

SLAMMING THE DOOR

The Safe Third Country Agreement and US-Canada Relations



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CITIZENS FOR
PUBLIC JUSTICE



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ACKNOWLEDGMENTS

STAND Canada

[STAND Canada](#) is a national advocacy organization with chapters across the country that advocates to make preventing and ending genocide a cornerstone of Canadian domestic and foreign policy. We are dedicated to providing Canadians with the educational and advocacy tools that they need to take action toward a world without genocide.

Since its founding in 2005 in response to the crisis in Darfur, Sudan, STAND has become the leading organization in Canada for youth-led anti-genocide advocacy. With university chapters across Canada, our volunteers are driven by our joint vision and passion for human rights, political advocacy, genocide education, and the social responsibility of Canadians. STAND focuses research into priority focus regions, which can change according to the risk of genocide, and prioritizes policy research into Canada's history of genocide and relationships to current genocides.

STAND USA

[STAND USA](#) is the student-led movement to end genocide and mass atrocity. Born in 2004 out of the fight to stop the genocide in Darfur, Sudan, STAND is devoted to creating a sustainable student network that actively fights genocide and mass atrocities wherever they may occur. By creating political will, we hold our elected officials accountable for preventing and ending genocide and mass atrocities, and by supporting young peacebuilders in conflict-affected and post-conflict countries, we help communities build resistance to conflict.

STAND USA is the only US student-led organization focused on genocide and atrocity prevention. By sounding the alarm on emerging and ongoing conflicts, mobilizing campuses and communities, building meaningful relationships with policymakers, developing young leaders, and creating innovative campaigns, we are leading members of the anti-genocide movement. STAND USA is managed by a twelve member committee which oversees the organization as a whole and has many chapters on high school and university campuses throughout the United States. This research on the US-Canada STCA continues a long legacy of supporting and advocating for refugees in asylum seekers both in the US and abroad.

Citizens for Public Justice

[Citizens for Public Justice \(CPJ\)](#) is a national, progressive organization of members who are inspired by faith to act for social and environmental justice in Canadian public policy. Our work focuses on three key policy areas: poverty in Canada, climate justice, and refugee rights. For over 50 years, we have been working with churches and justice-oriented people of faith towards a better Canada through policy research and advocacy.

CPJ has been doing research and advocacy on the STCA for several years. In [Canada's Not So Safe Agreement](#), we pointed out that refugees have the right to seek asylum as guaranteed by domestic and international law. [Reclaiming Protection](#)

showed the negative impacts of the STCA and guided the public on how to advocate against it. This report highlighted how denying refugee claimant protection without a fair hearing encourages them to make perilous journeys. [*The Politics of the Safe Third Country Agreement*](#) was CPJ's public call to action ahead of the 2019 federal election where we laid out the stances of Canadian political parties on STCA. Many in the media and government have mischaracterized them as "illegals." In [*Irregular vs. Illegal – Why Language Matters*](#), we assert that calling immigrants "illegal" is inaccurate because crossing the border to make a claim is in accordance with international and domestic law. We are [opposed to words](#) like "queue jumpers," "asylum shoppers," and "illegal border crossers" which negatively influence the public mindset about refugees. In 2018, we stated that though we cannot directly affect political events in the US, we can and should [raise our voices and ask for the rights and dignity of refugees to be respected](#). Every refugee claimant fleeing persecution should have access to the Canadian refugee status determination system at the border and be treated with fairness and humanity.

EXECUTIVE SUMMARY

This is a joint report by Citizens for Public Justice, STAND Canada, and STAND USA. It discusses various aspects of the Safe Third Country Agreement (STCA) which came into effect in 2004 with the goal of maintaining the integrity and efficiency of the asylum and refugee system in Canada and the US. Canada and the US had different motivations in signing the STCA. The US implemented the STCA to enhance border security and counter-terrorism measures while Canada was motivated by the desire to reduce the number of asylum seekers entering Canada.

This report delves into the implications and effects of the STCA for Canada as well as the legal challenges to the STCA. On July 22, 2020, Justice Ann Marie MacDonald ruled that sending refugee claimants back to the US under the STCA violates the Canadian Charter of Rights and Freedoms. The Canadian government has appealed against the ruling. This report looks at the STCA and the overall US-Canada diplomatic relations which deter Canada from rescinding the STCA.

The main findings of the report are that there are differences in refugee determination systems and treatment of asylum seekers in the US and Canada. In some ways, the US defines refugees more narrowly than the international standard that Canada uses. Some aspects of the US administration's handling of asylum seekers cause many asylum seekers to seek safety in Canada. President Trump's executive orders have resulted into large-scale detention of asylum seekers, delays in adjudication, discrimination based on religion or national origin, expedited deportations and denial of family reunification.

CPJ and STAND Canada recommend that:

- Canadian border agents give special attention to victims of sexual assault and gender persecution, recognizing that the US does not consider violence against women as a valid reason for an asylum claim.
- Politicians and the media should refrain from mischaracterizing asylum seekers as "illegal" border crossers because such language criminalizes people fleeing

persecution.

- The Canadian government should respect the Canadian Federal Court ruling by Justice Ann Marie MacDonald and give a fair hearing to asylum seekers to ensure that they are not subjected to violations of their life, liberty, and security of the person through denial of entry into Canada under the STCA.
- The Canadian government should drop the appeal against the Federal Court decision and rescind the STCA with the US.

STAND USA calls on the US government to:

- Improve treatment of refugees and asylum seekers by modifying legal processes to meet international standards to end the criminal penalization of migrants, the administrative detention of migrant children and the practice of summary removal proceedings for asylees.
- Dialogue with Canada to address the causes of disproportionate flows of asylum seekers and modify the US asylum system to address disparities in services offered to asylum seekers, creating a more equal environment between the two countries.
- Suspend the US-Canada STCA until appropriate changes can be made.

LIST OF ABBREVIATIONS

AI	Amnesty International Canada
CBSA	Canadian Border Services Agency
CCC	Canadian Council of Churches
CCR	Canadian Council for Refugees
CPJ	Citizens for Public Justice
IDPs	Internally Displaced Persons
IRCC	Immigration, Refugees and Citizenship Canada
IRPA	Immigration and Refugee Protection Act
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
NORAD	National American Aerospace Defense Command
OECD	Organization for Economic Co-operation and Development
STCA	Safe Third Country Agreement
UNHCR	United Nations High Commissioner for Refugees
USMCA	United States-Mexico-Canada Agreement

CHAPTER 1: THE SAFE THIRD COUNTRY AGREEMENT

1.1. Introduction

The number of asylum seekers attempting to enter Canada at unofficial ports of entry has drastically increased, from an estimated [2,500 people](#) in 2018 to [54,739 asylum seekers](#) in 2020. This increase is due to policies from the government of the United States that has put the health and safety of migrants at risk and has resulted in a total of [58,621 refugee protection claims](#) being made in Canada by irregular border crossers from February 2017 to June 2020. However, the Canadian government has not welcomed these asylum seekers. Their failure in this area can partly be attributed to the effects of the COVID-19 pandemic which has brought unprecedented changes to all aspects of Canadian society, including the immigration sector. Due to the nature of the virus, all asylum seekers need to be screened for COVID-19 at irregular border crossings in Canada. However, because of the influx in asylum seekers in 2020, [security concerns](#) have emerged around the current screening procedures at unofficial crossings such as Roxham Road in Quebec. These concerns prompted Prime Minister Justin Trudeau to [temporarily expand the Safe Third Country Agreement](#) (STCA) on March 20th, 2020 to include the entire land border, not just official border crossings used by irregular migrants to enter Canada and apply for asylum status at unofficial ports of entry. The change will remain in place until the end of the COVID-19 pandemic. All irregular asylum seekers apprehended by Canadian authorities during this time will be handed over to American authorities.

Originally, the STCA was created based on the assumption that both Canada and the US would address immigration in the same way and that they would both commit to acting in the interests of refugees and migrants. However, recent political and legal developments have demonstrated that this is currently not the case. By barring migrants from declaring asylum at irregular checkpoints, the Canadian government has made seeking asylum more perilous. Based on our analysis of the positive and negative impacts of the STCA, this study will show that there is an urgent need to overhaul the parameters of the agreement, especially considering the precedence that the Canadian government's actions during the COVID-19 pandemic may have set for future crises. The purpose of this study is thus to educate the public, advocate for changing or rescinding the STCA, and to convince the government not to appeal the decision by putting forward policy recommendations that can be undertaken by the Canadian government.

1.2. What Is the STCA?

The STCA was signed on December 5, 2002 as a component of the [US-Canada Smart Border Action Plan](#). It came into effect in 2004 with the goal of maintaining the integrity and efficiency of the asylum and refugee system in Canada and the US. In the agreement, Canada and the US consider each other's country to be safe for

refugees and it allows each country to send asylum seekers back if they cross at any of the official border ports. The [Canadian government views the STCA](#) “as an important tool for Canada and the US to work together on the orderly handling of refugee claims made in our countries.”

Canada and the US had different motivations in signing the STCA. The US implemented the STCA to enhance border security and counter-terrorism measures in response to the September 11, 2001 attacks. On the other hand, Canada was motivated by the desire to reduce the number of asylum seekers entering Canada. This is confirmed in a [Canada Border Services Agency report](#) stating that “[w]hile the primary focus for the US was security, Canada sought to limit the significant irregular northbound movement of people from the US who wished to access the Canadian refugee determination system.”

As a general rule, asylum claims made at an official land border port of entry are summarily refused. However, there are [some exceptions](#), including where the claimant has a family member in Canada or where the claimant is an unaccompanied minor whose parents are not in the US or Canada. The agreement does not apply to asylum seekers who cross at non-official border points. That is why some proponents would like to see that so-called “loophole” closed. We reject this narrative because it ignored the legal right to make a refugee claim under the STCA. In 2019, in an endeavor to close the so-called “loophole,” the government [backpedalled on refugee rights](#) by stealthily proposing changes to Canada’s refugee determination system through the Budget Implementation Act. It introduced new grounds for ineligibility of refugee claimants who have previously made a claim in another country. The proposed policy changes came amidst news that the government intended to expand the STCA across the entire US-Canada border, a move that would arbitrarily deny those in search of safety their right to make a refugee claim. The government’s main aim was to stem the flow of asylum seekers using unofficial border crossings from the US to Canada.

1.3. The Canadian Government’s Stance on the STCA

The Canadian government’s official stance towards the STCA overall has remained largely unchanged despite the actions undertaken by the outgoing Trump administration and the risks posed by the COVID-19 pandemic. They have indicated that Canada’s long history of providing protection to vulnerable populations through their [compassionate, fair, and orderly refugee protection system](#) has not been endangered due to the STCA. As part of the [Smart Border Action Plan](#) with the US, Canadian officials have emphasized that the STCA remains a comprehensive and effective method of allowing the Canadian and US governments to share the responsibility of protecting migrants and those in need, reduce abuse of both countries’ refugee programs, and enhance the orderly handling of refugee claims. Human rights groups have reported [unconstitutional refugee policies](#) and past instances of [violating the right of refugees](#) to seek asylum as well as their right to life, liberty, and security in the US. Yet the Canadian government still holds publicly that the US continues to [meet the requirements](#) for being designated as a safe third country.

CHAPTER 2: IMPLICATIONS OF THE STCA

2.1. Positive Implications

In assessing the usefulness and effects of a multiple party agreement, it is important to consider the full range of benefits and challenges. The STCA is no different, especially since its implementation has highlighted the pitfalls in the agreement when it comes to irregular asylum seekers in Canada which is a serious human rights concern. This section discusses the positive political and economic implications of the agreement.

Political Considerations

The STCA was originally initiated in order to [improve border security](#) and information sharing measures between Canada and the US after the 9/11 attacks. In light of this, the STCA can be considered as part of Canada's efforts to maintain and deepen the country's [military-strategic partnership with the US](#). This has also been [highlighted](#) by the following statement from the US National Commission on Terrorist Attacks through the 9/11 Commission in 2004. "We should do more to... raise US and global border security standards for travel and border crossing over the medium and long-term through extensive cooperation." Promoting partnership between the two countries can be considered as one of the early positive points of the STCA. Though statistics to show an enhancement of Canada's relationship with the US remains unidentified.

Signing the STCA improved Canada's relationship with the international community as well. Implementing this agreement signified Canada's commitment to joining the international community's efforts to impose measures to control the international smuggling industry and address the lack of screening measures. In response to these concerns about smuggling and trafficking issues, the government of Canada confirmed that the STCA was aligned with its initial goals and stated that in the [Canada chapter of the partnership](#): "However, since implementation, Canadian and US law enforcement agencies report that apprehensions of irregular migrants known to have attempted to cross the international border declined (in both directions) in 2005 from the previous year."

Financial Considerations

Implementing the STCA has also had significant financial benefits for Canada as a whole, namely in reducing the processing costs of asylum claims. During the eight years before the STCA came into effect, the [annual number of refugee claims](#) reported at legal ports of border was between 6,000 and 14,000. However, as a result of this agreement, this number decreased to an average of 5,600 between 2005 and 2012. [Efrat Arbel](#), an assistant law professor at UBC, who has been studying the effects of the STCA, also recognized this agreement as the main reason for the reduced number of asylum seekers. "The Safe Third blocks the safest, most organized mode through which asylum seekers can enter," she says. Depending on the

complexity of the asylum seeker's case, the [average processing cost](#) could vary from \$10,000 to \$34,000 per case. Given the decreased number of asylum seekers, the government of Canada met one of the initial goals of the agreement which was to cut the costs and resources associated with refugee claims. The Organization for Economic Co-operation and Development (OECD) suggests that the STCA may have helped Canada reduce the spending on asylum seekers by [\\$2 billion over a 10-year period](#) since it was first implemented.

2.2. Negative Implications

Overall, the effects that the STCA has had on irregular asylum seekers in Canada has become a more salient issue since 2017, when President Trump tightened the restrictions on immigration. [Related statistics](#) provided by the Immigration and Refugee Board of Canada indicate that between February 2017 and June 2020, the total number of refugee claims made by irregular border crossers was 58,625. Here are the negative implications of this agreement.

Economic Considerations

According to a report from the parliamentary budget officer, the [average cost](#) of irregular migrants that landed in Canada from April 2017 to March 2018, has been calculated as \$14,321 per individual. The [financial consequences](#) of the increasing number of irregular border crossings have caused much conflict, particularly in Ontario and Quebec. These two provinces have been the most affected by the increasing numbers of irregular asylum claims and subsequently, have been reaching out more and more to the federal government for funds to cover the costs of housing and social services for asylum seekers. Parliamentary budget officer [Yves Giroux](#) indicated that the extra \$173 million allocated in the 2018 budget for covering the costs of irregular border crossers over the last two years is insufficient. This number was calculated based on annual numbers of 5,000 to 8,000 persons. The actual annual number is around 23,000 per year. Much of the [federal-provincial conflict](#) over basic needs such as food, shelter, and social services for asylum seekers stemmed from this lack of sufficient fiscal support for two most impacted provinces, Quebec and Ontario. Clearly, this has put pressure on both asylum seekers and governments and requires proper long-term and short-term plans to be resolved. For instance, according to a [CBC report released in 2018](#), around 800 refugees were staying at college dormitories temporarily due to the lack of space in Toronto for asylum seekers. Another example is the [challenge that this crisis placed on many Montreal food banks](#) when the number of refugee claimants jumped from 15 families in the first six months of 2017 to 221 families in the first six months of 2018.

Societal Considerations

The agreement also has had significant implications on the asylum seekers themselves and their relationship to Canada. From the asylum seekers' perspective this agreement is Canada essentially "slamming the door" on them. This is in direct opposition to Canada's history of welcoming and supporting refugees especially considering that when asylum seekers are returned back to the US they are [impacted severely by US policies](#). These [policies](#), implemented by the Trump administration in 2017 and 2018, include but are not limited to mass deportations of asylum seekers

at the border of the US and Mexico, severe family separation policies, and arbitrary detention of asylum seekers. The challenges are even more concerning for women and vulnerable individuals such as children who have been locked in cages away from their parents. As these issues have been raised and discussed on different platforms, it seems that Canada is just [sitting on its hands](#) and waiting for the US to correct itself. This is not in accordance with the international human rights framework and the Canadian Charter of Rights and Freedoms. Canada has generally been known as a [welcoming country](#) to refugees and immigrants, as was demonstrated by Prime Minister Trudeau when he tweeted [#WelcomeToCanada](#) in support of refugees after President Trump's travel ban for seven Muslim countries. As a result, this ongoing issue of the asylum seekers can be considered among one of the strongest negative outcomes of the STCA. The current situation in Canada is contradictory to the international reputation it has cultivated since 2014 for being welcoming to refugees at a time where many countries were shutting their borders down to refugees.

Gender Considerations

The recent amendments to the STCA have also had significant negative implications for the health and safety of female asylum seekers. This is largely due to the legal changes that the US has made to its immigration and refugee policies in 2018 in [Matter A-B](#). The precedential decision that was issued by Attorney General Jeff Sessions in this case [significantly reduced women's ability to gain refugee or asylum status](#) based on claims of gender-related persecution and violence. [The case determined that,](#)

“An applicant seeking to establish persecution based on violent conduct of a private actor must show more than the government's difficulty controlling private behavior. The applicant must show that the government condoned the private actions or demonstrated an inability to protect the victims.”

This is extremely concerning given that most cases of gender violence occur between individuals in the private sphere which is not an area that is typically in the state's jurisdiction. Additionally, while the wording here does allow for claims to be made based on the existence of government laws that persecute and discriminate based on gender, [the following decision negates a female claimant's ability to do so:](#)

“An asylum applicant has the burden of showing her eligibility for asylum. The applicant must present facts that establish each element of the standard, and the asylum officer, immigration judge, or the Board has the duty to determine whether those facts satisfy all those elements.”

This decision essentially puts the burden on the claimant to convince the involved authorities that her claim is eligible while allowing for subjective opinions to factor into the decisions made by the board. However, it is unlikely that these subjective decisions will fall in favor of these women given the US' recent history of enacting policies, such as [separating families at the US border](#) and sexual assault allegations occurring inside of ICE detention facilities against female refugees and asylum seekers. These indicate a [disregard for the mental health and safety of women and girls](#).

Therefore, by sending these women back to the US, Canada is complicit in the human rights abuses that are being perpetuated against these women and girls both in the US and in their country of origins. Especially considering that once deported from the US, many will continue to face sexual and physical abuse.

Health Considerations

As discussed above, the continuing implementation of the STCA has encouraged more asylum seekers to cross into Canada between the official ports of entry. This has led to a greater loss of life and/or irreparable harm for people who have risked their lives to enter Canada through unofficial ports of entry. Most of those sent back to the US are arbitrarily detained. UC Hastings law professor Karen Musalo, [testified in the STCA challenge that](#) "Many experts have found that detention may cause irreparable harm to asylum seekers, especially where they have experienced past trauma, including gender-based violence. [...] We have seen many women give up their opportunity to seek asylum or to appeal an adverse decision because they cannot bear continued detention, choosing instead to return to danger."

There are many first-hand accounts that confirm how dangerous this process is. Sending asylum seekers back to the US puts them in harm's way as demonstrated by the following examples:

- The [young man who lost his fingers and toes](#) while walking through the Manitoba border on a cold winter night or the [two men from Ghana](#) that were found on the side of a road in Emerson and taken to a hospital due to frostbite on hands and feet. The STCA can lead to an increase in [human smuggling](#) despite the government's initial expectations for the STCA to reduce human trafficking and smuggling issues.
- [Nedira Jemal Mustefa](#), one of the key appellants in the STCA legal challenge, "was turned away at the Canadian border and arrested by the US authorities. She was placed in solitary confinement for a week where she felt terrified, isolated, and psychologically traumatized. She lost weight because of not eating after officers attempted to give her pork even though she is a Muslim. She spent a month in what she and other refugees from the ruling described as an "abnormally cold" US prison before being released on bond.
- A [Human Rights Watch report](#) identified a total of 138 cases of people killed between 2013 and 2019 after they were deported from the US. The US immigration officials and judges continue to turn a blind eye to the reality that people deported by the US to El Salvador have lost their lives, often at the hands of their original persecutors.

- Recently a whistleblower alleged that female detainees were being subjected to hysterectomies at alarming rates without their consent in an Immigration and Customs Enforcement (ICE) detention facility. The nurse [documented](#) “jarring medical neglect” that included an exorbitant rate of hysterectomies being performed without consent by a doctor supposedly known as the “uterus collector” and a refusal to test for the novel coronavirus.

2.3. The Government of Canada’s Response to Negative Implications

The development and implementation of the STCA can be understood as a general disregard by the Canadian government for the wellbeing and safety of asylum seekers. The STCA, in its execution, has led to many negative outcomes for asylum seekers and the government’s refusal and negligence in creating systemic changes to counter side effects indicates its lack of prioritization of asylum seekers.

Is Canada Living up to Its Humanitarian Reputation?

Canada boasts a positive reputation amongst Western countries concerning its openness to migrants and the subsequent multiculturalism this brings. However, the implementation of the STCA brings into question how committed Canada truly is to the wellbeing of migrants, specifically refugees.

Many statistics and statements by the Canadian government make it evident that the government aims to take in asylum seekers as a way of consistently dedicating itself to humanitarian causes.

- In [Canada’s 2019 Annual Report to Parliament on Immigration](#), Canada makes a claim to resettling the world’s highest number of refugees in 2018, with the number at 28,076. A [UNHCR 2018 Global Trends report](#) writes that Canada also had the second-highest number of refugee naturalizations.
- A [2015 research publication from the Library of Parliament](#), writes, “Canada has international obligations to those who come to Canada on their own and are found to be in need of protection (refugee claimants or asylum seekers).” This publication adds that asylum seekers in Canada must meet certain criteria to be eligible for resettlement, with much of the criteria pertaining to two general strands: the 1951 United Nations *Convention on the Status of Refugees*’ standards of a person who has legitimate fears of being persecuted on the basis of their identity/beliefs, finding no safety in their home country and the *Immigration and Refugee Protection Regulations*’ standards of one who has been directly impacted by violent conflict and victim to human rights violations.
- In June 2020, [Marco Mendicino, Minister of Immigration, Refugees and Citizenship attended the Annual Tripartite Consultations on Resettlement](#) and made announcements surrounding the protections and settlements of refugees. He said Canada has an “ongoing commitment” to finding new solutions for refugees and presented three actions that the government will be taking to ensure these protections and settlements would come to fruition. Mendicino added, “...these proposals demonstrate Canada’s commitment to refugee protection and the

expansion of opportunities for refugees.”

However, in spite of Canada’s external commitment to refugee protections and settlement, the reality with the STCA points to the country heading in a different direction. [Janet Dench, the executive director of the Canadian Council for Refugees](#), told Global News that while Canada does have a reputation as a leader of refugee resettlement, “...it’s more to do with the fact that the US has fallen behind in recent years.” Regardless of Canada’s current willingness to take in eligible asylum seekers, their dedication must be questioned for as long as they continue the STCA, considering the US’ failures in taking in asylum seekers.

In March 2019 [Global News obtained documents from government officials disclosing](#) that the STCA is “no longer working as intended.” [“Memos and briefing material”](#) for the meeting, prepared in January 2018 by Immigration, Refugees and Citizenship Canada officials, advised then-Immigration Minister Ahmed Hussen to bring up the STCA as a “key issue” in a meeting (which has since been cancelled) with Homeland Security Secretary Kristjen Nielson. The documents also described efforts being made to develop a steering committee to address “immigration issues.” These documents contained the full statement, “With the recent influx of asylum seekers to Canada, the Safe Third Country Agreement is no longer working as intended.”

A [longer excerpt from the memo](#) regarding the STCA reads,

“Asylum seekers are evading the Canada-US STCA by crossing into Canada between ports of entry where the agreement does not apply. This has brought to our attention gaps that may be creating a pull factor for people to cross illegally into Canada.”

Global News, after attempting to speak with Hussen, were redirected to the Minister of Public Safety and Emergency Preparedness Bill Blair, who assumed responsibility for the STCA. [Blair sent a letter to Nielson inquiring about working with American officials to improve the STCA](#), implying that there have been no intentions to rescind, suspend, or reform the agreement for the benefit of asylum seekers.

Blair’s press secretary, Marie-Emmanuelle Cadieux, [wrote in an email](#),

“Canada has a long and proud tradition of providing protection to the world’s most vulnerable people. Ultimately, this is an issue of fairness and making sure the rules are being properly followed to uphold the integrity of our shared border.”

[Cadieux also says](#), “we are in a different environment than we were when the agreement was signed in 2004” thereby acknowledging the vastly different political and humanitarian circumstances currently surrounding the STCA.

She adds that [Minister Blair has been in talks with American officials](#) to, “...address the loophole that permits people to avoid the provisions in the STCA and improve the way the ‘anchor relative exception’ is defined and applied.”

These consistent governmental concerns over crossing through unofficial ports of entry and having a “fair and orderly” system, highlights the government’s true priorities: borders, as opposed to the lives of the asylum seekers. The STCA “no longer working as intended” refers to the continuous flow of asylum seekers through unofficial ports of entry. The government’s primary concerns lie with their inability to control this through the STCA, hence the agreement not working as intended.

Concerns over the STCA have been brought up before—including prior to the release of these 2018 memos—specifically with regards to the safety and wellbeing of asylum seekers (see: [Amnesty International](#) and [Canadian Council for Refugees](#)). Yet all official discussions about changes and improvements to the STCA have centred on retaining the STCA’s core of stopping asylum entry into Canada and continuously designating the US as a safe country, whilst planning for methods and processes to prevent irregular entry and manage flows.

The government’s main focus remains on borders, the legal system, and controlling the flow of asylum seekers, rather than investigating why the flows are increasing into Canada and what can be done to ensure the safety and wellbeing of asylum seekers.

2.4. What Are the Implications for the Future of the STCA?

Given all the positive and negative implications discussed above, it seems that despite the benefits stemming from the agreement, they are still not enough to outweigh the negative effects that it has/will have. Although the STCA has had positive effects on reducing smugglers through the border at its early stages, the loophole in the agreement itself along with the US policies has actually led to an increase in human trafficking along the Canadian-US border. In regard to finances, even though the STCA has helped Canada save money overall, the increased number of irregular asylum seekers has caused a progressive financial pressure on both provincial and federal governments. Among all provinces, Ontario and Quebec are the most affected ones with the highest number of irregular asylum seekers, as a result, with the most demand for fiscal support in order to provide housing and social services.

Related statistics confirm that the number of irregular asylum seekers are still rising, in spite of the required [health considerations](#) during COVID-19 pandemic as well as the [life threatening risks](#) in their journeys to enter Canada between legal ports. Consequently, continuing this agreement will likely have negative effects and consequences both on the country as a whole and on asylum seekers.

CHAPTER 3: LEGAL CHALLENGES TO THE STCA

The [1951 Convention Relating to the Status of Refugees](#) and its [1967 Protocol](#) are the cornerstones of international refugee law. They clearly [spell out](#) who is a refugee and the kind of legal protection, other assistance, and social rights a refugee is entitled to receive. The Convention and Canada's IRPA prohibit penalizing refugees who enter or remain in the country illegally. All persons in Canada, regardless of their immigration status or lack thereof, are entitled to full protection under the [Canadian Charter of Rights and Freedoms](#). The Charter entrenches Canada's human rights obligations in the Constitution and the refugee determination system must therefore fully comply with the Charter. This was affirmed in the landmark [1985 Singh case](#), in which the Supreme Court declared that the legal guarantees of the Charter apply to "everyone" physically present in Canada, including asylum seekers.

3.1. President Trump's Executive Orders

The US has over the last years sent thousands of refugees back to countries where they face persecution in many cases without a fair hearing. In some ways, the US [interprets the refugee definition](#) more narrowly than the international standard that Canada uses. The differences in the two country's refugee determination systems are just some of the many reasons the STCA has been opposed since it came into effect in 2004.

Within a week of being sworn in, President Trump signed three executive orders on immigration. On January 25, 2017, he signed executive orders on [border security](#) and [interior enforcement](#) directing the building of the "Trump wall" along the Mexico-US border. On January 27, he signed an executive order on [protecting the nation from foreign terrorist entry into the US](#) known otherwise as the Muslim ban against nationals from Iran, Iraq, Sudan, Syria, Libya, Somalia, and Yemen. He ordered the shut down of the US refugee program for 120 days and drastically reduced the number of refugees to be allowed into the US. He also halted the resettlement of Syrian refugees indefinitely and launched a screening mechanism for the entry of foreign nationals. The orders were [based on erroneous assumptions](#) regarding the criminality and extremist tendency of the immigrant population. President Trump's orders significantly expanded the range of immigrants targeted as "priorities for removal." [Section 5 of the Interior Enforcement Order](#) directs the prioritization of the removal of noncitizens including those convicted or charged of any criminal offense, those who have committed acts that constitute a chargeable criminal offense, and those who immigration officers decide "pose a risk to public safety or national security."

The orders represent a dramatic restriction of access to asylum and other immigration protections in the US. This anti-immigration stance undermines refugee and human rights through the expanded use of detention and immigration raids and by limiting access to asylum, restricting entry along the US-Mexico border, and constructing a border wall. They signal that the US has turned its back on its heritage as a country of immigrants and a sanctuary for people fleeing persecution. These orders led to the large-scale detention of asylum seekers; discrimination against

asylum seekers based on religion and national origin; expedited deportations (some with disregard for due process); *refoulement* of asylum seekers, particularly those coming in from Mexico; denial of family reunion; and an unfounded increase in the criminal prosecution and delays in adjudication. The [principle of non-refoulement](#) is the cornerstone of asylum and of international refugee law where it is embedded and applies to all migrants at all times—regardless of migration status. It guarantees that no one should be returned to a country where they would face torture; cruel, inhuman, or degrading treatment; or punishment and other irreparable harm. The US has, therefore, lost its image as the safe country envisaged in the STCA.

Article 33 (1) of the 1951 Convention relating to the Status of Refugees, states that: “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

Since President Trump signed these executive orders, Roxham Road in Quebec has become famous as a place where people can make a refugee claim without being deported back to the US.

3.2. Differences in the Reception of Asylees in Canada and the US

The way asylum seekers are received and treated in Canada and the US has been a subject of interest to refugee rights advocates from the inception of STCA. There are major differences in the refugee determination systems of the two countries that guide how refugees are received.

Canada

Asylum seekers are treated more humanely in Canada in comparison to the US. The Insider observed [asylum seekers crossing the US-Canada border at Roxham Road](#). On arrival they are simply warned against crossing but arrested when they do. The migrants may then make a request for asylum after explaining why they cannot return to their home countries. Health and security checks are then performed to ensure that the migrants do not pose a danger to Canadians. After health and security clearance, the migrants are released and referred for a hearing with the Immigration and Refugee Board of Canada. They are entitled to legal aid which provides legal information, legal advice, and a lawyer to represent them with their claim. In the meantime, they can also apply for a work permit.

United States

In the US, the Insider found, [asylum seekers who irregularly cross the border encounter different treatment](#). The initial reception procedures are somewhat similar with those crossing surrendering themselves to border agents. They are arrested and allowed to request asylum, and those with credible claims are given a future court hearing. The atmosphere in which they are arrested is far more “chaotic and

unpredictable.” The asylum seekers are not permitted to apply for work authorization until after about five months since the filing of their claim and only if they have not received a decision. The US refugee protection system has what they call the one-year bar which requires that those seeking asylum must apply within one year of their arrival in the US. Those who fail to meet the filing deadline are automatically denied protection with very few exceptions. However, there are various systematic bottlenecks that prevent many applicants from complying with the one-year deadline.

Many aspects of the US administration’s handling of asylum seekers scare many of them to seek a safe haven in Canada. [The Impact of President Trump’s Executive Orders on Asylum Seekers](#) is witnessed through large-scale detention of asylum seekers including “on suspicion” of violating federal or state law; delays in adjudication and lack of legal representation; discrimination on the basis of religion or national origin; refoulement or expedited deportation without a right of appeal; and denial of family reunification. Since President Trump signed these executive orders, Roxham Road in Quebec has become famous as a place where people can make a refugee claim without being deported back to the US.

Sending asylum seekers back to the US does put them in harm’s way. They can be denied access to the US asylum process altogether and put into the [expedited removal process](#). Under this process, noncitizens can be deported within a few hours without a hearing and with no time to even consult a lawyer. There is no right to appeal and they are put in detention until they are formally removed.

3.3. STCA Legal Challenges and Their Potential Implications

On December 29, 2005, [Amnesty International](#) (AI), the [Canadian Council for Refugees](#) (CCR), [Canadian Council of Churches](#) (CCC), and a John Doe launched the first legal challenge to the STCA. On January 17, 2008, the Federal Court issued an order quashing the designation of the US as a safe third country as of February 2008. After the government appealed and it was found that the Federal Court had erred in deciding a case based on hypothetical scenarios. Amnesty International and the others appealed, but the Supreme Court declined to hear the case.

In 2017, on behalf of three women, the CCC, AI, and CCR brought forward another legal case against the STCA. On July 22, 2020, Citizens for Public Justice, STAND Canada, STAND USA, and other stakeholders welcomed the Canadian Federal Court ruling by Justice Ann Marie MacDonald that sending refugee claimants back to the US under the [Safe Third Country Agreement](#) violates the [Canadian Charter of Rights and Freedoms](#). In the 60-page ruling, the judge claimed the agreement violated the Canadian Charter of Rights and Freedoms in failing to guarantee “the right to life, liberty and the security of the person.” The judge said in her conclusion that “Canada cannot turn a blind eye to the consequences that befell Ms. Mustafa in its efforts to adhere to the STCA. The evidence clearly demonstrates that those returned to the US by Canadian officials are detained as a penalty.” This was an important and significant victory for the rights of asylum seekers. The judge concluded that the provisions enacting the STCA infringe the guarantees in the Canadian Charter of Rights and Freedoms therefore rendering it unconstitutional. The decision reaffirmed what CPJ and other advocates and stakeholders have long been saying—that the STCA

contravenes the Canadian Charter of Rights and Freedoms by putting the lives of asylum seekers at risk. The judge suspended her decision for six months to give the federal government a chance to respond.

“I conclude that the provisions enacting the STCA infringe the guarantees in section 7 of the Charter. I have also concluded that the infringement is not justified under section 1 of the Charter. Accordingly, s. 101(1)(e) of the IRPA and s. 159.3 of the Regulations [3] are of no force or effect pursuant to section 52 of the Constitution Act, 1982, because they violate s. 7 of the Charter.” —Justice Ann Marie MacDonald

3.4. The Canadian Government’s Response to the Federal Court Ruling

On August 21, [Minister of Public Safety and Emergency Preparedness Bill Blair announced](#) that the government had “filed an appeal to the Federal Court of Appeal as it has assessed that there are factual and legal errors in some of the Federal Court’s key findings. There are important legal principles to be determined in this case, and it is the responsibility of the Government of Canada to appeal to ensure clarity on the legal framework governing asylum law.” He added that “Canada has a long and proud tradition of providing protection to those who need it most by offering refuge to the world’s most vulnerable people, and the Government of Canada remains firmly committed to upholding a compassionate, fair and orderly refugee protection system.” To this contradiction, the [general secretary of the CCC Peter Noteboom](#) observed that “the government of Canada is complicit in Charter violations by sending refugee claimants back to a country that routinely places them in prison, yet, our government claims when announcing its appeal that it provides protection to those who need it.”

Furthermore, in his 2019 [mandate letter](#), the Prime Minister directed Minister Blair to lead the government’s work on irregular migration, with the support of the Minister of Immigration, Refugees and Citizenship, including the new Border Enforcement Strategy and continued work with the US to modernize the STCA. The appeal of the court ruling is a step backwards and risks an infringement of the human rights Canada has previously affirmed in the [UN Refugee Convention](#).

The appeal process kicked off on October 23, 2020 with [the government arguing](#) that Canada would face “an influx of refugee claimants” and other “ripple effects” in the absence of the STCA, causing “irreparable harm” to the Canadian public, especially amid a global pandemic. As a result, the federal government has now won a partial victory against striking down the STCA to a bilateral pact that stops asylum seekers from making a claim in this country via the US. On October 26, the Federal Court of Appeal put aside the January 22 deadline set by the lower court to void STCA. [Jamie Liew, an associate professor at the University of Ottawa](#), said the appeal means that the STCA is in effect indefinitely now, and a decision is likely years off. The Federal Court of Appeal doesn’t have “a great track record in recognizing the rights of refugees.”

CHAPTER 4: THE STCA AND GLOBAL CRISES

4.1. Current Political Climate

Towards the end of September 2020, President Trump announced that his [administration will accept only 18,000 refugees during the next 12 months](#). This is down from the current limit of 30,000 and a fraction of the 110,000 President Barack Obama said should be allowed into the US in 2016, his final year in office.

On November 7, 2020, Joe Biden became the president-elect of the US. In his [immigration platform](#), he had promised during the campaign to provide a fair system based on American values by undoing the damage done by Trump. The new administration promises to modernize the immigration system to better welcome immigrants, reassert commitment to asylum seekers and refugees, and tackle the root causes of irregular migration.

Meanwhile, Canadian Prime Minister Justin Trudeau prorogued parliament from mid-August to September 23 when the [2020 Throne Speech](#) was read by Governor General Julie Payette. Among other things, she said Canada must continue to stand up for the values that define this country like welcoming newcomers and addressing systemic racism. She added that immigration remains a driver of Canada's economic growth and that the Government will continue to bring in newcomers and support family reunification.

The decision of the Canadian courts and the outcome of the November 3 presidential election in the US are likely to [determine the ultimate future of the STCA](#). That in turn, will determine the degree to which Canada will see more refugee claimants arriving from the US after the COVID-19 pandemic has lifted.

Moreover, the increasing rate of irregular border crossers has put the governing Liberals under political pressure from the NDP and Conservatives. Along with human rights organizations and law professors, [the NDP is calling for the government to suspend the STCA](#) due to the mentioned concerns about the refugees' safety. They believe that suspending this agreement will encourage asylum seekers to apply for asylum at official border ports of entry without risking their lives and taking dangerous journeys to enter Canada, as discussed in the previous section. At the same time, [the Conservatives are calling on the Liberals](#) to close the so-called "loophole" and designate the whole Canada-US border as an official port of entry which they believe will lead to a more efficient and effective system of managing irregular asylum seekers. They are hoping that taking proper action can protect the borders and stop irregular cross borders. However, [the Liberals have refused both options](#). They are concerned that suspending the STCA will lead to a higher number of asylum seekers in the country which would require more financial resources and settlement services. On the other hand, expanding the STCA over the whole border would require the US agreement as well which could be a huge challenge. There is not much interest on their end to prevent asylum seekers from leaving the country for Canada.

4.2. Current Social Climate

A [recent survey](#) has found that Canadians are steadily becoming more open and accepting of immigrants and refugees despite uncertainty caused by the COVID-19 pandemic. Fully 66 per cent of the respondents disagreed with the statement: “Overall, there is too much immigration to Canada.” Canadians are generally supportive of immigration as an Ipsos survey in 2018 showed. However, the same study also showed that some Canadians were concerned about asylum seekers.

There has been a growing tendency across the globe from some media outlets and populist politicians to call for the criminalization of refugees and asylum seekers. Some politicians refer to refugee claimants as [“illegals,” “queue jumpers,” or “asylum shoppers.”](#) That creates a discriminatory public discourse and provides ammunition for misinformed anti-refugee rhetoric in Canada. It also confers a false element of criminality on those seeking refugee protection. Such rhetoric also makes some Canadians dubious about people who enter the country at unofficial border crossings to apply for asylum.

4.3. What Kind of Precedence Has Been Set Regarding Irregular Asylum for Future Crises?

COVID-19 has not ended forced migration around the world. People continue to flee their homes. The pandemic struck at the historic height of global refugee flows with [79.5 million people forcibly displaced](#) by war, famine, and upheaval of whom 26 million are refugees and 47.5 are internally displaced persons (IDPs). A full [73 per cent of all displaced people](#) are hosted in neighboring poor countries, the top four being Turkey, Colombia, Pakistan, and Uganda. Only a small percentage of displaced persons are resettled in countries like Canada and the US.

Unfortunately, the pandemic forced many countries, including Canada, to close their borders to contain its spread. Countries have become inward looking to protect their citizens. Many have taken harsh and unprecedented measures against migrants, refugees, and other displaced persons, ignoring established international human rights norms.

However, it is still a violation of international law to close the Canada-US border to asylum seekers. It jeopardizes the rights of those denied entry because on being sent back to the US, they risk being detained in harsh conditions and ultimately sent back to countries where they could lose their lives. Canada, the US, and all other countries should respect their international obligations while at the same time protecting public safety through quarantines and testing for COVID-19.

The pandemic has brought unprecedented deep disruption to global travel. Immigration systems are still working, but at a much slower pace. To protect Canadian public servants who facilitate international travel, their numbers were cut down to skeleton levels with most of them working at home. Even UNHCR and IOM were forced to temporarily suspend resettlement travel for refugees because of the travel disruptions caused by the pandemic. The suspension of resettlement coupled with border closures have left many refugees in grave danger being people who are un-

able to return to their countries of origin due to a well-founded fear of being persecuted.

To prepare for future crises, the world should also operationalize the [Global Compact on Refugees](#). This is a framework for more predictable and equitable responsibility-sharing in finding solutions to refugee situations through international cooperation. Countries that host refugees for extended periods do make a big contribution from their own limited resources for the common good of humanity. It is imperative, through international responsibility-sharing that these countries should be given tangible support from the international community. However, the [international system](#) currently responds to crises in a discretionary and highly unpredictable manner. There is a need to prioritize crisis prevention and preparedness. Funding is, therefore, vital to understand risks and act before crises happen.

CHAPTER 5: THE CHALLENGES PRESENTED BY US-CANADA RELATIONS

The US and Canada have held diplomatic relations for the last 93 years. While the two countries have worked together intimately on a variety of issues, current standards of relations issues such as Border and International Security, Global Affairs, and combating COVID-19 have presented challenges that impact asylum seekers.

Border & International Security and Global Affairs

The US and Canada share the longest international border with 8,891 km (5,525 miles) and 120 entry land ports. Additionally, approximately 400,000 people cross the border between the two countries on a daily basis. Canada and the US are currently working to increase border and international security to actively address threats early on; facilitate trade; create jobs; establish cross-border law enforcement; and strengthen critical infrastructure and cybersecurity.

The US and Canada share mutual defense, aeronautical, and law enforcement commitments through the North Atlantic Treaty Organization (NATO), the National American Aerospace Defense Command (NORAD), and the Border Enforcement Security Task Forces (BEST). Along with this, the US and Canada also signed the Binational Smart Border Declaration, which included a 30-point action plan in attempts to improve border security, information sharing, infrastructure protection and law enforcement co-operation.

Applying for asylum in the US takes an average of 6 months to several years and only 28 per cent of applications are accepted. With Canada being another safe country directly north of the US, many asylum seekers migrate from the US to Canada in hopes for better chances of security and acceptance. Under the STCA, both the US and Canada recognize one another as equally safe countries for the settlement of refugees and asylum seekers. However, in this agreement, individuals seeking security in one country while passing through the other are ineligible to make claims for asylum and are instructed to make claims in the first country they arrive in.

Canada recently declared the STCA as unconstitutional, stating that the agreement contravenes charter rights of individuals. With the current state of US policies regarding refugee and asylum seeking, there is little guarantee that the life, liberty, or security of asylum seekers will be protected on American soil.

The two countries also share many relations under global affairs. Canada and the US are mutually involved in various organizations such as the North Atlantic Treaty Organization (NATO), the World Trade Organization (WTO), the G7, the Organization for Security and Cooperation in Europe (OSCE), the United Nations (UN), the Organization for Economic Cooperation and Development (OECD), and the Organization of American States and Asia-Pacific Economic Cooperation Forum (APEC).

Both Canada and the US collaborate through the High-Level Policy Review group,

which was created in 2009 to allow for both countries as close allies to coordinate actions in response to global issues, spreading democracy, peace, security, and the rule of law around the world. This group met in February of 2020 to discuss China, NATO, Iran, the Middle East, North Korea, and Venezuela.

Canada and the US have collaborated through various organizations and agreements and have become rather politically dependent on one another as a result. With both countries sharing a border, working closely together to address issues of border security and global affairs is necessary for both countries and their relationship. Solutions, changes and approaches for issues that exist across a shared border need to be agreed upon by both countries. Efforts from the Canadian government to make changes to the STCA may strain political relations with the US and consequently affect future collaboration. With the US and Canada holding different approaches to asylum seeking and refugee issues, discussion and solution is necessary to determine the effectiveness of the STCA.

Combatting the COVID-19 Pandemic

The US and Canada have been working closely to combat the pandemic as well as plan for recovery. Companies from both countries are working together to develop potential vaccines and treatments in response to the virus. The two are also working to provide proper personal protective equipment for frontline workers as well. While both countries are working closely to combat the pandemic, it has caused tension on the relations between Canada and the US.

Currently the border between the US and Canada has been thickened, meaning that all non-essential travel has been closed across the border in efforts to halt the spread of the virus. The US has a highly disproportionate number of COVID-19 cases and deaths in comparison to Canada and has become vulnerable to future waves with trying to reopen the economy quickly. With cases in Canada reaching around [161,107 COVID-19 cases](#) and the US reaching [over 7,229,723 cases](#), this border doesn't seem as though it will lessen anytime soon.

COVID-19 has profoundly disrupted the asylum and immigration process within the US and has disproportionately impacted the asylum seekers. The US response to COVID-19 included The Department of State [suspending routine visa services in March of 2020](#), and UCIS [closing all offices and suspending asylum seeking appointments until June 4, 2020](#). This made it extremely difficult for asylum seekers to claim status within the US.

The US response to COVID-19 has also heavily impacted the safety of asylum seekers being held in detention facilities. Detention facilities in which asylum seekers are being held lack basic needs and are unsanitary as reported by the [Department Of Homeland Security](#). As of November 23, 2020, [7,315 individuals who are or were in ICE custody](#) have tested positive for COVID-19 since testing began in February 2020.

While the US and Canada are both working on combating COVID-19, it is apparent that asylum seekers are facing safety concerns under current US COVID responses that need to be addressed before the US can be considered as a safe location for asylum seekers.

CHAPTER 6: POLICY RECOMMENDATIONS

6.1. Canada

Based on the current, [subjective immigration policies](#) in the US and the fact that [gender-based persecution](#) is currently neither one of the grounds for asylum acceptance nor one of the exceptions for admittance into Canada, STAND Canada and Citizens for Public Justice put forward the following recommendations to the Canadian Government:

- Enact policies to include the US as an immediate threat to the safety of asylum seekers. This will allow Canadian immigration authorities to include the US' treatment of refugees as an exemption under which refugees can be accepted.
- Canadian border agencies should develop a policy on how to handle claims made by victims of domestic abuse, sexual assault, and gender-persecution recognizing that the US does not consider violence against women as a valid reason for an asylum claim.
- Refrain from mischaracterizing asylum seekers as "illegal" border crossers.
- Respect the court ruling and give a fair hearing to asylum seekers to ensure that they are not subjected to violations of their life, liberty, and security of the person through denial of entry into Canada under the STCA.
- Drop the appeal against the Federal Court decision and rescind the STCA with the US.

6.2. United States

Considering the aforementioned information presented concerning the context and implementation of the US-Canada Safe Third Country Agreement (STCA), STAND USA makes the following recommendations to the US government:

- Improve treatment of refugees and asylum seekers and modify legal processes to meet international obligations. Current US treatment of asylum seekers is in violation of international legal standards in a [variety of areas](#). It is imperative that the US government act quickly to remedy these violations in order to protect the rights of asylum seekers and uphold US responsibility to the international community. Specifically,
 - End the criminal penalization of migration.
 - End the administrative detention of migrant children.
 - End the practice of summary removal proceedings for asylees.
- Create a dialogue with Canada in order to address the causes of disproportionate flows of asylum seekers and modify the US asylum system to address disparities in services offered to asylum seekers, creating a more equal environment

between the two countries.

- Suspend the US–Canada STCA until appropriate changes can be made.

6.3. Conclusion

As CCC General Secretary Peter Noteboom writes, we should “ensure that all who arrive at border crossings are received with dignity, have their case heard and receive a response as to whether or not they can be recognized as a refugee claimant in a timely way.” The way forward is to rescind the STCA to enable better management of refugee claims at the Canadian border while respecting the claimants’ rights. That will ensure that people seeking Canada’s protection do not imperil their lives by using dangerous routes to get to Canada particularly during winter. In the 2020 Throne Speech, the fourth foundation pertains to standing up for who we are as a welcoming country. To continue reflecting who we are as Canadians, the government should shelve the appeal against the STCA and rescind it for the common good.

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