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Submission to the Special Rapporteur on the human rights of migrants

Externalization of Migration and the Impact on the Human Rights of Migrants

Colour of Poverty – Colour of Change
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Introduction

We are pleased to make this submission on the Externalization of Migration and the Impact on the Human Rights of Migrants. We thank the Special Rapporteur on the human rights of migrants for the opportunity to provide input to the upcoming report.

This submission will focus on the Safe Third Country Agreement between Canada and the United States (U.S.).

1. Examples of externalisation measures

Safe Third Country Agreement[1]
The Safe Third Country Agreement between Canada and the United States (U.S.) is part of the U.S.–Canada Smart Border Action Plan. Under the Agreement, refugee claimants are required to request refugee protection in the first safe country they arrive in, unless they qualify for an exception to the Agreement.

The Agreement was signed on December 5, 2002 and came into effect on December 29, 2004. The two countries signed an Additional Protocol to the STCA, which came into effect on March 25, 2023 following completion of regulatory amendments. Together the two documents represent a revised agreement.

To date, the US is the only country that is designated as a safe third country by Canada under the Immigration and Refugee Protection Act.

Where the Agreement is in effect
The Safe Third Country Agreement applies to refugee claimants who are seeking entry to Canada from the U.S.:

- at Canada-U.S. land border crossings

[1] Canada-US Safe Third Country Agreement. https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/safe-third-country-agreement.html#toc4 (Retrieved June 10, 2025)

- after crossing between ports of entry and making a claim for refugee protection less than 14 days after the day of entry into Canada
- by train, or
- at airports, only if the person seeking refugee protection in Canada has been refused refugee status in the US and is in transit through Canada after being deported from the US.

Exceptions to the Agreement

Exceptions to the Agreement consider the importance of family unity, the best interests of children and the public interest.

There are four types of exceptions:

- Family member exceptions
- Unaccompanied minors exception
- Document holder exceptions
- Public interest exceptions

Even if they qualify for one of these exceptions, refugee claimants must still meet all other eligibility criteria of Canada's immigration legislation. For example, if a person seeking refugee protection has been found inadmissible in Canada on the grounds of security, for violating human or international rights, or for serious criminality, that person will not be eligible to make a refugee claim.

Under s. 101(1)(e) of the *Immigration and Refugee Protection Act* ("*IRPA*"), refugee claimants who arrive from a country designated as a "safe third country" are ineligible to seek refugee protection in Canada.4 Canadian immigration officers at the border summarily return these claimants to the United States (US). The officers have no discretion in applying the provisions and do not consider whether US authorities will respect claimants' rights under international law[2].

Since the provisions came into force, the Federal Court ("FC") has twice found that the scheme exposes refugees to a risk of *indirect refoulement*, violating their rights under the Canadian *Charter* of Right and Freedoms. In the first case in 2007 the FC found claimants who had been in the US for more than one year and women survivors of domestic violence faced a risk of *refoulement* from the US. In the second date in 2020 the FC ruled that the regime violates the Section. 7 *Charter* rights of refugee claimants returned to the US as a result of that country's immigration detention practices.7

The federal Court of Appeal reversed both decisions, but both times it declined to engage with the substantive merits of the case and the legal implications of the prohibition on indirect *refoulement*.8

In a partial ruling in 2023, the Supreme Court of Canada decided that the STCA's constitutionality depended on border agents using hypothetical "safety valves" to protect migrants whose safety would be at risk if they returned to the U.S. The court was silent on the issue of whether the Safe Third Country Agreement is discriminatory on the basis of gender. It sent the question back to the Federal Court, though a hearing date has not been set.

[2] Factum Appellant Canadian-Council-for-Refugees-et-al..PDF (Retrieved June 10, 2025)

On March 24, 2023, Canada and the United States announced the expansion of the STCA across the entire land border, including internal waterways, and the expansion took effect the next day. A person who crossed the border to make an asylum (refugee) claim and did not meet one of the Agreement's exceptions, is returned to the U.S.[3]
The legislation allows a refugee claimant who crossed the border, but has not been examined, to make a refugee claim 14 days after remaining in Canada.

The government of Canada tabled on June 3, 2025 legislation, "Bill C-2 - An Act respecting certain measures relating to the security of the border between Canada and the United States and respecting other related security measures". The new legislation will eliminate the 14-day window for a person to make a refugee claim. Consequently, anyone who enters Canada from the US across the land border (including waterways) will be returned if the person does not meet the exceptions and other criteria in immigration legislation.

Examination of persons at ports of entry and those who arrived via irregular crossings are conducted by Canada Border Services Agency (CBSA).

2. Transparency and monitoring

The legislation requires that the review of a designated country be based on the following four factors:

1. whether it is party to the 1951 Refugee Convention and the 1984 Convention Against Torture;
2. its policies and practices with respect to claims under the 1951 Refugee Convention, and its obligations under the 1984 Convention Against Torture;
3. its human rights record; and
4. whether it is party to an agreement with the Government of Canada for the purpose of sharing responsibility with respect to claims for refugee protection.

In addition, the Governor in Council may issue directives to provide greater clarity on the review process. The current directives came into effect in June 2015. Under these directives:
For the United States, "the Minister of Citizenship and Immigration will monitor, on a continual basis, the four factors described above and report to the Governor in Council should circumstances warrant".

The results of any such review have not been made public. The government continues to assert that the US is a safe country.

SALCO recently filed a legal challenge together with the Canadian Association of Refugee Lawyers, that the federal government's oversight of the STCA is fundamentally flawed.[4]

[3] Canada-US Safe Third Country Agreement. https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/safe-third-country-agreement.html#toc4 (Retrieved June 10, 2025)
[4] "Groups mount legal challenge against Ottawa over refugee treaty with U.S.". Sara Mojtehedzadeh Published May 26, 2025 Globe and Mail https://www.theglobeandmail.com/canada/article-canada-united-states-refugee-treaty-court-challenge/ (Retrieved June 10, 2025)

Legislation was enacted in October 2024, “An Act establishing the Public Complaints and Review Commission” to create an independent oversight body for CBSA[5]. This has not been implemented. No information about the process or the progress on establishing such a body has been made public.

An appeal or review about an enforcement action must be submitted directly to the CBSA. There is no third party or external complaints mechanism. This is not an effective option from the point of view of the person subject to deportation, as they may be already in detention in Canada or in detention in the US.

3. Cooperating States

The STCA is a reciprocal agreement, however there are far fewer entries from Canada to the US. A much higher number of persons enter Canada from the US and seek to make a refugee claim in Canada.

The Parliamentary Standing Committee on Citizenship and Immigration (CIMM) has on occasion undertaken a study on the STCA and has invited government representatives as well as NGOs to appear as witnesses.

The most recent study was completed in May 2023. CIMM release the report, “Asylum-Seekers at Canada’s Border”[6] Despite the recommendations from numerous civil society witnesses and refugee advocates that the US is not safe for refugee claimants, CIMM recommended that the government of Canada should publicly assert that the US is a safe country and that asylum seekers should be encouraged to seek protection there.

CIMM also recommended that the Government of Canada expand exemptions provided in the Safe Third Country Agreement to include gender-based claims as a public interest exception, and restore the exemption for claimants from moratorium countries.

4. Non-State actors

NGOs in Canada and the US assist refugee claimants (referred to as ‘asylum seekers in the US), including people in detention, unaccompanied minors, people in the process of navigating the refugee claim system, and people subject to deportation. NGO are very limited by lack of resources in the scope and scale of assistance they can provide.

5. Use of technology
[Not able to comment on this question]

6. Human rights implications

From his appearance before CIMM in May 2023[7]:

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[5] “Legislation to create enhanced independent review body for the RCMP and the CBSA receives Royal Assent”. https://www.canada.ca/en/public-safety-canada/news/2024/11/legislation-to-create-enhanced-independent-review-body-for-the-rcmp-and-the-cbsa-receives-royal-assent.html (retrieved June 10, 2025)
[6] https://www.ourcommons.ca/DocumentViewer/en/44-1/CIMM/report-16/ (Retrieved June 10, 2025)
[7] ASYLUM-SEEKERS AT CANADA’S BORDER - Report of the Standing Committee on Citizenship and Immigration, MAY 2023 44th PARLIAMENT, 1st SESSION
https://www.ourcommons.ca/DocumentViewer/en/44-1/CIMM/report-16/ (Retrieved June 10, 2025)

> Frantz André, representative for the Comité d'action des personnes sans statut, suspected that the U.S. was circumventing the STCA by rejecting refugee claims that should be admitted in their country, and that the Canada-U.S. agreement was discriminatory. He noted that 28,000 Haitians were deported from the U.S. without having an opportunity to have their cases heard. He also reported that mistreatment and racism were commonplace for migrants in the U.S., and that the American rigid approach to humanitarian migration was leading to the irregular migration at Roxham Road. On this point, Frantz André provided the Committee with disconcerting descriptions of the American system reported in the media. He noted that although the U.S. had extended temporary protected status in November for Haitian nationals who are making asylum claims, the Haitian diaspora was anxious and uncertain about their status in that country.

There is extensive media reporting on the escalation of enforcement activities in the US by Immigration Customs and Enforcement (ICE), against asylum seekers, including those sent back across the border from Canada. According to CBSA, Canada sent back more than 1,600 asylum seekers to the United States in 2025 without hearing their case for refugee protection. Many reportedly ended up in ICE custody.[8]

There are specific concerns about the safety of women and girls survivors of violence, and 2SLGBTQ+ people survivors of gender-based persecution and violence. The US does not recognize these experiences as legitimate grounds for asylum claims. Further, 2SLGBTQ+ people in particular are subject to extreme scrutiny and discrimination in ICE custody as documented by the US-based National Immigrant Justice Centre, in their 2024 report, "No Human Being Should Be Held There" The Mistreatment of LGBTQ and HIV-Positive People in U.S. Federal Immigration Jails".[9]

Conclusion

We have called on the government of Canada to withdraw from the STCA as the US is not a safe country for refugees. We have also called on the government to withdraw the recently tabled Bill C-2, which will further expand the STCA and prevent even more people from entering Canada in search of safety.

These are urgent considerations in the face of widespread abuses and human rights violations faced by asylum seekers and migrants in the US, including detention, lack of due process, family separation and deportation to a third country.

We ask the Special Rapporteur to recommend that Canada should withdraw from the STCA and withdraw Bill C-2.

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[8] 'Complicit with a totalitarian regime': Canada's border rules are landing asylum seekers in ICE detention By Jack Wilson Updated June 9, 2025. Montreal Gazette. https://www.montrealgazette.com/news/article975299.html#storylink=cpy (Retrieved June 10, 2025)

[9] "No Human Being Should Be Held There" The Mistreatment of LGBTQ and HIV-Positive People in U.S. Federal Immigration Jails JUNE 2024. National Immigrant Justice Center. https://immigrantjustice.org/wp-content/uploads/2025/05/No-Human-Being-Should-Be-Held-There-THE-MISTREATMENT-OF-LGBTQ-AND-HIV-POSITIVE-PEOPLE-IN-U.S.-FEDERAL-IMMIGRATION-JAILS.pdf (Retrieved June 10, 2025)