to determine whether a country's asylum system fulfils the requisite safety criteria both in general terms and in the particular case of an individual asylum seeker. The Court nevertheless found that Greece's domestic legislation complies with EU legal standards since it cites the elements and sources based on which a STC list should be drawn up (177/2023, para 34).

The applicants also argued that the designation of Turkey as a country fulfilling the STC criteria ran counter to the evidence collected by the Greek Asylum Service itself, documenting systemic breaches of the *non-refoulement* principle and of lack of access to asylum procedures. Those sources include the European Court of Human Rights (*Akkad v. Türkiye App No 1557/19, 21 June 2022)* and reputable reports of EU bodies and civil society. The regrettable omission of this point by the Council of State is a critical gap in the adjudication of STC. The Court seems to have paid undue deference to the Greek

government and to have refrained from assessing whether the designation of Turkey as a STC had in fact been preceded by a "thorough assessment" of its compliance with protection standards based on available evidence.

Re-Admission Considerations

STC policies are often unilateral, yet always dependent on support and cooperation from the very countries to which sending states seek to shift responsibility. The European continent has grappled all too often with this conundrum. From 2015 onwards, Hungary systematically applied STC policies to refugees transiting from Serbia in the face of a clear refusal on the part of Serbian authorities to readmit them; various iterations of that policy have been condemned by the European Court of Human Rights (*Ilias & Ahmed v. Hungary*) and the Court of Justice of the European Union (C-564/18 *LH*, C-924/19 and C-925/19 *FMS*, C-821/19 *Commission v Hungary*).

In the case of Greece, Turkey has not accepted any returns from Greece since it repudiated the EU-Turkey Statement in 2020 and had officially stated that "no return operation would take place unless the alleged pushbacks along the Turkish-Greek border stop and Greece revokes its decision to consider Turkey a Safe Third Country". Greece's decision to move forward with an official designation of Turkey as a STC in 2021 was therefore taken in full knowledge of the fact that removal of asylum seekers thereto would never materialise. The policy has unsurprisingly created thousands of "refugees in orbit" on European soil, stripped of lawful status and of core human rights to shelter, health care, and even food.

Against that backdrop, the Greek Council of State recalled that the *Asylum Procedures Directive* must be read in the light of the fundamental right to seek asylum enshrined in Article 18 of the *EU Charter of Fundamental Rights* and of the overall EU legal objective of rapid processing of asylum claims. Relying on soft law and case law from other jurisdictions (Dutch Council of State, 201609584/1/V3, 13 December 2017), the majority judgment correctly held that EU law should thus preclude the STC designation of a country to which readmission is not feasible, in the interests of legal certainty and of preventing undue delays in the examination of asylum applications (177/2023, para 38). It then accepted that Turkey's prolonged refusal to readmit asylum seekers from Greece amounts to non-compliance with its undertaken legal obligations and that no prospect of a change of position on its part has been brought forth by the Greek government (177/2023, para 41).

Whereas a large 18-4 majority of the Court ruled in favour of quashing the STC list, two of the dissenting judges found that readmission considerations only come into play upon the assessment of an individual claim, while the other two deemed them applicable only at the stage of execution of readmission after an asylum claim has been dismissed. As a result, the Council of State referred the case to the EU Court (CJEU) for an interpretation of the *Asylum Procedures Directive* provisions on STC in conjunction with the right to asylum. It specifically asked the CJEU to determine whether the prolonged absence of readmission prospects to a country should bar its designation as a STC or only come into play in the processing of an individual asylum claim or upon execution of a removal order

after the end of the asylum procedure.

The judgment hints that the Greek case could have been resolved domestically by the Council of State. Seizing the CJEU with a question that is somewhat already answered appears to be a tactical – if deferential – decision by the Greek judiciary, mindful of the potential repercussions of quashing the STC policy in its institutional dynamics with the executive. Passing the buck to the EU Court nevertheless increases the precedent-setting potential of the case. Preliminary rulings interpret EU legal standards that are applicable beyond the referring Member State and binding throughout the European Union. The Greek case therefore offers a timely opportunity for the CJEU to construe STC in line with the requirements of effective access to asylum in a way that reins in Europe's trend of increasing reliance on and arbitrary application of the concept.

[1] See generally, Cathryn Costello, "The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?" European Journal of Migration and Law 7(1) 2005, 35-70.

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No Countries for Refugees - Canada and Europe's Shrinking Asylum Space

By: Alice Massari

Image of barbed wire near human rights sign **Introduction**

Migration has taken center stage in Canada and Europe's media and political arenas, capturing intense attention and priority over the past decade. The divergence between these two contexts runs deep, with stark contrasts in the nature and scale of the phenomenon, the geographical features that shape respective countries' accessibility, and the strategic approaches employed to tackle this pressing issue; however, both Canada and Europe are progressively shrinking asylum seekers' possibilities for safe entry and the protection space. This article compares the most recent migration policies in place across the two contexts regarding asylum.

Canada's Migration Exceptionalism and the Safe Third Country Agreement

Canada's migration system is a highly proactive one. Often defined as the "immigration exceptionalism" approach, the system is based on a commitment to multiculturalism and large public support. With a total of 431,645 new permanent residents accepted in 2022, Canada has the highest proportion of immigrants among G7 countries. According to the latest statistics, the majority of Canada's labor force expansion is a result of immigration. Economic immigration contributes to around 75% of the country's population growth. It is anticipated that by 2036, immigrants will comprise up to 30% of Canada's population, rising from 20.7% in 2011.

The immigration system focuses on three immigration categories. The first one is the economic immigration class, which constitutes nearly 60% of all the immigrants planned for admission in 2022. The second category, accounting for 25% of planned entries, comprises individuals accepted through family reunification programs. The third class includes the people accepted in Canada through the refugees, protected persons, and humanitarian and compassionate immigration scheme (16% of planned admissions).

Canada's physical geography, location, and features are functional to this highly selective approach to immigration predicated upon complete control of the situation. Because of the country's distance from most countries of origin, irregular border crossing in Canada has been sporadic compared to other countries' statistics. However, unofficial border crossings such as the famous example of Roxham Road have been increasingly used by people to enter Canada in the last decade, particularly in coincidence with the restrictive measures introduced by the Trump administration in the US. Between 2017 and 2020, almost 60,000 people applied for asylum at land borders.

Although figures for irregular border crossings are relatively low in Canada, especially compared to European statistics, the phenomenon has attracted much attention. Nearly all people who entered the country irregularly did so through Roxham Road, a rural road connecting a village in New York, United States, with a municipality in Quebec, Canada. What made this particular entry point so popular was that it fell outside of the enforcement area of the 2004 Canada-US Safe Third Country Agreement

("STCA"). According to the 2004 Agreement, people seeking refugee status must file their claim in the country they first arrive in (either the United States or Canada) unless they meet specific criteria for exception. The Agreement applied to all official ports of entry. However, because Roxham Road is an unofficial point of entry to Canada, the 2004 STCA did not apply, and people could file for asylum by crossing the border at that specific point. On the 24th of March 2023, Canada and the United States announced that the application of the STCA had been expanded across all official and unofficial ports of entry, including internal waterways. This new measure effectively means that people now attempting to cross the border between US and Canada at Roxham Road or other unofficial ports of entry will be deported to the US, if they seek asylum within 14 days of entering Canada.

EU Borders' Externalization and the Dublin III Regulation

In Europe, the topic of migration has been very high on the media and political agenda over the last decade, at least and even more prominently so since 2015, the year of the so-called refugee crisis. While public attitudes towards migration have generally remained stable or even become more positive over the past decade, the perceived significance of migration issues has risen throughout Europe. It has become a crucial area through which political parties define their positions. The media and political agenda have been dominated by migration, particularly since the highly mediatized and politicized 2015 "European Migration Crisis", during which more than one million people, primarily from war-torn Syria, made dangerous journeys to Europe. In 2022, 330,000 people crossed European borders irregularly, while 253,000 individuals were granted refugee status or subsidiary protection out of the 966,000 applications received.

In contrast to Canada, Europe's physical geography and proximity to regions affected by conflict, political instability, economic turmoil, and humanitarian crises make it more accessible via both land and sea borders, at least in principle. International mobility within Europe has been increasingly viewed as problematic, deviating from the perceived norm and requiring management. Border and return policies have become more restrictive, shifting the focus from admission and integration policies to externalizing migration management to third countries. Despite criticism, European migration policies and practices have largely followed the outlined approach. While attitudes towards migration vary across European member states, the overall direction has been consistent.

The 2020 New Pact on Migration and Asylum is based on two main pillars: pathways linked to education and work to attract skills and talent to the EU and pathways to protection such as resettlement and other forms of humanitarian admission. The *Dublin III Regulation* establishes which EU member state is responsible for examining the asylum application according to family considerations, recent possession of visa or residence permit in a Member State, and whether the applicant has entered the EU irregularly or regularly.

Despite the EU asylum policy being predicated upon the development of a common policy on asylum, subsidiary protection, and temporary protection to offer appropriate status to all non-EU nationals who need international protection and to ensure that the principle of *non-refoulment* is observed, several

policies put in place over the years continue to constitute significant obstacles to the right of people to seek asylum.

One of the most criticized measures put in place by the EU post-2015 has been the 2016 EU-Turkey Statement. The Agreement, aimed at stopping the flow of irregular migrants via Turkey to Europe, requires that all new asylum seekers arriving in the EU from Turkey and whose applications for asylum have been declared inadmissible should be returned to Turkey. Turkey consented to facilitate the swift repatriation of all non-refugee migrants crossing from Turkey to Greece and agreed to reclaim all irregular migrants intercepted in Turkish waters. Other similar measures have also been implemented through member states' bilateral agreements. The Italy-Libya Memorandum of Understanding, which provides Italian and EU financial and technical assistance to the Libyan Coast Guard in bolstering their maritime monitoring capabilities, is a case in point. These measures significantly limit asylum seekers' possibility to seek asylum as they prevent entry to the EU country where a claim can be filed.

Dark Perspectives on the Horizon for Asylum in the Global North

The recent amendment to the STCA in Canada renders refugee claimants who cross the border between the US and Canada ineligible for asylum and other humanitarian safeguards if they are apprehended or voluntarily present themselves to authorities within 14 days of crossing. Instead, they are returned to the country they entered from, where they are expected to seek protection. The new STCA is problematic in many ways. First, it almost entirely closes legal pathways for migrants coming from the US to look for asylum in Canada. Second, it risks significantly increasing the conditions for vulnerability by pushing people to look for even more remote and dangerous crossing points and remain hidden for the 14 days of the provision. Many studies have shown that it is the status of irregularity that creates most of the conditions for asylum seekers' exploitation. This is in addition to the concerns about the actual *safety* of the United States as a country where asylum seekers should be returned to, a significant preoccupation despite the Supreme Court of Canada's recent ruling dismissing concerns about immigration detention and risk of *refoulement*.

Moreover, the STCA revision coincides with the end of the much criticized Title 42 migration policy in the US, established during the COVID-19 pandemic. Under the temporary policy, most asylum seekers who arrived in the United States to seek asylum were returned to Mexico and required to wait until their scheduled appearances in immigration court instead of being permitted to remain with their families in the US during the waiting period for their court hearings. With the end of Title 42, the new Biden administration introduced even more severe repercussions for people attempting to cross the border irregularly to ask for asylum, which include the prohibition of re-entry for five years and criminal prosecution. The combination of all these new policies will make it extremely hard for people coming from Central and Latin America to file for asylum in North America.

The situation is also very grim on the other side of the Atlantic Ocean. One year after the EU-Turkey Statement took effect, humanitarian organizations already flagged how the purported success of the Agreement in reducing the number of people attempting to cross the Aegean Sea overlooked the

unresolved issue of what happens to individuals who still have valid reasons to escape life-threatening circumstances as well as the systematic human rights violations inflicted on the asylum seekers.

Similarly, with regard to the Memorandum of Understanding between Italy and Libya, human rights organizations have documented the heinous treatment to which migrants and refugees not able to leave Libya to seek asylum in Europe were subject. A 2022 UN fact-finding mission also highlighted how the EU "aided and abetted" the commission of crimes against migrants in the conflict-torn country.

All this, however, has not produced a strategic change of direction. Europe continues its policy of externalization, outsourcing refugee protection and externalizing migration controls to partner countries, with severe concerns around accountability and human rights violations. Also, the focus on border surveillance continues to violate migrants' fundamental rights as access to asylum has been significantly hampered by border surveillance operations. On the contrary, the EU is preparing to tighten its borders further. A four-point plan that has been presented by the EU Commission President aims at stepping up EU border management capabilities at the Bulgarian-Turkish border, increasing repatriations, preventing asylum seekers from moving between EU states, and supporting partner states to help the EU reduce irregular migration and boost the number of repatriations.

Conclusions

The recent trend and changes to migration policies and agreements in both Canada and Europe paint a concerning picture for asylum seekers and migrants in need of protection. The Safe Third Country Agreement amendment in Canada effectively shuts down legal pathways for those seeking asylum who travel by land from the United States, pushing them to resort to more perilous and hidden crossing points. This increases their vulnerability and disregards the safety and security of the United States as a country to which asylum seekers are returned. The proposed four-point EU Commission plan deepens previously flagged concerns about ongoing serious human rights violations.

In light of these developments, it is crucial to critically examine and challenge the increasingly restrictive migration policies elaborated in the Global North and the ever-shrinking availability of legal pathways and channels. Migration policies are obviously not set in stone, and a change of direction is possible. How policies are designed and implemented will eventually define how Canada and the EU position themselves in terms of humanitarian and human rights values.

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Examining the Impact of Refugee Responsibility Sharing Agreements and Border Crossings on the Stigmatization of Refugees and Migrants

By: Amin Sadiqi

Image of Canadian flag, feet and backpackIntroduction

In a world plagued by conflicts and displacement, millions of people see their lives shattered, and their stories are often defined by a single word: "illegal". The use of the term illegal is perpetuated by restrictive laws and regulations to control the flow of refugees and to share the "burden." Moreover, when refugees, no matter how lawful and compelling their reasons may be for crossing borders, do not allow themselves to be defined and limited by those regulatory boxes, they fall into the discourse of "illegality".

As a survivor of war and a refugee in two different contexts, I have witnessed firsthand how public discourse, language, and media narratives distort the discussion surrounding refugees. Born in Kabul, Afghanistan, my life unfolded in the shadow of the Soviet invasion and the subsequent ethnic civil war. My family and I were forced to flee to Iran in the early 1990s. I hoped for a chance to continue my education there, only to be met with rejection due to inadequate documentation and thus falling into the "illegal" box. As a child, I was instead thrust into a life of labour and hardship, working in hazardous conditions to meet our basic needs.

Although I was able to cope with those unjust restrictions on a personal level and pursued self-learning under challenging conditions, thousands of others in similar situations could not overcome the limitations imposed on their basic human rights, such as education. They were pushed into an endless cycle of suffering and hardship, with long-term psychological and addiction consequences.

I was eventually able to return to Afghanistan in 2004, where I was able to pursue my higher education and eventually worked with non-governmental organizations and the United Nations. However, as insecurity and targeted killings of members of the Hazara/Shia ethnoreligious group, to which I belong,

dramatically increased at the hands of extremist groups such as the Taliban and ISIS, Canada became my second refugee experience.

In July 2018, I found myself crossing the border from the United States into Canada, doing so irregularly at Roxham Road, which had become well known as Canada's "official" unofficial border crossing for refugees. I refrained from seeking asylum in the United States due to the discriminatory policies implemented by the Trump administration, which targeted refugees from specific backgrounds, including the infamous Muslim Ban.

Once again, I was stamped with the label of an "illegal border crosser". The words echoed and resonated with my bitter experiences in Iran as a child refugee. Although the overall condition for refugees and newcomers in Canada is incomparable with those I experienced in Iran, I feel there is nonetheless a similar paradox. The narrative of illegality surrounding refugees who have no choice other than to cross the border irregularly does not align with Canada's international refugee and human rights legal obligations.

I believe refugee responsibility sharing agreements like the Safe Third Country Agreement (STCA) between Canada and the United States violate Canada's international and domestic laws concerning refugees and contradict Canada's image on the international stage as a champion of human rights. Very significantly, the agreement has negative consequences for those who are compelled into the refugee journey and contributes to and perpetuates the use of dehumanizing terms like "illegal border crossers", "bogus refugees", and "abusers of the system".

Refugee Responsibility Sharing Agreements – Problematic Assumptions

Responsibility-sharing agreements ostensibly aim to distribute the responsibility of hosting and protecting refugees among participating countries. The concept was first introduced in Europe under the *Dublin Agreement*, which is a set of regulations established through the European Union (EU) to determine the responsibility of member states for processing asylum claims. The *Dublin Agreement* aims to ensure a fair distribution of asylum seekers among member states by establishing criteria to determine the country responsible for examining an asylum application. There have been several revisions to the *Dublin Agreement* over the years, trying to find a proper balance in sharing responsibilities for refugee protection among member states. However, the overall effect remains the same: to prevent "asylum shopping," which essentially strips refugees of the choice to move from one country to another, seeking the most favourable outcome for their asylum claim or trying to reach a country where they have close family or other connections. The term asylum shopping has no legal basis but is used frequently both informally and officially, always with a pejorative sense of accusing refugees of somehow abusing asylum procedures.

There are no provisions in the *Refugee Convention* or other international human rights laws that directly or indirectly impose a limitation on refugees' right to seek asylum in their preferred location. The underlying rationale advanced by proponents of the asylum shopping concept is that asylum

seekers should not be allowed to choose where they make their claim for protection as they will look for the most generous option. The logic is that allowing such a practice ultimately gives rise to increased pressure on countries that are perceived as providing better opportunities for refugees. Instead, seemingly, it is preferable to force refugees to remain in countries where their options for obtaining asylum and for having their rights be respected are more tenuous.

The Asylum Shopping Concept is Problematic

Accusations of asylum shopping are often used to dehumanize asylum seekers as abusing a country's refugee determination system. From an international human rights law perspective, the very notion of "country shopping" or "asylum shopping" is problematic for several reasons. First and foremost, it assumes that all countries equally provide adequate protection to asylum seekers, consistent with international standards, which is not the case. Countries have different levels of resources, infrastructure, and expertise regarding refugee protection, and asylum seekers may have legitimate reasons for seeking asylum in a particular country where they feel they will be safe and their rights will be protected.

Furthermore, the right to seek asylum is a fundamental human right, recognized in the *Universal Declaration of Human Rights*, the *1951 Refugee Convention* and other international human rights instruments. There is no basis to assert that the right does not include the right to seek asylum in a country of one's choosing, as long as the person has a well-founded fear of persecution and meets the other criteria for refugee status. To suggest that asylum seekers cannot choose the country in which they seek protection undermines the very essence of this fundamental right.

Finally, resorting to a narrative of "asylum shopping" disguises and justifies restrictive and discriminatory asylum policies that violate international human rights laws that may in fact be rooted in xenophobia. A growing number of countries have adopted policies that deter asylum seekers by making it difficult or impossible for them to reach their territory and access protection. These policies are often explained as being necessary to stop asylum seekers from engaging in "asylum shopping" and imply that refugees who do move from one country to another do not genuinely need protection. This approach violates international human rights law, fails to address the root causes of displacement and persecution, and places vulnerable individuals at risk of harm.

Safe Third Country Assumptions

The designation of a country as a "safe third country" is controversial and can be complex. Some countries may have laws and policies that make it difficult for refugees to access protection or which violate their human rights. As such, the designation of a country as "safe" may be unjustified or at least dubious in some cases, and individuals may rightly be concerned about being sent back to what is in fact an unsafe country.

The designation of a country as “safe” may be arbitrary or politically motivated rather than based on objective criteria. The arbitrary designation could result in refugees being forced to return to their country of origin, where they face persecution. For example, a country may be considered “safe” because it has signed the *Refugee Convention* or has a functioning asylum system. However, refugees in that country may be denied equal access to protection and legal recourse, depending on their nationality or other considerations. Applying the safe third-country concept assumes that all refugees are treated equally, which is certainly not always the case.

The safe third-country concept also prevents refugees from accessing the most appropriate country in which to make their claims for protection. For example, a refugee may have family or community connections in a particular country that would make it easier for them to settle and integrate. However, if the refugee first transited through another country that is considered to be a “safe” third country, they may be forced to seek protection there instead.

The safe third-country concept may also discourage refugees from seeking protection at all, as they may fear being sent back to a country where they do not feel safe or where they have already faced persecution. This fear can be particularly acute in cases where refugees are routinely denied protection in the designated “safe” third country. As a result, refugees will feel compelled to use irregular migration routes to avoid being sent back to a country they fear. The process can contribute to the criminalization of refugees, leading to increased human rights abuses, including trafficking, exploitation, and violence.

The US-Canada Safe Third Country Agreement

As part of the bilateral *U.S.-Canada Smart Border Declaration and associated 30-Point Action Plan*, the *Safe Third Country Agreement* (“STCA”) between the United States and Canada was signed in December 2002 and entered into force in December 2004. The agreement aimed to promote cooperation between the two countries in managing refugee claims. There are some limited exceptions, but under the agreement, most asylum seekers who seek to cross at a land border crossing from the United States to Canada or from Canada to the United States are returned to seek asylum in the country of first arrival. For Canada, the STCA was a means to restrict the numbers of asylum seekers crossing the Canada-US border to make claims in Canada. However, from the US side, the STCA’s main rationale was political, in the wake of the 9/11 terrorist attacks. The US government was intent on tightening security across the border, and part of that enhanced security focus was restricting asylum seekers’ movement across that border.

However, the STCA, at least originally, did not shut down the Canada-US border entirely to refugees. It did not apply to those who were able to cross the border irregularly, and then make their claims at places like Roxham Road. The numbers of refugees doing so began to increase markedly after Donald Trump’s election and an increasingly hostile climate towards refugees and migrants in the United States.

The STCA's Consequences

The STCA has added another layer of restriction to the ability of asylum seekers to access protection, coming on top of other deterring measures such as visa requirements and increased surveillance at entry points. These measures have created significant barriers for refugees, making it more difficult for them to seek protection through "legal" channels. The STCA has instead pushed refugee claimants to use irregular ways to avoid the risk of being returned to the United States. And that returns us to the narrative of "illegality".

The political discussion around refugees arriving via irregular entry points often labels asylum seekers as "illegal border crossers". Labelling and dehumanizing asylum seekers in this way blurs the lines between the political and legal aspects of refugee protection and results in further social pressure on vulnerable people who are fleeing from persecution to save their lives.

Consequently, refugees may become more vulnerable to exploitation, trafficking, and other forms of abuse as they are pushed towards irregular migration routes. Facing limited options for safe and legal migration, some are compelled to take perilous journeys, often facilitated by smugglers or human traffickers. These irregular migration routes pose immense risks to their safety and well-being, exposing them to hazardous conditions, violence, and exploitation and can lead to tragic human losses.

The prevalent use of terms like "illegal refugee", "illegal migrants", and "illegal border crossings" in public discourse and media narratives significantly contributes to the stigmatization and dehumanization of forced migrants, further undermining their rights and entitlement to protection. It creates a perception that they are a burden or a threat to receiving countries, feeding into anti-immigrant sentiments and policies that further marginalization and exclusion.

Notably, the STCA has failed to achieve its stated policy objective. The number of refugees claiming asylum in Canada prior to the agreement and after the STCA enactment have largely remained the same or has even increased. Asylum seekers coming to Canada from the United States surged in 2017-2020 after the Trump Administration implemented anti-Muslim and anti-refugee policies. People with temporary status in the United States, fearing deportation to their countries of nationality, crossed the border at unofficial ports of entry, in order to seek asylum in Canada.

More recently, earlier this year, the Canadian and US governments agreed to expand and extend the reach of the STCA. It now applies to all refugee claimants, whether they make their claims at official border posts or cross the border irregularly to do so. The move was widely decried as shutting down important avenues for refugees to seek protection.

Court Challenge to STCA

In July 2020, the Federal Court of Canada ruled that the STCA between Canada and the United States violates the rights of refugee claimants under the *Canadian Charter of Rights and Freedoms*.

The Court focused in particular on concerns that refugee claimants returned to the US faced an almost certain risk of being subject to arbitrary detention in harsh and inhumane conditions. The decision was struck down by the Federal Court of Appeal, prompting individual litigants and public interest groups to seek recourse through an appeal to the Supreme Court of Canada.

In mid-June 2023, the Supreme Court rendered its ruling, partially dismissing the appeal. The Court affirmed the STCA as a valid treaty, and concluded there were sufficient safeguards to ensure the well-being of asylum seekers upon return. However, in practice, this ruling perpetuates the violation of the fundamental rights of the vast majority of asylum seekers who lack legal knowledge or access to legal services which might allow them to turn to these apparent "safety valves". Consequently, these individuals, returned to the United States, may potentially face detention, torture, and forcible return to their countries of origin. The Supreme Court has, however, left open the question as to whether the impact of the STCA on women and girls is discriminatory and thus violates the equality guarantee in section 15 of the *Charter*. That question has been returned to the Federal Court for a further hearing.

Violating International and Domestic Law

It is disappointing that the Supreme Court failed to assess applicable international legal provisions in its decision. These legal instruments are designed to uphold the human rights of refugees and ensure they are treated with dignity and respect. The *Universal Declaration of Human Rights* affirms the fundamental human rights that all people are entitled to, including refugees. The Declaration recognizes the right to seek and enjoy asylum in other countries for those fleeing persecution and violence in their home countries (Article 14(1)).

The *International Covenant on Civil and Political Rights* (ICCPR) recognizes the rights of refugees to life, liberty, and security of persons and prohibits the arbitrary deprivation of these rights. The Covenant also lays out safeguards regarding the "expulsion of aliens" and recognizes the right to be protected against "torture or to cruel, inhuman or degrading treatment or punishment," which many refugees face upon returning to the countries from which they escaped (and in the context of the STCA, may also risk experiencing in immigration detention in the United States).

Numerous reports indicate that the United States is not a safe country for returned asylum seekers. For that reason alone, the STCA violates Canada's binding obligations to ensure protection for asylum seekers. The main principle of all international covenants, treaties and norms is to respect human dignity regardless of country of origin, nationality, color of skin, or social status. Returning asylum seekers arbitrarily to another country violates this accepted principle.

Canada's soft power on the international stage lies in respecting international human rights and being a champion of that cause. An agreement like the STCA tarnishes Canada's reputation as a country that respects principles such as human dignity and the rule of law.

The Way Forward

The STCA is a political tool that does more harm to Canada and, more importantly, more harm to refugees than it does to meet any of its stated policy objectives. Scrapping the agreement, and the policy behind it, and having a rights-based approach to refugees centred on their dignity as human beings and based on the principles Canadians take pride in does not mean having an open-door policy and letting everyone enter as they wish. It is simply about ensuring that everyone is treated fairly. Assessing the validity of refugee claims is a technical and legal procedure. The Immigration and Refugee Board is mandated to carry out that task and is well equipped to do so in an orderly and humane manner.

We should not categorically ban asylum seekers and make arbitrary decisions for vulnerable groups that show up at our border about which country they are obliged to turn to for protection. Largely due to its geographical location, Canada does not face anywhere near the high volume of asylum seekers that many other countries receive. It would be wise to shift resources from the efforts of the Canada Border Services Agency to deter refugee claimants under the STCA to the Immigration and Refugee Board to process refugee claims in an orderly and legal manner. There is no objection to returning those people who show up at the border as refugee claimants but are subsequently determined, through a fair process, to not be in need of protection. Allowing refugee claimants to present their claims is in keeping with basic recognized human rights principles repeatedly affirmed by the Supreme Court of Canada.

Instead of investing resources in preventing asylum seekers from reaching Canada, through measures that often fail to meet their policy objectives, the Canadian government should focus on increasing resettlement quotas, facilitating family reunification processes, and expanding humanitarian visa programs that can provide safe and legal alternatives to irregular migration. These pathways reduce the reliance on dangerous and exploitative routes and offer refugees the opportunity to rebuild their lives in a secure and stable environment.

It is of utmost importance to humanize the experiences of refugees and migrants and recognize their rights as individuals. They are not just statistics or labels; they are human beings who have faced unimaginable challenges and are searching for safety, protection, and a better life. By acknowledging their inherent dignity and worth, we can shift the narrative away from dehumanization and towards empathy and understanding.

Conclusion

This paper has highlighted the negative impact of responsibility-sharing agreements on the narrative surrounding refugees. These agreements often lead to stricter border controls, limitations on refugee admissions, and the perpetuation of the perception of “illegal” border crossings. Such measures push refugees towards irregular migration routes, increasing their vulnerability and hindering their access to protection.

Replacing responsibility-sharing agreements with more humane refugee policies that are consistent with Canada's international legal obligations and are in line with Canada's values is essential. Establishing and enhancing legal pathways for refugees, including increased resettlement, family reunification, and humanitarian visas, can provide safe alternatives to irregular migration and foster a more equitable approach.

Our collective responsibility is to challenge the toxic narrative surrounding refugees, migrants and forced migration, and advocate for a more compassionate and equitable approach. Let us try to humanize their experiences, promote understanding, and build a more inclusive society. Together, we can create a world where the rights and dignity of every individual, regardless of their background, are respected and protected.

By embracing compassion and empathy and by rejecting the divisive language that marginalizes and stigmatizes, we can build a future where refugees are no longer seen as "illegals" but as individuals deserving of our support, understanding, and solidarity. Together, let us weave a tapestry of compassion that honours the resilience and courage of refugees and affirms our commitment to a world where no one is forced to flee, and where those who have to because of human rights violations are welcomed with open arms.

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Image of author, Amin SadiqiAmin Sadiqi is a third-year law student at the University of Ottawa. He is a Fulbright scholar with an MA from New York University in Media Culture and Communication and a BA from the American University of Afghanistan. Amin has worked for over a decade with several international organizations, not-for-profits and the United Nations in Afghanistan, helping rural and underserved communities. Prior to starting his law degree, Amin worked with a newcomer center in Ottawa and continues volunteering with refugee-sponsoring groups. As a refugee in two different contexts, Amin is passionate about contributing to discussions that affect refugees and newcomers.

How We Keep The Door Closed: Restrictive Border Policies and the Right to Seek Asylum at the US-Mexico Border

By: Nicole Elizabeth Ramos

Image of mother sitting on bunk bed holding her child surrounded by all her belongingsAcross both Democratic and Republican administrations alike, the push to restrict access and externalize asylum seeker processing at the US-México border has been systemic and incremental, with each new policy building upon the ideological premise of the last, and ignoring the requirements of the *1951 Refugee Convention* and *1967 Protocol*, i.e., the ideological foundation upon which asylum law, both domestically and internationally, is built.

The idea that it is acceptable to turn away refugees fleeing threats of violence and persecution in nothing new for the United States. In 1939, the *MS St. Louis*, a ship carrying over 900 Jewish refugees who were then fleeing Europe, attempted to dock off the coast of Florida. The government denied this request despite its awareness of who was on board the ship, and the reasons behind their cross-Atlantic voyage. First denied entry by Cuba, and later denied entry by Canada, the ship was left with no other options but to return to Europe, where 254 of the refugees would later die in the Holocaust. These human beings would be alive today had the US government, Canada, or Cuba, permitted them to enter the country, and make their claims for protection.

Following the end of World War II, the international community joined together to reach basic agreements under the *Refugee Convention*, regarding how nation states would treat refugees fleeing persecution in the future – because the murder of six million Jewish people, and almost one million Roma gypsies, disabled persons, and members of the LGBTQ+ community, was completely avoidable, and "never again" should human beings fleeing persecution be summarily dismissed from borders, and denied access to a legal process that could save their lives.

Metering Access to Asylum

The right of asylum seekers to be processed upon arrival at US ports of entry is codified by US federal law, at Title 8, Section 1225. Despite this statutory requirement, in 2016 under the administration of Barack Obama, our nation's first Black president, the Department of Homeland Security implemented the "metering policy," a policy designed to slow down and deter the admission of tens of thousands of Black refugees from Haiti then arriving to the US-Meéxico border to seek asylum due to widespread violence and political instability at home.

Under the metering policy, in order to be considered for processing by US Customs and Border Protection ("CBP") officers at the US port of entry in Tijuana, asylum seekers were first required to place their name on a waitlist operated and maintained by Mexican immigration officials. While initially applying to only Haitian refugees, the the Trump Administration later expanded the policy to apply to

all asylum seekers at ports of entry border-wide, regardless of their migration status in México, and irrespective of other risk factors such as medical vulnerability, linguistic isolation, membership in the LGBTQ+ community, status as a Black or Indigenous asylum seeker in a society that is deeply racist, or risk of imminent harm by their persecutors. The policy even applied to Mexican citizens, who were prevented from immediately fleeing the country in which they feared being killed and instead required them to register their name on a waitlist operated by Mexican government officials, regardless of whether their motive for fleeing México was due to persecution or threats by government actors.

While initially presented as a strategy to manage the flow of Haitian asylum seekers at the Tijuana port of entry, the Trump Administration later expanded the policy to apply to all asylum seekers at ports of entry border-wide.

Since its inception, the waitlist was rife with corruption, and presented very serious risks to asylum seeker safety. Asylum seekers reported that list managers at times made demands for payment to be placed on the list, or to obtain a more favorable place on the list. Reports of demands for sexual favors by female asylum seekers, were also not uncommon. Anti-Black racism and transphobia present in Mexican society also reflected itself in how Mexican authorities managed the list, where Black asylum seekers often had ever-changing identity and migration document requirements, and transgender asylum seekers were sometimes denied access to the list because their identity documents identified them as male, but they presented and identified as women. Often asylum seekers facing imminent harm at the hands of their persecutors, or those who were at risk of permanent injury and/or death due to medical vulnerability, were kept waiting for weeks and months, with no individualized consideration of their individual risk levels, resulting in asylum seekers throughout the border area dying due to medical neglect, being kidnapped, raped, sold, tortured or killed before their name was processed through the wait list.

The metering policy directly challenged the right of asylum seekers to be processed upon arrival. Officials justified the policy as a relief measure for the agency, which painted itself as having insufficient financial and personnel resources to attend to the asylum seekers arriving at ports-of-entry along the southern border, despite the fact that, historically, US Customs and Border Protection, the agency charged with protecting the nation's borders, is the largest federal law enforcement agency, with the largest budget. By painting the agency as insufficiently staffed and resourced, the agency sought to convince Congress and the public that some amount of waiting at the border was to be expected, and normal, given the circumstances.

This policy was directly challenged by the organization, Al Otro Lado in the case, *Al Otro Lado v. Mayorkas*, filed in July 2017. During the course of the litigation, evidence revealed that the metering policy was merely a pretext, that immigration authorities did in fact have the capacity to process asylum seekers upon arrival - they simply lacked the desire to do so. The policy was later deemed unlawful by a federal district court in September 2021, but the impact of this decision had little effect at that time due to other policies implemented in the years following, discussed at-length below.

Zero Tolerance

Following the massive Central American caravan of May 2018, the Trump Administration implemented "Zero Tolerance" a policy which separated asylum seeking parents from their children at the border. While the administration billed the policy as a strategy to deter and reduce unauthorized border crossings and human trafficking, CBP also applied the policy to asylum seeking families who presented themselves to authorities at US ports of entry.

During this period the government separated thousands of children from their asylum seeking parents, with no tracking process to ensure that the families could later be reunified and, in many cases, deporting parents to their countries of origin without their children, who had been sent by immigration authorities to migrant shelters for children that had arrived at the border unaccompanied by a parent or legal guardian. In many cases, parents were given no information about the whereabouts of their children, or were provided with information that was false, including that their children would be returning on the same deportation flights as them.

While the world reviled in horror at the sheer cruelty of the Trump Administration, especially after audio of children screaming and crying for their parents inside CBP custody leaked to the news media, the administration had actually been piloting the family separation policy for almost a full year prior, separating families on a dramatically smaller scale, but separating them nonetheless.

Yet, the idea of using children as a bargaining chip against asylum seekers in order to deter them from coming was not solely a product of the Trump years. Under the Obama Administration, there was a dramatic expansion of family detention in order to deter the migration of Central American families. Babies as young as a few weeks old were placed in family-style jails with their parents, where government attorneys argued for years to keep the families detained. When viewed in hindsight, it is clear that we do not arrive at the ideological place where separating children from their parents is viewed as a palatable method of deterrence without first normalizing the caging of families as a way to scare them into not coming. In fact, the use of children as weapons against specific communities of color is nothing new in the history of the United States, including the selling of the children of slaves, and the forced enrollment of Indigenous children in boarding schools designed to erase their Indigenous heritage.

Remain in México

In January 2019, the Trump Administration implemented the Migrant Protection Protocols ("MPP"), also known as the "Remain in México" Policy. Advocates working with asylum seekers at the border during this period often referred to the policy as the "Migrant Persecution Protocols" because that seemed to be a more apt description of the policy's intended purpose. Through the MPP program, asylum seekers from Latin America were placed in removal proceedings in the United States but were required to remain in México until the final adjudication of their cases, a process which can take several months to several years.

Under MPP, asylum seekers received a notice to appear in immigration court in the US. Because an asylum case will often require several smaller hearings before the final merits hearing, which will decide the asylum seeker's fate, this meant that asylum seekers would spend months and years in México waiting for their process to conclude. In between hearing dates, asylum seekers were required to "remain in México," and were only permitted to enter the US to attend their immigration hearings, after which they were transported by authorities to the border, in order to return to México.

While the Trump Administration billed the MPP program as a strategic tool to expeditiously and fairly resolve the cases of asylum seekers crossing the southern border, and combat the scourge of human trafficking what asylum seekers experienced was quite the opposite of what one would consider to be fair. Unlike immigrants fighting asylum cases from within the United States, individuals assigned to the MPP program had virtually no access to legal counsel. To be clear – access to counsel is a problem for almost all immigrants fighting removal proceedings in the United States, particularly those who lack the financial resources to hire counsel, and especially for immigrants inside detention. There is unfortunately no legal right to government-funded counsel in immigration court, despite the life-or-death stakes of the outcome. However, *in theory*, asylum seekers can work, save money, and pool resources in order to hire private counsel to represent them. If they can raise the funds, they can make an appointment, or several appointments, in order to find an attorney who is the best fit (or most affordable). There are also a number of non-profit organizations in cities throughout the country that represent asylum seekers in removal proceedings, although the need for counsel always eclipses the number of pro bono attorneys available.

For MPP asylum seekers trapped in México, there were virtually no attorneys to whom they could turn for assistance, as few attorneys and even fewer organizations have offices or a presence in México. While a patchwork of nonprofit organizations, student groups, and private attorney volunteers attempted to provide legal orientation and representation to asylum seekers in MPP, with over 70,000 individuals placed in the program, the vast majority over 91% of asylum seekers in MPP proceeded without representation, with the vast majority of those who made it to their final hearing receiving an order of deportation due to the complexity and ever-changing nature of US asylum law.

Even without counsel, asylum seekers were expected to file their completed asylum application with the court, along with any supporting evidence, in English. Per immigration court rules, where documents are submitted in another language, those documents must be accompanied by a certified English translation, and *all* documents must be filed in triplicate. Yet, the US government provided no resources to asylum seekers to assist them in preparing their applications in English, or translating evidence from their native language to English, nor provided funds for the costs of submitting applications and copies of evidence in triplicate.

Similarly, asylum seekers were not provided with any assistance with transportation to the port-of-entry in the early morning hours, during hours when public transportation is not operating, and despite the fact that the cost of a private taxi ride to the port-of-entry could cost more than what many asylum seekers earned in a week. Asylum seekers who missed MPP court hearings, even just one hearing,

found themselves with removal orders, issued *in absentia* due to their failure to appear in court, regardless of the reason, including asylum seekers who were hospitalized and those who had been kidnapped, making it physically impossible for them to attend.

During the months and years that MPP asylum seekers waited for their final day in court, and despite the promises of support by the Mexican government, the majority lacked employment authorization, which prevented them from securing dignified and non-exploitative employment, secure and stable housing, access to healthcare, and education for their children. As noted in an American Civil Liberties report tens of thousands battled homelessness, hunger, and poor health due to their inability to access these basic supports. Hundreds of MPP asylum seekers died due to medical neglect, were killed, or disappeared without a trace. And although the exact numbers will never be known-- all of these deaths and disappearances were avoidable. While the metering policy normalized some amount of undefined wait time for asylum seekers in México on the basis of limited resources, the MPP program pushed the boundary line even further, forcing asylum seekers to wait many months and, in some cases, years, enduring conditions of staggering deprivation, all in the supposed name of efficient use of government resources.

Title 42

As the coronavirus pandemic descended upon the world in March 2020, the Trump Administration seized the opportunity to completely close the southern border to asylum seekers using a little used public health law known as Title 42. Arguing that such a measure was necessary to protect public health, all MPP court hearings were indefinitely postponed, and all then-existing asylum seeker waitlists under the metering policy were closed. The government provided no answers to advocates or asylum seekers as to when the border would reopen. Asylum seekers were expected to wait – patiently – in border cities that are identified as among the most deadly cities in the world, and which lacked the resources and infrastructure to support a never dwindling migrant population, as more asylum seekers arrived each and every day.

Asylum seekers who attempted to present themselves at US ports of entry were summarily turned away, regardless of whether they were bleeding out and holding a colostomy bag, or a suicidal sex trafficking victim whose persecutors had pursued them throughout México. Those who crossed the border without inspection were expelled back to México, regardless of whether they were a Mexican citizen, while others were promptly placed on expulsion flights to their countries of origin, without ever having the opportunity to plead their case before an asylum officer or an immigration judge. That includes over 26,000 Haitian refugees placed on expulsion flights by the Biden Administration.

Biden Administration Policies

While President Biden campaigned on the promise of a more humane approach to refugee processing at the southern border, and the promise to end MPP, that promise has been only nominally fulfilled. Despite the efforts of conservative Republican-led state governments to challenge the decision to end

MPP, the administration has succeeded in that goal. However, much to the dismay of refugees and advocates border-wide, the Biden Administration continued the use of the Title 42 expulsion policy for over two years following President Biden taking office.

During the over three years that Title 42 remained in effect, over the course of both Republican and Democratic administrations, thousands of asylum seekers have been kidnapped, disappeared, trafficked, tortured, and murdered, or died due to lack of medical care, or lost their lives while attempting to cross the border through the desert, the mountains, and the Rio Grande. Thousands of parents , fearful for their children's lives in México, sent them across the border alone in the hope that US immigration authorities would not expel them back to danger, taking the chance that they might never be reunited with their children, but willing to take that risk so that their children would at least have a better chance of staying alive.

Contrast this treatment of largely Black and brown asylum seekers with the welcome received by Ukrainian refugees following the invasion of Russian troops and the outbreak of war. In late March 2022, over 20,000 Ukrainian refugees arrived at the US-México border, the vast majority arriving in Tijuana. And in under six weeks *all* of those refugees were expeditiously processed by US immigration authorities at the port-of-entry, on some days processing as many as 1000 asylum seekers, despite the continued pandemic which justified closing the border entirely to all other asylum seekers.

Recently, on May 12, 2023, the Biden Administration lifted Title 42, once again allowing for the processing of asylum seekers at US ports of entry. While seemingly a victory, the reopening of the border came with serious restrictions on the right to access the asylum process. Notably, all asylum seekers are required to seek a processing appointment using a smartphone application known as CBP One. The platform is not intuitive, and requires a certain level of technological proficiency to navigate. It is only available in English, Spanish, and Haitian Kreyol, cutting off access for tens of thousands of asylum seekers at the US-México border who speak as many as thirty-two different languages, as well as those who cannot read, those who have a disability, such as blindness or a serious mental illness, those do not know how to use a smartphone, and those who do not have the resources to purchase a smartphone.

Under CBP One, appointment slots at each port of entry are limited to a few hundred per day, despite the US government showing its capacity to process almost triple that number of Ukrainian asylum seekers in the same 24-hour time period at a single port-of-entry. Asylum seekers who arrive at US ports of entry without an appointment are more frequently than not turned away by authorities, in violation of Title 8, and the previously established precedent in *Al Otro Lado v. Mayorkas*, a decision which could not take effect while Title 42 remained in place.

The Transit Rule

In order to deter asylum seekers from attempting to seek processing at US ports of entry without an appointment, or enter the US without inspection, the administration has resurrected a once-defeated

Trump era policy, the Transit Rule, adding its own special twist. Under the Trump Transit Rule, asylum seekers who transited through another country, not their own, before arriving at the US-México border, were found ineligible for asylum if they could not show that they had applied for asylum in a country through which they transited, and that this application was denied. Under the current version of the rule, asylum seekers who failed to obtain a CBP One appointment, and who also failed to seek asylum in a transit country on their way to the US-México border, are similarly deemed ineligible for asylum.

Much like the asylum seeker waitlist under the metering policy, forcing asylum seekers to wait in México for an undefined, and potentially lengthy period of time, in order to secure a processing appointment through CBP One, and premising asylum eligibility on waiting in México for that appointment, is simply another form of metering. It is a policy which ignores the government's clear requirement to process asylum seekers upon arrival. Much like the other policies discussed, the current system also results in the avoidable loss of life, and advocates have already documented several deaths in the weeks since the ending of Title 42, deaths that would have otherwise been prevented had US authorities processed asylum seekers upon arrival, as the statute requires.

Double Standards

What is disappointing about the current political climate in the United States is the absence of outrage. The fact that the Biden administration has continued Trump era policies that were once previously condemned, and faced very little backlash, is indicative of a more systemic problem that is not tied to one particular political party. The US government, regardless of what political party is in power, will always look to implement policies that limit or deny access to the legal process to asylum seekers at the US-México border, instead forcing them to wait for the chance to save their lives, in some of the world's deadliest cities, on borrowed time that many of them do not have. The government executes these policies *knowing* that they will result in the avoidable loss of life. Gone are the days of "Give me your tired, your poor, /Your huddled masses yearning to breathe free," because the face of migration to the United States looks different these days, i.e., there are many more Black and brown faces, and apparently when it comes to non-white refugees, undefined wait times and untold suffering is the price of admission in order to be afforded the chance to fight for your freedom.

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Rolling Back Refugee Rights at the Canada-US Border

By: Sabrineh Ardalan and Alexandra Kersley

Image of Canada-US border, snow covered treesIntroduction

For almost twenty years, the *Safe Third Country Agreement* ("STCA," or "Agreement") has been used to deny protection to refugees seeking asylum at the Canadian border. Under the Agreement, both Canada and the United States force most asylum seekers to return to the first country in which they arrived (usually the United States) without ever hearing their claims. Until recently, the *Safe Third Country* Agreement applied only at ports of entry. In March 2023, however, the Canadian and U.S. governments announced they would extend the Agreement to the entire U.S.-Canadian border.

The extension of the STCA will have dire consequences for asylum seekers in the United States who are travelling by land and who have been left with no safe way to seek asylum in Canada. Increased enforcement will not stop people fleeing harm from seeking safety. As the United States has heightened enforcement at the southern border, asylum seekers have begun to fly to Canada and cross into the United States on the northern side. Policies like the STCA make those journeys harder and more dangerous.

The Agreement is not the first tool Canada has used to deny asylum seekers protection. In 2003, Canada began its "direct back" program, forcing refugees to wait in the United States while their claims were processed in Canada. After the Harvard Immigration and Refugee Clinical program brought a challenge to that policy, the Inter-American Commission on Human Rights held that "direct back" was a violation of the right to asylum, and the prohibition on chain *refoulement*. Like "direct back," the STCA denies asylum seekers the right to seek protection in Canada, and forces asylum seekers to return to the United States, where they face a high risk of detention and deportation.

***The Safe Third Country Agreement*: History and Challenges**

In 1988, Canada introduced an amendment to the *Immigration and Refugee Protection Act* ("*IRPA* that allowed the government to designate third countries as "safe". Before determining that a country is "safe", the *IRPA* requires the Canadian government to consider a country's human rights record and compliance with international refugee law. In 1996, a first draft of an agreement had been concluded

between Canada and the United States, but was ultimately withdrawn by the Clinton administration. U .S. willingness to enter into an agreement changed following the September 11the terrorist attacks in 2001. In 2004, the Canadian government officially designated the United States as "safe" and the STCA took effect on December 29, 2004. *The safe third country agreement* was part of a broader Canadian effort to exclude asylum seekers, including by seeking to negotiate bilateral and multilateral agreements not only with the United States but, unsuccessfully, with Mexico and the European Union, as well.

Advocates in Canada have repeatedly challenged the STCA under Canadian and international law. In June 2023, the Canadian Supreme Court the Agreement under section 7 of the *Charter of Rights and Freedoms*, which protects the right to life, liberty, and security of the person. But the Court remanded advocates' challenge to the Agreement under section 15, which prohibits discrimination on the basis of sex. The ruling prompted protests against the Agreement across Canada, including a three-day march from Montreal to Roxham Road, which had served as a well-used irregular border crossing.

The STCA and similar prior policies have also come under scrutiny in international fora. In 2011, for example, the Inter-American Commission on Human Rights concluded that Canada violated binding human rights obligations, including the right to seek asylum and the right to protection against possible chain *refoulement*, when it returned refugee claimants to the United States under Canada's "direct back" policy without first providing individualized review of their asylum claims. This decision, based on a complaint filed in 2004 by advocates, including the Canadian Council for Refugees and the Harvard Immigration and Refugee Clinical Program, among others, addressed a precursor to the STCA. More recently, in 2017, the Commission granted a hearing request filed by Harvard's Program on behalf of dozens of U.S. and Canadian scholars and advocates about the impact of executive orders issued by the Trump administration and heard testimony about how those orders placed refugees at grave risk of *refoulement* if they were turned back by Canada to the United States.

Expansion of the STCA: Current Trends at the Border

Until 2023, the STCA applied only at land ports of entry. That meant that by getting on a plane, or crossing between ports of entry, asylum seekers could avoid being turned back under the Agreement. As with any border enforcement measure, the Agreement forced asylum seekers into dangerous border crossings, particularly during the winter. But asylum seekers and allies on both sides of the border found ways to preserve the right to seek asylum. Taxi drivers on the American side drove migrants from Plattsburgh, NY across the border, such as at Roxham Road. On the Canadian side, the government set up a semi-permanent police post to begin processing asylum seekers' claims.

On March 24, 2023, however, Canada and the United States announced that the STCA would be extended to the entire border. Early the next morning, Canadian border officials put up a sign at Roxham Road that read: "Stop. Do Not Cross."

Prime Minister Justin Trudeau asserts, without basis, that the expansion of the STCA will facilitate "keeping asylum seekers safe, keeping our borders secure, and keeping our immigration system strong." But the expanded Agreement will do none of these things. As experts have warned, expanding the Agreement will only "divert people into more dangerous, more risky, more clandestine modes of entry across 6,000 kilometres of border." The Canadian government's own regulatory assessment identifies this same risk, explaining that asylum seekers will face "increased danger," including at the hands of smugglers that may subject them to abuse, as well as from "exposure to extreme weather conditions" and other risks to their life and safety, depending on when and where they cross and lack of access to shelter, water, food, and medicine.

Indeed, the expanded STCA appears to be a direct response to anti-immigrant advocacy, not a measure aimed at safeguarding asylum seekers. Restrictive U.S. policies have led more asylum seekers to turn to Canada for protection in recent years. Under the Trump administration, the numbers of people presenting themselves at the Canada-U.S. border and asking for refugee protection rose substantially: close to 1,700 people in the first three months of 2017 as compared to just over 720 in the same time period of 2016. In 2022, almost 40,000 asylum seekers crossed into Canada between ports of entry, most at Roxham Road. Quebec premier François Legault, in particular, had pressured the federal government to "close" Roxham Road, arguing that Quebec has been unable to absorb the costs and logistical demands associated with the increase in border crossings. But there is no reason that the Canadian government cannot provide the resources to support asylum seekers crossing the border, as evidenced by Canada's investment in resettling more than 173,000 Ukrainian refugees in 2022 alone.

Restrictive U.S. Policies: Recent Developments

Recent developments in U.S. asylum law demonstrate that the United States is not, in fact, a safe third country. By returning asylum seekers to a country where they face a high risk of detention and *refoulement*, Canada violates the *Refugee Convention*'s ban on chain *refoulement*.

Take, for example, the sweeping asylum ban recently adopted by the Biden administration that in effect bars from asylum people who fail to apply for asylum in transit countries. The ban was adopted direct contravention of U.S. and international law and despite widespread recognition that transit countries are often not safe, especially for Black, Indigenous and LGBTQ+ asylum seekers. The asylum ban requires asylum seekers to either navigate the complex US system using CBP One, a flawed mobile application, to try to book an unduly limited appointment to present at a port of entry or obtain advanced permission, known as parole, allowing them to travel into the United States. Yet, neither the app nor parole is a viable option for most. The parole programs only apply to people from a few countries and require individuals to fly to the U.S.; they do not apply to those who arrive at the border. The app, which uses predictably racist facial recognition technology, can only be accessed by tech savvy asylum seekers who speak English, Spanish, and Haitian Creole.

Advocates have repeatedly highlighted the impact of the administration's racist policies on Haitian asylum seekers, documenting ongoing human rights violations that continue since the abuses inflicted at the Customs and Border Protection ("CBP") encampment in Del Rio, Texas two years ago. The UN Committee on the Elimination of Racial Discrimination has also expressed its grave concern over the inhumane treatment of Haitians, citing the repatriation of 15,000 Haitians from the United States between January and November 2022. Returning Black asylum seekers to the hands of U.S. immigration enforcement violates international non-discrimination provisions, including the *Convention on the Elimination of All Forms of Racial Discrimination*.

Efforts by the Biden administration to fast-track the deportation of asylum seekers have deprived them of a fair opportunity to present their cases to the Asylum Office and to have their day in court. The administration has implemented new measures that facilitate the rapid deportation of individuals placed in CBP custody, truncating the time for asylum seekers to find legal counsel and undermining their access to counsel, in an effort to quickly remove migrants from the United States.

Moreover, detention conditions in the United States remain notoriously bad – an eight-year-old girl recently became so sick in CBP custody that she died despite her mother's repeated requests for appropriate medical care. Yet, this spring, the Biden administration was reportedly considering renewing family detention in an effort to deter families and children from seeking asylum. And tens of thousands of asylum seekers are regularly detained by U.S. Immigration and Customs Enforcement (" ICE"), instead of being allowed to live with family or in communities, with dire consequences: sexual assault, verbal abuse from a therapist, solitary confinement without clothing are just a few examples of "horrific abuse and mistreatment" in ICE detention.

Courts in the United States have also erroneously rejected gender-based asylum claims, revealing ongoing confusion about the state of asylum law when it comes to people seeking protection based on harm they suffered or fear on account of their gender. In one case, for example, a federal court of appeals rejected—without basis—the *pro se* (self-represented) appeal of a Honduran asylum seeker who suffered repeated rape and threats at the hands of her partner; another court of appeals reflected similar confusion when it erroneously denied a petition for review filed by a Guatemalan asylum seeker who had also fled rape, and threats of assault and death. In so doing, the courts ignored long-standing precedent and flouted a recent decision by the U.S. Attorney General, recognizing the viability of gender-based asylum claims. Because the Agreement places women and non-binary asylum seekers at a heightened risk of *refoulement*, it violates international non-discrimination provisions, such as Article 26 of the International *Convention* on Civil and Political Rights.

Even the Canadian Parliament acknowledges that the United States is not safe for all refugees. In recognition of the serious concerns "regarding the viability of gender-based claims made on American soil," a recent House of Commons report recommended exempting all gender-based asylum claims from the *Safe Third Country Agreement*. The same report urged the government to exempt citizens of "moratorium countries" – countries to which Canada does not deport individuals denied asylum – from the Agreement. This recommendation reflects the understanding that the United States deports

individuals to harm the Canadian government cannot condone.

Conclusion

Through the *Safe Third Country Agreement*, Canada violates its most basic obligation to refugees, returning countless people to persecution. Asylum seekers at the Canadian border have the right to seek protection; a right that cannot be guaranteed by returning them to the United States. To fulfill its commitments under international law, Canada should end the STCA, not expand it.

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Responsibility Sharing or Deflection? Digital Information Sharing as an Instrument of Refugee Exclusion

By: Claire Ellis

Image illustrating identifying measures for fingerprintingIntroduction

The constitutionality of the Canada-U.S. *Safe Third Country Agreement*> (“STCA”), an agreement that requires refugees to make a claim in the first of the two states they arrive in, has been the subject of an ongoing constitutional challenge. In a most recent decision in the matter, the Supreme Court of Canada ruled that the STCA was not in violation of the *Canadian Charter of Rights and Freedoms*, specifically section 7, which pertains to life, liberty, and security of the person. The Court did also rule that the Federal Court must now examine the STCA’s compliance with the *Charter’s* section 15 equality guarantees.

The ruling comes despite longstanding opposition from refugee, legal, and civil society groups that have argued that the agreement impinges on the rights of refugees by forcing them to remain in or return to the US, deemed unsafe for a number of refugees. The judgement also comes on the heels of a politicized decision in March 2023 to expand the enforcement of the STCA to the entire border. This closed the so-called “loophole” that allowed claimants to cross into Canada between ports of entry and avoid being turned back to the US. A well-established, if often perilous, route for refugee claimants otherwise excluded from any formal means of accessing Canada’s asylum system from the United States has now been closed off.

The STCA is one of Canada’s more well-known examples of a responsibility sharing agreement, and is now a clear case of the type of policy reforms that demonstrate a perimeter expansion approach to border enforcement and refugee protection under the stated objective of establishing and maintaining an “orderly migration system". Responsibility sharing and border enforcement cooperation arrangements are presented as effective strategies to organize state responses to forced migration, but less explicitly they have expanded the border continuum of predominantly northern refugee receiving states by widening the scope of their operational instruments. Examples such as increased biometric collection and sharing practices between refugee receiving states, fortified through information sharing agreements, have ushered in new dimensions to border control and access to refugee determination systems. Such reforms are notably bolstered by techno-solutionist surveillance trends that seek to justify technology innovation and interconnected data systems to address complex social issues such as migration and refugee protection. These shifts have also opened the space for a layering of new ineligibility grounds based on the information now quickly ping-ponged between digital state channels. The result is an ever-expanding border with both visible and invisible roadblocks reducing the mobility and access to protection of the rights of refugees.

Refugee Responsibility Sharing as an Instrument of Deflection

Refugee responsibility sharing agreements cover a variety of bilateral and multilateral policies that establish governmental responses to refugee migration. On one hand, such responses can be grounded in frameworks that increase government-facilitated access to refugee protection, such as

large-scale refugee resettlement programs. The Canadian government's response to the Syrian or Ukrainian refugee migrations are prime examples of where swift government action resulted in the resettlement of sizable numbers of people in a short period of time. On the other hand, other types of agreements such as safe third country policies perform a restrictive or even punitive function to prevent refugee access to physical borders and, in turn, refugee determination systems.

Safe third country policies are agreements made between states to determine which party is bound to process and determine a claim for refugee protection. The framework is predicated on the country of first asylum concept, which refers to the idea that the first refugee receiving state a refugee arrives to from their country of origin is responsible for determining whether the individual will receive refugee protection. If the individual then approaches or enters another state party to the agreement to make a claim, that state is permitted to turn back or remove the individual to the first country of asylum.

Safe third country agreements are a governmental tool utilized by states globally. The policy trend appeared across Europe in the 1990's through the Dublin *Convention* (later replaced by the *Dublin II Regulation* in 2003), that determines EU member state responsibility for refugee claim determination. Australia adopted safe third country policy in the late 1990's, South Africa employs safe third country concepts as grounds for ineligibly to make claims, and in 2019 the United States signed short-lived and highly controversial safe third country agreements with Guatemala, Honduras, and El Salvador that were later withdrawn in 2021. Canada introduced safe third country legislation in the late 1980's, unsuccessfully pursued an initial STCA with the United States in 1996, and then signed the landmark STCA with the United States in 2002 in the aftermath of 9/11 and the decade's anti-terrorism security agenda.

Of particular concern for states are those migrating via so called "irregular" routes to arrive at borders and make claims for refugee protection. Inhibiting pathways of irregularity, often conceived as unauthorized border crossings of people via boat or on foot at unofficial border points, was largely justified through a security lens in the aftermath of 9/11 throughout the early 2000's. Safe third country "protection elsewhere" agreements, are a key fixture of this approach, justified in that to effectively manage rising global migration rates, and increase control of their borders, states must divvy up their resources and access to refugee determination systems. Yet the repercussions of safe third country agreements is the deflection of refugees back towards situations of legal precarity, restricted access to protection, detention, and chain *refoulement* , where a state returns an individual to a state which then returns the individual back to another state that may be their country of persecution. Further, policy developments over the past ten years demonstrate a shift from the more explicit post 9/11 security ethos to a pre-occupation with digital identity management. This combination of information sharing agreements with expanded data collection and sharing have effectively positioned the safe third country framework as an instrument for preventing access to the asylum system.

Digital Data Sharing in Border and Refugee Governance

As within many areas of government, techno-solutionism has become a policy ethos in immigration and border control that drives justifications for the adoption of more technology supported data-driven approaches to processing and tracking migrants and their mobility. The digitization of the border rests within a larger societal transformation of digitally based communication and governing that produces data at an ever-increasing rate. The “smart” or virtual border is the reconstruction of border controls through technology-driven alternatives that take up the work of “hard” border practices like physical checkpoints and paper documentation. Digital border tools range from identity verification instruments such as facial recognition technologies and biometric data collection; automated decision-making technologies through the use of artificial intelligence; and surveillance technologies such as drones and vehicle scanners.

The development and implementation of digital border tools requires a network of actors beyond border enforcement personnel, such as private software firms, software developers, engineers, system analysts, and data analysis teams in governmental departments. Despite gains in efficiency and the movement of some populations across borders, such innovation comes with significant costs for others. The use of digital technologies in the context of immigration and border enforcement have been shown to promote racial discrimination and xenophobia through systemized profiling, algorithmic bias, digitized collection, categorization, and filtering of migrant data.

Canada started collecting biometrics, a digital photograph and fingerprints, from refugee claimants and deportees in 1993. Biometric data collection expanded to other immigration streams via the Biometrics Expansion Project, which today includes temporary resident and permanent resident applicants. This forensic turn brought the practice of fingerprint identity verification and evidence used in criminal proceedings to immigration processing and border management.

Now integral to contemporary border enforcement, digitization has reconfigured interactions and engagement between states, such as the Five Eyes members (Canada, United States, Australia, New Zealand and the United Kingdom) which collaborate for purposes of immigration information sharing and border management. Policy developments among this alliance reveal a growing interest in integrating border enforcement and, in turn, refugee determination responsibilities, through digitization and information sharing.

The 2001 Smart Border Declaration between Canada and the United States enhanced the interoperability of immigration and border enforcement through various programs such as sharing air carrier passenger data, integrated counter-terrorism intelligence initiatives, an electronic system to share fingerprints between the RCMP and FBI, and specific information sharing related to refugee claimants. By 2009, Canada was manually exchanging immigration information through the High Value Data Sharing Protocol with members of Five Eyes for the purposes of information sharing and coordination in areas of national security, borders, and immigration. In 2011, Canada began to implement automated immigration information sharing with the United States under the Biometrics (Steady State) and Canada-United States (US) Immigration Information Sharing (IIS) Initiatives. From 2012 and 2016, the Canadian government entered into information sharing agreements with all

remaining Five Eyes members, followed by the introduction of automated biometric sharing. In 2018, the Border of the Future (BOTF) Plan was endorsed at a Five Eyes Five Country Ministerial (FCM). The initiative, co-lead by Canada and Australia, intends to leverage cooperation and emerging technologies to establish a "touchless" border to promote global border information sharing and security. These bilateral and multilateral agreements and initiatives allow states to share biometric and biographic information of migrants to manage mobility between state territories more tightly.

A New Ineligibility Clause: Narrowing Access to the Refugee Determination System via Information Sharing

Collecting and sharing migrant data, including those of refugee claimants, is positioned through the objectives of identity management and to preserve the integrity of border and asylum systems subject to ineligible claims and overburdened numbers. In 2019, the Canadian federal government made legislative changes that linked information sharing further with ineligibility grounds for refugee determination. Introduced in the *2019 Budget Implementation Act*, and later amended in the *Immigration and Refugee Protection Act*, section 101 (1) c.1 deems individuals inadmissible to make a claim for refugee protection before the Immigration Review Board ("IRB") if they had previously initiated a claim in another country with which Canada shares an immigration information sharing agreement. As discussed, prior to 2019, Canada had entered into information sharing agreements with its Five Eyes partners. Instead, they are eligible to apply for a Pre Removal Risk Assessment ("PRRA") which is accompanied in this instance with a mandatory hearing conducted by PRRA officers. The hearing, in the words of former Minister of Border Security and Organized Crime Reduction, Bill Blair, was instituted to ensure "that everyone receives fair treatment before any removals take place". Yet routing claimants to a hearing performed by PRRA officials, who are civil servants, rather than independent adjudicators at the IRB, creates a tiered system that applies unequal treatment based on the a variation of the premise of responsibility sharing and that protection ought to be gained elsewhere.

It is significant that the ground includes the specificity of there being an information sharing agreement in place. It emphasizes the establishment of information sharing policy and infrastructure as a fundamental component of the refugee system. It does not state, for example, that the ineligibility ground is based on having actually received protection in the other country or on the presence of a safe third country agreement, which requires proving, at least in the eyes of the government, that a state is safe to receive refugees. Instead, the focus is on information-sharing – with who, is left in question. While to date the only information sharing agreements in place are with the Five Eye member states, future agreements with other states could further widen the scope of this ineligibility clause.

Further, the 2019 ineligibility ground states that individuals only need to have initiated a claim to be rendered ineligible to make a claim in Canada. This broad application of responsibly-sharing does not require party states to effectively determine a need for protection, the only threshold is the existence of paperwork. Since its inception, the numbers deemed ineligible due to this ground have contributed to

overall ineligibility rates. According to data provided by CBSA (ATIP file: A-2022-31680 / TJANO), in the first three years of implementation, between 2019 and 2021, 954 individuals (27%) were deemed ineligible to make claims at the Immigration and Refugee Board due to this change. By comparison, during the same period, 1705 individuals (49.5%) were barred from making claims at the IRB due to the STCA. Less than 2% were deemed ineligible based on all possible inadmissibility grounds related to security, violating human or international rights, serious criminality or organized criminality combined. Should the STCA be abolished tomorrow, a comparable framework of exclusion would remain, facilitated by the conduits of digital information highways.

Conclusion

As the number of people leaving their country of nationality to claim protection is rising, coupled with increasing types of drivers such as climate change, responsibility sharing agreements serve more often as stagnant instruments of deflection rather than a receptive global response to refugee migration. Established modes of border control such as physical checkpoints and documentation have become complicated with new layers of data-driven surveillance built into border control policy and practice. The deployment of more technology-supported identity management tools, supported by bilateral information sharing agreements, strengthens the perimeter approach to migration management praised for its ability to more quickly identify “legitimate” or “illegitimate” travelers, support industry, and detect fraud and inadmissibility.

Yet, the power differential in surveillance based on biometrics is demonstrated when particular facts about an individual are collected without context and without the ability for the person to explain how particular circumstances came to be. Biometrics depict a particular kind of truth and create new kinds of identities based on a unidirectional observation by those performing surveillance. The use of this practice contravenes the dimensions of refugee protection which are based on the individual being able to explain and tell their story. The refugee system relies on interviews and hearings to explain the circumstances of persecution argued to warrant state protection and provide context to migration pathways. The use of biometrics in supporting the deflection of claimants to other states, even those party to responsibility-sharing agreements, denies the need for explanation and impedes the right to claim refugee protection.

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"Responsibility-Sharing" and the *Safe Third Country Agreement*: From a Politics-Based to a Rights-Based Approach to Refugee Protection

By: Christina Clark-Kazak

Image of Surrey, Canada border crossing The March 2023 modification of the *Safe Third Country Agreement* (STCA) between Canada and the United States severely restricts the fundamental right of asylum. While framed in terms of "responsibility-sharing", the agreement and its additional protocol adopt a politics-based, rather than rights-based, approach to refugee protection, posing legal, practical and financial challenges.

Regional and International Context

The STCA and its recent modification must be understood within multilateral efforts at "responsibility-sharing" for forced migration at regional and international levels.

In the context of unprecedented global forced migration, the UN General Assembly adopted the *New York Declaration for Refugees and Migrants* in September 2016. This was a promising start. The Declaration was explicitly framed as being *for* refugees and migrants. There was also a commitment to "protect the human rights of all refugees and migrants, regardless of status."

However, the subsequent Global Compacts – one on refugees, and one on migration – watered down the rights-based commitments and reframed people in situations of forced migration as "burdens" that needed to be managed. The language of "responsibility-sharing" glosses over deep structural power inequities that both cause and exacerbate forced migration. Importantly, the right to seek asylum is relegated to a footnote in the Global Compact on Refugees, rather than providing the framework on which international cooperation is premised.

At a regional level, in June 2022, the *Los Angeles Declaration on Migration and Protection* was signed by twenty countries across the Western Hemisphere following the Summit of the Americas. In the

context of large-scale displacement from Venezuela and on-going forced migration from Colombia, Central America and Haiti, countries agreed to cooperate to create the conditions for safe, orderly, humane, and regular migration."

These non-binding multilateral efforts deliberately focus on migration management under the elusive term of "responsibility", rather than adopting a rights-based approach. This strategy by powerful and wealthy states, like the US and Canada, maximizes discretionary control over refugee protection.

David Scott FitzGerald[1] refers to an "architecture of repulsion" to describe externalization policies such as visas, carrier sanctions and agreements like the STCA which Canada, the US and other rich countries in the Global North use to keep out potential refugee claimants. As a result, the majority of people in situations of displacement remain in countries and regions of origin, primarily low- and middle-income countries in the Global South. Humanitarian assistance to these countries is another way that Canada uses "responsibility-sharing" language to mask our increasingly restrictive asylum policies. Indeed, the Canadian announcement following the Los Angeles declaration was tens of millions of dollars in aid to recipient countries in Latin America, not permanent protection pathways to Canada.

The Canadian Political Context

Against this international backdrop, the Canadian government, under both Liberal and Conservative parties, has consistently prioritized carefully managed resettlement over in-land refugee protection. The new changes to the STCA consolidate policies to severely restrict and criminalize the right to asylum, while maximizing discretionary access to refugee protection through exceptions and specialized resettlement programs.

The Government of Canada has always preferred managed resettlement over spontaneous arrivals. This has led to public policy discourse that pits "good refugees" who wait in refugee camps for resettlement, over erroneously labelled "bogus refugees" who arrive unannounced at our borders. Those seeking asylum by boat are criminalized through mandatory detention if deemed "irregular arrivals".

Canada's private sponsorship of refugees program ("PSR") is rightly lauded both at home and abroad. Ordinary people come together to sponsor refugees, who arrive in Canada as permanent residents. This is a good news story. Indeed, the PSR program has strong cross-partisan support, but for the wrong reasons: it allows the Canadian government to claim moral superiority through consistent refugee resettlement, funded and supported by private donations and voluntary labour. The Canadian government should not (ab)use this individual and collective goodwill to then abdicate its responsibility to *also* allow people to exercise their right to claim asylum at and within our borders.

This "good versus bad refugee" discourse has entered into the public consciousness. For example, on the February 2023 CBC Cross Country Checkup call-in radio program focused on irregular border crossings, many callers empathized with the situation of refugee claimants, but suggested that they

should seek “legal routes”. However, under the STCA and other externalization policies, there are very few legal opportunities to claim asylum.

The revised STCA agreement only allows people who meet certain specific exceptions, such as unaccompanied minors and people who can prove that they have a close family member who is legally in Canada, to make a refugee claim at a land border. While asylum claims are still permitted at land and sea ports, these are restricted to people who can obtain a visa and get past transportation carrier screening to board a flight or ship to Canada.

The Canadian government’s preference for “invited refugees” was made explicit in its announcement of the STCA modification. While it framed the changes in terms of “modernization”, it also announced that Canada will welcome 15,000 migrants on a humanitarian basis from the Western Hemisphere over the course of the year, with a path to economic opportunities to address forced displacement, as an alternative to irregular migration.” Since the announcement was made in March 2023, no details of this humanitarian program have been forthcoming. However, the message underpinning Canada’s refugee protection policy is clear: don’t come to us, we’ll (maybe) call you. And it is notable that the new program references migrants, not refugees, and talks of admission on a humanitarian rather than human rights basis.

A Politics-Based Approach Poses Legal, Practical and Financial Challenges

The modified STCA and its broader policy agenda are politics-based, rather than rights- and evidence-based. The timing of entry into force of the additional protocol is particularly telling. Although the new deal had been negotiated in 2022, the modified STCA was not announced until the press conference during US President Joe Biden’s visit to Canada in March 2023.

At this time, President Biden was facing political pressure about increased irregular border crossings at the US’s southern and northern borders. Similarly, Canadian Prime Minister Justin Trudeau had received an open letter from Québec Premier Legault to “close Roxham Road” (the primary unofficial border crossing), a refrain echoed by the Official Opposition leader Pierre Poilievre.

In this context, a modified STCA and the message of border control was politically expedient for both the Canadian and US governments. However, the revised STCA poses a number of legal, practical and financial challenges.

Legally speaking, the original STCA had already been subject to a *Charter* challenge. That challenge has now been partially dismissed and partially upheld by the Supreme Court. The initial Federal Court ruling that the agreement violates section 7 of the *Charter* has been overturned, but the Supreme Court has ruled that the Federal Court must now consider the section 15 equality rights implications of the STCA. Even if the government ultimately prevails, the STCA clearly undermines the right to claim asylum. Whatever appeal courts conclude, there is no doubt that it disproportionately impacts people whose claims would be more likely accepted in Canada than in the US, such as those claiming persecution on the basis of gender, gender identity and sexual orientation. The US also has higher

rates of immigration detention and deportation than Canada.

The modified STCA poses practical challenges. The additional protocol now excludes anyone who crosses irregularly at a land border from making a claim in Canada within 14 days of arrival. But, if a person has crossed irregularly, how do they prove when they arrived in Canada? And, if there is the risk that they will be deported back to the United States, it incentivizes people to remain undocumented, at least for those 14 days, increasing their vulnerability to exploitation. The Canadian government has recently announced regularization programs because evidence shows that it is better for Canada if people's live, work and pay taxes without the fear of deportation. It also keeps people safe and protects their rights.

Data from the US-Mexico and the European Union borders demonstrate that tightening up border controls does not prevent desperate people from trying to cross to claim asylum. They simply make those crossings more dangerous. They also increase the likelihood of people resorting to smugglers.

The new STCA is also very expensive, with preliminary minimal estimates of $60 million, not including costs to the RCMP for border surveillance and interception. Patrolling and enforcing the longest undefended border in the world between Canada and the US is a costly – and likely impossible – proposition. Rather than investing in border surveillance, detention and deportation, the Canadian government could be using these resources to clear the backlog across all immigration categories, including asylum claims.

Towards a Rights-Based Approach?

Given these legal, practical and financial issues with the STCA, the Government of Canada should instead enact "responsibility-sharing" policies that uphold the fundamental right of people to seek refugee protection no matter their mode or place of entry.

To do this, the STCA should be suspended. The *Refugee Convention* makes no mention of a safe third country. Nor does any other international human rights treaty. The right to asylum, codified in international and national law, is universal – applying to everyone, everywhere.

Until the STCA is revoked, the current exceptions should be expanded. Exceptions are problematic because they normalize the exclusionary nature of the STCA for all others. However, as mentioned above, some people are disproportionately negatively affected by the STCA, including people making gender-based claims, and those from moratorium countries to which Canada does not currently deport . As argued by Maureen Silcoff, Canada could use the existing public policy exemption clause in article 6 of the STCA to create a larger list of exemptions, thereby expanding access to Canada's asylum system for more people.

Finally, Canada needs to expand safe routes by issuing humanitarian visas. The Canadian government did this effectively and efficiently for Ukrainians under the Canadian-Ukraine authorization for emergency travel measures. Political will should be mobilized to expand this program to other

nationalities.

The government of Canada has a responsibility to protect and promote the right to seek asylum. Instead of politicizing “responsibility-sharing”, Canadians should demand rights-based refugee protection policies that recognize the dignity of each human being, including those who arrive at our borders, regularly or irregularly.

[1] FitzGerald, David Scott. *Refuge beyond reach: How rich democracies repel asylum seekers*. Oxford University Press, 2019.

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Stuck in the Past and Looking Forward: Responsibility Sharing, the *Canada-U.S. Safe Third Country Agreement*, and Regional Agreements

By: Denise Bell

Image of protestors holding signsIntroduction

The recent decision of the Canadian Supreme Court to uphold the *Canada-U.S. Safe Third Country Agreement* (“STCA”) represents a disappointing application of the principle of refugee responsibility

sharing. Preventing people from accessing asylum at the Canadian border and forcing them into a U.S. asylum system that violates human rights standards is not a true sharing of responsibility for refugee protection. It is the triumph of legal reasoning over reality.

Although States have an obligation to work together to ensure that refugees can enjoy international protection, there is an inherent tension between the need for international cooperation and responsibility sharing with States' autonomy and prerogative to manage their borders (in line with human rights standards). Fairness and best outcomes demand that States shape responsibility sharing agreements to provide meaningful access to international protection and safe pathways for people on the move, not just protect States' own interests. The STCA fails this test.

There is no easy solution for addressing the large-scale movement of people globally. This is a complex logistical undertaking distorted by politics and harmful public narratives. Nowhere is that more clear than in the anti-immigrant rhetoric and policies of many local and national politicians worldwide that place people in danger and even result in death.

Fortunately, shifting ground is opening up new opportunities to share responsibility in support of the human imperative to find protection, security, and livelihoods. Agreements like the STCA, which instrumentalize responsibility sharing to enforce border restrictions, are representative of outdated policies focused entirely on keeping asylum seekers out. Regional responsibility-sharing, such as envisioned in the *Los Angeles Declaration on Migration and Protection* ("LA Declaration"), provides a new framework for where we can head. Through creative new approaches, such as the Safe Mobility Offices arising from the LA Declaration, we can collectively work to uphold access to international protection, facilitate safe pathways to address migration movements, and answer the concerns of States over border management. Meaningful responsibility sharing not only gives teeth to intentional obligations, it's also in States' best interests.

The Canada-U.S. *Safe Third Country Agreement*: Harming not Helping Through Shared Responsibility

In effect since December 2004, the *Safe Third Country Agreement* ("STCA") between Canada and the United States frames its purpose as responsibility sharing for refugees between two countries capable of providing access to full and fair asylum systems, as required under international law. Limited exceptions apply. Operationally, this means that people who arrive in the United States but ask for asylum in Canada will be turned back, as will people seeking U.S. asylum who first entered Canada. Originally applicable only at ports of entry, the STCA was expanded to apply "across the entire land border, including internal waterways" in March 2023.

Human rights and refugee advocates, including Amnesty International Canada, the Canadian Council of Churches, and the Canadian Council for Refugees challenged the designation of the U.S. as a "safe third country", arguing it "violates refugee rights under international law and the *Canadian Charter of Rights and Freedoms*," which guarantees "the right to life, liberty and security of the person."

Assessing whether a country is eligible for safe third country status turns on whether that third country will “grant the person access to a fair and efficient procedure for determination of refugee status and other international protection needs,” which includes effective protection from *refoulement*.

In June, Canada’s highest court rejected advocates’ arguments that the STCA violates the rights of people seeking asylum under Section 7 of the *Canadian Charter of Rights and Freedoms*, and unanimously upheld the STCA in part. Specifically, the Court assessed “the risk of discretionary detention and medical isolation, along with the presumed risks of *refoulement*” (para 12 of headnote), and found that the *Safe Third Country Agreement* as a legislative vehicle “is not overbroad or grossly disproportionate and therefore accords with the principles of fundamental justice” (paras 126-164). It also acknowledged that although people returned to the United States could face *refoulement*, “safety valves” in the Canadian implementation of the STCA are available that would exempt such individuals (paras 163-164).

The Court returned to the lower courts the question of whether the STCA violates the guarantee to equality under Section 15 of the *Canadian Charter of Rights and Freedoms*, in particular with respect to the treatment of gender-based claims to asylum in the United States. In other words, it left open the door for the STCA to be struck down at least in part because the United States is not safe for all people seeking refugee protection.

Access to Asylum in the United States: Undermining Human Rights Obligations

The STCA is predicated on an assessment that the U.S. is providing “access to a full and fair refugee status determination procedure.” As Canada's highest court has stated, “the American system is not fundamentally unfair.” As a human rights lawyer, I would respectfully disagree.

Consistent with the *1980 Refugee Act* and all other signatories to the 1*951 Refugee Convention* and/or its *1967 Protocol*, the U.S. is obligated under international law to uphold the human right to seek asylum and to ensure people have fair and meaningful access to asylum.

Although this bedrock belief in the right to seek asylum lives on in the U.S. Code, policies that seek to deter and undermine fair and meaningful access to asylum are increasingly operational norms. The reasons for this are complex, ranging from decades-long Congressional failures to update immigration law to successive U.S. administrations pursuing deterrent-based border strategies that ignore the complexity of large-scale migration, including downplaying protection needs in favor of a narrative that people on the move are principally economic migrants. As a former Amnesty International USA researcher, who has published and contributed to numerous policy recommendations, briefings, and reports on access to asylum, border restrictions and immigration detention, I would know.

A range of bodies and organizations have long documented deficiencies in the U.S. asylum system, including the use of expedited removal and lack of due process safeguards; mass, arbitrary immigration detention; structural racism in the immigration system; forcible family separation; unlawful pushbacks of people seeking asylum at the Mexico-United States border; the “Migrant Protection

Protocols" (also known as the "Remain in Mexico" policy), requiring people seeking asylum at the Mexico-United States border to stay in Mexico; the Title 42 policy, under which nearly 2.5 million asylum seekers from Central America, Haiti, Venezuela, and other countries were expelled from the United States to Mexico under the misuse of a public health emergency order; and a highly restrictive new administrative rule, Circumvention of Lawful Pathways that constricts access to asylum so significantly that advocates refer to it as an Asylum Ban.

Zeroing in on immigration detention, multiple civil society organizations have documented the systemic, unlawful, harmful use of immigration detention in the United States. This for me is perhaps most astonishing in the Court's ruling – the U.S. immigration detention system is a documented multi-billion dollar industry that benefits from policies and practice which curate a steady pipeline of people for detention, disproportionately affecting Black and brown individuals and undermining access to asylum and contributing to *refoulement*. Detention is intended to serve as a deterrent, and it violates human rights standards.

These policies and practices violate the U.S.'s human rights obligations, which contravenes the STCA. They seek to deter people from seeking asylum in the United States, violating the right to seek asylum and to fair and meaningful access to asylum. They lead to violations of the non-derogable principle of *non-refoulement* – not to return a person to a country in which they would be at risk of torture or other serious human rights abuses. They contribute to the threat of chain *refoulement* when people who are denied the right to seek asylum in Canada pursuant to the STCA and pushed back to the U.S. and are then subjected to detention, expedited processing, and deportation.

Permitting the STCA to continue without amendment bypasses a unique opportunity to collectively shape fair chances and better outcomes for people seeking asylum and States alike. Approaching shared responsibility through an understanding of mutual obligations and capacity, without indexing on where a person asks for asylum, enables more effective planning and outcomes for people on the move and States alike. Instead, the STCA is designed to deliver border security, not responsibility sharing, to deliver better outcomes for people on the move, which itself helps manage that very movement. Evidence demonstrates that when people seeking asylum have access to – and believe they have access to – a full and fair hearing, they are more likely to accept a negative decision. Instead of doubling down on the STCA, Canada and the U.S. should structure immigration policy to protect human rights and promote their own economic, cultural, and labor priorities.

The Principle of Responsibility Sharing: Promise, Peril, and a Path Forward

The post-World War II order is built in part on a global commitment to providing protection for refugees. Central to this global commitment – the right to seek asylum – is the bedrock principle of responsibility sharing, rooted in international human rights and refugee law. States have obligations "to seek, and provide, international cooperation and assistance to ensure that refugees can enjoy international protection." This has historically relied on financial contributions to UNHCR, supporting host countries, and helping to share the burden of receiving refugees. Although the principle of

responsibility sharing is a recognized frame for how States can uphold the right to international protection, collaborate on migration management, and provide mutual support, there is no binding mechanism to allocate and enforce responsibility sharing.

Nonetheless, there continues to be successive international and regional agreements reinforcing the principle. Under the *Global Compact on Refugees*, 181 countries agreed to share equitably the responsibility for refugee protection. Similarly, the *Global Compact for Safe, Orderly and Regular Migration* commits itself "to improving cooperation on international migration." Moving from the global stage, the *Los Angeles Declaration on Migration and Protection* aims to "create the conditions for safe, orderly, humane, and regular migration through robust responsibility sharing" in the Americas. Similarly, the *European Union's Dublin III Regulation* is the responsibility-sharing agreement for EU member States for processing international protection claims.

While governments have put plenty of words to paper with good intent to uphold this principle, they have gone on to enact policies that were deterrent-based, limited access to asylum, and paid other countries to shoulder the responsibility, effectively representing "responsibility dumping" and "responsibility shifting." As we have seen around the world, the post-World War II refugee protection regime is crumbling as governments brazenly shift their obligations to other countries and limit access to asylum at their borders, sometimes in shocking and cruel ways. The shirking of responsibility sharing and offshoring of obligations reflects an unraveling of the post-World War II order, seen for example through the growing rise of authoritarian and undemocratic governments that villainize immigrant populations as "other" to centralize power for illiberal ends.

However, there is hope: where the STCA is stuck in the past, a forward-looking approach is regional responsibility-sharing arrangements such as envisioned in the LA Declaration. Even before the LA Declaration, the U.S. was already thinking regionally for responsibility sharing, when the U.S. Congress considered legislation in 2019 that would have set up regional processing centers in Central America, which critically maintained territorial access to asylum. Similarly, the U.S. proposed the LA Declaration in recognition of the need for regional responsibility sharing and cooperation due to dynamic and complex regional migration and protection needs.

As States continue to implement responsibility-sharing agreements such as the *LA Declaration*, we must guard against those that externalize obligations to restrict, rather than amplify, access to international protection, result in *refoulement*, and undermine human rights standards. States' increasing use of externalization, including through responsibility-sharing agreements, has correspondingly raised more and more concerns and critiques over States' turning away from their obligations, especially with regard to territorial access to asylum and *refoulement*.

The nomenclature can get murky here, as there is no one definition of externalization. Loosely understood, externalization "is the process of shifting functions normally undertaken by a State within its own territory so they take place, in part or in whole, outside its territory." According to UNHCR, externalization refers "to measures taken by States—unilaterally or in cooperation with other

States—which are implemented or have effects outside their own territories, and which directly or indirectly prevent asylum-seekers and refugees from reaching a particular 'destination' country or region, and/or from being able to claim or enjoy protection there." This is distinguished from States' transferring the responsibility for international protection in accordance with international standards. At heart, this is about avoiding "[p]ractices that shift burdens, avoid responsibility, or frustrate access to international protection [that] are inconsistent with global solidarity and responsibility sharing."

As advocates guard against externalization that blocks access to protection, States' attempts to better and meaningfully share responsibility for international protection must be nurtured. As advocates rightfully fight to restore meaningful access to asylum in the United States and defend the human right to seek asylum globally, responsibility-sharing agreements can be a "second-best" response tool to meet current international protection and migration needs. All of the tools in the toolbox must be used to uphold and achieve to the fullest extent possible access to international protection and safe passage for people on the move.

Safe Mobility Offices: A Regional Model for Responsibility Sharing

The new Safe Mobility Offices ("SMO"), proposed as part of a regional plan that draws on the premise of the *LA Declaration*, offer the potential for transformative change and a regional responsibility-sharing model for global consideration.

Announced at the end of April and operational since mid-June, SMOs are in their infancy. They are operated by UNHCR and the *International Organization for Migration* ("IOM") in collaboration with the U.S. and host governments, and have the participation of two partner governments, Canada and Spain. They intend to expand access to resettlement and complementary pathways closer to home. Depending on the pathway, SMOs will screen, process, and/or refer people to an appropriate pathway based on their eligibility and their needs. Some people may be considered for resettlement whereas others, for example, will be considered for humanitarian parole, family reunification programs, and labor pathways. For those who are not eligible for a pathway, the mechanism should be developed to integrate people, if desired, into host countries. All of this will require funding.

By expanding access to international protection and regular pathways closer to home, the hope is that fewer people will feel they need to undertake a dangerous journey at the mercy of traffickers and smugglers. However, people will not be deterred from continuing on if they desire. Critically, these SMOs are additional to territorial access to asylum in the United States. As of the beginning of July, SMOs will operate in Colombia, Costa Rica, and Guatemala. Canada and Spain will accept referrals from the SMOs for various pathways. Discussions are underway to expand SMOs.

SMOs are not without concerns. The blueprint for them can be seen not only in the LA Declaration but also thought pieces laying out the architecture of what would be needed. Yet, their announcement alongside the lapsing of Title 42 and introduction of a new administrative rule, Circumvention of Lawful Pathways, is troubling. Known by advocates as the Asylum Ban, the new rule significantly restricts

access to asylum to narrow and limited conditions. One of these is the reliance on CBP One as the only mechanism by which to apply for asylum, which Amnesty International has determined to violate the right to seek asylum. Thus, while territorial access to asylum remains, the U.S. is severely restricting it. Civil society organizations are consequently suing the government on multiple fronts to restore access to asylum in line with the U.S.'s own laws and human rights obligations.

But if we assess the concept of an SMO itself – with the critical requirement that it is not a substitute for, but an addition, to territorial access to asylum – the idea holds great and transformative promise. As my colleagues and I write elsewhere, some of the building blocks for the success must include focusing on protection needs, with expedited processing of resettlement claims; providing access to a broad range of regular pathways; building off community-based knowledge for culturally appropriate, accessible, and equitable access; preserving territorial access to asylum; and investing significantly in the new infrastructure. SMOs should also seek to integrate people outside their country of origin into host communities. New regular pathways should also be introduced to further facilitate safe and orderly migration. What's heartening is seeing that in addition to Colombia, Costa Rica, and Guatemala participating, countries such as Canada and Spain are participating too. This contribution to international cooperation and responsibility sharing could point us in the right direction. Because SMOs externalize some functions such as processing, careful attention is necessary to upholding human rights obligations and procedural safeguards to help ensure territorial access to asylum.

As noted above, the SMOs are in their infancy and will benefit from an iterative process. Lessons learned from them can benefit global conversation on how to maintain access to international protection and manage mixed migration so that people's physical security, dignity, and rights are upheld. Interestingly, when migration management models are introduced in other parts of the world, for example on how to address the movement of people from Africa across the Mediterranean or through Turkey to Europe, people adapt their actions, from smugglers and traffickers to people seeking safety. In the Western Hemisphere, the movement of people will consistently follow a similar pathway through Darien Gap and Guatemala, the crossroads of mobility, as people move to find humanitarian protection, reunify with families, and seek security in the United States. This means SMOs can iterate against a fairly consistent baseline understanding of migration pathways.

There is a real opportunity to apply lessons learned from the regional responsibility-sharing the SMOs represent to other parts of the world. In other words, this is looking forward, not backward like the STCA.

Using All the Tools in the Tool Box: Regional Responsibility Sharing

Deterrence-first policies, which have consistently failed to stop people from leaving their homelands, should be retired and replaced by a whole new set of tools. An agreement such as the STCA that deprives a person of access to territorial asylum is solely about border management, not sharing responsibility for refugee protection.

Safe Mobility Offices move policy toward a fuller embodiment of responsibility sharing and international cooperation consistent with States' interests and refugee rights. Operating in tandem with advocates pursuing policy changes and litigation to preserve access to asylum, SMOs represent an additional tool toward a comprehensive, principled, and effective response to the increasing number of people in the region who need protection and the increasing labor, economic, and cultural needs of many host countries. They are neither designed to act nor can be justified as substitutes for territorial access to asylum.

SMOs and the regional responsibility-sharing agreement from which they arise, the LA Declaration, make-up part of a new toolbox, ultimately benefiting the international protection regime and people on the move.

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Safe Third Country Litigation: Concealing Deficiencies in the U.S. Asylum System

By: Michael Bossin and Laïla Demirdache

Image of Canadian and US flags flying behind barbed wireOn June 16, 2023, the Supreme Court of Canada (SCC) released its decision (*Canadian Council for Refugees v. Canada (Citizenship and Immigration),* 2023 SCC 17) on the constitutionality and legality of the *U.S./Canada Safe Third Country Agreement* ("STCA" or "the Agreement"). It was only the latest chapter in a legal saga that began more than 15 years earlier and which, further to the SCC judgment, is to be continued, at least in part. While dismissing the appellants contention that the STCA legislative provisions are *ultra vires* and that they violate the section 7 *Charter* rights of refugee claimants returned to the United States pursuant to the Agreement, the SCC remitted to the Federal Court the question of the provisions' constitutionality under section 15 of the *Charter,* which neither of the Courts below had addressed.

Before reaching the SCC, challenges to the STCA had been twice before the Federal Court (FC) and twice before the Federal Court of Appeal (FCA). In both Federal Court decisions (2007 and 2020) the Court identified what FC Justice Phelan in his 2007 judgment described as "deficiencies" in the U.S. asylum system. On that basis, both FC Justices found that the legislation violated the section 7 *Charter* rights of persons affected by the STCA and, in the earlier decision, their section 15 *Charter* rights as well.

This paper focuses primarily on the most recent litigation (2017-2023), in particular how the SCC found ways to overturn the FC's well-supported findings about the risks faced by certain categories of asylum seekers in the U.S. The SCC did so by placing an emphasis on legal remedies potentially available to those affected by the STCA while minimizing the Agreement's actual impact on them. Having ruled that the STCA is working well within the parameters of the law, regrettably, the SCC lost sight of the real negative consequences facing refugees returned to the U.S.

While the STCA litigation has raised several issues (including section 15 and the *vires* question), our discussion is limited to how the Courts have addressed the section 7 *Charter* challenge.

How the STCA Works

Section 102(1) of the *Immigration and Refugee Protection Act* ("*IRPA*") enables the federal government to pass regulations "for the purpose of sharing responsibility with governments of foreign states for the consideration of refugee claims". Section 102(2) sets out the factors to be considered before a foreign state can be designated as safe (including "its policies and practices with respect to claims under the *United Nations Convention relating to the Status of Refugees* ("*Refugee Convention*") and with respect to its obligations under the *Convention Against Torture (*"*CAT)*"). Section 102(3) of the *IRPA* requires the Governor in Council ("GIC") to "ensure the continuing review of [those] factors … with respect to each designated country".

Pursuant to s. 159.3 of the *Immigration and Refugee Protection Regulations* ("*IRPR*"), the United States is designated as a safe third country. It is the only country that has been designated as such.

The STCA provides that, subject to some enumerated exceptions, persons seeking refugee protection at the Canada/U.S. border will be ineligible to have their claim referred to the Immigration and Refugee Board ("IRB") for determination (*IRPA,* s. 101(1)(e), *IRPR,* ss. 159.1-159.6). Instead, they are returned to the U.S. to pursue their claims there.

Interpreting the STCA

Before addressing how the courts have interpreted the STCA provisions, it is worthwhile asking how the STCA *should* be interpreted: more specifically, if a conflict arises between the interests of the state parties (Canada and the U.S.) and those refugee claimants affected by the Agreement, whose interests should prevail?

The answer is not straightforward. To start, the STCA (whose provisions have been incorporated into our domestic legislation) is a negotiated agreement between two states. The refugees affected by its provisions had no say in establishing its terms. As Audrey Macklin, referring to the STCA and its preamble, has noted, "It bears emphasizing that the objects of this law, namely asylum seekers, have no voice or role in the conversation; the preamble does not speak to them, only about them" (Macklin, 2005, at pp. 377-378).

Seen in its wider context, the STCA constitutes one mechanism among others (such as visa restrictions and overseas interdiction) designed to limit the number of refugee claimants entering Canada. The practical way that countries "share responsibility for refugee determination" is (again, with some exceptions) to deny refugee claimants the ability to choose where they want to seek protection. For many, having been forced to flee their country, losing much if not all in the process, effectively being told "where to go" is simply one more indignity to suffer.

If reducing the number of refugee claimants in a receiving country by sharing the responsibility for determination of their claims with another state is the *raison d'être* of the STCA, the agreement is nevertheless premised on the understanding that the "third country" will be one where there is a demonstrated adherence to the fundamental principles set out in the *Refugee Convention* and the *CAT*. After all, as the name implies, the STCA is an agreement between Canada and a third country determined to be *safe*.

The SCC has stated that "the purpose of s. 159.3 of the *IRPR* is to share responsibility for fairly considering refugee claims with the United States, in accordance with the principle of *non-refoulement* " (2023 SCC 17, at para 28).

Indeed, the legislature has made compliance with international human rights standards the starting point – arguably the foundation – of any safe third country agreement. To be designated by Canada as safe, a country must not only be a signatory to the *Refugee Convention* and the *CAT* (*IRPA,* s. 102(2)(a)), the legislation requires that it *comply* with the most significant provisions of those Conventions, Article 33 of the *Refugee Convention* and Article 3 of the *CAT,* which prohibit the *refoulement* of persons to face persecution or torture respectively (*IRPA,* s. 102(1)(a).

As the SCC stated in *Németh,* regarding the linkage between Canada's domestic laws (referring in that case to s. 44(1)(b) of the *Extradition Act*) and its international human rights obligations: "This clear link between s. 44(1)(*b*) and Canada's international obligations under the *Refugee Convention* has important implications for its interpretation and application in the refugee context. The *Refugee Convention* has an "overarching and clear human rights object and purpose", and domestic law aimed at implementing the *Refugee Convention*, such as s. 44(1)(*b*), must be interpreted in light of that human rights object and purpose: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* 1998 CanLII 778 (SCC), [1998] 1 S.C.R. 982, at para 57; *Németh v. Canada (Justice)* 2010 SCC 56, at para 86).

By making compliance with the *Refugee Convention* and the *CAT* a precondition to where Canada will return refugee claimants arriving at its border for a determination of their claim, "in accordance with the principle of *non-refoulement*", Canada has effectively implemented both international human rights Conventions into our domestic law. As such, any interpretation of the STCA provisions ought to be conducted in light of the human rights object and purpose of those *Conventions.*

Consequently, the answer to the question posed above regarding state parties vs. refugee claimants is, in our view, "the claimants". As we shall see, however, the Courts have not always seen things the same way.

The STCA's Litigation History: Briefly

Even before there was a Safe Third Country Agreement, the very concept of denying a claimant access to Canada's refugee determination system faced opposition. In 1989, the Canadian Council of Churches (CCC) challenged a broad range of amendments to the *Immigration Act,* one of which authorized the passing of regulations that would limit the right of nationals from certain (to be determined) countries to claim refugee protection in Canada. However, as no such regulations had yet been promulgated, the FCA dismissed that aspect of the challenge on the grounds that allegations of any harms arising from such a law were speculative (*Canadian Council of Churches v. R,* [1990] 2 F.C. 534 (FCA) at paras 56-57).

The first challenge to Canada's designation of the United States as a safe third country was commenced in December 2005 ("the 2005 challenge"). The applicants (referred to hereafter with respect to all proceedings as "the applicants") were three public interest litigants with a history of advocating for the rights of refugees, the Canadian Council for Refugees (CCR), Amnesty International (AI) and once again, the CCC. They were joined in the application by "John Doe", an anonymous Colombian refugee claimant in the United States who, if he had presented himself at the Canada/US border seeking protection, would have been barred from having his claim heard in Canada despite also being ineligible to have his claim processed in the U.S. (*Canadian Council for Refugees v Canada,* 2007 FC 1262, at paras. 1-2). The applicants argued that the STCA provisions were *ultra vires* and, in any event, offended sections 7 and 15 of the *Charter* (2007 FC 1262, at paras 55-60).

Based on findings of numerous “deficiencies” in the U.S. asylum system, Justice Phelan of the Federal Court (“2007 FC decision”) declared the STCA regulations (*IRPR* sections 159.1 to 159.7) to be *ultra vires* in that: the conditions specified in section 102(1) of the *IRPA* had not been met; the GIC had acted unreasonably in concluding that the U.S. complied with the relevant international *Conventions*; the GIC had failed to ensure the continuing review of the U.S.’s practices and policies regarding refugees; and the STCA regulations and the operation of the STCA were contrary to section 7 and 15 of the *Charter* and were not saved by Section 1 (2007 FC 1262, at para 338).

In 2008, the Federal Court of Appeal (per Noël J.A., and Evans J.A. in a separate, concurring judgment) (“2008 FCA decision”) overturned the FC’s decision (*Canada v. Canadian Council for Refugees,* 2008 FCA 229). An application for leave to appeal to the SCC was dismissed.

In 2017, the three public interest litigants from the 2005 challenge commenced a new challenge to the STCA (“2017 challenge”), again on grounds that the provisions were *ultra vires* (focusing on the GIC’s review obligations) and in violation of sections 7 and 15 of the *Charter* (based again on conditions facing asylum seekers in the U.S.). They were joined by several individuals directly affected by the STCA provisions: a woman (“ABC”) and her two daughters fleeing gender-based persecution in El Salvador; a young Ethiopian woman (“M”), who, after being deemed ineligible under the STCA and returned to the United States, was immediately detained and held for several weeks thereafter; and a Syrian woman (“al N”) and her three children (“H”), who sought refugee protection in Canada following the issuance by the Trump administration of an Executive Order barring citizens of several Muslim-dominant countries from travel to the United States, and amidst a growing perception of public hatred expressed toward Muslim and Arab people (*Canadian Council for Refugees v. Canada (Immigration, Refugees and Citizenship,* 2020 FC 770, at paras 4, 11-25).

Relying on the FCA’s 2008 decision on *vires,* Justice McDonald of the Federal Court (“2020 FC decision”) held that the STCA provisions were *intra vires.* McDonald J. concluded, however, that by returning refugee claimants to the U.S., where some were being detained in what she found to be inhumane conditions, the legislation violated their section 7 *Charter* rights to liberty and security of the person, and was not saved by section 1. Because of these findings, McDonald J. decided that she did not need to address the applicants’ section 15 arguments (2020 FC 770, at paras 80, 10, 150, 154).

The government appealed McDonald J.’s decision regarding section 7 and the applicants cross-appealed concerning her findings on the *vires* issue and section 15.

The Federal Court of Appeal (per Stratas J.A., 2021 FCA 72) ("2021 FCA decision") overturned the lower court's decision regarding section 7 and dismissed the cross-appeals.

As stated above, the SCC (per Kasirer J.A.) found that the designation of the United States as a safe third country was not *ultra vires* (2023 SCC 17, at paras 49-55) and not in violation of section 7 of the *Charter* (2023 SCC 17, at paras 56-58, 83-171).

Regarding section 15, though not faulting McDonald J. for exercising judicial restraint regarding this issue, the SCC held that it was nevertheless in the interests of justice to remit this matter to the Federal Court for determination (2023 SCC 17, at paras 175-182).

The Evidence and the Arguments

Simply put, at the root of the two STCA challenges is the contention that, in a variety of ways, the United States is not a safe country for all refugee claimants. That was the basis of the applicants' argument that sending all STCA-ineligible claimants to the U.S. – without exception - violates their *Charter* rights, and that the mechanism designed to have the GIC ensure the continuing review of factors regarding the U.S. asylum system, including its policies and practices with respect to the *Refugee Convention* and the *CAT,* is not working as it should.

In both cases, the applicants produced a vast record detailing the U.S. asylum system's deficiencies, much of it obtained through expert evidence. In the 2017 challenge, the applicants' expert evidence was supplemented by the evidence of: lawyers and other service providers representing or working with STCA returnees; the individual litigants; as well as the sworn statements of ten anonymized individuals, nine of whom had been detained by U.S. authorities after being refused entry to Canada pursuant to the STCA. The evidentiary record in the 2017 challenge was over 20,000 pages.

In the 2017 challenge, the government did not take issue with the applicants' evidence of conditions in the U.S. They did not produce documents or testimony contradicting the applicants' evidence of what was happening to asylum seekers in the United States in general or to dispute Ms. M's or the anonymized affiants' evidence of their experiences of being rejected at the Canadian border and being immediately detained upon their return to the U.S. Rather, the government's strategy was to argue that there are laws in Canada and the United States that could alleviate any of the harms described in the applicants' evidence, that the *Charter* did not apply to a foreign government's actions outside of Canada's control, that the *Charter* is not engaged at the time of removal, and that, in any event, conditions in the United States were not such that returning claimants pursuant to the STCA met the standard of "shock[ing] the conscience" (2020 FC 770, at paras. 84, 125-126, 133).

The 2020 Federal Court Decision

In the 2020 FC decision, McDonald J. focused her section 7 analysis on the issue of detention. Among her findings of fact were the following:

Upon being found to be ineligible to have her refugee claim processed in Canada pursuant to the STCA, Ms. M was returned to the U.S. by Canada Border Service Agency ("CBSA") officers and immediately taken into custody by U.S. authorities. She was detained at the Clinton Correctional Facility for one month and held in solitary confinement for one week before being released on bond (2020 FC 770, at para 95). Her imprisonment was the direct result of her being found ineligible to have her claim processed in Canada pursuant to section 101(1)(e) of the *IRPA* (2020 FC 770, at para 103).

Nine of the anonymized affiants were immediately detained by U.S. authorities after being refused entry to Canada pursuant to the STCA (2020 FC 770, at para 97).

Ineligible STCA claimants are returned to the U.S. by Canadian officials where they are immediately and automatically imprisoned by U.S. authorities (2020 FC 770, at para 103).

The immediate consequence to ineligible STCA claimants is that they will be imprisoned solely for having attempted to make a refugee claim in Canada (2020 FC 770, at para 128).

Failed (STCA-ineligible) claimants are detained in the U.S. without regard to their circumstances, moral blameworthiness, or their actions. They are detained often without a release on bond and without a meaningful process for review of their detention (2020 FC 770, at para 135).

STCA returnees were: kept in solitary confinement; denied food and the opportunity to bathe for several days; kept in conditions that were abnormally cold; and denied the use of blankets to keep warm. Ms. M, a Muslim, was fed pork despite having informed her guards that she could not eat this food due to her religious beliefs. Detained asylum seekers faced challenges mounting their claims due to barriers, including: an inability to afford phone calls; an inability to receive calls from people outside the detention facility; evidence being lost due to transfers between detention centres; and not having access to translators needed to fill in necessary forms (2020 FC 770, at paras 96, 107).

2021 Federal Court of Appeal Decision

In overturning McDonald J.'s decision, the FCA adopted an approach similar to that taken by the FCA in 2008. In the earlier case, the FCA overturned Phelan J.'s decision regarding section 7 on the grounds that neither the public interest litigants nor "John Doe" had standing to challenge the STCA under the *Charter*, which in the Court's view could only be brought by an individual who had actually sought refugee protection at the Canada/U.S. border and been found ineligible pursuant to the STCA. In this way, the FCA in 2008 managed to avoid addressing any of Phelan J.'s findings of "deficiencies" in the U.S. asylum system affecting STCA returnees' rights to life, liberty and security of the person (2008 FCA 229 at para 102).

In its 2021 decision, the FCA overturned the FC's 2020 decision on the basis that instead of focusing on the regulatory provision designating the U.S. as a safe third country (*IRPR,* section 159.3), the direct authority by which CBSA officers returned claimants to the U.S. pursuant to section 101(1)(e) of the *IRPA,* the applicants should have challenged the government's review process under section 102(3) of the *IRPA* (2021 FCA 72, at paras 48-91). According to Stratas J.A., the applicants' "proper recourse" was a judicial review of the administrative conduct – or inaction – of the GIC regarding its failure to revoke its designation of the U.S. as a safe country (2021 FCA 72, at paras 93, 96).

As Sean Dalton Santen has noted, referring to the 2008 and 2021 FCA decisions: "In both instances the appellate court did not meaningfully address the substance of [the FC's] findings [that the U.S. refugee determination system did not comply with its obligations under the *Refugee Convention* or the

CAT, that individuals claiming refugee status at a Canadian port of entry were entitled to *Charter* protection, and that Canada's return of claimants to the U.S. pursuant to the STCA provisions made the *Charter* violations that the claimants suffered or were at risk of suffering entirely foreseeable], but instead relied on procedural grounds to dismiss the claims altogether" (Santen, 2022, at p. 104).

Though the relevance of the 2021 FCA decision is limited in light of the SCC judgment, it reveals a line of reasoning reflected in the SCC decision – of undervaluing the impact of the STCA provisions on refugee claimants by focusing on the potential procedures available to them under Canadian and U.S. law and consequently paying little heed to the actual effect of STCA ineligibility on those claimants. That reasoning is reflected in the SCC's decision regarding the detention of STCA returnees in the U.S. and with respect to so-called "safety valves" available to STCA-affected claimants at the Canada/U.S. border.

The 2023 Supreme Court of Canada Decision

It has long been accepted by Canadian Courts that when it comes to a state's ability to protect its citizens from forms of persecution, the Refugee Protection Division of the IRB has to consider the state's capacity to implement measures at the operational or practical level for the persons concerned **:** (i.e., *Burai v. Canada (Citizenship and Immigration),* 2020 FC 966, at para 27, citing *Moran v. M.C.I.,* 2015 FC 902, at para 25)

In other words, in regard to refugee protection, what is happening in practice is more important than what is written in the law. For example, a law prohibiting domestic violence is of no use to a victim of such abuse if the police refuse to enforce the law on the basis that they perceive relations between a man and a woman to be "a personal matter". Yet, in regard to the STCA, at least at the appellate level, legal processes available to refugee claimants have effectively trumped the actual experiences of those claimants, including their ability in practice to access those processes.

The SCC found that claimants' section 7 rights to liberty and security of the person are engaged by the STCA (2023 SCC 17, at para 108), that Canada's participation in returning refugee claimants to the U.S. under legislative authority is a necessary precondition to the effects related to detention and the risk of *refoulement* (2023 SCC 17, at para 112) and that detention, the one-year bar, the treatment of gender-based claims and medical isolation were all foreseeable infringements of liberty and security of the person causally connected to Canadian state action (2023 SCC 17, at para 117).

However, according to the Court, the potential or actual deprivations of an STCA returnee's rights to liberty or security of the person are mitigated by remedies available to them under U.S. and Canadian law and are therefore in accordance with the principles of fundamental justice. In particular, the SCC held that the actual or potential section 7 deprivations experienced by STCA returnees are neither overbroad nor grossly disproportionate in regard to the legislation's purpose (again, "to share responsibility for fairly considering refugee claims with the United States, in accordance with the principle of *non-refoulement*") (2023 SCC 17, at paras 139-164).

Detention

Regarding the detention of STCA returnees in U.S. facilities, the SCC cites the UNHCR's *Detention Guidelines* (*Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum? Seekers and Alternatives to Detention* (2012)) as indicia of what it means to treat detainees fairly: "The *Detention Guidelines* require safeguards in relation to the use of detention. The particular form of these safeguards is a matter of state practice. Here, the appellants did not discharge their burden to show that safeguards are absent in the American asylum system. While the record shows that returnees face a risk of detention in the United States, it also discloses mechanisms that create opportunities for release and provide for review by administrative decision makers and courts. There is no basis to infer that these arrangements are fundamentally unfair. Thus, the risk of detention that returnees face is not overbroad" (2023 SCC 17, at para 143). [Emphasis added]

The evidence before McDonald J., however, was that, in fact, STCA-ineligible claimants "are detained often without a release on bond and without a meaningful process for review of their detention" (2020 FC 770, at para 135) and that "attempts to claim refugee status in Canada can be used by U.S. authorities as grounds to justify a large bond and ongoing detention" (2020 FC 770, at para 98). Lawyers working with STCA returnees described having their clients spend weeks in detention before getting a bond hearing (2020 FC 770, at para 99). One affiant who works for an organization that provides legal services to STCA returnees stated that most of the returnees are detained for two weeks to two months (2020 FC 770, at para 98). Another stated that "that nearly all of the STCA returnees he has encountered have been detained for three to five weeks without bond" (2020 FC 770, at para 98). Finally, an expert on U.S. asylum law testified in cross-examination that the average time of detention was 31 days (2020 FC 770, at para 99).

While the UNHCR's *Detention Guidelines* do speak of the importance of mechanisms for release, the SCC's reference to the *Guidelines* was nevertheless selective. *Detention Guideline* 4 states that "Detention must not be arbitrary, and any decision to detain must be based on an assessment of the person's individual circumstances". Guideline 4.1 states that "Detention is an exceptional measure and can only be justified by a legitimate purpose: to protect public order, public health, or national security". Further, "detention for the sole reason that the person is seeking asylum is not lawful under international law" (Guidelines 4, 4.1).

McDonald J. noted that in none of the cases before her were security or criminality concerns identified as relevant factors in the detention of STCA returnees (2020 FC 770, at para 102) but rather, that "[f]ailed claimants [were being] detained without regard to their circumstances, moral blameworthiness, or their actions" (2020 FC 770, at para 135).

In sum, the SCC's finding that the availability of legal mechanisms for release from U.S. detention centres renders the detention of STCA returnees in accordance with the principles of fundamental justice was made in the face of evidence that for many, if not most, those remedies were being applied only after they had spent a considerable period of time in detention, for no apparent reason other than

that they were seeking asylum. One might legitimately ask, where is the fundamental justice in that?

Canadian "Safety Valves"

The SCC acknowledged that "[s]ubjecting returnees to real and not speculative risks of *refoulement* would bear no relation to the purpose of the impugned legislation, which has respect for the *non-refoulement* principle at its core. A provision mandating return to a risk of *refoulement* would therefore be overbroad. Similarly, a provision mandating return to a risk of *refoulement* would be grossly disproportionate because doing so would, by definition, expose individuals to risks to their life or freedom" (2023 SCC 17, at para 148).

However, in the Court's view, where "safety valves" in the legislation exist, the question becomes "whether these mechanisms — properly interpreted and applied — are sufficient to ensure that no deprivations contrary to the principles of fundamental justice occur… [I]f no such deprivations materialize, then there is no breach of s. 7" (2023 SCC 17, at para 149; citing *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, at para 113).

In the case of refugee claimants affected by the STCA, the SCC cites the following provisions of the *IRPA* as applicable safety valves: s. 25.1 (by which the Minister may grant permanent resident status or exempt an individual from any criteria or obligation under the Act on humanitarian and compassionate (H&C) grounds; s. 25.2 (by which the Minister may provide the same relief to an individual where justified by public policy provisions; s. 48(2) (the provision requiring removal orders to be enforced "as soon as possible", from which an individual can seek a deferral of removal); and s. 24 (by which an individual can request a Temporary Resident Permit ("TRP") where, in the opinion of an officer, issuance is "justified in the circumstances") (2023 SCC 17, at para 148).

In discussing the availability of safety valves, the SCC compared the situation in the STCA challenge to that in *PHS,* noting that "[t]he *IRPA*'s curative provisions are, in many key respects, analogous to the safety valve in the *CDSA* [*Controlled Drugs and Substances Act*] upon which the Court relied in *PHS*" (2023 SCC 17, at para 150).The contexts in those two cases, however, could not be more different. At the time it commenced its *Charter* challenge in *PHS,* Insite, a safe injection facility in Vancouver, had been in operation for approximately five years (2011 SCC 44, at para 1). One cannot reasonably assume that individual claimants, by definition foreigners seeking refugee protection, having just arrived at the Canadian border, have the same sophistication or resources to pursue legislative safeguards as an established Canadian institution.

The SCC concluded that when McDonald J. asserted that any safeguards are "not generally available to those who arrive at a land POE" (Port of Entry) and are "largely out of reach and therefore 'illusory'" (2020 FC 770, at para 130), the FC Justice was referring only to the availability of judicial review and that she had erred by not assessing other curative mechanisms [such as those mentioned above] in any substantive way (2023 SCC 17, at para 160). Based on its *PHS* comparison, the Court went on to state, "Had the full range of relevant curative measures been considered, the Federal Court judge

would have recognized that there is insufficient evidence in the record regarding their practical operation" (2023 SCC 17, at para 161). However, when one examines the legislative safeguards outlined by the SCC, in terms of their practicality, each is found wanting.

Practical Barriers to Accessing Legislated Safety Valves

The SCC stated that the onus would be on an STCA-ineligible refugee claimant to establish that they have no access to the legislative safeguards outlined in its decision (2023 SCC 17, at para 161). But meeting that onus would be extremely challenging, as there are significant practical barriers that refugee claimants would have to overcome in order to access any of the legislative safeguards mentioned by the SCC. For example, two of those safeguards, sections 25.1 and 25.2 of the *IRPA,* are initiated by the Minister, not the applicant. Accordingly, access to these mechanisms is, by definition, beyond the control of an STCA-ineligible refugee claimant. Pursuant to s. 25.2, there is a long-established public policy prohibiting returns of STCA-ineligible individuals to the U.S. where they would face a risk of the death penalty (see *IRPR,* s. 159.6). Notably, before McDonald J., the government produced no evidence of either s. 25.1 or s. 25.2 having ever been used to stop an STCA-ineligible refugee claimant's return to the U.S.

Other potential means of stopping an STCA-ineligible claimant's removal to the U.S., an application for deferral of removal or for a TRP, mentioned by the SCC, or an application to remain in Canada on H&C grounds pursuant to section 25(1) of the *IRPA,* are initiated by the applicant. There are, however, reasons why refugee claimants arriving at the Canadian border would have difficulty benefitting from such applications. Regarding requests for deferral of removal, for example, there is little time within which one could submit such an application. The evidence before McDonald J., provided by the Director of Inland Enforcement Operations and Case Management Division for the CBSA, was that when claimants are determined to be ineligible pursuant to the STCA, they are issued a removal order which has "immediate effect and removal takes place as soon as possible" (2020 FC 770, at para 90).

There are additional practical barriers to accessing the legislative remedies identified by the SCC. First, by definition, potential applicants are persons who have never stepped foot in Canada and, consequently, are unlikely to have any awareness of Canadian law or procedures, or know what potential remedies are available. Secondly, the safeguards initiated by claimants are either paper applications (deferrals of removal or TRPs) or submitted through an online portal. Claimants would either have to arrive at the Canadian border with the necessary documents in hand, or navigate a complicated online portal before their arrival. In practice, to have a realistic chance of succeeding in such applications one requires legal representation. Generally, refugees seeking protection at the Canada/U.S. border do not arrive with legal representation. Nor do many have any fluency in English or French, the languages in which all applications must be completed. In addition, for some applications there is a fee to be paid. For H&C applications made pursuant to s. 25(1) of the *IRPA,* there is a filing fee of $570 for each adult and $155 for each dependent child. For a TRP, the fee is $200. Each of these factors, taken individually, constitutes a barrier to accessing justice. Cumulatively, they form a formidable obstacle to any refugee claimant seeking relief from the STCA.

Finally, all of the safeguards found in the legislation are discretionary. For them to be effective in a practical sense, not only will STCA-ineligible claimants have to overcome the barriers mentioned above to initiate their applications for relief, but CBSA officers will have to exercise their discretion to grant relief from removal to the U.S. Tellingly, although the respondents raised the availability of safety valves as part of its defence before McDonald J., the government provided no examples, or statistics, of these "remedies" having ever been applied, apart from the examples of two of the individual litigants who were successful in obtaining judicial stays of removal pending the outcome of the 2017 challenge, which the SCC noted, are not considered safety valves (2023 SCC 17, at para 160). Moreover**,** as noted by McDonald J., the issuance of those stays was not the norm, but rather "as a result of extraordinary efforts" (2020 FC 770, at para 130).

Additional Concerns: H&C Applications

An individual recognized as a Convention refugee in Canada can apply for permanent residence as a protected person (*IRPA,* s. 21(2)), whereas most of the legislative safeguards suggested by the SCC, with the exception of relief on H&C grounds under section 25(1) or 25.1 of the *IRPA,* result in only temporary status. Apart from the practical barriers described above, there are additional concerns with H&C applications.

First, before an STCA-ineligible claimant could even apply for H&C consideration, they would have to obtain a deferral of removal since, as indicated above, in most cases removal to the U.S. occurs "as soon as possible".

Secondly, H&C applications take time to prepare (ideally with the assistance of counsel) and once submitted, they take a long time to be processed. Currently, Immigration, Refugees and Citizenship Canada estimates that it takes approximately 20 months to make a decision on the first stage of an H&C application.

Thirdly, not only are H&C decisions discretionary, as Anthony Delisle and Delphine Nakache have noted, it is the program "that provides immigration officers making decisions on migrants' applications with the highest discretionary power" (2022, at p.4). In other words, there is no guarantee of success. The most recent statistics on H&C applications (from January to March 2021) show a refusal rate of 69.74%.

Conclusion

As stated at the outset, the STCA litigation saga is not over. Following the SCC judgment, the next chapter will involve a long-delayed assessment of the section 15 *Charter* challenge with respect to refugee claimants fearing gender-based persecution. It will likely take years to be decided.

In the meantime, the STCA provisions are still in place. In fact, following a recent amendment to the *IRPR,* the STCA applies not only to claimants arriving at regular ports of entry but also, since March 2023, to those crossing any border between Canada and the U.S. who make a claim less than 14

days after their date of arrival in Canada, subject to the usual exemptions (*IRPR,* s. 159.4(1.1)). As a result, more refugee claimants than ever will be potentially be affected by the STCA.

Regrettably, the legislative safety valves proposed for STCA-ineligible claimants who have fears for their liberty and/or security of the person if returned to the U.S. present significant practical barriers to anyone seeking to access them. For real change to occur, decision-makers will have take into account the actual experiences of those refugee claimants affected by the STCA, in the U.S. and at the Canada/U.S. border, and not merely the safeguards that exist “on paper”.

Citation: Michael Bossin and Laïla Demirdache, "Safe Third Country Litigation: Concealing Deficiencies in the U.S. Asylum System" in *Refugee "Responsibility Sharing" - Challenging the Status Quo: A special issue of the PKI Global Justice Journal* (2023) 7 PKI Global Justice Journal 6.

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The *Canada-U.S. Safe Third Country Agreement*: A Lifeline from the Supreme Court

By: Jamie Liew and Cheryl Milne

Image of the Supreme Court of Canada buildingThe Supreme Court of Canada delivered its much-anticipated reasons in *Canadian Council for Refugees v Canada (Citizenship and Immigration)* (2023 SCC 17) on June 16, 2023. The case centres around the *Safe Third Country Agreement*> ("STCA"), a responsibility sharing agreement between Canada and the United States. With limited exceptions, the STCA renders anyone ineligible to make a refugee claim at a port of entry along the land border shared by the two countries because they are expected to submit a claim for refugee protection in the first country they find themselves in, whether it be Canada or the United States.

The STCA is implemented domestically through sections 101(1)(e) and 102(1)(a) of the *Immigration and Refugee Protection Act* ("*IRPA*") where an agreement is permissible with a country that complies with *non-refoulement* obligations in international law. Section 159.3 of the *Immigration and Refugee Protection Regulations* ("*Regs*") makes the United States a designated country.

The Applicants in this case are public interest litigants and a group of persons who arrived from the United States to claim refugee protection in Canada at a land port of entry and were found ineligible to be referred to the Refugee Protection Division of the Immigration and Refugee Board. They challenged the validity of the designation of the United States under section 159.3 of the *Regs* and the constitutionality of the legal scheme giving rise to the STCA under sections 7 and 15 of the *Charter of Rights and Freedoms*. As part of the challenge, the Applicants submitted an enormous record that included multiple affidavits from individuals who had experienced being turned back at the port of entry, as well as from experts and lawyers. The affidavits described persons being detained, the conditions of detention, and how the US refugee determination system has a one-year bar for making a claim and treats gender-based claims differently.

The Federal Court found that the regime giving rise to the STCA violated the section 7 *Charter* rights, liberty and security of the person, because those returned to the United States faced risks of *refoulement* and other harm relating to immigration detention. The violation was not justified under section 1 of the *Charter*. The Court declined to rule on the section 15 *Charter* claim and rejected the *ultra vires* argument, finding that the assessment of *vires* is based at the time of promulgation. The Federal Court of Appeal allowed the appeal brought by the government, setting aside the judgement of the Federal Court.

In a unanimous decision by eight judges at the Supreme Court, the appeal was allowed in part. The Court held that the impugned regulation was not *ultra vires,* and that there was no breach of section 7 rights, but that the claim should be sent back to the Federal Court to decide whether section 15 equality rights were violated due to the claim that women fearing gender-based persecution are

adversely affected by the legislative scheme.

Judicial Review or *Charter* Challenge

The Federal Court of Appeal found that the applicants had not properly constituted a section 7 *Charter* challenge and stated that the applicants should have judicially reviewed the decisions coming out of the administrative review process as required by section 102(3) of the *IRPA* to assess whether the designation of the United States as a safe third country should have been maintained. The Supreme Court however found that "the mere fact that other forms of state action may also have a causal connection to the harms alleged does not mean that a challenge to legislation…is improperly constituted" (para 60). The Supreme Court reversed the Court of Appeal's problematic approach which restricts *Charter* challenges to administrative action or inaction when it comes to administrative legal regimes. As the Court rightly decides, *Charter* violations can be found in legislative forms as well.

A Concerning Approach to Assessing Claims of Section 7 Violations

The Supreme Court of Canada acknowledged in its decision the size and complexity of the record as well as the many affidavits provided by those with lived experience and those with expertise in refugee and American law. This record is in part the reason why the case was sent back to do a section 15 analysis.

With regards to section 7 however, the Supreme Court's decision provides a disappointing approach for future cases. The Court acknowledges that the record demonstrates section 7 is engaged since there are risks to detention and the conditions of detention (use of medical isolation, deficiencies in medical care, violation of religious dietary restrictions and cold conditions) fall within the scope of liberty and security of the person. Despite this, the court relied on two problematic grounds for concluding that section 7 rights were not violated: they question whether the Canadian state is implicated; and they point to the "curative provisions" or "safety valves" in the *IRPA*.

Lack of International Law Analysis

Given the Supreme Court's recent history of recognizing the role that customary international law may play in assessing Canadian state action in *Nevsun Resources Ltd v Araya (2020 SCC 5)*, the approach taken in this case is curious. The Court places importance on the concern for international comity and foreign sovereignty but seems to overlook the fact the STCA is an agreement that entrusts another state to make refugee determinations, in the place of Canada. The delegation of power by Canada invites scrutiny of this foreign context to assess the legality of such agreement. Scrutiny of a foreign state action in this context is important and must be informed by international legal obligations, namely those in the *Refugee Convention* and the *Convention Against Torture.*

The Court seems to view this as an examination of foreign state action, but it is far too simplistic to characterize the operation of the STCA in this way. In fact, the *IRPA* itself also invites scrutiny by

including a required review by the Governor in Council in section 102(3) to assess whether designation of a state pursuant to a responsibility sharing agreement should continue given the conditions in the foreign state. Indeed, the review, mandated by section 102(3), must be conducted considering obligations of *non-refoulement* in the *Refugee Convention* and the *Convention Against Torture* as indicated in section 102(1)(a).

The Court points out that there must be a causal connection between the harms alleged and the impugned state action (para 109). In this case, the Court depicts the harms (the risks associated with *refoulement* and detention) flowing from a foreign authority and that what needs to be established is that Canada knew, or ought to have known, such harms would occur. Here, the Court said that while the record did show risks to detention were foreseeable, some of the conditions in detention were not. Given the review function in section 102(3), should the government ought to have known? The Applicants' record may have been deficient with regards to what the government did or did not know, but they cannot be faulted with the fact that the government resisted sharing such information from the legislatively mandated reviews or failed to conduct reviews in the first place. This approach raises questions about the extent to which Canada's international obligations (in this case with regards to *non-refoulement*) inform evaluations of responsibility sharing agreements and to what extent individuals can provide evidence to meet this causation standard.

Safety Valves

One of the more concerning aspects of this decision is how the Court turns to alternative applications and processes to diminish or downplay any potential *Charter* violation. The so-called "safety valves" played a role in the Court's examination of the principles of fundamental justice; namely whether the scheme was overbroad and/or grossly disproportionate. The Supreme Court did clarify that "shocks the conscience" is not the test when it comes to reviewing *Charter* challenges to legislation, rejecting the approach followed by the Federal Court of Appeal. In essence, the Court found that the risks to detention and its conditions as well as *refoulement*, in the United States, were tolerable because, first, "[a] degree of difference as between the legal schemes applicable in the two countries can be tolerated, so long as the American system is not fundamentally unfair," pointing to the existence of "safeguards", for example in the form of detention reviews (paras 142-143).

Secondly, the Court found "safety valves" or "curative provisions" in Canada's own *IRPA* as dampening any overbreadth or proportionality effects. They identify deferrals of removal, temporary residence permits, humanitarian and compassionate exemptions and public policy exemptions (para 150). While they may be "germane to the assessment" (para 148) of principles of fundamental justice, the Court does not meaningfully examine the practical realities of accessing and obtaining these alternative remedies, as was outlined in the evidence and in oral arguments during the hearing. The reality is that many refugee claimants are not aware of the various immigration applications and processes they can access, or how to go about requesting or applying for these options within the short and stressful amount of time they would have while attempting to advance a refugee claim at a land border port of entry. The applicants in this case were assisted by a team of lawyers. Not every

person is able to obtain or even seeks legal advice before approaching a border. Border officials themselves generally do not offer different options to persons before them.

It appears that the mere existence of legislative opportunities to garner a benefit or alternative remedy will inform whether an aspect of a legislative scheme violates a *Charter* right. This raises long-term implications about the ability of individuals to mount *Charter* challenges. So long as a government can point to any "curative provisions" in a wider legislative scheme, applicants now must mount evidence to show the salience or practical effect of such options in relation to their claims. This case raises questions regarding the extent to which the existence of safety valves, even when more illusory than real, will defeat arguments about *Charter* violations.

Section 15 Equality Rights

The Courts Below

The Federal Court, after having found that the STCA infringed section 7 of the *Charter*, then turned briefly to the section 15 arguments before it. The Applicants had argued that the agreement disproportionately affected women because women facing gender-based violence were frequently denied protection in the United States due to a restrictive interpretation of the refugee definition and consequently faced *refoulement*. While McDonald J. reiterated the arguments put forward by the claimants, she declined to make any rulings either on the evidence or the legal claims due to her conclusion that the STCA infringed section 7, citing the Supreme Court of Canada's decision to decline ruling on the section 15 claim in *Carter v Canada (Attorney General) (2015 SCC 15)*.

The claimants cross-appealed on the section 15 claim at the Federal Court of Appeal. That Court's dismissal of the cross-appeal was of particular concern given that potential intervener groups, the David Asper Centre for Constitutional Rights, LEAF and WestCoast LEAF, were not granted leave to intervene in the appeal, and had sought to advance arguments on this point. While the Federal Court of Appeal's recharacterization of the case as a judicial review, rather than a *Charter* challenge rendered a section 15 ruling unnecessary, it further discounted the section 15 claim by stating that "section 15 does not enjoy 'superior status in a 'hierarchy' of rights,'" citing *Gosselin (Tutor of) v Quebec (Attorney General)(2005 SCC 15)*. In any event, it would have sent the matter back to the Federal Court to determine the factual findings needed to address the section 15 issues, but chose not to do so.

A Lifeline for the Case

At the Supreme Court of Canada, the Appellants devoted a single page in their written argument to the section 15 issue, making the point that the matter ought to be remitted back to the Federal Court for consideration. This is not surprising given the lack of evidentiary findings from the Federal Court and the number of issues arising from the Federal Court of Appeal's decision to refuse to determine the constitutionality of the provisions and the "guidance" that Court purported to offer on the section 7 claims. Despite the brevity of both the written and oral arguments on the section 15 claim the Supreme

Court of Canada held that it would not be in the interests of justice to dismiss the section 15 claim for lack of argument. While not explicitly finding fault with the Federal Court for exercising judicial restraint in not deciding the section 15 claim, it nonetheless noted that "when first instance judges decline to consider further constitutional issues, a false economy may arise if appellate courts have to remit claims" (para 181).

The Court engaged with the argument put forward by the Interveners that there was a perceived pattern of neglect with respect to section 15 in cases where there is a multiplicity of *Charter* claims. Kasirer J, for the Court stated, "One can well understand the concern: claims based on s. 15 are not secondary issues only to be reached after all other issues are considered. The *Charter* should not be treated as if it establishes a hierarchy of rights in which s. 15 occupies a lower tier" (para 180). The Court allowed the appeal on the section 15 claim remitting it back to the Federal Court for determination.

While this result extends a lifeline both to this case and for section 15 claimants in other cases where there are additional *Charter* claims, it remains to be seen whether the Court takes its own advice. The judicial pattern of neglect noted by the interveners was not simply based upon trial level decisions. Legal scholars have noted this pattern in appellate decisions where section 15 claims have been summarily dismissed or overlooked completely (Hamilton & Koshan 2015, at 192-193); Koshan 2013; Gilbert 2008; and Latimer 2018). Access to justice and the rule of law are arguably compromised when courts of all levels choose not to adjudicate section 15 claims properly within the court's purview. Siloing the section 15 claims could also frustrate a purposive approach to the *Charter* where the section 15 claims can animate, inform and provide context to harms arising from the violation of other *Charter* rights.

Role of Interveners

It is not necessarily commonplace for the Supreme Court of Canada to comment directly on the arguments put forward by interveners. The test for intervention requires applicants to show the they have a real and substantial interest in the subject of the appeal and that they can provide submissions that are useful and different from those of the other parties (Rules of the Supreme Court of Canada, Rule 57(2); *Reference re Workers' Compensation Act,* 1989 CanLII 23 (SCC), [1989] 2 SCR 335). In a Notice to the Profession issued in November, 2021, the Court set out its expectations of interveners and the scope of their submissions including that "[i]interveners should not challenge findings of fact, introduce new issues, or try to expand the case" and that it is expected that the submissions be "useful to the Court and different from those of the parties."

Despite acknowledging the important role of interveners before the Court, the Court has limited written arguments to 10 pages and oral arguments to only five minutes. Judges of the Court have also been critical of interveners in recent decisions, notably *R v Sharma* (2022 SCC 39) where the majority noted with concern interveners supplementing the record at the Court below (para 75) and *R v McGregor* (2023 SCC 4) where the majority criticized the interveners for, in its view, expanding the issues, (paras

23-24) while the dissenting judges' opinion was that the issue was properly before it (paras 81-82).

Here, the Court specifically acknowledged the issue raised by the interveners respecting the neglect of section 15 which supplemented the argument of the appellants that the section 15 issue ought to be remitted to the Federal Court. One wonders whether the Court would have paid as much attention to the issue with the appellants, by necessity, devoting little time to it, without the arguments of those interveners. We had hoped that the Court would engage with the arguments put forward by the Interveners that a purposive interpretation of the *Charter* requires the section 15 and section 7 arguments to be viewed together, both in relation to the harms experienced by claimants under both sections as well as in analyzing any proposed justification under section 1. For now we accept that the Court has clearly conveyed the message that section 15 is just as important as other *Charter* provisions.

Conclusion

On the one hand, the Supreme Court's acknowledgement that section 15 was neglected, and should not have been, in this case is a significant legal development. It means that courts cannot show preference for one *Charter* right over another and ignore claims made under section 15 in the future. This decision signals to courts that where it has been claimed that section 15 has been violated, they must engage with the record presented to them to assess whether this is the case. This could mean a new generation of section 15 analysis and a reinvigoration of the *Charter* for equality seeking groups.

On the other hand, the Court's section 7 analysis increases the evidentiary barrier for litigants. Despite the massive record compiled for this case, it was not enough to overcome the perception that sufficient alternative remedies, safety valves or curative provisions existed. Legislatively available processes and applications may prevent a claimant from accessing the protection of the *Charter* through section 7, regardless of how accessible they are in practice. We may see advocates having to stack the record with substantial amounts of evidence about the extent to which any such putative safety mechanisms do provide functional, operational, and practical opportunities to avoid harm.

As we wait for the Federal Court to evaluate the section 15 claim, for now, most refugees wanting to claim protection at the Canada-US land border are barred from doing so. In the months and years to come, we may see people perish and injured in their journeys to try to cross into Canada or the United States and hear stories where people are deported to their countries of origins to face tragic consequences.

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