The Canada – United States Safe Third Country Agreement:  
A Constitutional Analysis

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ABSTRACT

This thesis examines the Safe Third Country Agreement between Canada and the United States from the perspective of Canada's obligations vis-à-vis asylum seekers under the Canadian Charter of Rights and Freedoms. The Safe Third Country Agreement requires asylum seekers to lodge their refugee claims in the first country of arrival, as between Canada and the United States. Asylum seekers on the United States side of the border who are seeking to enter Canada for the purpose of claiming refugee status will be deflected to the United States to lodge their claims there. By deflecting asylum seekers in this manner, Canada effectively conscripts the United States to carry out its obligations under the Charter to furnish procedural and substantive protections to asylum seekers. This thesis examines certain features of the United States asylum system to which asylum seekers deflected under the Safe Third Country Agreement would be subjected, in order to determine whether, according to relevant Charter jurisprudence, deflection constitutes a deprivation of security of the person under section 7 of the Charter and whether such deprivation can be justified under section 1.
RÉSUMÉ

Ce mémoire examine l’entente sur les tiers pays sûrs entre le Canada et les États-Unis de la perspective des obligations du Canada aux demandeurs du statut de réfugié selon la Charte canadienne des droits et libertés. L’entente sur les tiers pays sûrs exige des demandeurs du statut de réfugié de loger leurs demandes dans le premier pays de l'arrivée, entre le Canada et les États-Unis. Les demandeurs du statut de réfugié du côté des États-Unis de la frontière cherchant à entrer du Canada doivent être refoulés aux États-Unis pour y loger leur demande. En refoulant les demandeurs du statut de réfugié de cette manière, le Canada compte sur les États-Unis pour satisfaire à ses obligations sous la Charte de fournir les protections procédurales et substantives aux demandeurs d'asile. Ce mémoire examine certains dispositifs du système d'asile des États-Unis auquel les demandeurs du statut de réfugié aux termes de l'entente sur les tiers pays sûrs seraient soumis, afin de déterminer si, selon l'interprétation de la Charte, le refoulement constitue une privation de la sécurité de la personne sous l'article 7 de la Charte et si une telle privation peut être justifiée sous l'article 1.
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INTRODUCTION

Involuntary population migration is one of the most vital human rights issues currently confronting the international community. Domestic human rights abuses, including persecution by governments of their own nationals, as well as social and economic disparity, have contributed to this phenomenon. Population migration will remain part of the international social landscape as long as the threat of human rights abuses continues to menace vulnerable peoples.

Involuntary migration necessarily entails increased pressure on nations offering economic opportunities and relief from persecution, such as Canada and the United States, to create and maintain efficient refugee determination systems. Such nations have developed policies and practices of deflection or interdiction in order to deter asylum seekers and avoid responsibility to assess asylum claims. Deflection mechanisms are, however, blunt instruments. Not only do they risk deterring genuine refugees in need of human rights protection from arriving and lodging a claim in the deflecting nation but, in addition, deflection mechanisms risk exposing asylum claimants to treatment that is incommensurate with the standards of human rights protection envisioned by international norms, as well as those enjoyed in Canada.

Canada has adopted a number of measures intended to deter asylum seekers from reaching its territorial borders. Of the techniques employed, the most recent is the
Canada–U.S. Safe Third Country Agreement (STCA), which was negotiated by Canada and the United States as a post 9/11 measure, and came into force on December 29, 2004. The STCA requires asylum seekers to lodge their refugee claims in the first country of arrival. Thus, asylum seekers on the U.S. side of the border who attempt entry into Canada will be deflected to the United States, and vice versa. The STCA applies only with respect to refugee claims made at a land port-of-entry, thus excluding claims made inland, at airports or marine ports.

This thesis examines the safe third country measure of controlling refugee flow mandated by the STCA according to the standards of the Canadian Charter of Rights and Freedoms (the Charter), as elaborated upon in the relevant Supreme Court of Canada jurisprudence. I argue that to the extent that Canada conscripts other nations to deliver procedural and substantive justice to asylum seekers arriving in Canada, it must be clear that the treatment they will receive in the receiving state is consonant with Canada’s obligations under the Charter vis-à-vis asylum claimants. In this regard, this thesis examines the standards of treatment to which asylum claimants are subject in the United States, and exposes the deficiencies in such treatment according to Charter standards, as informed by international human rights norms. In addressing this issue, I pay particular attention to the relative reception of asylum claims based on gender persecution in


Canada and the United States. Ultimately, I contend that the safe third country practice, as it has been implemented through the STCA, entails an unjustifiable violation of the rights guaranteed to asylum seekers in Canada under the Charter.

In Chapter 1 of this thesis, I set out the problem of deflection generally, and provide an overview of the STCA and its method of operation. Additionally, I discuss certain concepts, preconceptions and perceptions relating to the reception of the refugee in western, industrialized states. This discussion includes mention of the refugee's choice of destination and the related, much maligned notion of forum-shopping. The concepts of burden-sharing and national security are discussed, as factors motivating the implementation of the STCA.

In Chapter 2, I consider the relevant jurisprudence of the Supreme Court of Canada as regards Canada's obligations under the Charter vis-à-vis asylum seekers. Specifically, I explore the Court's decision in Singh and its implications for asylum seekers subject to the STCA. I analyze the STCA according to section 7 of the Charter, with a view to determining the application of the right of security of the person to asylum seekers as well as the content of security of the person itself. I also discuss the content of the principles of fundamental justice, as well as potential defences to such a Charter challenge on the basis of such concepts as remoteness and subcontracted fundamental justice.

3 Singh, infra note 61.
Chapter 3 consists of a detailed examination of various features of the United States asylum system which are particularly pernicious according to Canadian and international norms. The features of the United States asylum system discussed in this chapter include expedited removal, detention, political influence on the asylum system (including nationality-based detention), the one-year time limit on asylum claims, and the treatment of asylum seekers claiming on the basis of gender-related persecution. Following this exposition, I present my conclusion as to the implications of Canada’s deflection of asylum seekers to the United States, in light of the impact of the U.S. system on the security of the person and on Canada’s compliance with its duty to furnish fundamental justice.

In Chapter 4, I examine possible justificatory arguments for the implementation of the STCA, in order to determine whether a Charter breach occasioned by the deflection of asylum claimants to the United States can be saved under section 1. The framework provided in the Supreme Court of Canada decision in Oakes\(^4\) will be used in this regard. Specifically, objectives such as burden-sharing, reduction of backlog in the Canadian asylum system, reduction of misuse of the Canadian asylum system and national security are identified as factors motivating the implementation STCA.

Following the section 1 analysis, I present my conclusion as to the constitutionality of the STCA in light of Canada’s Charter obligations vis-à-vis asylum claimants.

\(^4\) Oakes, infra note 274.
CHAPTER 1: THE PROBLEM OF DEFLECTION

1. Deflection and Human Rights

There is a glaring contradiction between the public commitment of western, industrialized nations to international covenants and measures designed to ensure the protection of refugees, and their simultaneous resistance to the arrival of asylum seekers at their national borders. Stated otherwise, wealthy, industrialized nations have committed to assisting refugees, but continuously lament the arrival of asylum seekers requesting refuge from persecution in their countries of origin. Non-citizens seeking entry are often perceived as a threat to security, sovereignty and, in some cases culture. Furthermore, asylum-seekers are often met with fear and suspicion of being frauds seeking to abuse the system. State-sponsored policies and mechanisms designed with a view to the interdiction and/or deflection of potential asylum claimants illustrate this widespread sentiment.

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5 See Audrey Macklin, “Disappearing Refugees: Reflections on the Canada-U.S. Safe Third Country Agreement” (2005) 36 Colum. H.R.L. Rev. 365 [hereinafter Disappearing Refugees], for a discussion of this phenomenon and, as well, the consequences of the binary categorization of asylum seekers (legitimate) as refugees or (illegal) migrants.
According to the 1951 United Nations Convention Relating to the Status of Refugees\(^6\) as amended by the 1967 Protocol relating to the Status of Refugees,\(^7\) a refugee is a person who:

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country.\(^8\)

All major western nations, Canada and the United States included, are signatories to the Refugee Convention and the related Protocol. The Refugee Convention imposes certain obligations on States party regarding non-nationals at or inside the borders of the state. Most significant to the present discussion is the principle of non-refoulement, which prohibits a party to the Refugee Convention from returning a refugee “in any manner whatsoever” to a country in which the refugee could be subject to persecution.\(^9\) The broad language of subsection 33(1) of the Refugee Convention suggests a prohibition against the direct return of refugees, and has also been interpreted as prohibiting actions that risk indirect refoulement in which the state returns a refugee to a third state where the refugee would be at risk of further persecution or a risk of being returned back to his/her country of origin.\(^10\) Canadian law, however, leaves open the possibility of deporting an


\(^{7}\) Protocol relating to the Status of Refugees, 606 U.N.T.S. 8791 (entered into force 4 October 1967) [hereinafter the Protocol].

\(^{8}\) Refugee Convention, supra note 6 at Art. 33(1).

\(^{9}\) Refugee Convention, supra note 6 at Art. 33(1).

individual to face torture in another country, but this action is only justified in “exceptional” cases.11

Asylum seekers are accorded rights under the Refugee Convention based on the reason(s) for their flight, and international law distinguishes refugees from other categories of migrants based on those reasons. That is, the Refugee Convention identifies refugees as such according to their fear of persecution in the relevant country of origin due to the application of the listed grounds to their circumstances. Notwithstanding that that refugee status is determined largely by reason of flight (i.e. the asylum seeker’s identification with one or more of the listed grounds of persecution) it is, incongruously, the means by which the asylum seeker enters the country that is overwhelmingly determinative of their reception by the Canadian refugee determination system.12 That is, individuals who are entitled to make a claim are those who enter the country by state-sanctioned means, either before or at a port of entry. Conversely, so-called illegal migrants either enter without state permission or have already entered the country but remain longer than allowed under a visa.13

Their obligations under the Refugee Convention notwithstanding, many western states regularly evade such responsibilities by engaging in official measures designed to repel
or deflect asylum seekers from their territorial borders.\textsuperscript{14} Oft-cited examples of
deflection measures and policies include the placement of customs officers at foreign
airports in order to verify passenger information prior to boarding aircraft.\textsuperscript{15} Also
frequently utilized are state-imposed visa requirements,\textsuperscript{16} particularly for citizens of
countries perceived to produce refugees on a regular basis, as well as the denial of the
issuance of visas to individuals considered likely to make a refugee claim.\textsuperscript{17}
Additionally, several western states use interdiction techniques designed to physically
impede the flow of potential asylum claimants, such as interference with ships on the
high seas prior to their arrival in territorial waters. Professor Audrey Macklin points out
that deflection of potential asylum seekers is also achieved by effectively creating
unofficial customs officers out of employees of private air and marine transportation
companies by imposing liability for the transportation of undocumented migrants.\textsuperscript{18}
Finally, as will be discussed below, one of the most pernicious means by which states
evade their responsibilities with respect to asylum-seekers is by the implementation of the
“safe third country” concept in which asylum claimants are required to lodge their claims
in the “safe” country of first arrival.

\textsuperscript{14} See Canadian Council for Refugees, “Interdicting Refugees,” (May 1998), online:
<http://www.web.net/~ccr/Interd.pdf> (last accessed 28 January 2006) [hereinafter Interdicting Refugees],
for a discussion on the numerous tactics employed by the Canadian government to impede the access of
asylum seekers to Canadian territory.
\textsuperscript{15} Audrey Macklin, “Borderline Security” in Ron Daniels et al eds. The Security of Freedom (Toronto:
\textsuperscript{16} Ibid. Professor Macklin cites visa requirements as “the oldest and most obvious example” of efforts to
control access to Canada.
\textsuperscript{17} Ibid.
\textsuperscript{18} Ibid.
2. **The Safe Third Country Agreement: Background of Implementation and Overview of Operation**

The focus of this thesis is a recent policy instrument embodying the safe third country concept discussed above, entitled the Canada-U.S. Safe Third Country Agreement. The STCA was negotiated by Canada and the United States largely in response to the September 11 attacks on the World Trade Centre, as part of a 32-point action plan associated with the Smart Border Declaration signed by the two countries. Regulations concerning the STCA were issued by the Governor-in-Council in October, 2004. Pursuant to such regulations, as well as paragraph 101(1)(e) of the Immigration and Refugee Protection Act (IRPA), the United States was designated as a “safe third country” for the purposes of the STCA. The agreement itself came into force on December 29, 2004, and was developed on the basis of the “Dublin Convention” (now incorporated into the Dublin II Regulation of the European Union). A primary stated objective of the STCA is “to create an effective measure of control, necessary to better manage access to Canada’s refugee determination system” and is projected to “enhance the orderly handling of refugee claims and strengthen public confidence in the integrity of the asylum systems of both countries.”

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19 See Chapter 4, infra, for a more detailed discussion on the implementation of the STCA.
21 S.C. 2001, c. 27 [hereinafter IRPA].
24 Ibid.
The STCA operates by requiring asylum seekers to submit their refugee claims in the first country of arrival, as between Canada and the United States. Thus, asylum seekers arriving in Canada at the land border from the United States will not be eligible to have their refugee claim determined in Canada, unless they fall within an exception set out in the STCA. The agreement allows the United States to return to Canada asylum seekers attempting to enter the United States from Canada. A “third country” refers to a state through which an asylum seeker passes in her journey from her country of nationality to her ultimate destination. The “safe” descriptor implies that the so-named country will provide refugee protection in accordance with its international obligations, namely the Refugee Convention and the Protocol. Because the agreement applies only to refugee claims made at a land port of entry Canada Border Services Agency (CBSA) officers have a primary role in implementing the STCA.

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25 See Macklin, Disappearing Refugees, supra note 5 at 370.
26 Refugee claims made at ports of entry other than those located at land borders are excluded from the operation of the STCA. Thus, the STCA does not apply to claims made at marine ports, airports, or inland offices. Professor Macklin presumes that the STCA does not apply to asylum seekers arriving at airports because of opposition from airlines to this possibility, which would impose on them responsibility for transporting asylum claimants back to the “safe” country. See Macklin, Disappearing Refugees, supra note 5 at 372.

People who arrive claiming to be refugees are examined by a CBSA officer who determines their admissibility into Canada and prepares a recommendation on their eligibility. A second CBSA officer will review the report, the recommendation and any evidence, interview the person and make a decision as to whether the claimant is eligible to make a refugee claim and be admitted to Canada.
The STCA begins with a preamble that refers to the international legal obligations of the parties, and specifically acknowledges the duty of non-refoulement. Article 4(1) is the primary operative clause of the agreement, which provides the following:

[t]he Party of the country of last presence shall examine, in accordance with its refugee status determination system, the refugee status claim of any person who arrives at a land border port of entry... and makes a refugee status claim.

This rule stated in Article 4(1) is subject to several exceptions. According to Article 4(2), a claimant will be allowed to make a refugee in the territory of the “receiving Party” if he or she:

a) Has in the territory of the receiving Party at least one family member who has had a refugee status claim granted or has been granted lawful status, other than as a visitor, in the receiving Party’s territory; or
b) Has in the territory of the receiving Party at least one family member who is at least 18 years of age and is not ineligible to pursue a refugee status claim in the receiving Party’s refugee status determination system and has such a claim pending; or

c) Is an unaccompanied minor;
d) Arrived in the territory of the receiving Party:
   i) with a validly issued visa or other valid admission document, other than for transit, issued by the receiving Party; or
   ii) not being required to obtain a visa by only the receiving Party.

In addition, Article 6 of the agreement permits the parties to examine a refugee claim “where it determines that it is in the public interest to do so.” The STCA Regulations add two further categories of exceptions: individuals who have been charged outside Canada.

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28 There is considerable doubt as to whether the STCA lives up to the aspirations alluded to in its preamble. See Chapter 4, infra. See generally Macklin, Disappearing Refugees, supra note 5.
with an offence that could subject them to the death penalty, and individuals who are
nationals or residents of a country on which the minister has imposed a stay on the
enforcement of removal orders. 29

Under the STCA, the country of last presence of the asylum claimant is obligated to
accept the return of the individual from the receiving country, and the receiving country
is obligated to adjudicate the refugee claim. According to Article 3, the refugee claim
must be heard by one of the parties before the claimant can be removed to a country
outside Canada or the United States.

Although it is premature to draw any definitive conclusions as to the effects of the STCA
on refugee flow in Canada at this early stage, recent statistics indicate that there has been
a 40 percent decrease in the number of refugee protection claims made in Canada since
its coming into force. 30 It cannot yet be said with certainty that the drop in refugee
protection claims is a direct result of the agreement’s implementation, particularly in light
of the fact that there was also during the same period a decrease in refugee protection
claims made at other (non-land border) points of entry into Canada. 31 However, given
that according to the statistics of Citizenship and Immigration Canada between 1995 and
2001, 60 to 70 percent of refugee claimants lodging claims at ports-of-entry arrived in

29 STCA Regulations, supra note 20, s. 159.6.
Show Decline in Refugee Claimants,” (13 July 2005), online: <http://www.cic.gc.ca/english/policy/safe­
third-stats.html> (last accessed 8 January 2006). The statistics cover the period from December 29, 2005 to
March 30, 2005.
31 Ibid. The decrease in that case was noted as 23%.
Canada via the United States, it is reasonable to predict that the agreement will operate to significantly reduce the refugee flow to Canada.

In this thesis, I argue that the primary problem with the safe third country practice of deflection, in terms of human rights, lies in its blunt and indiscriminate nature. Deflection does not require an inquiry into the legitimacy of one’s asylum claim or the reasons for one’s flight. Rather, deflection mechanisms such as the STCA apply across the board to exclude individuals from lodging an asylum claim in Canada for reasons that are irrelevant to their need for protection, namely the fact that they happen to have arrived in the United States before having arrived in Canada. As will be discussed in Chapter 4 of this thesis, the measure of exclusion in this case (deflection) does not bear any meaningful rational connection to the express and implied objectives of the STCA. Moreover, the significant numbers of individuals returned to the United States under this policy will be subject to the treatment meted out to asylum claimants in that country which, in many aspects, falls short of the standards of treatment guaranteed to such individuals under the Charter in Canada.

3. Perception of the Refugee in Western, Industrialized States

The vilification of the refugee is a persistent theme found in the official policy and media of western, industrialized states. Recently, there has been an intensification of this

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phenomenon, particularly following the events of September 11. Some scholars have
condemned the media’s response to those events for its reliance on and exploitation of the
“emotive power of invoking the spectre of the foreigner as an intrinsic menace to national
security.” United Nations Secretary General Kofi Annan has acknowledged the growing
tendency to equate refugees “at best with economic migrants, and at worst with cheats,
criminals, or even terrorists.” This phenomenon is particularly worrisome in light of the
impact the public’s perception of refugees can have on the development of a state’s
refugee policy.

Due in part to such prejudice, asylum seekers are currently subjected to an inconsistent
and often paradoxical reception in so-called “safe” countries. On one hand, asylum
seekers evoke responses of compassion and humanitarian concern at the plight of
despondent individuals fleeing human rights abuses. However, it has been pointed out
that public empathy seems only to apply until such individuals reach the territory of the
“safe” country and request protection. At that point, the public tends to perceive
asylum seekers as potential opportunistic economic migrants who are seeking to jump the
immigration queue and/or, as will be discussed below, as security threats. It is not only
individual responses which are inconsistent and paradoxical; this dualism of sentiment is
reflected in the refugee policy of the governments of wealthy, industrialized, so-called
“safe” countries, including Canada and the United States.

33 Macklin, Borderline Security, supra note 15 at 384.
34 See Ray Wilkinson, UNHCR, “Refugees and asylum seekers worldwide feel the effects of the September
attacks in the United States” (2002) 125 Refugees, online: <www.unhcr.ch/cgi-bin/texis/vtx/publ/
open_doc.htm?tbl=PUBLIC&page=home&id=3ced5842d> (last accessed 8 January 2006).
35 See generally Lara Sarbit, “The Reality Beneath the Rhetoric: Probing the Discourses Surrounding the
36 Macklin, Disappearing Refugees, supra note 5 at 365-371.
International legal norms do not prescribe the safe third country practice in regard to refugees seeking protection. On the contrary, according to Article 14(1) of the Universal Declaration of Human Rights refugees enjoy the right “to seek and enjoy in other countries asylum from persecution,”[37] which implies that refugees are entitled to select their destination. However, a common argument advanced by safe third country apologists is that asylum claimants should not be entitled to choose their preferred destination. Attempts to justify the notion that asylum claimants must make their claim for protection in the first country of arrival are frequently grounded in arguments against what is disparagingly referred to as “forum-shopping.” The argument is based on the assumption that states providing asylum do so out of a sense of charity and voluntary kindness and that, as willing recipients of such generosity, asylum claimants, cannot also be choosers.[38] An asylum seeker’s choice of forum, then, is perceived as the opportunistic and inappropriate use of the international regime of refugee protection. That is, those asylum claimants who seek to choose their destination based on factors


[38] See Macklin, *Disappearing Refugees*, supra note 5 at 381. Macklin points out a telling remark made in 2002 by then Deputy Prime Minister John Manley, soon after initiating the process leading to the STCA, “It’s not a matter of shopping for the country you want... It’s a matter of escaping the oppression you face.” See C. Clark, et al., “Canada-US Agree to ‘safe third country’ refugee pact” *Globe and Mail* (29 June 2002) A4. This line of thinking, however, betrays a common and devastating misconception on the part of western, industrialized nations. I argue that, as parties to the Refugee Convention it is not humanitarianism and voluntary kindness but, rather, *duty* that obliges such nations to offer protection to refugees.
other than the bare fact that protection from persecution is offered, are perceived as fitting more appropriately in the immigration queue, rather than the asylum system.\textsuperscript{39}

The notion of "forum shopping," and the disparaging brush with which it is painted, brings into stark relief the presumption that seeking protection in one "safe" country is as good as seeking protection in any other. This presumption underlying the STCA belies the belief that the United States is as "safe" as Canada for those seeking relief from persecution. Considerations such as which country of asylum is more advantageous to the claimant from the perspective of his or her economic, linguistic, social, cultural or ethnic background are considered secondary. Such presumptions ignore the fact that although the United States and Canada enjoy similar levels of economic prosperity relative to most refugee-producing countries, the two countries differ significantly in both the procedural and substantive treatment meted out to asylum claimants. I argue in this thesis that to the extent that the values and standards of both international human rights norms and the Charter inform Canadian asylum law and policy, the United States diverges so significantly from such standards that it cannot be considered a "safe" country for asylum seekers.

Furthermore, I argue that asylum claimants have numerous legitimate reasons for choosing to lodge their claims in Canada rather than the United States. Given that, as

\textsuperscript{39} See Macklin, \textit{Disappearing Refugees}, supra note 5 at 381, referring to statement by American anti-immigration activist Mark Krikorian in \textit{United States and Canada Safe Third Country Agreement: Hearing Before the Subcommittee on Immigration, Border Security, and Claims of the House Comm. on the Judiciary}, 107\textsuperscript{th} Cong. 28-38 (2002): "Asylum is analogous to giving a drowning man a berth in your lifeboat... A person who seeks to pick and choose among lifeboats is by definition not seeking immediate protection but instead seeking immigration."
stated above, the two countries enjoy similar standards of living and economic prosperity relative to most refugee-producing countries, it is unlikely that an asylum claimant would choose one over the other for economic reasons.\textsuperscript{40} Rather, it is the less evident, yet enormously significant, differences in the socio-political and legal environments of both countries that engender differential treatment of asylum claimants and adjudication of asylum claims in each country, and which consequently colours the choice of forum for asylum claimants. Naturally, asylum seekers want the choice to lodge their claims in the country that offers them the best chance of having their claim viewed favourably, as well as the country that offers an environment which is most personally advantageous and fulfilling. Additionally, asylum seekers may prefer one country over another due to the presence of a support network of family and friends. It would seem that “safe” countries should wish these same advantages for asylum claimants, given that the success of a country’s newcomers can only be a boon to the country itself.

5. Exemptions

It is important at this stage to point out several additional limitations on the protection of asylum seekers contained in the STCA itself. As discussed above, the STCA exempts from its application a number of categories of asylum seekers. However, the exemptions provide only a limited window of relief for asylum claimants. For example, in Article 1(1)(b), the term “family member” is defined as including one’s “spouse, sons, daughters,

\textsuperscript{40} Macklin, Disappearing Refugees, supra note 5 at 382.
parents, legal guardians, siblings, grandparents, grandchildren, aunts, uncles, nieces and nephews.” Cousins, then, are excluded from the definition. Also, the visa status exemption in Article 1(1)(d) is of limited utility. Even if asylum seekers possessing valid visas are not subject to the STCA, the individual must first obtain the visa, which may prove difficult for nationals of countries that are known to be “refugee-producing.”

6. **Express and Implied Motives for the Safe Third Country Agreement**

The Canadian government had been attempting to implement a safe third country provision as part of the IRPA’s predecessor, the *Immigration Act,*\(^4\) since the late 1980’s. Given the statistical figures discussed below, a safe third country accord between Canada and the United States would be primarily to Canada’s benefit and, unsurprisingly, the United States initially showed little interest in pursuing such an agreement. The implementation of the safe third country concept would result in the increased flow of asylum claimants in the U.S. refugee determination system, and the reduction of the same in Canada, because a greater number of asylum claimants reach Canada via the United States than reach the United States via Canada. Thus, the Safe Third Country Agreement would have the effect of deflecting greater numbers of claimants travelling to Canada via the United States back to the United States to lodge their claims there, than vice versa. To illustrate, in 2001, over 13,000 refugee claimants came to Canada from the United States.

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\(^4\) *Immigration Act, R.S.C. 1985, c. 1-2 s. 46.01(1)(b).* As no country was ever listed as “safe” in accordance with s. 114(1)(s) of the legislation, the incorporation of this provision had no effect.
States, 95% of which claims were made at a land border port of entry\textsuperscript{42} (which, today, would trigger the STCA), while only about 200 refugee claimants entered the United States from Canada annually.\textsuperscript{43} The effect of the STCA would be the significant reduction of refugee flow to Canada, affecting about one-third of refugees seeking asylum in Canada each year.\textsuperscript{44}

The United States became interested in signing the STCA following the attacks of September 11. The agreement was negotiated as part of a package of security measures entitled the "Smart Border Action Plan," by which Canada and the United States agreed to cooperate in various national security initiatives. It has been reported that U.S. government officials have hitherto appeared unable to identify a compelling need for the agreement, and it is perceived to benefit only the Canadian government.\textsuperscript{45} Because a cogent reason for the United States' entry into the STCA has proved elusive, and it was agreed to as part of a package of various security measures, it is possible that the United States agreed to the STCA as a compromise, in exchange for some kind of security-related concession by Canada. There does not seem to be any other, identifiable reason for the United States' entry into the agreement.

\textsuperscript{42} Standing Committee Report, \textit{supra} note 32.
\textsuperscript{44} Standing Committee Report, \textit{supra} note 32 at 3. According to statistics of the Department of Citizenship and Immigration Canada, between 1995 and 2001 about one-third of all refugee claimants in Canada entered at the U.S.-Canada border, and of those claiming refugee status at a port of entry 60-70\% arrived via the United States.
There are a number of express and implied motives for Canada’s entry into the STCA, the viability of which will be discussed in detail in Chapter 4 in the context of the section 1 justification portion of the Charter analysis. The notions of burden-sharing and national security will be introduced in this chapter as two of the agreement’s primary ideological underpinnings. Paragraph 4 of the Preamble to the STCA makes specific reference to the “principle of burden sharing,” which refers to the allocation of state responsibility for the determination of refugee status. The UNHCR supports measures aimed at this goal.46

The concept of burden sharing implies that states take responsibility for the handling of refugee flow that is proportional to their population and resources.47 It has been suggested, given that the United States received about 43,000 asylum claims in 2003, and Canada received 25,750 in 200448 and the population of the United States is approximately ten times that of Canada, that “the total number of refugee claimants received by the United States seems disproportionately small.”49 Thus, the objective of burden-sharing would appear to be served by measures such as the STCA in increasing refugee flow to the United States. However, the notion of burden-sharing through the STCA is problematic vis-à-vis Canada’s duties under the Charter, as is discussed in detail in Chapter 4.


47 Macklin, Disappearing Refugees, supra note 5 at 395.

48 Macklin, Disappearing Refugees, supra note 5 at 395, citing Immigration and Refugee Board (Canada), Country Report (2004), (on file with author).

49 Macklin, Disappearing Refugees, supra note 5 at 395.
The fostering of national security in Canada is one of the primary goals of the STCA, which is said to be achieved through the deflection of asylum seekers to the United States. As will be discussed in Chapter 4, Canada’s immigration and refugee system has long been used as a scapegoat for lapses in national security, and the motif of Canada as a safe haven for terrorists has decorated Canadian media headlines since the September 11 attacks.  

Although cooperation between Canada and the United States in information-sharing and intelligence-gathering are effective in promoting national security on both sides of the border, draconian measures such as deflection under the STCA are exceedingly inefficient means to combating terrorism in Canada. The Safe Third Country Agreement does not serve to restrict entry to only “legitimate” or “safe” refugees. Instead, it deters all refugees, including those who pose no security risk at all. In fact, critics posit that the STCA may have the effect of eroding national security by forcing migrants, including those posing security risks, to use clandestine measures to gain access to Canada’s territory. Alternatively, it has been suggested that the STCA may leave asylum seekers susceptible to human smugglers and, thus, the underground labour market of the destination country. Organized smuggling operations often include the exploitation of desperate undocumented workers following their entry into Canada. It is, then, in the interests of national security to ensure that the entry of asylum

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50 See, for example, R. Granatstein, “‘Al-Qaida’s Here’: Poll results blast immigration laws and sloppy border” Toronto Sun (8 September 2002), 1 at 4, setting out the results of a poll stating that 69% of Canadians wanted tighter immigration laws; see also Bob MacDonald, “Wake up, Canada!” Toronto Sun (11 September 2002), online: <http://www.canoe.ca/CNEWS/Sept11/Columns/sep11_macdonald.html> (last accessed 9 January 2006); see also Linda Williamson, “Soft underbelly: When will the feds get it? We’re a target for terrorism” Toronto Sun (5 September 2002), online: <http://www.canoe.ca/CNEWS/Sept11/Columns/sep5_williamson.html> (last accessed 9 January 2006).


52 Macklin, Disappearing Refugees, supra note 5 at 398.

53 Macklin, Disappearing Refugees, supra note 5 at 419-423.
seekers is documented upon their arrival, and measures such as the STCA may only be a hindrance to such efforts.

7. **The Safe Third Country Agreement and the Charter**

After having set out the problem of the deflection of asylum seekers and the background and overview of the STCA, in the following chapter I explore the application of section 7 of the Charter to asylum seekers deflected subject to the STCA. Furthermore, I set out the meaning of Canada’s duty to provide fundamental justice to asylum seekers, and address potential arguments in defence of the safe third country practice, including the principles of remoteness and subcontracted justice.
CHAPTER 2: ANALYSIS OF THE SAFE THIRD COUNTRY AGREEMENT
ACCORDING TO SECTION 7 OF THE CANADIAN CHARTER OF RIGHTS
AND FREEDOMS: SECURITY OF THE PERSON AND FUNDAMENTAL
JUSTICE

1. **Section 7**

This chapter considers relevant jurisprudence of the Supreme Court of Canada to
determine whether Canada's deflection of asylum seekers to the United States pursuant to
the STCA complies with the requirements of section 7 of the Charter. First, this chapter
examines the applicability of the Charter, generally, to asylum seekers subject to the
STCA. Then, I set out the meaning of security of the person under section 7, and attempt
to determine whether deflection of asylum seekers to the United States constitutes
deprivation of security of the person as the term has been interpreted in Canadian Charter
jurisprudence. Furthermore, I examine judicial interpretation of the principles of
fundamental justice, as well as the content of fundamental justice in the context of
Canada's duty vis-à-vis asylum seekers deflected pursuant to the STCA. The notions of
remoteness as well as the contracting out of Canada's duty to provide fundamental justice
will also be explored in this regard.

As discussed in Chapter 1, the STCA operates such that it requires the country of last
presence of the asylum claimant, being either the United States or Canada, to examine in
accordance with its refugee status determination system the refugee status claim of those
arriving and making such claims at land border ports of entry.
Section 7 of the Charter provides the following:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

In light of the foregoing, I will proceed by discussing the application of section 7, beginning with the burdens and benefits to which Charter protection applies.

2. **Burden of Upholding Rights under Section 7**

Section 32(1)(a) of the Charter provides:

32. (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament...

From this provision, it is evident that the Charter operates as a limitation on the powers of Parliament and government.\(^\text{54}\) Governments (federal or provincial), acting under statutory authority, are bound by the Charter,\(^\text{55}\) such that actions taken by the cabinet, federal government ministers must be in accordance with the Charter.\(^\text{56}\) By contrast,

\(^{55}\) *Ibid.* at 767.
\(^{56}\) *Ibid.* at 768.
actions taken by private parties, in the absence of the involvement of any government power or discretion, are not subject to Charter scrutiny.57

The Charter applies to the STCA as a measure undertaken by the Canadian government acting under statutory authority. Canada is authorized to enter into agreements with governments of other nations, such as the STCA, under the Immigration and Refugee Protection Act.58 Furthermore, as immigration is a matter which falls within the authority of Parliament under section 91(25) of the Constitution Act, 1867,59 the Immigration and Refugee Protection Act and the administration of programs, policies and agreements under it fall within the authority of the federal government. The implementation of the STCA cannot be considered to be in the realm of private law such that the Charter does not apply. Rather, it was a measure undertaken by a public body, acting under its statutorily-granted authority to enter into such an agreement with the United States which, as will be discussed below, operates to the detriment of asylum seekers as possessors of Charter rights.

57 The application of the Charter is a complex issue which is obscured in cases in which government involvement is indirect. However, for the purposes of this thesis, it is sufficient to point out that the Charter applies when there has been government action of some kind, rather than in the realm of relations between private individuals.
58 IRPA, supra note 21, s. 8(1), provides the following:

8. (1) The Minister, with the approval of the Governor in Council, may enter into an agreement with the government of any province for the purposes of this Act. The Minister must publish, once a year, a list of the federal-provincial agreements that are in force.

3. **Benefit of Section 7 Rights**

Charter rights are effective to restrict the power of government over the persons possessing such rights. Although there must be action by a Canadian legislative body or government for the Charter to apply, there is no corresponding requirement of Canadian citizenship or permanent residence in order to receive the benefit of most Charter rights.⁶⁰

Section 7 of the Charter states that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principle of fundamental justice" (emphasis added). According to the Supreme Court of Canada in *Singh v. Canada (Minister of Employment and Immigration)*,⁶¹ "everyone" under section 7 encompasses a broader class of persons than Canadian citizens and permanent residents. Rather, "everyone" includes "every human being who is physically present in Canada and by virtue of such presence amenable to Canadian law"⁶². Thus, those physically present in Canada and claiming refugee status and, according to *Singh*, even those who have entered the country illegally, are entitled to a hearing before an official or tribunal with authority to decide the issue. Wilson J. dismissed as "utilitarian" or "administrative" the concern that the consequence of such decision would be to make it impossible to dispose expeditiously of the thousands of refugee claims made every year.

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⁶⁰ Certain Charter rights are reserved for citizens. Voting rights (section 3), mobility rights (section 6) and minority language educational rights (section 23) are examples thereof. See Hogg, *supra* note 54 at 755-757.

⁶¹ [1985] 1 S.C.R. 177 [hereinafter *Singh*].

⁶² *Singh, supra* note 61 at 202
in Canada, stating that such concerns could not be permitted to vitiate individual rights.\textsuperscript{63} Thus, \textit{Singh} established that a person does not need to be a Canadian citizen to enjoy the rights of life, liberty and security of the person, and can claim Charter protection simply by virtue of their presence on Canadian territory and their consequent amenability to Canadian law.

Unlike the additional deflection mechanisms mentioned in Chapter 1, the STCA is directed specifically at individuals who present themselves at a port of entry.\textsuperscript{64} Although the notion that one's appearance at a port of entry constitutes physical presence in Canada is not entirely clear (as the Supreme Court of Canada has not yet been asked to decide that particular point) existing jurisprudence suggests that this is the case.\textsuperscript{65} Furthermore, in deciding that the scope of protected persons under section 7 extends to refugee claimants, Wilson J. in \textit{Singh} did not exclude refugee claimants at ports of entry.\textsuperscript{66} Given the aforementioned jurisprudence, all signs indicate that if pressed to decide the issue the Supreme Court of Canada would not differentiate between asylum seekers inside and outside the country in its application of section 7. That is, the Court would interpret the appearance of an asylum claimant at a port of entry as constituting his or her physical

\textsuperscript{63} Singh, supra note 61 at 218-219. However, after the \textit{Singh} decision, refugee claimants arrived in Canada at a rate of about 36,000 per year. Thus, a huge backlog of refugee claimants developed, and refugee claimants had to endure delays of two or more years awaiting adjudication. See Hogg, supra note 54 at 993, referring to reports contained in \textit{The Globe and Mail}, February 23, 26 and 27, 1991.

\textsuperscript{64} STCA, supra note 1, Art. 4.

\textsuperscript{65} See Macklin, \textit{Disappearing Refugees}, supra note 5 at 424. See also Dehghani \textit{v. Canada (Minister of Employment and Immigration)}, [1993] 1 S.C.R. 1053. In that case, the appellant arrived in Canada from Iran without valid travel and identity documents, claiming Convention refugee status. His detention and examination at the airport was the subject of his Charter challenge under section 10(b), which guarantees his right to counsel upon detention. This case supports the argument that asylum claimants present at ports of entry are entitled to Charter protection.

\textsuperscript{66} Singh, supra note 61 at 210. Essentially, the Supreme Court of Canada embraced the theory that if asylum seekers are to be subject to Canadian law, they are entitled to the benefit of Canadian standards of human rights protection.
presence in Canada, and therefore his or her amenability to Charter protection in accordance with Singh.

4. **Security of the Person and the Safe Third Country Agreement**

I set out above the Supreme Court of Canada’s confirmation that asylum seekers physically present in Canada are entitled to Charter protection, and argued according to Singh that this class includes asylum seekers arriving at ports of entry in Canada. Thus, those deflected to the United States pursuant to the STCA due to their appearance at a Canadian port of entry can invoke section 7. We are, at this point, faced with the question of whether the deflection mechanism under the STCA presents a risk to life, liberty and/or security of the person as guaranteed under section 7. For the purposes of this thesis, I will focus on the asylum claimant’s right to security of the person as the section 7 interest which is most relevant to the issue of deflection to the United States under the STCA.

First, it is important to set out the meaning of “security of the person” as it has been interpreted in Canadian jurisprudence. The Charter does not provide a definition; however, the Supreme Court of Canada has on many occasions elaborated upon the term’s meaning. Specifically, the Supreme Court of Canada has found violations of
section 7 security of the person in legislated risks to one’s health and safety, and has extended security of the person to include control over one’s body and psychological integrity. More recently, in *Suresh v. Canada (Minister of Citizenship and Immigration)*, the Supreme Court of Canada held that the process of deportation to face torture is a deprivation of both liberty and security of the person.

In *Singh*, Wilson J. established an approach to the assessment of a risk of security of the person applicable to refugee claimants. She found that the impairment of one’s right to security of the person occurs in the event of a threat to any of the three then-statutorily-guaranteed rights of a refugee: the right to status determination, to appeal a removal or deportation order, and to protection against *refoulement*. As statutory rights are “avenues open to [refugee claimants] under the Act to escape from... fear of persecution,” the impairment of them is considered a risk to the security of the person of the refugee claimant. Wilson J. even suggested that the denial of protection against *refoulement* may, on its own, “amount to a deprivation of security of the person within s.7”. Wilson J.

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67 *R. v. Morgentaler (No. 2)*, [1988] 1 S.C.R. 30 [hereinafter *Morgentaler*]. In that case, the Court found that the restrictions on abortion in the Criminal Code were unconstitutional, as they required the approval of a therapeutic abortion committee, causing delays in treatment and consequent risks to the health of the woman.

68 *Rodriguez v. British Columbia*, [1993] 3 S.C.R. 519 [hereinafter *Rodriguez*]. In that case, the plaintiff, who suffered from terminal Lou Gehrig’s disease, was successful in her argument that the removal of control over her body (i.e. the right to commit suicide) was a violation of her security of the person under section 7. However, her Charter challenge was ultimately unsuccessful as the impugned law was found not to violate the principles of fundamental justice.

69 *Blencoe v. British Columbia* [2000] 2 S.C.R. 307 [hereinafter *Blencoe*]. In that case, the plaintiff sought a section 7 remedy for unreasonable delay by the British Columbia Human Rights Commission in addressing complaints of sexual harassment which had been made against him. Although the Court ultimately found no breach of section 7, Bastarache J. found for the majority that state-induced psychological stress would be a breach of security of the person, and that in cases of administrative delay causing sufficient distress a constitutional remedy may be appropriate.

70 Supra, note 11.

71 *Singh*, supra note 61 at 206.

72 *Singh*, supra note 61 at 207.
proceeded in her section 7 analysis to determine that the refugee determination procedure then used in Canada did not comply with the principles of fundamental justice because it failed to afford refugee claimants adequate opportunity to state their case and respond to the evidence against them.

Notwithstanding the desirability of Madam Justice Wilson’s extension of Charter protection to asylum claimants from a human rights perspective, her approach has been sharply criticized for its requirement that the claimant possess a statutory interest as a precondition of Charter protection. Professor James Hathaway has commented upon the “illogic”73 of this requirement, as follows:

Wilson J’s approach is fundamentally flawed in that it suggests that constitutional rights somehow “spring to life” only by the wave of a statutory wand. If the goal of constitutional entitlement to protection of security of the person is to avoid a situation in which an individual may be harmed by application of the force of Canadian law without simultaneously enjoying the benefit of the fundamental protections set by Canadian law, then it is difficult to see why constitutional protection should be conditioned on the identification of a compromised right that exists outside the Charter itself. It should be sufficient to show that the individual may be subjected to action under Canadian law which has the effect of endangering his or her physical or psychological welfare.74

The problematic nature of Madam Justice Wilson’s statutory requirement is illustrated by the plight of the asylum seeker who is physically present in Canada but does not quite meet the definition of a Convention refugee (and is therefore not considered entitled to

74 Ibid. at 232-233.
protection under the Refugee Convention or the IRPA). The Refugee Convention does not extend protection to persons who are at risk due to war or violence generally. Rather, refugee status is reserved for those at risk because of their race, religion, nationality, membership in a particular social group or political opinion. Individuals not falling within the definition of a Convention refugee may be subject to removal to undesirable circumstances in his or her country of origin. On a strict reading of Singh, barring the application of a statutory interest, individuals can face deportation and would not be entitled to claim protection based on a risk to security of the person.

It must also be noted that since the Singh decision, two of the statutorily protected rights mentioned above have been abridged. Amendments to the immigration legislation in Canada, most recently reflected in the new IRPA, provide that asylum seekers no longer have a statutory right to undergo a refugee status determination upon their arrival in Canada. Now, status determination is conditional upon success at a preliminary screening procedure undertaken by an immigration officer, which includes an assessment of the claimant’s country of first arrival (i.e. the United States or Canada). Thus, it appears that asylum seekers no longer enjoy this statutory basis as grounding for their constitutional claim. Furthermore, more recently, the availability of appeal against deportation has also been truncated. In any event, although it is unfortunate that the

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75 Ibid. at 233.
76 Refugee Convention, supra note 6.
77 Hathaway & Neve, supra note 73 at 229. This point was made by Hathaway & Neve due to amendments to immigration legislation preceding the IRPA.
78 With implementation of the IRPA the Canadian government also proposed the creation of an appeal division of the Immigration and Refugee Board, to be named the Refugee Appeal Division (RAD). The implementation of the RAD was initially delayed. See Citizenship and Immigration Canada, News Release, “Refugee Appeal Division Delayed,” (29 April 2002), online: <http://www.cic.gc.ca/english/press/02/0212-pre.html> (last accessed 10 January 2006). The RAD implementation proposal has now been cancelled
statutory bases upon which an asylum claimant may hinge a Charter claim have been eliminated, one of the three statutory bases identified by Wilson J. in Singh remains.

If it is still the case that a statutory interest is required in order to ground an asylum claimant’s section 7 right to security of the person, Canada’s international and domestic legal obligations of nonrefoulement fulfil this requirement.\(^79\) As stated above, the Supreme Court of Canada has determined that the risk of refoulement can, on its own, amount to a deprivation of security of the person. The primary implication of Singh is that asylum claimants physically present in Canada have a right to argue their need for protection against refoulement in full and fair determination procedures, protection against refoulement being an aspect of security of the person. Asylum claimants continue to enjoy protection against refoulement under international law,\(^80\) formalized in section 95 of the IRPA. Moreover, it has been pointed out that the concept of non-refoulement as a rule of customary international law has evolved such that it prohibits more than the return of an asylum seeker to his or her original state of persecution.\(^81\) Law professor Emily Carasco has explained the current broad interpretation of non-refoulement thusly:

\[\text{Born out of the [Refugee Convention’s] objective of providing protection, the prohibition of non-refoulement is now said to include the obligation of}\]

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\(^79\) Hathaway & Neve, \textit{supra} note 73 at 232-234.
\(^80\) Refugee Convention, \textit{supra} note 6 at Art. 33(1).
not denying to those within one’s borders the right to claim refugee status, to provide access to one’s refugee procedures, and to avoid any action that could lead to refoulement.82

Thus, it would appear that the international legal principle of non-refoulement proscribes the return of an asylum seeker to a country which may, in turn, subject such individual to refoulement to a persecuting country of origin. Professor Carasco has criticized the STCA for its dearth of safeguards preventing the United States from returning asylum seekers to a “third” state.83 Furthermore, the United States has been severely criticized for its engagement in refoulement, contrary to its international obligations.84 The expedited removal procedures in place in the United States further intensify this risk to asylum seekers, as I argue in Chapter 3 of this thesis. Consequently, if it is the case that the statutory interest requirement articulated by Wilson J. still applies, and asylum seekers are statutorily entitled to protection against refoulement, and refoulement is to be broadly interpreted as aforesaid, asylum seekers subject to deflection to the United States under the STCA easily dispose of the statutory interest requirement and therefore enjoy section 7 protection.

In any event, I contend that if asked decide Singh today, it is unlikely that the Supreme Court of Canada would endorse the same analytical approach. In light of subsequent decisions enlarging the scope of section 7 protection, such as the above-noted Rodriguez, Morgentaler and Blencoe decisions and their consequent location of security of the person in freedom from state-induced risks to physical and psychological integrity, it is

82 Ibid. at 329.
83 Ibid. at 330-331.
84 Ibid. at 330-331.
reasonable to propose that the Court would not today impose a statutory-interest requirement as did Wilson J. in *Singh*. The preservation of a statutory-interest requirement would indeed be very difficult to reconcile with what Hathaway and Neve describe as the "consequence-driven logic" of more recent judgments.\(^85\) Rather, if the recent trend of expanding the recognition of section 7 rights is any indication, it is entirely reasonable to propose that the Court would not continue to espouse such a restrictive analysis of asylum claimants' section 7 rights.

Following the current tide of section 7 jurisprudence, in order to argue a risk to security of the person exists, it should be satisfactory to demonstrate that an asylum seeker is exposed to action by the Canadian government that poses a risk to his or her physical or psychological welfare. The STCA can be characterized as a legislated risk to physical and psychological welfare of asylum seekers, due to the many features of the United States asylum system representing egregious lapses in human rights protection to which asylum seekers would be subjected. In this way, the asylum seeker's right to security of the person is engaged. In Chapter 3, I set out in further detail my argument that the substantive and procedural features of the United States asylum system discussed in that chapter contribute to a deprivation of security of the person of asylum seekers deflected to the United States pursuant to the STCA, on the generous definition of security of the person demonstrated by the Supreme Court of Canada of late. In summary, on the issue of the content of security of the person, it is argued that asylum seekers physically present in Canada, who are subject to deflection to the United States under the STCA without the benefit of a meaningful refugee status determination hearing in Canada, can assert that

\(^85\) Hathaway & Neve, *supra* note 73 at 234.
their deflection engages their section 7 right to security of the person. If it is the case that a statutory interest is required, according to the Singh analysis the asylum claimant can ground his or her claim in the right of non-refoulement recognized in international law and domestic law in Canada. Regardless of the current application of Singh, the section 7 right to security of the person is threatened by government interference with the physical and psychological integrity of asylum seekers resulting from the application of the STCA.

5. **Fundamental Justice and the Safe Third Country Agreement**

a) **Interpretation of the Principles of Fundamental Justice: Procedure, Substance and the Canadian Conscience**

According to Canadian Charter jurisprudence, the deprivation of one’s life, liberty or security of the person does not constitute a breach of section 7 if the deprivation is in accordance with the principles of fundamental justice, as that term is interpreted by Canadian courts. That is, in order to find a section 7 breach, there must not only be a deprivation of life, liberty of security of the person, but such deprivation must also be contrary to the principles of fundamental justice.86

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86 Hogg, *supra* note 54 at 1005.
It is clear that fundamental justice includes, at the very least, a component of procedural fairness.\(^{87}\) In \textit{B.C. Motor Vehicle Reference},\(^{88}\) the Supreme Court of Canada held that “fundamental justice” encompasses both procedural and substantive justice, and thus judicial review of governmental action extends beyond procedural issues to cover alleged substantive injustice as well.\(^{89}\) However, in that case, the Court did not provide a clear definition, except to state “the principles of fundamental justice are to be found in the basic tenets of the legal system”.\(^{90}\) Lamer J. admitted difficulty in formulating a precise definition of the content of fundamental justice, stating that the term “will take on concrete meaning as the courts address alleged violations of section 7.”\(^{91}\) Regardless, noted Canadian constitutional law scholar Peter Hogg has commented that, since the decision in \textit{B.C. Motor Vehicle Reference}, the courts have not been in agreement as to what constitutes the basic tenets of the legal system.\(^{92}\)

In the context of asylum claims, fundamental justice was found by the Supreme Court of Canada to entail the opportunity to have one’s claim adjudicated on the merits in an unbiased hearing in which the claimant has sufficient opportunity to make his or her


\(^{88}\) \textit{Ibid.}

\(^{89}\) Lamer J. provided three reasons for the extension of fundamental justice beyond procedure: first, the term “fundamental justice” implies something broader in scope than other terms that could have been used, such as “natural justice”, which implies procedural fairness. Second, a liberal interpretation of fundamental justice entails a desirable liberal interpretation of life, liberty and security of the person. Third, Lamer J. interpreted section 7 as a residuary clause for legal rights under the Charter, and since the other legal rights encompass substantive and procedural rights, it only makes sense that section 7 would also do so. See also, Hogg, \textit{supra} note 54 at 1007.

\(^{90}\) \textit{B.C. Motor Vehicle Reference}, \textit{supra} note 87 at 503.

\(^{91}\) \textit{B.C. Motor Vehicle Reference}, \textit{supra} note 87 at 513.

\(^{92}\) Hogg, \textit{supra} note 54 at 1009. Professor Hogg cites the decision of \textit{Thomson Newspapers v. Canada}, [1990] 1 S.C.R. 425, as an example of this phenomenon. According to Hogg, in that case, five judges all differed in their interpretation of the meaning of the basic tenets of the legal system.
In Singh, Wilson J. found that in the case of asylum claims, the credibility of the claimant is of considerable importance, and fundamental justice requires that in order to make a finding of credibility written submissions alone are insufficient. The deflection mechanism in the STCA effectively denies refugee claimants the opportunity for an unbiased hearing in which his or her claim is adjudicated on its merits. It can be argued that the United States provides a surrogate system of adjudication by which Canada fulfills its duty to asylum seekers, albeit indirectly. However, this theory of "subcontracted fundamental justice" contains several deficiencies, as will be discussed subsequently in this chapter. In any event, the Supreme Court of Canada jurisprudence discussed below suggests that fundamental justice requires Canada to provide more than the opportunity to have one's case determined at an impartial hearing.

The decision of the Supreme Court of Canada in Rodriguez evidences a marked divergence from the location of fundamental justice in the "basic tenets of the legal system." Rather, the Court articulated a kind of objective test for the content of fundamental justice. In Rodriguez, the Court was called upon to decide whether the Criminal Code prohibition of assisting a person to commit suicide runs contrary to the principles of fundamental justice. Sopinka J., for the majority, stated that the principles of fundamental justice must "have general acceptance among reasonable people."95

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93 Singh, supra note 61 at 214. It was found that fundamental justice may not require an oral hearing in all cases, but it does require that claimants have the opportunity to state their case and to know the case against them.
94 Singh, supra note 61.
95 Rodriguez, supra note 68 at 607. See also, Hogg, supra note 54 at 1010. Professor Hogg commented that a more orthodox view would consider the search for consensus among reasonable people to be more properly the role of Parliament rather than the courts.
Finding no such consensus with respect to the issue of euthanasia, the Court held that the impugned law did not offend the principles of fundamental justice.

Further departure from the “basic tenets of the legal system” criteria can be found in the Supreme Court of Canada decision, *Canada v. Schmidt*. 96 In that case, the Court was called upon to assess the constitutionality of an extradition order. The Court found that section 7 is breached in the case of an extradition order under which a fugitive faces punishment under foreign law which would “shock the conscience of” or be “simply unacceptable” to reasonable Canadians. 97 Using a similar approach, in *United States v. Burns* 98 the Court found that extradition to face the death penalty was sufficient to shock the collective conscience of Canadians (and was, on that basis, found to be a deprivation of security of the person). The difficulty inherent in this approach to the fundamental justice analysis is that it is impossible to know with certainty what a given panel of judges will perceive to be offensive to the public conscience, and equally difficult to ensure consistency in the interpretation of public opinion from one judge to the next, or from one judicial panel to the next. Notwithstanding such difficulty, current jurisprudence informs us that governmental action which may be perceived to shock the Canadian conscience is exposed to scrutiny under section 7.

Hathaway and Neve argue for the confinement of the *Schmidt* “public outrage” standard to the extradition context in which it was originally applied. 99 According to the

96 [1987] 1 S.C.R. 500 [hereinafter *Schmidt*].
99 Hathaway & Neve, *supra* note 73 at 249.
following argument, the Schmidt standard should not be used in assessing whether refugee status determination procedures comply with the principles of fundamental justice:

The common commitment of states to the prosecution of crime may require that impediments to the removal of those accused of serious offences be kept to an absolute minimum: criminal justice functions best where there is ready access to witnesses, and deterrent and retributive goals are most easily served by trial in the community is alleged to have occurred. These arguments clearly have no currency in the context of refugee status determination.100

The Supreme Court of Canada has engaged in a balancing of various interests in determining compliance with the principles of fundamental justice. In Kindler v. Canada, the Court found that the principles of fundamental justice are determined by a contextual approach that "takes into account the decision to be made".101 Furthermore, according to the Court in Burns, "it is inherent in the balancing process that the outcome may well vary from case to case depending on the mix of contextual factors put into the balance".102 In the more recent decision, Suresh, after finding that deportation involves a deprivation of section 7 rights, the Court proceeded to engage in a balancing of Canadian interests and the interests of the Refugee Convention, as follows:

Deportation to torture, for example, requires us to consider a variety of factors, including the circumstances or conditions of the potential deportee, the danger that the deportee presents to Canadians or the country's security, and the threat of terrorism to Canada. In contexts in which the most significant considerations are general ones, it is likely that the balance will be struck the same way in most cases. It would be

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100 Hathaway & Neve, supra note 73 at 250.
102 Burns, supra note 98 at para 65.
impossible to say in advance, however, that the balance will necessarily be struck the same way in every case.\textsuperscript{103}

In that case, in determining whether deportation to torture violates the principles of fundamental justice, the factors considered in the Court's balancing exercise were Canada's interest in national security and combating terrorism with the interest of the Convention refugee in not being deported to torture:

The notion of proportionality is fundamental to our constitutional system. Thus, we must ask whether the government's proposed response is reasonable in relation to the threat.\textsuperscript{104}

In \textit{Suresh}, the Court found that the deportation of a Convention refugee to face torture violates the principles of fundamental justice, but that the international context (including \textit{jus cogens}) must also inform our interpretation of fundamental justice.\textsuperscript{105} Thus, the Court examined a number of international human rights norms and instruments reflecting a prohibition on torture in international law in its balancing exercise. The Court ultimately found that "Canadians do not accept torture... as compatible with justice".\textsuperscript{106} Thus, in considering the issuance of a deportation order, the Minister must conform to the principles of fundamental justice, which entails declining to deport refugees where, on the evidence, there is a substantial risk of torture.

In the case of the STCA, determining whether deportation to face United States asylum procedures violates the principles of fundamental justice requires us to engage in the

\textsuperscript{103} \textit{Suresh}, supra note 11 at para 45.  
\textsuperscript{104} \textit{Suresh}, supra note 11 at para 47.  
\textsuperscript{105} \textit{Suresh}, supra note 11 at para 59.  
\textsuperscript{106} \textit{Suresh}, supra note 11 at para 50.
same method of interests. In doing so, according to Suresh, such balancing must be informed by the international context of refugee protection and international standards of human rights. In this fundamental justice analysis, then, the factors to be weighed are Canada’s interest in controlling access to its refugee determination system and the potential consequences for the asylum seeker who is deflected to the United States and is effectively denied access to Canada’s refugee determination system. Furthermore in the course of this analysis, following the jurisprudence of Schmidt, Kindler and Burns, it must be determined whether the deportation of asylum claimants to the United States under the Safe Third Country Agreement would “shock the Canadian conscience and therefore violate fundamental justice. It is important that the fundamental justice analysis is informed not only by Canadian legislation, jurisprudence and the public conscience, but also by international law and international legal norms and standards, often as expressed in the numerous international human rights instruments to which Canada is a signatory. In light of the foregoing, in order to engage in a meaningful balancing of Canada’s interest in controlling the access of asylum seekers to its refugee determination procedures and the implications of the STCA to asylum seekers, in Chapter 3 I will examine the salient features of the United States asylum system and its effects on asylum claimants deflected pursuant to the STCA.
b) The Remoteness Defence

Prior to proceeding further with the fundamental justice analysis it must be determined whether the consequences of the treatment of non-Canadian asylum seekers by the United States government is considered sufficiently proximate to Canadian government action to attract Charter scrutiny. Stated otherwise, the relevant question to be answered at this stage is whether the consequences of deflection to the United States are too remote from Canadian action for the Charter to apply.

In contrast to deflection to the United States, it is clear that extradition to a country in which persecution, torture and/or the death penalty may occur is a sufficiently proximate risk of harm to invoke section 7 protection. The waters become somewhat muddied, however, in circumstances in which the asylum claimant is deflected to a state such as the United States, in which the threat to his or her security is material (as will be illustrated by the features of the United States refugee determination system discussed below), but does not necessarily constitute direct exposure to persecutory circumstances such as torture or the death penalty as in the Schmidt and Burns examples. Nonetheless, by acting in accordance with the STCA, Canada is complicit in exposing asylum claimants to certain tangible risks posed by the United States asylum system.

Hathaway and Neve point out the distinct aversion demonstrated by the Supreme Court of Canada to the use of remoteness as a defence to Charter challenges based on section 7

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107 See Schmidt, supra note 96. See also Burns, supra note 98.
security of the person. Furthermore, they point to a similar general disinclination by international human rights bodies. Hathaway and Neve identify, as an important limitation on the applicability of any doctrine of remoteness, the objective foreseeability of risk to the asylum claimant, as follows:

If there is a foreseeable risk that refugees will be returned to persecution by reason of the process unleashed by defection, the Canadian action cannot be said to be unduly remote from the ultimate harm.

As will become evident in Chapter 3, the risks to asylum seekers subjected to the United States asylum system are manifest and are sufficiently divergent from both Canadian and international standards of asylum and human rights protection, that Canada cannot reasonably claim that such risks are unforeseeable.

c) Contracting Out Fundamental Justice

As discussed above, it was decided in Singh that fundamental justice requires a component of procedural fairness, which may include an oral hearing, but at the minimum means affording the asylum claimant a meaningful opportunity to state his or her case and to know the case to be met. In the case of the STCA, the very object of Canada’s implementation of the agreement is to divest the asylum seeker of the opportunity to present his or her case at an impartial hearing on its merits in Canada.

108 Hathaway & Neve, supra note 73 at 244, referring to Kindler, supra note 101 at 824.
109 Hathaway & Neve, supra note 73 at 241.
110 Hathaway & Neve, supra note 73 at 244.
Proponents of the STCA may answer this apparent evasion of Canada's duty to deliver fundamental justice by advocating what Hathaway and Neve refer to as a theory of "subcontracted fundamental justice"\textsuperscript{111} by which Canada profits from the provision of fundamental justice in an external receiving state. This section will examine the viability of such a theory in light of both Supreme Court of Canada jurisprudence and international legal norms.

Supreme Court of Canada jurisprudence confirms that, in the context of extradition, Canada will be considered to fulfil its duty to provide fundamental justice if the standards of the receiving state are sufficiently similar to Canadian standards. Hathaway and Neve point to the jurisprudence on extradition as illustrating the acceptance of a "generally comparable range of normative and procedural guarantees."\textsuperscript{112} That is, there need not be absolute congruity between Canadian standards of protection and those of a receiving state. For example, McLachlin J. in \textit{Kindler} stated the following in the context of extradition:

\begin{quote}
While our conceptions of what constitutes a fair criminal law are important to the process of extradition... we require a limited but not absolute degree of similarity between our laws and those of the reciprocating state.\textsuperscript{113}
\end{quote}

\begin{flushright}
\textsuperscript{111} Hathaway & Neve, \textit{supra} note 73 at 246.
\textsuperscript{112} Hathaway & Neve, \textit{supra} note 73 at 247.
\textsuperscript{113} \textit{Kindler}, \textit{supra} note 101 at 844-45.
\end{flushright}
Furthermore, in Kindler, McLachlin J. found that an indicator of a section 7 breach in the extradition context is the imposition of penalties by the foreign state which are found to “sufficiently shock the Canadian conscience.”\textsuperscript{114}

I argue that even though the Supreme Court of Canada has accepted that Canada can effectively subcontract its duty to deliver fundamental justice to other countries, and receiving states need not espouse identical standards of protection as Canada, the receiving country must demonstrate a degree of respect for Canadian standards. Contracting out fundamental justice is not the problem. It is, however, Canada’s duty to ensure that the countries with which it enters into such arrangements demonstrate due respect for Canadian human rights laws, standards and values. By entrusting other countries to provide fundamental justice to asylum seekers Canada is not absolved of its obligations under the Charter. Canada must ensure that the claims of asylum seekers deflected to the United States under the STCA are considered within a system that is at least similar to its own, that ensures a reasonable standard of due process and substantive and procedural fairness. As will be discussed below, the United States is far from ensuring such a standard. Unless and until standards improve, Canada will fail to deliver fundamental justice to asylum seekers by their deflection to the United States.

\textsuperscript{114} Kindler, \textit{supra} note 101 at 849.
CHAPTER 3: THE CONSEQUENCES OF SUBCONTRACTED FUNDAMENTAL JUSTICE: ANALYSIS OF THE UNITED STATES AS A "SAFE HAVEN" FOR ASYLUM CLAIMANTS

The United States has been criticized sharply for the erosion of its refugee protections, particularly in the last ten years. In 1996, the U.S. federal government introduced two major pieces of legislation\(^{115}\) which were intended to alter the asylum process in the United States in a dramatic way. The new legislation sought to address lengthy delays and abuses in the United States asylum system, but has been widely admonished for its effects in undermining the rights of asylum seekers, including their access to asylum determination procedures. As will be discussed below, this problem has become increasingly acute since the occurrence of the September 11 attacks.

I argue in this chapter that the deflection of asylum seekers who are present in Canada, to the United States, where such individuals are subject to the features of U.S. asylum policy and practice discussed in this chapter,\(^{116}\) inhibits Canada's compliance with its duty to deliver fundamental justice. Due to the features of the United States asylum system discussed below, it is evident that the United States fails to provide a level of


\(^{116}\) Please note that in this chapter I frequently refer to factual and statistical information gathered and reported by or on behalf of non-profit human rights and refugee rights organizations, such as Amnesty International and Human Rights First (formerly, the Lawyer's Committee for Human Rights). Reliance on such sources is necessary and deliberate on my part, as it is often the case that such organizations are the only available source of information necessary for the analysis set forth in this thesis. This is true due largely to the reluctance of government of the United States to provide certain relevant statistical information when requested. For further discussion of this phenomenon, see section entitled "What's wrong with expedited removal?", below.
protection to asylum seekers which would be considered adequate by Canadian and international standards.

The 1996 legislation introduced such measures as a filing deadline for asylum claims, as well as an expedited removal process designed to ensure an expedient deportation process for persons arriving without proper travel documents. Furthermore, the 1996 legislation introduced the requirement to detain those subject to expedited removal pending their deportation. Lengthy detention of asylum seekers is commonplace and the conditions and treatment endured by detainees, not to mention the very imposition of detention itself, are cause for considerable concern vis-à-vis Canada’s duty to deliver fundamental justice. What’s more, foreign policy considerations which have little or no regard for the protection of asylum seekers, are permitted to influence the detention practices and refugee policy of the United States, further undermining the rights of asylum seekers. Finally, the treatment of asylum claims made on the basis of gender-related persecution falls considerably short of both Canadian and international standards of protection.

The 1996 legislation has resulted in an immediate drop in new asylum applications in the United States. A 2000 report by Human Rights First sets out the relevant statistics, as follows:

According to INS figures, new asylum applications dropped precipitously from almost 124,000 in fiscal year 1994 to fewer than 47,000 in fiscal year 1996. Preliminary data for fiscal year 1999 shows a decline to a little over
Thus, a major concern with the 1996 legislation is that not only has it had the specific corrosive effects on asylum claimants’ rights discussed below, but additionally it appears to have had the immediate, discernible effect of discouraging those individuals who may be considering seeking asylum in the United States from lodging an application in the first place. It is impossible to calculate the numbers of potential asylum claimants deserving of refugee protection\textsuperscript{118} who are so discouraged, because they remain unidentified in their home (persecuting) countries. Not only does the 1996 legislation discourage applications, but it introduces several means of diminishing the pool of asylum claimants appearing at United States ports of entry by utilizing arbitrary criteria that are entirely irrelevant to their worthiness as asylum claimants. In that regard, the discussion below focuses on those features of the United States asylum system which are of particular concern Canada’s duty to furnish fundamental justice.

\textsuperscript{117} Human Rights First, “Is this America? The Denial of Due Process to Asylum Seekers in the United States” (2000), online: <http://www.humanrightsfirst.org/refugees/reports/due_process/due_process.htm> (last accessed 3 January 2006) [hereinafter \textit{Is this America?}].

\textsuperscript{118} By “deserving of refugee protection” I refer to asylum seekers who would meet the definition of “refugee” under the Refugee Convention.
1. **Expedited Removal**

a) **The Procedure**

Asylum seekers arriving in the United States without proper travel documents, including those deflected from Canada pursuant to the STCA, are subject to an “expedited removal” process. This procedure was introduced in the 1996 legislation discussed above, and took effect on April 1, 1997. This legislative amendment enables an officer of the Department of Homeland Security (DHS) to decide that expedited removal is appropriate in a given case, and to summarily remove an asylum seeker without the benefit of procedural safeguards such as a removal hearing before an independent adjudicator, legal counsel and cross-examination of the government’s evidence. The legislation requires the detention of asylum seekers during the expedited removal process and results in asylum seekers being taken to detention centres or prisons immediately upon their arrival in the United States.

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119 Immigration and Nationality Act (INA) § 235(b)(1); see also, 8 C.F.R § 208.30.
120 See Human Rights First, *Is this America?*, supra note 117 at Part 1. Expedited removal applies in all cases in which asylum claimants arrive with improper or incomplete documentation. Although an amendment to the expedited removal bill was sponsored by Senator Patrick Leahy (Democrat-VT) and Senator Mike DeWine (Republican-OH), proposing the limitation of expedited removal to immigration emergencies where the extraordinary numbers of arrivals overwhelms the capacity of INS to process claims, the “Leahy Amendment” was ultimately defeated in the conference committee between the House and Senate.
122 See section 2 of this Chapter, entitled “Detention of Non-Citizens,” below.
The expedited removal provisions have attracted a considerable degree of criticism from legal academics\textsuperscript{123} and human rights advocacy groups such as Human Rights First,\textsuperscript{124} Amnesty International\textsuperscript{125} and the Canadian Council for Refugees,\textsuperscript{126} not to mention the UNHCR.\textsuperscript{127} Prior to the implementation of the STCA the Standing Committee on Citizenship and Immigration expressed its condemnation of expedited removal in its recommendation that the Canadian government seek assurances that asylum seekers returned to the United States would not be subject thereto.\textsuperscript{128} The committee’s recommendation was ignored,\textsuperscript{129} and asylum seekers continue to find themselves subject to expedited removal.


\textsuperscript{126} Canadian Council for Refugees, “10 Reasons Why the Safe Third Country Agreement is a Bad Deal,” online: <http://www.web.net/~ccr/10reasons.html> (last accessed 29 January 2006).


\textsuperscript{128} Standing Committee Report, \textit{supra} note 32.

\textsuperscript{129} See Citizenship and Immigration Canada, “Government Response to Standing Committee on Citizenship and Immigration,” (May 2003), online: <http://www.cic.gc.ca/english/pub/safe-third.html> (last accessed 3 January 2006) [hereinafter Government Response to Standing Committee]. The Canadian government considered as sufficient the assurances of senior U.S. officials that persons returned to the United States under the STCA would not be treated as “arriving aliens” who are subject to expedited removal. However, such assurances have never been legislated or otherwise formalized.
The expedited removal procedure operates as follows. If, based on what is often merely an informal interview, a DHS\textsuperscript{130} officer determines that the individual is attempting to enter the United States without proper documents or by means of fraud or misrepresentation, the officer can bar entry.\textsuperscript{131} It has been reported that during this process, the individual is not given the opportunity to contact others, including family, friends or legal counsel.\textsuperscript{132} The decision often results in immediate removal, coupled with a five-year bar on entering the United States,\textsuperscript{133} and is not reviewable by an immigration judge or other adjudicator.

The summary removal procedure allows one exception, which applies to those people who, in the course of the proceeding express a "credible fear" of persecution if removed from the United States or express intent to apply for asylum. As discussed below, although the exception appears broad, the manner of its application leaves much to be desired by asylum seekers. Furthermore, although immigration officers are charged with responsibility for border enforcement in the ordinary context of their duties, the expedited removal procedures result in their acting in an unusual, quasi-judicial capacity.\textsuperscript{134}

\textsuperscript{130} This function was previously undertaken by officers of the Immigration and Naturalization Service (INS). As of March 1, 2003, the INS was abolished and its mandate subsumed by the newly established Department of Homeland Security. The function of the DHS is to prevent terrorism in the United States. See 8 CFR §§ 1, 2, 103, 239. This decision has been criticized by human rights groups who argue that the mission of the DHS ignores the obligations of the U.S. government to refugee protection contained in domestic and international law. See Human Rights First, \textit{In Liberty's Shadow, supra} note 124 at 20.

\textsuperscript{131} INA §§ 212(a)(6)(C) or 212(a)(7).


\textsuperscript{134} The breadth of the power and discretion afforded to immigration officers, particularly by contrast to the typical duties of an administrative officer of the government, has been the subject of intense criticism by refugee rights advocates. See, for example, Human Rights First, \textit{In Liberty's Shadow, supra} note 124 at 20.
The current system of expedited removal differs from the system in place prior to the 1996 legislation, in a number of ways. Human Rights First sets out the salient differences operating to the detriment of asylum seekers, below:

First, an INS officer, who is not required to have specific expertise in asylum law, country conditions, or specialized interview training appropriate to refugees, can issue a summary order for the deportation of any alien he considers inadmissible for want of valid or suitable documentation. This order may be reviewed only by his or her supervisor, and this is only a perfunctory review. Previously, only a trained immigration judge was allowed to issue an order of deportation. Second, those who are ordered removed under this process have no right to federal judicial review. Third, the process lacks key procedural safeguards: there is no notice prior to secondary inspection of the consequences of the process (i.e., immediate deportation); there is no guarantee of a qualified interpreter to explain the process to an alien who is not fluent in English; there is no right to be represented by legal counsel; decisions are made not by independent adjudicators but by border enforcement personnel; and there is no right to have these decisions reviewed on appeal. Compounding these deficiencies is the speed of the process; expedited removal moves so quickly that mistakes are inevitable. Fourth, those who are removed under this procedure are barred from re-entering the United States for five years.

Following the initial inspection, the immigration officer may the subject asylum seeker to a second inspection by another immigration officer. Asylum seekers are not to be deported unless and until they are provided with an opportunity to demonstrate, during the course of the interview process, that they have a “credible fear” of persecution upon return to their country of origin. A ‘credible fear’ is defined as a ‘significant

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135 Human Rights First, *Is this America?*, supra note 117 at Part I.
136 Human Rights First, *Is this America?*, supra note 117 at Part I.
137 According to INA § 235(b)(1)(B)(v); 8 U.S.C. § 1225(b)(1)(B)(v) (1996), “credible fear” is defined as:

"a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum..."
possibility' that the individual would qualify for asylum in the United States. Although the law requires DHS officers to provide notice that the second interview constitutes the asylum seeker’s last opportunity to request asylum, it has been reported that this protocol is generally ignored. If a credible fear is established, the asylum seeker is no longer subject to expedited removal, and he or she may seek parole. However, statistics indicate a widespread discrepancy in the United States as to the granting of parole. It is also important to note that there is no availability of review of a negative parole decision. Moreover, if the claim is rejected at either the primary or secondary inspection stage, the asylum seeker is subject to immediate deportation.

If the asylum seeker establishes a credible fear at the inspection stage, he or she is entitled to a “credible fear” interview. If the immigration officer conducting the interview accepts the claim, the asylum seeker will be entitled to present his or her claim


139 Human Rights First, *Is this America?*, *supra* note 117 at Part I. Human Rights First reports that the INS has stated that the provision of notice “would needlessly delay the millions of aliens found admissible after secondary questioning,” “unnecessarily burden... the inspections process” and “encourag[e] spurious asylum claims.” See Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 10,311, 10,3318-19 (supplementary information to interim rule, March 6, 1997).
140 Amnesty International USA, *US Detention*, *supra* note 125. According to Amnesty International USA, in practice the criteria for granting parole are applied inconsistently and, consequently, discrepancy across the United States exists as to the rates of parole granting for asylum seekers claiming a credible fear of persecution. The statistics of Amnesty International USA indicate the following: in Newark, only 3.8 percent of the people who have passed credible fear screening are released on parole; in New York, 8.4 percent are released. By contrast, release rates for the same category of asylum seekers in Harlingen, Texas, is 97.6 percent and 94 percent in San Antonio.

141 Amnesty International USA, *US Detention*, *supra* note 125.
143 Goodwin-Gill, *supra* note 123 at 29.
for asylum in front of an immigration judge. If a negative credible fear determination is issued, the asylum claimant may request a review by an immigration judge, which must occur within seven days of the negative decision. However, there is no availability of appeal in the federal court from DHS decisions in this regard.

b) Statistics on Expedited Removal

Expedited removal is not merely a minor issue that affects only a small percentage of asylum seekers in the United States. According to Human Rights First, the following statistics indicate the ever-increasing numbers of asylum claimants adversely affected by the expedited removal legislation:

Since April 1997 when expedited removal first took effect, 189,177 people have been deported under its provisions. Of these 172,929 were Mexican nationals. The use of expedited removal by the INS has increased significantly. In the 1997 fiscal year, the year in which expedited removal procedures were first implemented, 20.6% of all removals were through the expedited removal process. In the 1999 fiscal year, of the 176,990 total removals, 50.3% were expedited. Of those 89,035 people deported under expedited removal during the 1999 fiscal year, 99.3% were returned without a referral for further examination to determine whether a credible fear of persecution existed or whether U.S. citizenship or another lawful basis existed for admission into the United States. INS inspectors make almost all expedited removal decisions on the spot at ports of entry, with no meaningful review.

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144 It is important to note that the immigration judge is an officer of DHS. Thus, it cannot be said that such an adjudicator is acting in a capacity independent of DHS when rendering decisions on credible fear at this stage of the asylum determination process. Adjudication by a judicial panel not aligned with DHS, such as an appellate court, would afford the asylum seeker a greater opportunity for a fair and balanced asylum determination, as will be discussed subsequently in this section.

145 Goodwin-Gill, supra note 123 at 31.

146 Human Rights First, *Is this America?*, supra note 117 at Part II.
c) What’s wrong with expedited removal?

The primary concern with the United States system of expedited removal, from the perspective of Canada’s duty to deliver fundamental justice, is its failure to afford procedural justice to asylum claimants. Expedited removal deprives the asylum claimant of the opportunity to present his or her claim to be adjudicated by a judicial body which is independent of the government body charged with rendering the initial removal decision. It is often up to a single immigration officer who is not required to possess specialized knowledge pertaining to asylum law or country conditions, acting on his or her discretion in applying the relevant legislation, to decide the fate of asylum claimants and, consequently, to expose them to potential harm and persecution in the event of a removal order. Although I do not intend to argue that fundamental justice requires adjudication by a panel of impartial judges (i.e. adjudicators who are not appointed by the federal body responsible for the removal of asylum seekers) in all cases, as will be demonstrated below the current system requires further safeguards in order to comply with the demands procedural justice, particularly in light of the potentially dire consequences faced by refused asylum seekers. The UNHCR has too expressed its concern that the current asylum procedures in place in the United States require additional procedural safeguards in order to comply with international legal standards. 147

Specifically, it has been suggested that the expedited removal system should contain safeguards against the refoulement of asylum seekers to countries of feared persecution, and should ensure that they are given the opportunity to present their claims. 148

147 UNHCR, Comments on Draft Agreement, supra note 46 at Point II.
148 Ibid.
According to INS statistics, as quoted by Human Rights First, the majority of those in the secondary inspection stage were found by INS officers to have a credible fear of persecution.149 Such statistics lead one to wonder how many asylum claimants deserving of refugee protection are being turned away prior to the interview stage. DHS (and, previously, INS) regularly declines to publish such information, nor does it publish data concerning the rate of error at the secondary interview stage.150 However, statistics indicate that a very small proportion of asylum claimants in the expedited removal system are allowed to proceed to the credible fear interview stage.151

Furthermore, the credible fear requirement is an unreasonable burden to most asylum seekers. The burden is on the asylum claimant to express a fear of persecution. Numerous legal academics have commented on the unreasonably high standard to be met by asylum seekers in this regard.152 By contrast, the appropriate international standard imposes a considerably lesser burden on the asylum claimant. The UNHCR provides that asylum seekers must be screened in order to determine if their claims are "manifestly

149 According to Human Rights First, *Is this America?*, supra note 117 at Part II:

[D]ata provided by the INS to the General Accounting Office (GAO) indicate that of 11,087 persons referred for credible fear interviews in fiscal years 1997 through 1999, 96% were found to have a credible fear.

150 Human Rights First, *Is this America?*, supra note 117 at Part II.
151 According to Human Rights First, *Is this America?*, supra note 117 at Part II:

INS statistics show that, in fiscal year 1998, only about 3.75% of the approximately 80,000 people put into expedited removal were passed through for a credible fear interview by an asylum officer. In fiscal year 1999, only 0.6% of the 89,035 people put into expedited removal were referred for a credible fear interview.

152 Hathaway & Neve, *supra* note 73 at 256-257; Blum, *supra* note 123 at 48.
unfounded,” as opposed to requiring the asylum claimant to demonstrate that they possess a credible fear of persecution.

Additionally, the credible fear requirement fails to reflect the reality of the circumstances faced by many asylum seekers. There are numerous factors deterring asylum claimants from expressing the requisite credible fear of persecution during the interview process, therefore resulting in their subjection to the expedited removal process. For example, asylum claimants may be unaware of the need to express a fear of persecution. This lack of awareness is particularly acute in light of the fact that asylum claimants in the United States are not afforded a meaningful right to counsel. That is, unlike in Canada where most asylum claimants are eligible for legal aid, the United States government does not fund legal aid for asylum seekers. Moreover, for various reasons, asylum claimants may be unwilling to discuss the reasons for their flight. This is particularly true of individuals who have experienced traumatizing events in their countries of origin, leading to their flight. Furthermore, such asylum claimants may harbor distrust for government institutions and may therefore not feel confident in expressing his or her fear of persecution, despite having fled for reasons that would support a credible fear claim.


155 Ibid. at 739. As reported by Schoenholtz & Jacobs, those asylum claimants who are represented by counsel have a Furthermore, any right to counsel in the United States is severely limited. According to the 1996 legislation, asylum claimants must be allowed to consult with someone during the inspection process; however, the government is not responsible for the cost of such consultation, nor must the consultation "unreasonably delay the process". See INA § 235(b)(1)(B)(iv); 8 U.S.C. § 2345(b)(1)(B)(iv) (1996).
It is also important to point out that the expedited removal provisions fail to take into account the fact that many asylum claimants are simply unable to obtain proper travel documents in the course of their flight from persecution. The desperate circumstances encountered by asylum seekers in their home countries often necessitate an urgent and clandestine escape and a consequent impossibility of obtaining travel documents. To impose expedited removal procedures on such individuals has been described as akin to punishing refugees because of their status as refugees.\footnote{Blum, supra note 123 at 48.}

It has been reported that the expedited removal system in the United States has caused the mistaken deportation of a number of asylum seekers to face dire circumstances.\footnote{See Human Rights First, In Liberty's Shadow, supra note 124 at 7-8. Human Rights First reports that "[w]hile genuine asylum seekers are not supposed to be deported under this summary process... the process is so hasty and lacking in safeguards that mistakes can and do happen." See also, Eric Schmitt, "When Asylum Requests are Overlooked" The New York Times (15 August 2001) A6, discussing various cases of mistaken deportation as a result of the expedited removal procedure. See also Blum, supra note 123 at 48, regarding the dearth of procedural safeguards under the expedited removal procedure to protect bona fide refugees from refoulement.} A study on expedited removal funded by the Ford Foundation and directed by noted refugee rights scholar Karen Musalo, chronicles various flaws in the expedited removal system, including many instances in which asylum seekers have been deported mistakenly or abused during the course of the expedited removal process.\footnote{Expedited Removal Study, supra note 123. See also Human Rights First, Is this America?, supra note 117 at Part II.} The dearth of procedural safeguards in this regard has also been identified as having led to the refoulement of bona fide refugees.\footnote{Blum, supra note 123 at 48.}

Prior to the implementation of the STCA, the Standing Committee on Citizenship and
Immigration recommended that the Canadian government seek assurances that individuals sent back to the United States under the STCA not be subject to expedited removal.\(^{160}\) In response, the Canadian government stated that "assurances were received from senior U.S. officials during the course of negotiations that U.S. implementing regulations would not treat persons returned under the STCA as "arriving aliens", the only category of persons subjected to expedited removal."\(^{161}\) However, it is impossible to overlook the fact that no such assurances were ever formalized or legislated. Professor Macklin points out that the U.S. Attorney General has the authority to apply expedited removal procedures to "other aliens."\(^{162}\) This category would appear to capture asylum seekers returned to the United States under the STCA. Consequently, asylum seekers deflected to the United States remain vulnerable to the threat of expedited removal and all of the above-noted dangers it presents.

\(^{160}\) *Standing Committee Report, supra* note 32 at Recommendation 1.

\(^{161}\) *Government Response to Standing Committee, supra* note 129.

\(^{162}\) Macklin, *Disappearing Refugees*, supra note 5 at 403, referring to the Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924, (Nov. 13, 2002). This Notice provides that the U.S. Attorney General may extend expedited removal procedures to aliens "even though they are not arriving in the United States."
2. Detention of Non-Citizens

a) The Procedure and Statistics

As alluded to in the foregoing discussion on expedited removal, the detention policies of the United States as regard asylum seekers raise further concern vis-à-vis Canada’s duty to deliver fundamental justice. Despite the urgings of legal academics and refugee rights advocates, Canada has received no guarantee that asylum claimants returned to the United States under the STCA will not be subject to detention. Moreover, the United States has clearly asserted its right to detain asylum seekers sent back to the United States from Canada.\(^{163}\)

Detention may occur at various stages of the asylum process, and the grounds for imposing detention on asylum seekers in the United States are numerous. According to the 1996 legislation, asylum seekers can be detained prior to their admission in the United States due to improper or false travel documents (as discussed above), in anticipation of transfer to a safe country (i.e. Canada), or for reasons of national security at any stage in the determination process.\(^{164}\) According to the statistics of Human Rights First, in 2002 and 2003 at least 16,000 asylum seekers were subject to mandatory detention upon their arrival in the United States.\(^{165}\)

\(^{163}\) UNHCR, Comments on Draft Agreement, supra note 46.
\(^{164}\) See generally Human Rights First, In Liberty’s Shadow, supra note 124.
\(^{165}\) Human Rights First, In Liberty’s Shadow, supra note 124 at 7.
In the case of expedited removal proceedings, the 1996 legislation provides that it is mandatory to detain an asylum claimant pending a credible fear determination.\footnote{8 C.F.R. § 253.3(b)(4)(ii).} Even if the applicant succeeds at a credible fear interview, he or she then becomes subject to the normal application procedure, and remains in detention pending the determination of his or her claim on its merits.\footnote{As discussed in section 1 of this Chapter, above, parole is available in very limited circumstances. See also, Blum, \textit{supra} note 123 at 48-49.}

\textbf{b) What's wrong with detention?}

The arbitrary\footnote{As will be discussed in this section, “arbitrary” detention refers to detention which is not in accordance with internationally accepted procedures and which is not imposed on any ground recognized by international human rights standards, and which amounts to a penalty imposed on an asylum claimant without regard to the merits of his or her claim. See UNHCR, \textit{ExCom Conclusion 44}, \textit{infra} note 175.} detention of asylum seekers runs contrary to international legal norms. As will be discussed below, the Refugee Convention states that refugees should not be subject to penalties for arrival in a country without authorization. Specifically, Article 31 of the Refugee Convention provides the following:

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.
The principles of Article 31 of the Refugee Convention have been incorporated into the domestic legislation of both Canada\textsuperscript{169} and the United States.\textsuperscript{170} Furthermore, Article 9 of the International Covenant on Civil and Political Rights\textsuperscript{171} prohibits arbitrary detention and requires that any detention be in accord with established procedures.

In its 1999 Detention Guidelines, the UNHCR describes the detention of asylum seekers as “inherently undesirable,”\textsuperscript{172} and considers freedom from arbitrary detention a fundamental human right.\textsuperscript{173} The imposition of detention is “in many instances, contrary to the norms and principles of international law.”\textsuperscript{174}

The UNHCR Executive Committee has made specific recommendations as to the detention of asylum seekers,\textsuperscript{175} which tightly circumscribe the circumstances under which international law tolerates detention, as well as the treatment to which detainees may be subjected. According to ExCom Conclusion 44:

Detention should normally be avoided. If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements of which the claim to refugee status or asylum is

\textsuperscript{169} IRPA, supra note 21. See Appendix A to this thesis for text of relevant IRPA provisions.
\textsuperscript{170} 8 U.S.C. § 270.2. See Appendix B to this thesis for text of relevant U.S. legislative provisions.
\textsuperscript{173} Ibid.
\textsuperscript{174} Ibid.
\textsuperscript{175} UNHCR, Executive Committee, Conclusion 44 (1986) relating to the Detention of Refugees and Asylum-seekers (Report of the 37th Session: UN doc. A/AC.96/688. para 128), online: \texttt{<www.unhcr.bg/other/refugee_studies_book_2_en.pdf> (last accessed 4 January 2006) [hereinafter ExCom Conclusion 44]. See Appendix C to this thesis for full text of Excom Conclusion 44.
based; to deal with cases where refugees or asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order.\textsuperscript{176}

In a 2001 report for the UNHCR, noted refugee law scholar Guy Goodwin-Gill stated the following of detention practices in light of Article 31 of the Refugee Convention:

The 1951 Convention establishes a regime of rights and responsibilities for refugees. In most cases, only if an individual’s claim to refugee status is examined before he or she is affected by an exercise of State jurisdiction (for example, in regard to penalization for ‘illegal’ entry), can the State be sure that its international obligations are met. Just as a decision on the merits of a claim to refugee status is generally the only way to ensure that the obligation of nonrefoulement is observed, so also is such a decision essential to ensure that penalties are not imposed on refugees, contrary to Article 31 of the 1951 Convention.

To impose penalties without regard to the merits of an individual’s claim to be a refugee will likely also violate the obligation of the State to ensure and to protect the human rights of everyone within its territory or subject to its jurisdiction.

Such a practice is also wasteful of national resources and an example of bad management. Where the penalty imposed is detention, it imposes significant costs on the receiving State, and inevitably increases delay in national systems, whether at the level of refugee determination or immigration control.

Nevertheless, increasing demands for control measures over the movements of people have led even to refugees recognized after ‘unauthorised’ arrival being accorded lesser rights, contrary to the terms of the 1951 Convention/1967 Protocol, while elsewhere refugees and asylum seekers are commonly fined or imprisoned.\textsuperscript{177}

\footnotesize{\begin{itemize}
\item \textsuperscript{176} Ibid.
\item \textsuperscript{177} Goodwin-Gill, supra note 123 at 2.
\end{itemize}}
International standards notwithstanding, the United States continues to subject asylum seekers to detention, without individual assessment or adjudication, for potentially indefinite periods of time. Following are the specific features of the U.S. detention system pointing to a lack of safeguards to prevent arbitrary detention and to ensure due process.

It is often the case that applicants are detained pending the determination of their claims, and U.S. legislation contains no time limits on detention. The processing of asylum claims may take months, or even years, to complete. Immigration and Customs Enforcement (ICE), a division of the DHS, has reported an average stay in detention of 64 days in 2003, and 32% of all detainees endured detention for 90 days or longer.\(^\text{178}\) Amnesty International USA has cast doubt on the accuracy of such statistics, pointing instead to a study by Physicians for Human Rights, which found that asylum seekers involved in their study spent an average of 10 months in detention, with the longest stay being 3.5 years.\(^\text{179}\)

Due to the 1996 legislation, the INS doubled the number of beds in its facilities to 16,000.\(^\text{180}\) Following the September 11 attacks, detention policies and practices have become more pernicious. At that time, the U.S. government expanded its powers of detention by legislation introduced by Attorney General John Ashcroft. For example,

\(^{178}\) Amnesty International USA, *US Detention*, supra note 125.
\(^{180}\) Human Rights First, *In Liberty’s Shadow*, supra note 124.
under the *USA Patriot Act*,\textsuperscript{181} which came into force in October of 2001, the Attorney General has an increased power to impose detention, particularly by designating non-citizens as terrorist threats.\textsuperscript{182} There is no indication that the United States plans to curb its detention practices in the future. On the contrary, in 2004, Congress passed the *Intelligence Reform and Terrorist Prevention Act of 2004*,\textsuperscript{183} which authorizes the construction of over 40,000 additional bed spaces for immigration detainees over the next five years.\textsuperscript{184}

\begin{itemize}
    \item[i)] \textbf{Mandatory Detention for those under Expedited Removal:}
\end{itemize}

Asylum seekers arriving in the United States without proper documents are subject to expedited removal under the 1996 legislation, during which process detention is the rule rather than the exception. As discussed above, asylum seekers demonstrating a “credible fear” of persecution can be released on parole by the DHS.\textsuperscript{185} However, there are certain obstacles to obtaining parole which can prove insurmountable for many asylum seekers. In addition to the burden of demonstrating a credible fear of persecution, DHS imposes on asylum seekers the requirement to prove additional criteria, such as the establishment


\textsuperscript{182} INA § 236A (b). Note that the DHS assumed this authority in March, 2003.


\textsuperscript{185} INA § 235(b)(1)(B)(v); INA § 235(b)(1)(B)(ii)(IV); INA § 212(d)(5)(A); 8 CFR § 235.3(c); 8 CFR § 212.5(a). Note that although parole is available, it is impossible to know with any certainty how many asylum seekers are allowed parole, nor the average period of detention if denied parole, because the DHS does not provide reliable statistical information on this matter. See *Human Rights First, In Liberty’s Shadow*, supra note 124 at 13.
of community ties and the absence of any bars to asylum involving violence or misconduct. The denial of parole cannot be appealed to an independent judge or even a DHS adjudicator.

ii) No Appeal to Judge/Independent Adjudicator:

In the U.S. asylum system the immigration officer acts in a judicial capacity, and can effectively sentence a person to imprisonment for a potentially indefinite period for the mere fact that he or she has fled his or her home country for fear of persecution, without independent review of that decision. Whereas in Canada asylum seekers may apply for judicial review of a positive detention decision, the decision by DHS to detain “arriving aliens” cannot be appealed.

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186 Human Rights First, In Liberty’s Shadow, supra note 124 at 7-8. Note that the parole guidelines are found in scattered INS memoranda. See Memorandum from Michael A. Pearson, INS Executive Associate Commissioner for Field Operations, to Regional Directors, District Directors, and Asylum Office Directors, “Expedited Removal: Additional Policy Guidelines,” (30 December 1997); Memorandum from Michael A. Pearson, INS Executive Associate Commissioner, Office of Field Operations, to Regional Directors, “Detention Guidelines Effective October 9, 1998,” (7 October 1998). See also Amnesty International USA, US Detention, supra note 125. Amnesty International USA points out that the guidelines are merely advisory and there are wide discrepancies as to the exercise of this discretion.


188 See Human Rights First, In Liberty’s Shadow, supra note 124 at 9. DHS immigration adjudicators can review detention decisions of DHS officers for all detainees, with the exception of “arriving aliens”, which includes asylum seekers arriving at airports and borders. Although, as mentioned above, the United States has provided its assurance that it will not treat individuals returned under the STCA as “arriving aliens” this assurance is far from a guarantee. See supra note 129.
iii) Additional Hurdles:

Detention impedes the very ability of the asylum seeker to exercise his or her right to asylum. It is frequently the case that those in detention do not have the benefit of legal counsel due to the factors discussed above in the context of expedited removal. Furthermore, detention centres are often located in remote areas, further contributing to the alienation of asylum seekers. Moreover, Amnesty International USA reports that many asylum seekers have survived torture or inhumane treatment in their countries of origin, and consequently suffer from mental or physical illness. They are detained with no regard to the circumstances leading to the reasons for their claim for asylum and, detention becomes a further traumatizing factor in their already difficult lives.

iv) Criminal Treatment of Asylum Seekers:

Not only are asylum seekers deprived of procedural justice, they are often subject to treatment which has been described as “cruel, inhuman or degrading.” Asylum seekers, including minors, are often held in detention centres or prisons alongside

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189 The right to seek and enjoy asylum from persecution is enshrined in Article 14 of the Universal Declaration of Human Rights, supra note 36.
190 Amnesty International USA, US Detention, supra note 125.
191 Amnesty International USA, US Detention, supra note 125.
192 Amnesty International USA, US Detention, supra note 125.
193 Amnesty International USA, Lost in the Labyrinth, supra note 125.
According to Amnesty International USA, those in charge of detention facilities are rarely aware of whether individuals in their custody are asylum seekers, and are not apprised by INS of how international legal standards require asylum seekers to be treated. The human rights organization states the following in this regard:

Many [asylum seekers] are confined with criminal prisoners, but unlike criminal suspects, are frequently denied any opportunity of parole... They are held in conditions that are sometimes inhuman and degrading. Asylum-seekers detained in the USA have often been treated like criminals: stripped and searched; shackled and chained; sometimes verbally or physically abused. Many are denied access to their families, lawyers and non-governmental organizations (NGOs) who could help them...

According to the UNHCR, approximately 60% of detainees are held in county jails or detention facilities where immigration officials have little to no control or influence over conditions. Specifically, the UNHCR states the following of this situation:

Asylum seekers are often housed with criminals solely as a matter of convenience, but once inside the deliberate jail policy is to ‘treat everyone the same.’ Detainees can be transferred across the country from one facility to another, at a moment’s notice and without informing an applicant’s lawyer.

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194 Standing Committee Report, supra note 32. See also Human Rights First, “Refugees Behind Bars,” (August 1999), online: <http://www.humanrightsfirst.org/pubs/descriptions/behindbars.htm> (last accessed 29 January 2006). Following the coming into force of the 1996 legislation, the INS opened two new detention facilities for asylum seekers subject to mandatory detention. These facilities are administered by private companies. One facility, in Queens, New York, contains 200 beds and is run by Wackenhut Corrections Corporation. The other, in Elizabeth, New Jersey, contains 300 beds and is run by Correction Corporation of America. The operation of detention facilities by private companies raises additional concerns in ensuring the proper treatment of asylum seekers.

195 Amnesty International USA, Lost in the Labyrinth, supra note 125.

196 Amnesty International USA, Lost in the Labyrinth, supra note 125.

197 UNHCR, Refugees (2000) 2 at 15.

198 Ibid.
v) Detention of Minors:

One of the aspects of the detention program in the United States that is most offensive to Canadian and international standards and sensibilities is the practice of detaining minors. According to Canada's *IRPA*, "a minor child shall be detained only as a measure of last resort, taking into account the... best interests of the child."  Unaccompanied minors seeking asylum in Canada are, in the vast majority of cases, handed to provincial child welfare authorities and placed in foster care or other group living situations.

The UNHCR has clearly condemned the practice of detaining minors in its Detention Guidelines:

...minors who are asylum-seekers should not be detained.... Where possible they should be released into the care of family members who already have residency within the asylum country. Where this is not possible, alternative arrangements should be made by the competent child care authorities... If none of the alternatives can be applied and States do detain children, this should, in accordance with Article 37 of the Convention on the Rights of the Child, be as a measure of last resort, and for the shortest period of time.

International human rights standards notwithstanding, the United States continues to engage in the practice of detaining minor children. According to INS statistics, the number of unaccompanied children detained in the United States has more than doubled.

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199 *IRPA*, supra note 21, s. 60.
200 Macklin, *Disappearing Refugees*, supra note 5 at 387. Professor Macklin also describes an exception in which detention is imposed where immigration authorities determine that it is the only means of preventing smugglers from apprehending the children and taking them out of Canada.
201 UNHCR, *Detention Guidelines*, supra note 172.
over the last five years, rising from 2,375 in 1997 to 5,385 in 2001. Approximately 75 percent of these children are boys and 25 percent are girls. According to Amnesty International USA, one-third of minor detainees are housed in jail-like facilities designed for incarcerated juvenile offenders, for months or even years pending the resolution of their immigration status. This practice is a further example of the incarceration of individuals who have not committed a criminal offence and have already experienced considerable upheaval in their lives. Once again, this practice is akin to punishing asylum seekers for their status as such, which is even more egregious in the case of unaccompanied minors due to their vulnerability, their special status in international law and their consequent need for enhanced human rights protection.

vi) Nationality-Based Detention and the Political Influences of Asylum Policy:

The two major nationality-based detention policies initiated by the U.S. government have been condemned as contrary to domestic and international human rights standards. One such policy is aimed at asylum seekers from Haiti, and the other at those from 35

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203 Ibid.

204 Amnesty International USA, Unaccompanied Children, supra note 202.

205 See Macklin, Disappearing Refugees, supra note 5 at 389-393; see also Human Rights First, In Liberty's Shadow, supra note 124 at 21-23.

206 Human Rights First, In Liberty's Shadow, supra note 124 at 22-23. In 2001 and 2002, two boats carrying a total of approximately 400 Haitian asylum seekers arrived off the coast of Florida. In response, the INS took steps to effectively deny individualized due process to these individuals. The INS (and now the DHS) continues to apply a policy of denying parole to Haitians arriving in the U.S. by sea.
nations and territories, all primarily Arab and/or Muslim in population.

It has been reported that the majority of the 1200 non-citizens detained following the September 11 attacks were of Arab or Muslim background. Furthermore, notwithstanding that national security was cited as the impetus for the nationality-based detention policies, according to a June 2003 report of the U.S. Justice Department’s Inspector General, the “vast majority” of those detained were accused of violations of federal immigration law, and not terrorism-related offences.

Following the September 11 attacks, the White House announced its inauguration of Operation Liberty Shield, a comprehensive national security initiative, one of the measures of which involved the detention of asylum applicants “from nations where al-Qaeda, al-Qaeda sympathizers, and other terrorist groups are known to have operated will be detained for the duration of their processing period.” The program, which effectively mandated the detention of asylum claimants from Iraq and a number of other predominantly Arab or Muslim countries, was announced on March 17, 2003, but has now been terminated. Nonetheless, questionable detention policies and practices

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207 Human Rights First, In Liberty's Shadow, supra note 124 at 21.
208 Human Rights First, In Liberty's Shadow, supra note 124 at 22.
persist, particularly as illustrated by the National Security Entry-Exit Registration System (more commonly known as the “Special Registration System”) described below.

The U.S. government implemented the Special Registration System in August of 2002, and has cited national security and prevention of terrorism as its driving force. The program is touted as the first step in the federal government’s recent security-based entry/exit policy called US-VISIT. It was designed to keep track of some of the approximately 25 million “nonimmigrants”, or individuals who do not hold citizenship or permanent resident status in the United States. The program, administered by ICE, requires such individuals to register with U.S. immigration authorities at ports of entry and other immigration offices (including fingerprinting and photographing), to undergo interviews with immigration officers under oath, and to inform immigration officers of changes in address, employment or schools on an ongoing basis. Those subject to Special Registration are required to report in person to immigration officers on their departure date, and those who fail to comply with the requirements of the Special Registration system are subject to deportation. According to the Migration Policy Institute:

214 See U.S. Immigration and Customs Enforcement, supra note 212. According to Professor Macklin, the policy applies only to men and boys from the subject countries. See Macklin, Disappearing Refugees, supra note 5 at 391.
215 Jachimowicz & McKay, supra note 212.
Between the Special Registration Program’s inception in August 2002 and March 2003, over 60,000 males were registered, over 2000 were detained, and an unknown number were deported.\textsuperscript{216}

The program has faced opposition from civil and refugee rights advocates for its consequent alienation of immigrant communities and failure to improve national security.\textsuperscript{217} It is evident that the effect of the Special Registration program is to target people based on national and ethnic origin, rather than on specific intelligence information. It is difficult to overlook the fact that, with the exception of North Korea, all of the countries in the program are predominantly Arab or Muslim.\textsuperscript{218} As pointed out by the UNHCR, a blanket detention policy imposed on the basis of nationality violates international legal norms for various reasons.\textsuperscript{219} First, detention policies based on nationality (rather than security or intelligence) discriminate based on nationality, which is a prohibited ground of discrimination.\textsuperscript{220} Additionally, international legal standards require that legitimate attempts at relief from persecution must not be thwarted by detention policies.\textsuperscript{221} Finally, where national security is cited as the reason for detention, there must be a substantive basis for that conclusion in the particular case at hand.\textsuperscript{222}

Nationality-based detention and programs such as the Special Registration System are examples of the United States’ “propensity to permit foreign policy considerations” to

\begin{thebibliography}{99}
\item 216 Jachimowicz & McKay, \textit{supra} note 212.
\item 218 See Macklin, \textit{Disappearing Refugees, supra} note 5 at 391.
\item 219 UNHCR, \textit{Detention Guidelines, supra} note 172. See also Macklin, \textit{Disappearing Refugees supra} note 5 at 401.
\item 220 UNHCR, \textit{Detention Guidelines, supra} note 172.
\item 221 UNHCR, \textit{Detention Guidelines, supra} note 172.
\item 222 UNHCR, \textit{Detention Guidelines, supra} note 172.
\end{thebibliography}
influence its immigration and refugee policy. The central criticism of the United States in this regard is that the detention of non-citizens of certain ethnic backgrounds and/or nationalities, and their subjection to restrictive programs such as Special Registration, are frequently the result of U.S. dissatisfaction with the government of the asylum seeker’s country of origin, rather than specific security-related information about the asylum seeker in question. Nationality-based differential treatment of asylum-seekers further casting doubt on the characterization of the United States as a “safe” country for refugees and for Canada’s ability to furnish fundamental justice through deflection under the STCA.

3. **One-Year Time Limit for Asylum Claims**

Another problematic measure introduced by the 1996 legislation, from the perspective of fundamental justice, is the United States government’s imposition of a one-year time limit within which an asylum seeker present in the country must file his or her request for asylum. The one-year time limit applies, *inter alia*, to asylum-seekers who are deflected to the United States under the STCA. For example, if an asylum seeker who has lived in the United States for one year or more seeks to enter Canada, the STCA requires his or her return to the United States, where the asylum seeker will be subject to the one-year time limit provisions. By contrast, Canada does not impose such a time limit.

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223 Carasco, *supra* note 81 at 322.
224 Carasco, *supra* note 81 at 322-323.
on asylum seekers. In the United States, however, the asylum claimant must demonstrate in the course of his or her application that he or she has complied with the one-year time limit. Those individuals failing to demonstrate compliance with the one-year deadline, as well as those caught inside the United States after the deadline, are considered ineligible for asylum and are subject to deportation.\textsuperscript{226}

The one-year time limit is of concern primarily due to its potential to disqualify from asylum individuals who may be legitimately in need of protection, for the simple reason that they have not met the burden of demonstrating compliance with the deadline.\textsuperscript{227} The one-year time limit is an unreasonable burden and, once again, does not reflect the reality faced by many asylum seekers in the United States. For many, it is difficult, if not impossible, to file a claim within one year. This is true particularly if the asylum claimant is, or has been, in detention and/or is unaware of the one-year time limit. Additionally, the one-year time limit may prove particularly burdensome for those who have entered the country illegally and have been living “underground”. Such individuals may be unaware of the deadline, and/or may be afraid to make U.S. government officials aware of their presence in the United States.\textsuperscript{228} On this point, Professor Audrey Macklin states the following:

Given the present political climate in the United States, and the widespread use of detention, it would hardly be surprising if some asylum seekers...

\textsuperscript{226} 8 U.S.C. § 1158(a)(2)(B) (2000). See also Blum, supra note 123 at 49. Exceptions apply in order to permit applications outside the one-year time limit, but such exceptions only apply if circumstances exist which are accepted as materially affecting the application, or if it can be demonstrated that the delay in filing occurred as a result of extraordinary circumstances. See INA § 208(d)(6); 8 U.S.C. §1158(d)(6) (1996).
\textsuperscript{227} See Macklin, Disappearing Refugees, supra note 5 at 405.
\textsuperscript{228} Macklin, Disappearing Refugees, supra note 5 at 405.
seekers in the United States opt to go underground for as long as possible for fear of making a refugee claim and ending up in detention. Yet, if caught after a year, they would be precluded from making an asylum claim, and also face refoulement.\textsuperscript{229}

The implication of the one-year time limit is that asylum seekers returned to the United States after the filing deadline are precluded from having their claims heard, and may be \textit{refouled} without ever having had their claim adjudicated meaningfully.

The UNHCR has questioned the compliance of the U.S. filing deadline with international standards.\textsuperscript{230} Furthermore, the Standing Committee on Citizenship and Immigration recommended that the Canadian government seek assurances from the United States that individuals returned to the United States under the Safe Third Country Agreement would not be precluded from making an asylum claim on the basis that they have been in the country for one year or more.\textsuperscript{231} However, the Canadian government ultimately declined to do so.

4. \textit{Treatment of Asylum Claims based on Gender-Related Persecution}

In addition to the problematic procedural aspects of the United States asylum system, there exist substantive differences in refugee protection law and jurisprudence in the

\textsuperscript{229} Macklin, \textit{Disappearing Refugees}, supra note 5 at 405.
\textsuperscript{230} UNHCR, \textit{Comments on Draft Agreement}, supra note 46; See also UNHCR, Executive Committee, Note on International Protection, Doc. A/AC.96/815, 1993, at 7, online: <http://www.unhcr.ch/cgi-bin/texis/vtx/excom/opendoc.pdf?tbl=EXCOM&id=3ae68d5d10> (last accessed 5 January 2006).
\textsuperscript{231} Standing Committee Report, supra note 32 at Recommendation 4.
United States which indicate that asylum seekers fearing gender-related persecution would not meet the same reception in the United States, notwithstanding that they would qualify for refugee protection in Canada. The United States diverges significantly from Canadian and international standards of refugee protection in its treatment of women claiming asylum based on gender-related persecution. This section will discuss the reception of asylum claims based on gender-related violence in the United States, and the identification of such violence as persecution. Specifically, this section will explore the treatment of such claims as persecution due to the grounds listed in the Refugee Convention, namely membership in a “particular social group”, based on differential treatment accorded to women based on gender.

The international community has become increasingly willing to recognize gender-related violence as persecution. Also significant is the identification of gender-related persecution as such, rather than as a form of random violence. Persecution based on gender includes such phenomena as female genital mutilation, forced abortion, state-condoned domestic violence, rape and honour killings. It is also important to note that in the context of gender-related asylum claims it is often inaction or lack of state protection in the asylum claimant’s country of origin, rather than positive action on the part of the state, that is the focus of the claim of persecution.


233 Erin Patrick, Migration Information Source, “Gender-Related Persecution and International Protection,” (1 April 2004), online: <http://www.migrationinformation.org/Feature/display.cfm?id=216> (last accessed 29 January 2006). The Refugee Convention indicates that positive action on the part of the state is not required in order to ground an asylum claim based on persecution; the absence of state intervention or protection is sufficient in this regard. See also Kasinga, infra note 249.
As stated above, the Refugee Convention (as well as the U.S. *Immigration and Nationality Act*)

Refugee Convention, supra note 6, Art. 1.

defines a refugee as someone who is:

outside of his or her country of nationality who is unable or unwilling to return because of persecution or a well-founded fear or persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.235

The category “gender” is not named in the above definition. Thus, on a narrow reading of the Refugee Convention gender is not an independent ground for a claim of protection from persecution. A woman claiming asylum based on gender-related violence will therefore be required to demonstrate a nexus between the impugned persecutory action, her gender, and at least one of the grounds listed in the above definition.

Women fleeing persecutory action in their countries of origin can be considered members of a particular social group,236 although their claims may, theoretically, fall within any of the listed grounds of protection. Additionally, as will be discussed below, the manner in which the particular social group is circumscribed has significant implications as to the protection of women asylum claimants.

The UNHCR Executive Committee adopted Conclusion Number 39, which provides the following directions as to the protection of women:

235 Refugee Convention, supra note 6, Art. 1.
States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a "particular social group" within the meaning of Article 1 A(2) of the 1951 United Nations Refugee Convention.\textsuperscript{237}

Subsequently, the UNHCR Executive Committee issued guidelines as to the protection of women refugees\textsuperscript{238} which elaborate upon Conclusion 39, and include the direction that women fearing persecution on the basis of their gender "should be considered a member of a social group for the purposes of determining refugee status."\textsuperscript{239} It is important to note, however, that the UNHCR directives do not obligate States party to recognize women as a social group deserving of protection.\textsuperscript{240}

Violence against women is defined in the U.N. Declaration on the Elimination of Violence Against Women as:

any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.\textsuperscript{241}

\textsuperscript{239} Ibid.
In March 1993, Canada became the first country to issue guidelines\textsuperscript{242} as to the treatment of women refugees fleeing gender-based persecution. The IRB Gender Guidelines are not law; rather, they are administrative directions from the Chair of the Immigration and Refugee Board to its officers, and consist of instructions for the treatment of women asylum claimants and gender-based asylum claims. The IRB Gender Guidelines set out, \textit{inter alia}, that persecution may “be the same as severe discrimination on the grounds of gender.”\textsuperscript{243}

Since the issuance of the guidelines, the recognition of gender-based persecution has become well established in Canada’s refugee determination system.\textsuperscript{244} The Supreme Court of Canada’s decision in \textit{Ward v. Canada (Minister of Employment and Immigration)},\textsuperscript{245} released shortly after the IRB Gender Guidelines, sets out three categories of groups which may be considered a “particular social group”, the first of which is the category of groups which are defined by “innate or unchangeable characteristics”\textsuperscript{246} which, I argue, includes women fleeing persecution on the basis of gender. Whereas Canada has, through its IRB Gender Guidelines and Supreme Court of Canada jurisprudence, effectively ended any debate over the proper identification of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{242} Immigration and Refugee Board of Canada, Guidelines Issued By the Chairperson Pursuant to Section 65(3) of the Immigration Act, Guideline 4, Women Refugee Claimants Fearing Gender-Related Persecution: Update (13 November 1996), online: <http://www.irb-cisr.gc.ca/en/about/guidelines/women_e.htm> (last accessed 28 January 2006) [hereinafter IRB Gender Guidelines].
\item \textsuperscript{244} Canadian Council for Refugees, “Refugee Women Fleeing Gender-Based Persecution,” online: <http://www.web.net/~ccr/gendpers.html> (last accessed 5 January 2006).
\item \textsuperscript{245} [1993] 2 S.C.R. 689.
\item \textsuperscript{246} Ibid. at 739.
\end{itemize}
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women as a particular social group, as will be discussed below, the United States continues to grapple inconsistently with this issue.

a) The Characterization of Claims made on the basis of Gender-Related Persecution: Women as Members of a Particular Social Group

According to the IRB Gender Guidelines, adjudicators are directed to grant refugee status to women claiming asylum based on gender-related persecution who demonstrate both a well-founded fear of persecution and that the persecution relates to one of the grounds listed in the Refugee Convention. Because gender is absent from the list, women must lodge their claims under the existing categories. The United States, through its appeals courts and the Board of Immigration Appeals (BIA), has not yet reconciled the place of gender within the particular social group category and has demonstrated a narrow interpretation of the protection offered to women by virtue of their membership in particular social groups. Furthermore, the United States has demonstrated inconsistency in its readiness to characterize the persecution of women seeking asylum as persecution due to gender, and in its imposition of prohibitive evidentiary requirements on asylum seekers in this category.

247 IRB Gender Guidelines, supra note 242.
248 In 2000, the Clinton Administration prepared draft INS Regulations setting out an analytical framework for the recognition of asylum claims based on membership in a particular social group, which included women subject to domestic violence. However, the regulations have not been published.
The 1996 precedent-setting case, *Matter of Kasinga*, the BIA ruled that subjection to female genital mutilation (FGM) is a valid basis for an asylum claim based on persecution. *Kasinga* is noted as a significant advance in that it identifies gender as part of the particular social group category. Specifically, the BIA recognized women who are members of the northern Togolese tribe of Tchamba-Kunsuntu who have not undergone FGM and who oppose the practice as members of a “particular social group” and thus entitled to refugee protection. Although the decision opened the door to the recognition of FGM as the basis for an asylum claim, the BIA was careful not to state that FGM, or gender generally, is a specific ground for asylum. Furthermore, BIA defined the persecuted group so narrowly that gender was not emphasized as its primary characteristic. That is, FGM was not recognized as gender-specific in the *Kasinga* decision. The result of such a restrictive analysis is that it does not recognize gender, generally, as a distinct category of protection, and tightly circumscribes the group afforded protection by its restrictive definition of the recognized group (protection in that case being restricted to women who are members of a particular tribe who have not undergone FGM and who oppose the practice).

In addition to the restrictive analysis described above, there is additional, evidentiary difficulty for asylum claimants seeking to be recognized as members of a particular social group. Even though the United States has recognized certain characterizations of women

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249 *Matter of Kasinga*, 211 & N Dec. 77 (BIA 1993) [hereinafter *Kasinga*].
251 Randall, supra note 243 at 295.
as members of a particular social group (i.e. on the narrow definition given in the Kasinga example), the claimant must still prove that she is actually a member of such group, and that the persecution is inflicted on that basis. For example, in the case of repressive social norms such as the Iranian imposition of the requirement to wear the chador, a United States court found that Iranian women who refuse to conform to the government’s gender-based laws are members of a particular social group.\textsuperscript{252} However, in that case, the claimant’s beliefs were not found to be so deeply-felt that she would refuse to conform to the impugned social norm if returned to Iran.\textsuperscript{253} Furthermore, the court found that the practice of compliance with social norms despite personal opposition to them is not sufficiently abhorrent to be considered persecution.\textsuperscript{254}

By contrast, citing the Federal Court of Appeal decision in Salibian v. M.E.I.,\textsuperscript{255} the IRB Gender Guidelines direct that the evidence must demonstrate that the claimant genuinely fears persecution for a reason outlined in the Convention, but it would be sufficient, for the purposes of evaluating the claim, to take into account the general circumstances of the claimant’s country of origin:

A gender-related claim cannot be rejected simply because the claimant comes from a country where women face generalized oppression and violence and the claimant’s fear of persecution is not identifiable to her on the basis of an individualized set of facts.\textsuperscript{256}

\textsuperscript{252} Fatin v. INS, 12 F. 3d 1233 (3rd Cir. 1993) [hereinafter Fatin].
\textsuperscript{253} Ibid.
\textsuperscript{254} Ibid. See also Fisher v. INS, 79 F. 3d 955 (9th Cir. 1996) (en banc) at 964, in which the court found that although non-conforming women may constitute a particular social group the claimant had not satisfied her requirement to demonstrate that in her particular case the treatment was persecution. Rather, the court found that the mistreatment of non-conforming women in Iran was “routine punishment for violating generally applicable laws”.
\textsuperscript{255} [1990] 3 F.C. 250 (C.A.) at 258.
\textsuperscript{256} IRB Gender Guidelines, supra note 242 at Part C.
b) Treatment of Domestic Violence as Persecution

In the past, the BIA has recognized domestic violence as a form of persecution. However, current jurisprudence leaves open the question of whether, in the case of domestic violence, gender will be considered the basis of such persecution. Amnesty International USA has reported that women seeking asylum in the United States “rarely gain refugee status based on claims of gender-related violence, as U.S. asylum adjudicators apply a restrictive interpretation of the international definition of a refugee...”257 As discussed below, the refusal to recognize gender as integral to group identity as a basis for a claim of persecution is perhaps even more troubling than the above-noted example of a narrowly constructed definition of “particular social group”.

In the 2000 decision, Matter of S-A258 a United States court found that a Moroccan woman espousing “liberal Muslim beliefs” had a well-founded fear of persecution by her father based on her religious beliefs, which differed from his own orthodox Muslim views. The BIA found that her father beat her and subjected her to isolation, and deprived her of education, all due to his orthodox religious views concerning the position of women in Moroccan society. The BIA found a sufficient nexus to a Convention ground in the category of religion (as opposed to membership in a particular social group, as in the above-noted examples of Kasinga and Fatin). The court did not, however,

257 Amnesty International USA, Violence Against Women, supra note 232.
establish gender as integral to the decision to grant protection, focusing instead on the correlation between the persecutory acts and her personal, liberal political views.

The case described below is an example of both the restrictive interpretation of "particular social group", as well as an example of refusal to recognize gender as constitutive of group identity. In the highly-publicized decision, *In re R-A*, the BIA rejected the claim of Rodi Alvaredo, a Guatemalan woman claiming asylum based on domestic violence in her country of origin. Specifically, the BIA rejected the claimant's assertion that the relevant social group was "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination". The decision by the BIA prompted reconsideration by the INS, which requested the former Attorney-General Janet Reno to exercise her authority to review the decision. In January 2001, the Attorney-General vacated the BIA’s decision. Subsequently, current U.S. Attorney-General John Ashcroft remanded the case back to the BIA for a further hearing. The BIA has not yet issued its decision on this matter. However, there seems to be little reason for Ms. Alvaredo to be optimistic, considering a report that upon his appointment Mr. Ashcroft dismissed several members of the Board of Immigration Appeals who had been appointed by the Clinton Administration, including three of the five members who had dissented in the initial Alvaredo case.

Furthermore, it has been reported that the decision in *R-A* was subsequently relied upon

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260 Ibid.
by the BIA in an unpublished decision to reverse an order of an immigration judge to
withhold removal proceedings. In short, the Matter of R-A has left considerable
uncertainty as to the treatment of gender-based asylum claims in the United States.

In May 1995, the INS issued its own gender-related guidelines for asylum officers. The
guidelines state that gender-related persecution such as rape, sexual violence and
abuses considered to be private can form the basis of asylum. However, the guidelines
have significant limitations in their ability to ensure the adequate protection of women, as
they are non-binding rules as to the decision-making criteria to be used by asylum
officers.

In summary, as evidenced by the above-noted examples the jurisprudence on gender-
related asylum claims has left much to be desired in terms of the meaningful protection of
women asylum claimants, and the decision of R-A has created uncertainty as to the future
treatment of asylum claims in the United States. It is also worth noting that certain
features of the United States asylum system have been reported to have gendered effects
which operate to the detriment of women. For example, the Expedited Removal Study

264 See David A. Martin, Citizenship and Immigration Canada, "Treatment of Gender-Based Asylum
Claims in the United States," (31 March 2003), online: <http://www.cic.gc.ca/english/policy/asylum-
gender-us.html> (last accessed 5 January 2006).
265 The guidelines were issued in a memorandum. See Phyllis Coven, Office of Internal Affairs,
Considerations for Asylum Officers Adjudicating Asylum Claims from Women, to all INS Asylum
Officers and Headquarters Coordinators: Immigration and Naturalization Service, Gender Guidelines:
Considerations for Asylum Officers Adjudicating Asylum Claims from Women (26 May 1995) in (1995) 7
Intl. J. Refugee L. 700.
266 Ibid.
concluded that, in comparison to regular immigration removals, a greater proportion of women than men are removed as a result of the expedited removal program.267

The Standing Committee on Citizenship and Immigration recognized the STCA as particularly pernicious for women seeking asylum on the basis of domestic violence, and recommended that women fleeing gender-related persecution be exempted from the scope of the agreement.268 However, the recommendation was ignored. Instead, the Canadian government indicated that it would review the treatment of gender-related claims as part of its general monitoring of the STCA.269 Once again, Canada neglected to obtain a formal undertaking from the United States that claims made on the basis of gender-related persecution will be adjudicated based on internationally accepted standards.

5. The Status of the United States as a “Safe Haven” for Asylum Claimants

In this Chapter, I presented several examples of procedural and substantive features of the United States asylum system and its treatment of asylum seekers, which fall short of the standard of protection considered adequate by both Canadian and international legal norms. Although the United States is commonly characterized as a wealthy, industrialized nation, its status as such should not necessarily lead one to espouse the

267 Expedited Removal Study, supra note 123 at 50-51. See also UNHCR, Report on Expedited Removal, supra note 127.
268 Standing Committee Report, supra note 32 at 8-9.
269 Government Response to Standing Committee, supra note 129.
view that the protections it offers its asylum seekers are commensurate with those offered in other nations such as Canada. In entering into the STCA Canada appears to have taken this notion for granted, and has presumed that in deflecting asylum seekers to the United States it is absolved of its duty under the Charter to ensure security of the person and treatment in accordance with the principles of fundamental justice.

In Chapter 2, I argued that the content of the guarantee of security of the person can be located in measures ensuring the physical and psychological integrity of the individual enjoying Charter protection. After having exposed various features of the United States asylum system in this Chapter, I argue that the STCA and its deflection of asylum seekers in Canada to the United States deprives asylum seekers of security of the person. The examples of substandard treatment of asylum seekers stemming from the procedural and substantive facets of asylum law and policy in the United States discussed in this Chapter illustrate tangible risks to which the physical and psychological integrity of asylum seekers are subject by their deflection pursuant to the STCA. If a breach of security of the person has been located in such items as legislation exposing women to health risks resulting from delayed medical treatment,\textsuperscript{270} the legislated removal of control over one's body,\textsuperscript{271} and state-imposed psychological stress due to unreasonable delay in the disposal of complaints of sexual harassment,\textsuperscript{272} then it is entirely reasonable to posit that risks to security of the person can be found in exposure to refoulement and mistaken deportation under the expedited removal procedure. Furthermore, risks to security of the person can be found in the subjection of asylum claimants to detention (including mandatory

\textsuperscript{270} See Morgentaler, supra note 67.

\textsuperscript{271} See Rodriguez, supra note 68.

\textsuperscript{272} See Blencoe, supra note 69.
detention under the expedited removal provisions), which often includes imprisonment for indefinite periods, and the housing of asylum claimants with convicted criminals as well as their treatment as such. The detention of minor children and asylum seekers of any age who have suffered traumatizing events further intensify the risk to security of the person to which asylum claimants are subject in the United States.

I pointed out in Chapter 2 that the right not to be deprived of security of the person can be abridged (and that such action will still be in accordance with the Charter) if doing so is in accordance with the principles of fundamental justice. As discussed, Charter jurisprudence indicates that the principles of fundamental justice include elements of both procedural and substantive fairness. According to Suresh, a determination of compliance with the principles of fundamental justice should be informed by the international context of refugee protection and human rights.

My discussion of the United States asylum system exposes numerous lapses in procedural justice, including the absence of an impartial adjudication mechanism and an unreasonable burden on asylum claimants in the expedited removal procedure, leading to the likelihood that legitimate refugees are turned away for their inability to demonstrate a credible fear of persecution. Procedural justice is lacking in the detention policies of the United States asylum system, in light of the fact that mandatory detention is imposed upon those subject to expedited removal, and the fact there exists no legislated time limit on detention, potentially leaving asylum claimants imprisoned for months or years. Asylum seekers are faced with what are often insurmountable obstacles in obtaining
parole from detention. The absence of an appeal mechanism for the denial of parole and positive detention decisions further inhibits procedural justice. The lack of access to legal counsel, as well as the numerous aforementioned ways in which the United States asylum system fails to reflect the reality faced by most asylum seekers, further contribute to the dearth of meaningful procedural protections.

The nationality and ethnic-origin-based treatment of asylum seekers, and the influence of foreign policy on the asylum system are further examples of the absence of fundamental justice. The one-year time limit for filing an asylum claim is also a concern, as it is not a realistic option for many asylum seekers. The substandard treatment of asylum seekers claiming on the basis of gender-related persecution is an illustration of the substantive aspect of fundamental justice lacking in the United States asylum system. Taking all of the above factors into consideration, as informed by the international context of refugee protection and international standards of human rights discussed throughout this chapter, I argue that the United States does not afford procedural and substantive justice to asylum seekers in the manner that is commensurate with Canada’s obligations under the Charter.

In light of the exposition of features of the United States asylum system in this chapter, it cannot be said that the United States provides to asylum seekers protection from risks to security of the person according to Charter standards, as set out in Canadian Charter jurisprudence. Due to these same features, neither can it be said that the United States affords procedural and substantive justice to asylum seekers in accordance with the principles of fundamental justice required under section 7. Even in light of the
application of a theory of subcontracted fundamental justice discussed in Chapter 2, in which the United States is not required to espouse identical standards of protection as Canada, the features of the United States asylum system discussed herein differ sufficiently from the Canadian system such that the subjection of asylum seekers to such treatment would be found to "sufficiently shock" the Canadian conscience on the Kindler standard. Thus, Canada cannot, by its deflection of asylum seekers to the United States, absolve itself from its duty to respect the security of the person of asylum seekers and to not deprive them of same except in accordance with the principles of fundamental justice. Canada violates the section 7 rights of asylum seekers by doing so, and must engage in a justification of such measures in accordance with section 1 of the Charter, as discussed in Chapter 4.
CHAPTER 4: SECTION 1 AND REASONABLE LIMITS ON RIGHTS AND FREEDOMS UNDER THE CHARTER

1. Section 1 of the Charter

Section 1 provides that the rights and freedoms guaranteed under the Charter are not unlimited; that is, Charter rights and freedoms are subject to reasonable limits which are prescribed by law and can be demonstrably justified in a free and democratic society. I argued in Chapter 3 that the STCA has the effect of depriving asylum seekers of the right to security of the person guaranteed to them under section 7 in a manner that is not consistent with the principles of fundamental justice. In this chapter, I engage in an analysis of whether such a limit on rights can be justified as reasonable in a free and democratic society. Specifically, section 1 provides the following:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.273

According to the decision of Dickson C.J. in the Supreme Court of Canada decision in R. v. Oakes274, the values of a free and democratic society include the following:

... respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.275

273 Charter, supra note 2 at s. 1.
275 Ibid. at 136.
Although in the first stage of a Charter review (i.e. the section 7 stage discussed in Chapter 3 of this thesis) the burden of proving the elements of the Charter breach rests on the party alleging the breach, at the section 1 stage of the analysis the burden shifts to the party seeking to support the challenged law.\footnote{Hogg, \textit{supra} note 54 at 795.} In \textit{Oakes}, Dickson C.J. found that the appropriate standard of proof is the civil standard of a balance of probabilities, but that “the preponderance of probability test must be applied rigorously.”\footnote{\textit{Oakes}, \textit{supra} note 274 at 137.}

It is important to note the reference in section 1 to reasonable limits which are “prescribed by law.” Stated otherwise, this section provides that in order to be justified under section 1, the Charter violation at issue must be the result of legally authorized action. According to Professor Hogg, “[t]he words “prescribed by law” make clear that an act that is not legally authorized can never be justified under s. 1, no matter how reasonable or demonstrably justified it may appear to be.”\footnote{Hogg, \textit{supra} note 54 at 799.} In the case of the STCA, the deflection of asylum seekers to the United States (and the consequent deprivation of security of the person) is “prescribed by law” because their deflection is specifically mandated by the STCA. Barring the application of an exception,\footnote{Exceptions from the operation of the STCA are discussed in Chapter 1, above.} the STCA requires the deflection of asylum seekers who arrived previously in the United States.\footnote{STCA, \textit{supra} note 1, Art. 4(1).} It is not, by contrast, a matter of the application of an asylum officer’s discretion that asylum seekers are deflected pursuant to the STCA. Furthermore, the STCA is an agreement which the Canadian government is authorized to have entered into according to the \textit{IRPA},
as discussed in Chapter 2. In light of the foregoing, the actions of the Canadian government in deflecting asylum seekers to the United States are prescribed by law.

It must be noted at this stage in the section 1 analysis that section 7 is unique among Charter provisions in its relationship to section 1. Section 7 guarantees the right not to be deprived of security of the person except in accordance with the principles of fundamental justice. Thus, the right of security of the person is already internally limited in the sense that government action which violates security of the person may nonetheless not be found to violate the Charter if the violation is in accordance with the principles of fundamental justice, as discussed in Chapter 3.

However, whether government action that violates the principles of fundamental justice can nonetheless be justified under section 1 is a contentious issue, and Canadian courts have not been consistent in their approach to reconciling sections 7 and 1. For example, in Morgentaler, the Supreme Court of Canada held that the abortion provisions of the Criminal Code violated section 7, and the Court thereafter proceeded to consider the section 1 analysis. A similar approach was taken by the Supreme Court of Canada in Kindler. In that case, Lamer C.J. held that section 1 can only be used to justify a failure to comply with the principles of fundamental justice in cases "such as natural disasters, the outbreak of war, epidemics". Thus, it would seem that the availability of section 1 to validate the denial of fundamental justice to asylum seekers should be reserved for exceptional cases only. However, Professor Hogg points out that in other cases the

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281 Kindler, supra note 101 at 793.
282 See Hathaway & Neve, supra note 73 at 260.
Supreme Court of Canada has proceeded with the section 1 analysis prior to finding a section 7 breach. Nonetheless, Professor Hogg also points out that never has a majority allowed a section 1 justification in such a case.

Although evidently the law is not settled on this issue, it appears that if section 1 can be used to justify the denial of fundamental justice, it would follow from the above-noted consideration of this issue by the Supreme Court of Canada, that section 1 would be applied rigorously. Therefore, as it was argued that fundamental justice is denied to asylum seekers deflected to the United States pursuant to the STCA, the federal government would have a considerable burden to meet at the section 1 justification stage of the Oakes analysis.

2. The Oakes Test

According to the test set out by the Supreme Court of Canada in Oakes, the government must prove that deflection to the United States serves a sufficiently important objective to justify limiting a Charter right, that the procedure for deflection is a rational means to achieve those objectives, that the STCA impairs the rights of the asylum seeker as minimally as possible to achieve the objective, and that the limitation of the asylum

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283 Hogg, supra note 54 at 832.
284 Ibid.
seeker's rights to security of the person does not serve to inflict disproportionate harm to the asylum seeker relative to the benefits achieved.\textsuperscript{285}

a) Importance of Objective

According to \textit{Oakes}, in order to be justified as a limit on Charter rights, the law in question must have a sufficiently important objective. As will be discussed in this section, although demonstrating the importance of a government's stated objective for a legislative or other action has proven to be a relatively straightforward task for defendants of Charter breach allegations, identifying the objective of an impugned government action or legislation may prove to be no simple feat.

It is often the case that the public is not aware of the true objective(s) in the mind of the law's creator. The characterization of the objective is, nonetheless, important to the outcome of the \textit{Oakes} analysis. As pointed out by Professor Hogg, if the objective is characterized generally, it becomes difficult to argue that the objective is not sufficiently important for the purposes of section 1.\textsuperscript{286} For example, in the case of the STCA, the objective of Canada's entry into the agreement could be stated generally: to reduce the volume of asylum seekers entering the Canadian refugee determination system. In that case it would be difficult to argue that the objective is not sufficiently important for the purpose of section 1. However, if the objective is stated generally it also often proves

\textsuperscript{285} \textit{Oakes}, supra note 274 at 138-139.
\textsuperscript{286} Hogg, \textit{supra} note 54 at 806.
more difficult to demonstrate later in the *Oakes* analysis that the government objective is minimally impairing of asylum seekers' rights.\textsuperscript{287} In that case, it would be difficult to demonstrate that such general objectives could not have been reached by means that are less obtrusive of Charter rights.

The Canadian government has identified numerous objectives for its entry into the STCA, each of which appear to be of great importance from the outset:

The primary purpose of the Agreement is to reinforce refugee protection by establishing rules for the sharing of responsibility for hearing refugee claims between Canada and the United States... It is also expected that the Agreement will reduce backlogs and improve the efficiency of Canada's refugee determination system, allowing Canada to better respond to the needs of refugees... Another purpose is to reduce the misuse of our respective asylum systems and to restore public confidence.\textsuperscript{288}

In addition to such stated objectives, there is compelling cause to interpret a further objective of the Canadian government in entering into the STCA, namely the furtherance of national security and prevention of terrorism. The evidence confirming such an underlying objective is discussed below.

According to *Oakes*, in order to be considered sufficiently important, the objective of the law must be consistent with the values of a free and democratic society, must relate to concerns which are "pressing and substantial,"\textsuperscript{289} and must be directed toward the

\textsuperscript{287} Hogg, *supra* note 54 at 806.
\textsuperscript{288} Government Response to Standing Committee, *supra* note 129.
\textsuperscript{289} *Oakes*, *supra* note 274 at 138-139.
“realization of collective goals of fundamental importance.”290 When characterized as above, the goals of the STCA would appear to be sufficiently important to warrant further analysis for justification under section 1. It is difficult to argue that burden-sharing amongst wealthy nations, reduction of backlogs and misuse in the Canadian asylum system, and the prevention of terrorism are not important objectives, when considered in the abstract.

In any event, it is not to be expected that an impugned law would be found to fail the section 1 analysis at this stage. Professor Hogg has pointed out that although the Oakes analysis would seem to require close judicial scrutiny of the objective of the impugned law, "[i]n practice... the requirement of a sufficiently important objective has been satisfied in all but one or two of the Charter cases that have reached the Supreme Court of Canada."291 The stated and implied objectives of the STCA will be considered throughout the remaining stages of the Oakes analysis below, in order to determine whether the regime of deflection mandated by the STCA is ultimately justified in a free and democratic society.

b) Rational Connection

As its second stage, the Oakes analysis requires a determination of whether the government action is “rationally connected” to the objective of the law. In order to meet

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290 Oakes, supra note 274 at 136.
291 Hogg, supra note 54 at 810.
this burden, the party defending the Charter breach must demonstrate that the law is “carefully designed to achieve the objective in question,” and is not “arbitrary, unfair, or based on irrational considerations.”292 In essence, there must be a causal connection between the objective of the law and the measures mandated by the law.293

I will examine each of the objectives of the STCA as given both expressly and impliedly by the Canadian government, to determine if such objectives are rationally connected to the deflection of asylum seekers to the United States and the consequent denial of access to such asylum seekers to the Canadian asylum determination system, with very limited exceptions to such rule. Although it has been pointed out that there have been only two cases in which a law has been struck down for failure to satisfy the rational connection component of the section 1 analysis,294 I nonetheless argue that in the case of the STCA the rational connection portion of the analysis has a significant role to play in the section 1 justification.

i) Burden-Sharing and Reducing Backlog in Canadian Asylum System

First, I will examine the stated purpose of the STCA as a burden-sharing measure between Canada and the United States vis-à-vis the hearing of refugee claims, as well as

292 Oakes, supra note 274 at 139.
293 Hogg, supra note 54 at 820.
the related purpose of reducing backlog in the Canadian asylum determination system.

The preamble to the STCA states the following:

Convinced, in keeping with advice from the United Nations High Commissioner for Refugees (UNHCR) and its Executive Committee, that agreements among states may enhance the international protection of refugees by promoting the orderly handling of asylum applications and the principle of burden sharing... 295

Although the UNHCR has indicated that the choice of destination of asylum seekers should “as far as possible be taken into account” 296 the UNHCR also supports measures aimed at the “appropriate allocation of State responsibility for determining refugee status.” 297 The responsibility referred to in the UNHCR’s comments are those assumed by States party to the Refugee Convention and related Protocol.

In light of the relevant statistics as to refugee flow between Canada and the United States, I concede that it is possible to identify a nexus between the objective of backlog reduction and the deflection of refugees to the United States. The deflection mechanism of the STCA serves to reduce the flow of asylum seekers arriving in Canada from the United States. 298 Between 1995 and 2001, approximately one-third of all refugee claims made in Canada were made by individuals arriving via the United States. 299 In 2001, that number exceeded 13,000 claimants, 95% of which arrived via a land border port of

295 STCA, supra note 1, Preamble.
297 UNHCR, Comments on Draft Agreement, supra note 46. See also Macklin, Disappearing Refugees, supra note 5 at 393.
298 See Carasco, supra note 81 at 320. See also Standing Committee Report, supra note 32.
299 Standing Committee Report, supra note 32. See also Carasco, supra note 81 at 320; Macklin, Disappearing Refugees, supra note 5 at 394. See also Chapter 1, above.
entry\(^300\) (which, today, would trigger the application of the STCA). However, during that same period only approximately 200 refugee claimants arrived in the United States via Canada annually.\(^301\) In light of such statistics, it is evident that the volume of asylum seekers arriving in Canada via the United States far exceeds that of asylum seekers arriving in the United States via Canada, and that therefore a far greater number of asylum claimants will be deflected to the United States than Canada as a result of the STCA. Thus, the STCA operates to significantly reduce the burden posed by asylum seekers on the Canadian asylum determination system, while increasing flow to the United States, and therefore a causal connection can be located between deflection and backlog-reduction.

On the issue of burden-sharing, according to Professor Macklin this notion implies that “each state should take responsibility for a proportion of the refugee flow that is commensurate with its population, or resources, or some combination thereof.”\(^302\) The STCA appears to be an effective means to such end. The United States received 43,400 asylum claims in 2003, whereas Canada received 45,000 in 2001 and 25,750 by the end of 2004.\(^303\) The population of the United States is almost ten times that of Canada.\(^304\) However, even despite the apparent trend as to a decline in asylum claims in Canada, the United States receives a disproportionately small number of claimants. In increasing refugee flow to the United States it is reasonable to identify a nexus between the STCA’s

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\(^{300}\) Standing Committee Report, supra note 32.

\(^{301}\) Solomon, supra note 43 at 47.

\(^{302}\) Macklin, Disappearing Refugees, supra note 5 at 394.

\(^{303}\) Macklin, Disappearing Refugees, supra note 5 at 395, referring to IRB Country Reports on file with author.

\(^{304}\) As of July 2005, the population of the United States was 295,734,134, and that of Canada was 32,805,041. See United States Central Intelligence Agency, World Fact Book, online: <http://www.cia.gov/cia/publications/factbook/rankorder/2119rank.html> (last accessed 6 January 2006).
deflection measures and the objective of burden-sharing as between Canada and the
United States.

ii) Reducing Misuse of Canadian Asylum System

In addition to those objectives identified above, the Canadian government has attempted
to justify the STCA by its contention that it will serve to deter misuse of the Canadian
asylum system. The misuse identified refers to the opportunistic use of the Canadian
asylum determination system both as a surrogate means of immigration by “illegitimate”
refugee claimants,\(^{305}\) and as a “forum-shopping” mechanism. As stated by Denis
Coderre, Minister of Citizenship and Immigration at the time of the STCA’s
implementation:

The Safe Third Country Agreement addresses a fundamental concern
about asylum shopping for economic advantage interfering with legitimate
claims for refugee protection from those in genuine need.\(^{306}\)

The deflection mechanism under the STCA is a blunt instrument that serves to diminish
the numbers of refugee claimants in Canada generally, therefore necessarily reducing the
numbers of individuals claiming asylum in Canada under false pretences (i.e. as forum-

\(^{305}\) Hathaway & Neve, supra note 73 at 262. Hathaway and Neve refer to the potential for use of the
Canadian refugee system as a “back door” to would-be immigrants posing as refugee claimants for the
purpose of gaining entry into Canada.

\(^{306}\) Citizenship and Immigration Canada, News Release, “Minister Coderre Seeks Government Approval of
Safe Third Country Agreement,” (10 September 2002), online:
shoppers or opportunistic economic immigrants). In other words, it is axiomatic that generally reducing the numbers of asylum claimants in Canada reduces the numbers of asylum claimants who are not "genuine" Convention refugees deserving of asylum protection.

Notwithstanding the theoretical importance of deterring abuse of the refugee determination system, legal scholars have pointed out the dearth of empirical evidence confirming that abuse of the Canadian refugee determination system is in fact a material problem.\(^{307}\) On the contrary, statistics indicate that a majority of asylum claimants who are granted access to Canada’s asylum determination procedures are found to be Convention refugees entitled to protection. The acceptance rate for refugee claims decided in Canada has consistently been over 50 percent.\(^{308}\) According to Hathaway and Neve, this is the “highest recognition rate recorded by any industrialized country.”\(^{309}\) Evidence as to a pattern of non-citizen misuse of the Canadian refugee determination system does not appear to exist, and thus it would be extremely difficult for the Canadian government to meet its burden to demonstrate that this motivation for the STCA is rationally connected to the deflection of asylum claimants to the United States.

\(^{307}\) Hathaway & Neve, supra note 73 at 262-263.

\(^{308}\) See Hathaway & Neve, supra note 73 at 262. See also Macklin, Disappearing Refugees, supra note 5 at 412. According to a survey by the U.S. Committee for Refugees and Immigrants, the acceptance rate for refugee claims decided in 2001 was approximately 58% in Canada. See U.S. Committee for Refugees and Immigrants, “World Refugee Survey, 2002 Country Report: Canada” (2002) online: <http://www.refugees.org/sammam.aspx> (last accessed 11 January 2006).

\(^{309}\) Hathaway & Neve, supra note 73 at 262.
(iii) National Security and Anti-Terrorism Measures

Unlike the previously-discussed objectives of the STCA, references to national security and terrorism prevention are not found in the agreement’s preamble, nor in official policy statements leading directly to its implementation. However, such objectives have been confirmed on numerous occasions as significant factors motivating the Canadian government to implement the agreement.

First, it is important to point out the political circumstances surrounding the agreement’s implementation. Although the Canadian government had been for many years attempting to persuade the United States to enter into a safe third country arrangement during the 1990’s, the STCA was ultimately negotiated as part of a package of post-9/11 security measures under the Canada-US Smart Border Action Plan. The Action Plan was implemented as a direct result of the national security agenda pursued by the United States following the September 11 attacks.

In the past, officials of the Canadian government have betrayed the STCA’s national security underpinnings. Minister Coderre stated in an open letter published in several Canadian newspapers that the agreement was a measure aimed at:

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310 See discussion in Chapter 1, above.
311 Macklin, Disappearing Refugees, supra note 5 at 387
help[ing] ensure the safety of Canadians in the fight against terrorism that this department is pursuing in collaboration with Canadian and US partners.312

The supposed vulnerability of Canada’s immigration and refugee system to terrorist infiltration has been the subject of baseless criticism of Canada by the United States as a refuge for terrorists.313 Similarly, the Canadian media has followed suit, tending to cite Canada’s allegedly lenient refugee policies for the ongoing terrorist threat in North America.314 However, a rational connection between the goals of furthering national security and preventing terrorism in Canada, and Canada’s deflection of asylum seekers to the United States, cannot be established. There does not appear to be any empirical support for the allegation that asylum claimants arriving via the United States (or asylum claimants at all, as will be discussed below) pose a risk to national security in Canada.315

The argument that national security in Canada is enhanced by the deflection of asylum seekers to the United States is unsupported by evidence, and thus the correlation between national security and asylum control appears to be rhetorical only.

There does not appear to be any compelling evidence confirming that terrorists or individuals posing national security threats enter Canada via the United States.

Therefore, there is little to support the argument and that the deflection of asylum seekers

312 Letter from Denis Coderre, Citizenship and Immigration Minister, to Canadian News Editors (10
January 2006). Professor Macklin has pointed out that Minister Coderre made this statement despite his
awareness that Canada had been attempting to enter into such an agreement with the United States during
the 1990’s, prior to the rise to the fore of the national security agenda. See Macklin, Disappearing
Refugees, supra note 5 at 414-415.
313 See LaVerle Berry et al., Library of Congress, “Nations Hospitable to Organized Crime and Terrorism”
314 See S. Bell, “A conduit for terrorists” National Post (13 September 2001), cited in Macklin, Borderline
Security, supra note 15 at 388.
315 Hathaway & Neve, supra note 73 at 264-265.
to the United States pursuant to the STCA is rationally connected to the goal of fighting terrorism in Canada. As pointed out recently by one legal scholar, just as none of the individuals accused in the 9/11 attacks entered Canada from the United States, and none of them entered the United States as asylum seekers, similarly there is no evidence that any lapses in national security in Canada have been the result of Canadian immigration or asylum policy.

Rather than demonizing the asylum seeker and the Canadian asylum system as the cause of national security concerns, it is reasonable to identify a connection between national security and the following factors identified by Professor Macklin:

- the ease with which false identity documents are obtained,
- the apparent lack of coordination and sharing of information among police, immigration and intelligence agencies within and between states, and the inability to execute deportation orders.

In short, given the paucity of evidence confirming a causal correlation between asylum control and national security and terrorism prevention, it would be extremely difficult for the Canadian government to justify the deflection mechanism under the STCA on the basis of such factors.

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316 Macklin, Disappearing Refugees, supra note 5 at 412.
c) Minimal Impairment

I argued above that some, but not all, of the express or implied objectives of the STCA are rationally connected to deflection. I will now proceed to the third step in the Oakes analysis, the requirement of minimal impairment. This step requires that the impugned law "impair as little as possible" the right in question (in this case the section 7 right to security of the person, not to be deprived except in accordance with the principles of fundamental justice) in order to accomplish the objective of the law. As pointed out by Professor Hogg, in the majority of Charter cases before the Supreme Court of Canada, the greatest arena of debate surrounds this stage of the analysis.\(^{319}\)

The primary question in assessing minimal impairment is whether deflection is too drastic a means of achieving the objectives of the law stated above, namely furthering burden-sharing and thus reducing backlog of cases in Canada, deterring abuse of the asylum system and furthering national security. Regardless of whether the stated objectives were found to be both pressing and substantial and rationally connected, the deflection of asylum claimants to the United States cannot be justified under section 1 if it is found to be too drastic a means to achieving such objectives. As pointed out by Wilson J. in Singh, where the question before the court involves a section 1 analysis based on administrative or utilitarian concerns, section 1 should be interpreted narrowly.\(^{320}\) I argue that burden-sharing and reducing the backlog in the Canadian asylum system are exactly the kind of administrative or utilitarian concerns envisioned by

\(^{318}\) Oakes, supra note 274 at 139.
\(^{319}\) Hogg, supra note 54 at 822.
\(^{320}\) Singh, supra note 61 at 218-219.
Wilson J. as warranting a conservative interpretation of section 1. Thus, in this case the Canadian government would have a more difficult task of justifying such an objective.

The Supreme Court of Canada has found that an impugned law will fail the minimal impairment test due to its sweepingly exclusionary nature. In *Dunmore v. Ontario*\(^{321}\) the Court considered the exclusion from the Ontario labour relations statute of agricultural workers, and found that the law breached the freedom of association guaranteed to such workers under section 2(d) of the Charter. The Court accepted as sufficiently important the objectives of relieving the farm economy of Ontario of the formalism of collective bargaining and the risk of strikes, which were seen as inappropriate to an economic sector involving many family-owned farming businesses of a seasonal character. Nonetheless, the Court found that the law was not minimally impairing because it operated as a total exclusion of all agricultural workers. The Court noted that the legislature could have created an alternative regime of labour law for the agricultural workers, excluding the right to collective bargaining and strike, but including other protections afforded to workers employed in other sectors. In that case, the Court struck down the provision excluding the agricultural workers, but postponed the order for 18 months to allow the legislature to substitute a new, more appropriate provision.

The STCA involves the kind of total exclusion which, in *Dunmore*, was found to fail the minimal impairment stage of the *Oakes* analysis. The blunt instrument of the deflection mechanism mandated by the STCA cannot be said to minimally impair the rights of asylum seekers in Canada. Asylum seekers who arrive in Canada after having passed

\(^{321}\) [2001] 3 S.C.R. 1016 [hereinafter *Dunmore*].
through the United States are excluded entirely from the asylum determination system in Canada. They are not afforded any opportunity to have their claims heard in Canada, and are compelled to lodge their claims in the United States where, as was discussed in Chapter 3, they are not afforded protection commensurate with that available in Canada. Furthermore, the deflection mechanism excludes not only those individuals who are not Convention refugees and those who are seeking to misuse the system, but also those who meet that definition and are at risk of persecution. That is, the STCA contains no method of distinguishing between genuine\(^{322}\) and illegitimate\(^{323}\) asylum claimants, and simply excludes them all based on criteria that are irrelevant to the protection of asylum seekers, such as what “safe” nations they have previously visited.

There exist several exceptions to the general rule. However, as discussed in Chapter 1, such exceptions are extremely limited in their scope and applicability, and thus their meaningfulness to asylum seekers. In short, it is argued that a law which has the effect of excluding an entire class of individuals from accessing the Canadian asylum determination system cannot be said to be minimally impairing of the Charter rights possessed by asylum seekers physically present in Canada. This argument is bolstered by the comparatively weaker protections offered to asylum seekers facing the United States asylum determination system.

There are numerous alternative measures available to legislators which are significantly less obtrusive of the rights of asylum claimants than the blunt instrument of deflection

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\(^{322}\) By “genuine” I refer to those asylum seekers who meet the definition of a Convention refugee.

\(^{323}\) By “illegitimate” I refer to those asylum seekers who do not meet the definition of a Convention refugee, and who may fit more appropriately under the rubric of the economic immigration class.
under the STCA. For example, reducing the backlog of cases in the Canadian asylum system can be achieved by streamlining the asylum process and by a more generous allocation of resources and manpower to this area. Alternatively, if the objective at issue is countering abuse of the Canadian asylum system, minimal impairment can be achieved by targeting efforts in this regard to a greater extent. The primary means of achieving the objective of countering abuse of the system is for the Canadian government to expend greater efforts in the actual removal of rejected asylum seekers from Canada. Canada currently has a poor record of executing removals and thus rejected asylum seekers misuse the system by remaining in Canada longer than allowed. An intensification of efforts to execute removals would be a more effective means to this important objective. Additionally, as a measure intended to counter misuse of the asylum system, Hathaway and Neve have suggested increased efforts by Citizenship and Immigration Canada to intervene before the IRB to “oppose recognition of dubious claims.”

To the extent that the issue at hand is countering terrorism and enhancing national security in Canada, there are certainly more effective means of achieving this objective, which impair the rights of asylum seekers to a lesser extent. As discussed above, there appears to be little connection between immigration and asylum policy and national security. Stated otherwise, asylum seekers are not appropriate scapegoats on which to lay blame for lapses in national security. Instead, the Canadian government should seek to address the kinds of concerns that Professor Macklin has suggested as being in fact

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325 Hathaway & Neve, supra note 73 at 263.
rationally connected with the goals of national security. Again, such factors include the ease with which false identity documents are obtained, the apparent lack of coordination and sharing of information among police, immigration and intelligence agencies within and between states, and the inability to execute deportation orders.326

d) Proportionate Effect

The fourth and last stage of the Oakes analysis involves the element of proportionality.327 In order for a law to be justified under section 1, this stage requires “a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of ‘sufficient importance.’”328 Professor Hogg points out that laws which are found to be sufficiently important will almost necessarily be found to have proportionality, but that this stage of the analysis has never had any influence on the outcome of a Charter case.329 In fact, Professor Hogg finds the proportionality analysis to be redundant as a restatement of the first stage of the Oakes analysis, and can thus safely be ignored.330 In any event, even if the STCA were to succeed in the proportionality analysis, it has nonetheless failed the Oakes test for justification under section 1 due to its failure to meet the minimal impairment requirement.

327 Oakes, supra note 274 at 139.
328 Oakes, supra note 274 at 139 (per Dickson C.J.).
329 Hogg, supra note 54 at 828.
330 Hogg, supra note 54 at 828.
CONCLUSION

The STCA is one of a number of factors contributing to Canada’s decline as a meaningful place of asylum for refugees. Deflection measures such as the safe third country practice risk further alienating Canada from the world’s refugee flow and, correspondingly, its international obligations vis-à-vis asylum claimants.

The arguments set out in this thesis are intended to demonstrate the incompatibility of the deflection mechanism mandated by the STCA with Canada’s obligations to asylum seekers under the Charter. Deflection is a blunt instrument that summarily excludes asylum seekers from Canada’s asylum system and the protections it offers, without any inquiry into the claimant’s need for protection. The deflection mechanism of the STCA operates based on one overarching factor which has little to nothing to do with asylum seekers’ legitimacy as refugees and their need for protection, namely the fact that they were present in the United States prior to having arrived in Canada. Deflecting asylum claimants to face the United States asylum system, with all of the procedural and substantive shortcomings discussed in this thesis, constitutes a deprivation of the security of the person guaranteed to asylum seekers who are subject to the STCA, which deprivation is not in accordance with the principles of fundamental justice. Furthermore, this Charter violation cannot be justified under section 1. Many of the STCA’s objectives cannot be seen to be rationally connected to the deflection of asylum claimants to the United States, and none of its objectives (whether express or implied) can be shown to minimally impair asylum seekers’ rights, as required under Oakes. In fact, such
objectives can be achieved through means which are less obtrusive of asylum claimants’ rights.

The STCA is a measure that is based on a recent and disturbing trend calling for the vilification of both the refugee as the corruptor of national security in Canada, and the immigration and refugee system as the portal for terrorist infiltration. In light of the dearth of evidence supporting a causal nexus between Canada’s asylum system and lapses in national security, Canada’s Charter obligations require the federal government to refrain from allowing unfounded prejudices, scapegoat tactics and political distortion to dictate its asylum policy. Canada’s responsibility toward refugees as assumed under international human rights instruments and the Charter should be reflected in its international agreements. It is due to such obligations that Canada must accept in a meaningful way the legitimate choices of refugees in electing to arrive in and have their claims heard in Canada, due to the relative advantages of its socio-political climate. In short, it should not be taken for granted that countries with which Canada wishes to do political business are also the means by which Canada can legitimately contract out its Charter duties vis-à-vis asylum claimants.
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APPENDIX A

Immigration and Refugee Protection Act, S.C. 2001, c. 27

DETENTION AND RELEASE

Immigration Division

54. The Immigration Division is the competent Division of the Board with respect to the review of reasons for detention under this Division.

Arrest and detention with warrant

55. (1) An officer may issue a warrant for the arrest and detention of a permanent resident or a foreign national who the officer has reasonable grounds to believe is inadmissible and is a danger to the public or is unlikely to appear for examination, an admissibility hearing or removal from Canada.

Arrest and detention without warrant

(2) An officer may, without a warrant, arrest and detain a foreign national, other than a protected person,

(a) who the officer has reasonable grounds to believe is inadmissible and is a danger to the public or is unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2); or

(b) if the officer is not satisfied of the identity of the foreign national in the course of any procedure under this Act.

Detention on entry

(3) A permanent resident or a foreign national may, on entry into Canada, be detained if an officer

(a) considers it necessary to do so in order for the examination to be completed; or

(b) has reasonable grounds to suspect that the permanent resident or the foreign national is inadmissible on grounds of security or for violating human or international rights.

Notice

(4) If a permanent resident or a foreign national is taken into detention, an officer shall
without delay give notice to the Immigration Division.

Release -- officer

56. An officer may order the release from detention of a permanent resident or a foreign national before the first detention review by the Immigration Division if the officer is of the opinion that the reasons for the detention no longer exist. The officer may impose any conditions, including the payment of a deposit or the posting of a guarantee for compliance with the conditions, that the officer considers necessary.

Review of detention

57. (1) Within 48 hours after a permanent resident or a foreign national is taken into detention, or without delay afterward, the Immigration Division must review the reasons for the continued detention.

Further review

(2) At least once during the seven days following the review under subsection (1), and at least once during each 30-day period following each previous review, the Immigration Division must review the reasons for the continued detention.

Presence

(3) In a review under subsection (1) or (2), an officer shall bring the permanent resident or the foreign national before the Immigration Division or to a place specified by it.

Release -- Immigration Division

58. (1) The Immigration Division shall order the release of a permanent resident or a foreign national unless it is satisfied, taking into account prescribed factors, that

(a) they are a danger to the public;

(b) they are unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2);

(c) the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security or for violating human or international rights; or

(d) the Minister is of the opinion that the identity of the foreign national has not been, but may be, established and they have not reasonably cooperated with the Minister by providing relevant information for the purpose of establishing their identity or the Minister is making reasonable efforts to establish their identity.
Detention -- Immigration Division

(2) The Immigration Division may order the detention of a permanent resident or a foreign national if it is satisfied that the permanent resident or the foreign national is the subject of an examination or an admissibility hearing or is subject to a removal order and that the permanent resident or the foreign national is a danger to the public or is unlikely to appear for examination, an admissibility hearing or removal from Canada.

Conditions

(3) If the Immigration Division orders the release of a permanent resident or a foreign national, it may impose any conditions that it considers necessary, including the payment of a deposit or the posting of a guarantee for compliance with the conditions.

Incarcerated foreign nationals

59. If a warrant for arrest and detention under this Act is issued with respect to a permanent resident or a foreign national who is detained under another Act of Parliament in an institution, the person in charge of the institution shall deliver the inmate to an officer at the end of the inmate's period of detention in the institution.

Minor children

60. For the purposes of this Division, it is affirmed as a principle that a minor child shall be detained only as a measure of last resort, taking into account the other applicable grounds and criteria including the best interests of the child.

Regulations

61. The regulations may provide for the application of this Division, and may include provisions respecting

(a) grounds for and conditions and criteria with respect to the release of persons from detention;

(b) factors to be considered by an officer or the Immigration Division; and

(c) special considerations that may apply in relation to the detention of minor children.

...
Organizing entry into Canada

117. (1) No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act.

Penalties -- fewer than 10 persons

(2) A person who contravenes subsection (1) with respect to fewer than 10 persons is guilty of an offence and liable

(a) on conviction on indictment

(i) for a first offence, to a fine of not more than $500,000 or to a term of imprisonment of not more than 10 years, or to both, or

(ii) for a subsequent offence, to a fine of not more than $1,000,000 or to a term of imprisonment of not more than 14 years, or to both; and

(b) on summary conviction, to a fine of not more than $100,000 or to a term of imprisonment of not more than two years, or to both.

Penalty -- 10 persons or more

(3) A person who contravenes subsection (1) with respect to a group of 10 persons or more is guilty of an offence and liable on conviction by way of indictment to a fine of not more than $1,000,000 or to life imprisonment, or to both.

No proceedings without consent

(4) No proceedings for an offence under this section may be instituted except by or with the consent of the Attorney General of Canada.

Offence -- trafficking in persons

118. (1) No person shall knowingly organize the coming into Canada of one or more persons by means of abduction, fraud, deception or use or threat of force or coercion.

Definition of "organize"

(2) For the purpose of subsection (1), "organize", with respect to persons, includes their recruitment or transportation and, after their entry into Canada, the receipt or harbouring of those persons.

Disembarking persons at sea
119. A person shall not disembark a person or group of persons at sea for the purpose of inducing, aiding or abetting them to come into Canada in contravention of this Act.

Penalties

120. A person who contravenes section 118 or 119 is guilty of an offence and liable on conviction by way of indictment to a fine of not more than $1,000,000 or to life imprisonment, or to both.

Aggravating factors

121. (1) The court, in determining the penalty to be imposed under subsection 117(2) or (3) or section 120, shall take into account whether

(a) bodily harm or death occurred during the commission of the offence;

(b) the commission of the offence was for the benefit of, at the direction of or in association with a criminal organization;

(c) the commission of the offence was for profit, whether or not any profit was realized; and

(d) a person was subjected to humiliating or degrading treatment, including with respect to work or health conditions or sexual exploitation as a result of the commission of the offence.

Definition of "criminal organization"

(2) For the purposes of paragraph (1)(b), "criminal organization" means an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence.

Offences Related to Documents

Documents

122. (1) No person shall, in order to contravene this Act,

(a) possess a passport, visa or other document, of Canadian or foreign origin, that purports to establish or that could be used to establish a person's identity;

(b) use such a document, including for the purpose of entering or remaining in Canada; or
import, export or deal in such a document.

Proof of offence

(2) Proof of the matters referred to in subsection (1) in relation to a forged document or a document that is blank, incomplete, altered or not genuine is, in the absence of evidence to the contrary, proof that the person intends to contravene this Act.

Penalty

123. (1) Every person who contravenes

(a) paragraph 122(1)(a) is guilty of an offence and liable on conviction on indictment to a term of imprisonment of up to five years; and

(b) paragraph 122(1)(b) or (c) is guilty of an offence and liable on conviction on indictment to a term of imprisonment of up to 14 years.

Aggravating factors

(2) The court, in determining the penalty to be imposed, shall take into account whether

(a) the commission of the offence was for the benefit of, at the direction of or in association with a criminal organization as defined in subsection 121(2); and

(b) the commission of the offence was for profit, whether or not any profit was realized.

... Misrepresentation

127. No person shall knowingly

(a) directly or indirectly misrepresent or withhold material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;

(b) communicate, directly or indirectly, by any means, false or misleading information or declarations with intent to induce or deter immigration to Canada; or

(c) refuse to be sworn or to affirm or declare, as the case may be, or to answer a question put to the person at an examination or at a proceeding held under this Act.

... Prosecution of Offences
Deferral

133. A person who has claimed refugee protection, and who came to Canada directly or indirectly from the country in respect of which the claim is made, may not be charged with an offence under section 122, paragraph 124(1)(a) or section 127 of this Act or under section 57, paragraph 340(c) or section 354, 366, 368, 374 or 403 of the Criminal Code, in relation to the coming into Canada of the person, pending disposition of their claim for refugee protection or if refugee protection is conferred.
APPENDIX B

United States of America 8 Code of Federal Regulations

270.2 Enforcement procedures.

(a) Procedures for the filing of complaints.
Any person or entity having knowledge of a violation or potential violation of section 274C of the Act may submit a signed, written complaint to the Service office having jurisdiction over the business or residence of the potential violator or the location where the violation occurred. The signed, written complaint must contain sufficient information to identify both the complainant and the alleged violator, including their names and addresses. The complaint should also contain detailed factual allegations relating to the potential violation including the date, time and place of the alleged violation and the specific act or conduct alleged to constitute a violation of the Act. Written complaints may be delivered either by mail to the appropriate Service office or by personally appearing before any immigration officer at a Service office.

(b) Investigation.
When the Service receives complaints from a third party in accordance with paragraph (a) of this section, it shall investigate only those complaints which, on their face, have a substantial probability of validity. The Service may also conduct investigations for violations on its own initiative, and without having received a written complaint. If it is determined after investigation that the person or entity has violated section 274C of the Act, the Service may issue and serve upon the alleged violator a Notice of Intent to Fine.

c) Issuance of a subpoena.
Service officers shall have reasonable access to examine any relevant evidence of any person or entity being investigated. The Service may issue subpoenas pursuant to its authority under sections 235(a) and 287 of the Act, in accordance with the procedures set forth in §287.4 of this chapter.

(d) Notice of Intent to Fine.
The proceeding to assess administrative penalties under section 274C of the Act is commenced when the Service issues a Notice of Intent to Fine. Service of this notice shall be accomplished by personal service pursuant to §103.5a(a)(2) of this chapter. Service is effective upon receipt, as evidenced by the certificate of service or the certified mail return receipt. The person or entity identified in the Notice of Intent to Fine shall be known as the respondent. The Notice of Intent to Fine may be issued by an officer defined in §242.1 of this chapter or by an INS port director designated by his or her district director.

(e) Contents of the Notice of Intent to Fine.
(1) The Notice of Intent to Fine shall contain the basis for the charge(s) against the respondent, the statutory provisions alleged to have been violated, and the monetary amount of the penalty the Service intends to impose.

(2) The Notice of Intent to Fine shall provide the following advisals to the respondent:
   (i) That the person or entity has the right to representation by counsel of his or her own choice at no expense to the government;
   (ii) That any statement given may be used against the person or entity;
   (iii) That the person or entity has the right to request a hearing before an administrative law judge pursuant to 5 U.S.C. 554 - 557, and that such request must be filed with INS within 60 days from the service of the Notice of Intent to Fine; and
   (iv) That if a written request for a hearing is not timely filed, the Service will issue a final order from which there is no appeal.

(f) Request for hearing before an administrative law judge.
If a respondent contests the issuance of a Notice of Intent to Fine, the respondent must file with the INS, within 60 days of the Notice of Intent to Fine, a written request for a hearing before an administrative law judge. Any written request for a hearing submitted in a foreign language must be accompanied by an English language translation. A request for hearing is deemed filed when it is either received by the Service office designated in the Notice of Intent to Fine, or addressed to such office, stamped with the proper postage, and postmarked within the 60-day period. In computing the 60-day period prescribed by this section, the day of service of the Notice of Intent to Fine shall not be included. In the request for a hearing, the respondent may, but is not required to, respond to each allegation listed in the Notice of Intent to Fine. A respondent may waive the 60-day period in which to request a hearing before an administrative law judge and ask that the INS issue a final order from which there is no appeal. Prior to execution of the waiver, a respondent who is not a United States citizen will be advised that a waiver of a section 274C hearing will result in the issuance of a final order and that the respondent will be excludable and/or deportable from the United States pursuant to the Act.

(g) Failure to file a request for hearing.
If the respondent does not file a written request for a hearing within 60 days of service of the Notice of Intent to Fine, the INS shall issue a final order from which there shall be no appeal.

(h) Issuance of the final order.
A final order may be issued by an officer defined in § 242.1 of this chapter, by an INS port director designated by his or her district director, or by the Director of the INS National Fines Office. (i) Service of the final order.
(1) Generally.
Service of the final order shall be accomplished by personal service pursuant to section 103.5(a)(2) of this chapter. Service is effective upon receipt, as evidenced by the certificate of service or the certified mail return receipt.
(2) Alternative provisions for service in a foreign country.
When service is to be effected upon a party in a foreign country, it is sufficient if service of the final order is made:

(i) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or
(ii) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or
(iii) when applicable, pursuant to § 103.5a(a)(2) of this chapter. Service is effective upon receipt of the final order. Proof of service may be made as prescribed by the law of the foreign country, or, when service is pursuant to § 103.5a(a)(2) of this chapter, as evidenced by the certificate of service or the certified mail return receipt.

(j) Declination to file charges for document fraud committed by refugees at the time of entry.
The Service shall not issue a Notice of Intent to Fine for acts of document fraud committed by an alien pursuant to direct departure from a country in which the alien has a well-founded fear of persecution or from which there is a significant danger that the alien would be returned to a country in which the alien would have a well-founded fear of persecution, provided that the alien has presented himself or herself without delay to an INS officer and shown good cause for his or her illegal entry or presence. Other acts of document fraud committed by such an alien may result in the issuance of a Notice of Intent to Fine and the imposition of civil money penalties.
The Executive Committee, Recalling Article 31 of the 1951 Convention relating to the Status of Refugees. Recalling further its Conclusion No. 22 (XXXII) on the treatment of asylum-seekers in situations of large-scale influx, as well as Conclusion No. 7 (XXVIII), paragraph (e), on the question of custody or detention in relation to the expulsion of refugees lawfully in a country, and Conclusion No. 8 (XXVIII), paragraph (e), on the determination of refugee status. Noting that the term "refugee" in the present Conclusions has the same meaning as that in The 1951 Convention and the 1967 Protocol relating to the Status of Refugees, and is without prejudice to wider definitions applicable in different regions. (a) Noted with deep concern that large numbers of refugees and asylum-seekers in different areas of the world are currently the subject of detention or similar restrictive measures by reason of their illegal entry or presence in search of asylum, pending resolution of their situation; (b) Expressed the opinion that in view of the hardship which it involves, detention should normally be avoided. If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order; (c) Recognized the importance of fair and expeditious procedures for determining refugee status or granting asylum in protecting refugees and asylum-seekers from unjustified or unduly prolonged detention; (d) Stressed the importance for national legislation and/or administrative practice to make the necessary distinction between the situation of refugees and asylum-seekers, and that of other aliens; (e) Recommended that detention measures taken in respect of refugees and asylum-seekers should be subject to judicial or administrative review; (f) Stressed that conditions of detention of refugees and asylum seekers must be humane. In particular, refugees and asylum-seekers shall, whenever possible, not be accommodated with persons detained as common criminals, and shall not be located in areas where their physical safety is endangered; (g) Recommended that refugees and asylum-seekers who are detained be provided with the opportunity to contact the Office of the United Nations High Commissioner for Refugees or, in the absence of such office, available national refugee assistance agencies; (h) Reaffirmed that refugees and asylum-seekers have duties to the country in which they find themselves, which require in particular that they conform to its laws and regulations as well as to measures taken for the maintenance of public order; (i) Reaffirmed the fundamental importance of the observance of the principle of non-refoulement and in this context recalled the relevance of Conclusion No. 6 (XXVIII).