

CANADIAN COUNCIL FOR REFUGEES



CLOSING THE FRONT DOOR ON REFUGEES

REPORT ON THE FIRST YEAR OF THE SAFE THIRD COUNTRY AGREEMENT

December 2005

The Canadian Council for Refugees is a non-profit umbrella organization committed to the rights and protection of refugees in Canada and around the world and to the settlement of refugees and immigrants in Canada. The membership is made up of over 180 organizations involved in refugee sponsorship and protection and in newcomer settlement. The CCR serves the networking, information-exchange and advocacy needs of its membership.

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EXECUTIVE SUMMARY

On 29 December 2004, the US and Canada implemented the Safe Third Country Agreement, by which each government closed the door on most refugee claimants at the US-Canada border. The Agreement was strenuously opposed by refugee advocates on both sides of the border, who challenged the contention that the US is always a safe country for refugees, denounced the purpose and effect of reducing the number of refugees who can seek Canada's protection and predicted that the Agreement would lead to an increase in smuggling and irregular crossing at the border.

One year after implementation, the indications are that many of these worst fears are already being realized. Statistics show that the Safe Third Country Agreement has contributed to a dramatic drop in the number of refugee claims in Canada. Based on the first eleven months of the year, Canada is set to receive in 2005 the lowest number of claims since the mid-1980s, with a projected year end total of just 19,562. This figure is significantly below the average of 29,680 claims annually since the current refugee determination system came into effect in 1989. While there has been a modest decline in numbers of claims made at other places, the drop at the land border has been far greater, with numbers at only 51% of what they were in 2004.

The damaging human rights impact of the Agreement is dramatically illustrated by the experience of Colombian refugee claimants. In 2004, Colombia was the top country of origin of claimants in Canada. In 2005, claims by Colombians have dropped to less than a third of 2004 numbers, meaning that over 2,500 Colombians are "missing". Given the 81% acceptance rate for Colombian claims in Canada, versus just 45% in the United States, it is clear that the door has been closed on a group of claimants who need Canada's protection because they won't necessarily find safety in the United States.

Indeed, our analysis shows that, in the first year of the Agreement alone, some 922 Colombians who would have received protection in Canada will instead be facing either detention and removal from the US to Colombia, or lives without status in the US, in constant fear of arrest.

To make matters worse, since the implementation of the Safe Third Country Agreement, the US law has been changed in a manner that is likely to reduce the US acceptance rate yet further. Women fleeing gender-based persecution are particularly disadvantaged when forced to claim in the US rather than Canada.

The dramatic drop in the number of claims in 2005 continues a steady decline since 2001, suggesting that the Canadian government's interdiction efforts are having a serious impact on asylum seekers' ability to travel to a country where they might find protection. Safe third represents an escalation of these interdiction efforts and adds another significant barrier to asylum seekers finding protection. The Canadian government is achieving its goal of significantly reducing the number of refugee claimants arriving in Canada, leading us to ask: "How few claimants is few enough for the government of Canada?"

The effect of interdiction is to render the human rights violations suffered by asylum seekers invisible in the country of intended asylum, since they never arrive. Thus, the impact of safe third is largely invisible: there are no media reports about individuals being deported to the threat of death or torture; citizens do not lobby politicians on behalf of families who never make it here.

The impact for individuals facing return to risk of persecution in countries such as Colombia is however no less severe because it is not occurring in Canada. It is no exaggeration to describe safe third country as a “silent killer”.

Although the US and Canadian governments expressed their commitment to enhancing the international protection of refugees through the Agreement, there has in fact been little indication that the governments have monitored the ways in which the Agreement affects the rights of refugees. While attending to the smooth operation of the Agreement, the Canadian government turns a blind eye to egregious abuses of human rights by the US government and does not inquire into the fate of those denied access to Canada’s refugee determination system.

The low number of claims at the border suggests that most asylum seekers simply believe the Canadian border is now closed. Information about exceptions to safe third is not readily available and, consequently, some people who actually meet an exception believe that the door is closed on them too. Lack of information is just one of the ways in which safe third country contributes to the vulnerability of asylum seekers, particularly women. There are indications that, as predicted, asylum seekers are turning to smugglers or finding their own way across the border.

The Safe Third Country Agreement is having a devastating effect on the ability of refugees to find protection, on their vulnerability as they seek a place of safety and on Canada’s ability to meet its obligations towards refugees at our doors. The Agreement should be cancelled.

1. INTRODUCTION

On 29 December 2004, the governments of Canada and the United States of America implemented the Safe Third Country Agreement, closing the door on most refugees seeking to make a claim at the US-Canada land border. In the previous 15 years, more than 131,000 refugee claims were made in Canada at the land border: most of those claimants were found to be refugees in need of protection and many are now Canadians.¹ But for most of those refugee claimants who try today to follow the same route, the safe third country rule means that if they apply at a land border they will be rejected by Canada without ever being able to present their refugee claim or explain why the US is not safe for them. They will be sent summarily back to the US, even if this means that they will be immediately detained and deported by the US authorities.

In the period leading to its implementation, the Safe Third Country Agreement was fiercely opposed by refugee and human rights advocates in both Canada and the US.² They challenged the principle on which the Agreement is based, arguing that the US is in fact not a safe country for all refugees. They also opposed the Agreement on the grounds that it deprived refugee claimants of the choice of where they made their refugee claim, forcing them to seek asylum in a country where they might have no connections, no network of support, no means of economic survival, no ability to speak the language or where for other compelling reasons they do not wish to remain. Furthermore, the Agreement was denounced as another in a series of interdiction measures which reduce access to Canada for people needing protection. A country as wealthy and privileged as Canada should be seeking to do more, not less for the world's persecuted and displaced. Despite the opposition, the governments of Canada and the US moved forward with this Agreement that seriously undermines the rights of refugees on this continent.

This report provides an overview of the impacts on refugees of the Safe Third Country Agreement in its first year of operation. It is based on the observations of member organizations of the Canadian Council for Refugees as well as US colleagues, especially those working close to the Canadian border, who have extensive experience assisting asylum seekers on their way to Canada. This report is supported by the Lutheran Immigration and Refugee Service of the USA. Their letter of support is included in Appendix I (page 33).

Despite the opposition of refugee advocates to the Safe Third Country Agreement, good communications between NGOs and the two governments have been maintained, at national and local levels. The governments have been willing to share information, including statistics, with NGOs, thus helping them to monitor the impact of the Agreement.

Other sources of information include the daily experiences of NGOs on both sides of the border, many of which receive visits or telephone calls from people affected, in one way or another, by the Safe Third Country Agreement.

However, given the NGOs' lack of any resources specifically for monitoring the Agreement, these experiences can only be collected in an ad hoc manner. The fact that the Agreement's impact is broad and affects thousands of people, many of whom never approach the border,

¹ Based on an accumulated acceptance rate for refugee claims in Canada of 55%, from 1989 to 2004.

² See Appendix III, page 37, for an overview of the principal grounds of opposition.

means that the hardships caused by the Agreement are for the most part inaudible and invisible, not only to refugee advocates, but also to those who decided to implement it.

This report is a revised and updated version of the CCR's report on the first six months of the Safe Third Country Agreement.

2. OVERVIEW OF SAFE THIRD COUNTRY AGREEMENT

The Safe Third Country Agreement³ asserts that the US and Canada are both safe countries for refugees and that refugee claimants should make their claim in the first of these countries that they reach. Thus refugees who are in the US are expected to pursue their claim in the US, rather than seeking protection in Canada. Similarly, those in Canada are expected to apply in Canada. While the Agreement is framed in a symmetrical way, in impact it is anything but symmetrical since the direction in which refugee claimants travel has been overwhelmingly from the US to Canada, with only a handful of claimants moving from Canada to the US.⁴ In other words, the Agreement is basically about preventing people who are in the US, or travelling through the US, from making a refugee claim in Canada.

The Agreement applies to refugee claims made at a land border port of entry.⁵ The general rule is that claims are excluded, with some exceptions, including where the claimant has a family member in the second country with the required immigration status or where the claimant is an unaccompanied minor whose parents are not in the US or Canada.⁶ In addition to the exceptions spelled out in the Agreement, each country can exempt other claimants on public interest grounds. Canada has chosen to limit this discretion to two additional categories defined by regulation: nationals of countries to which Canada has temporarily suspended removals and claimants charged with or convicted of an offence punishable by the death penalty.⁷

³ Agreement between the Government of Canada and the Government of the United States of America for cooperation in the examination of refugee status claims from nationals of third countries (hereafter *Agreement*). The text of the agreement can be found at <http://www.cic.gc.ca/english/policy/safe-third.html>.

⁴ For the 15-year period from 1990 to 2004, an average of 8,750 claimants a year applied in Canada at the US-Canada border. In contrast, the US government has cited 200 as the approximate annual number of claims made in the US by persons entering from Canada (for example, this was the number given by US officials at the public meeting on safe third country held on 1 August 2002 in Washington DC).

⁵ Agreement, Article 4.

⁶ Also exempted are claimants who have been issued a visa by the second country or who are nationals of a country for which the second country does not have a visa requirement, while the first country does. The CCR has prepared an overview of the principal provisions of the Agreement in the form of Frequently Asked Questions, available at <http://www.web.ca/ccr/s3cFAQ.html>.

⁷ *Amended Immigration and Refugee Protection Regulations* 159.6. For the full text of the safe third country regulations, see *Regulations Amending the Immigration and Refugee Protection Regulations*, P.C. 2004-1157 12 October, 2004, published in Canada Gazette, Part II, Vol. 138, No. 22. November 3, 2004. Available at <http://canadagazette.gc.ca/partII/2004/20041103/html/sor217-e.html>.

3. IMPACT ON NUMBERS OF CLAIMANTS IN CANADA

The most important impact of the Safe Third Country Agreement has been the dramatic drop in the number of refugee claims made in Canada, particularly at the land border, where numbers have halved since 2004. This decline comes after several years of decreases in numbers of refugee claimants. The 2005 figure for refugee claims is lower than Canada has seen since the 1980s.

Table 1 below shows claims in Canada since 1989, when the current refugee determination system came into effect.⁸

Table 1

Claims made in Canada, 1989 – 2004, by point claim made							
	Inland	Airport	Border	Total*	Inland	Airport	Border
1989	10,149	6,101	3,614	20,056	51%	30%	18%
1990	16,607	12,552	7,201	36,691	45%	34%	20%
1991	14,750	9,063	8,049	32,317	46%	28%	25%
1992	19,119	9,711	8,896	37,733	51%	26%	24%
1993	10,234	4,477	6,468	21,184	48%	21%	31%
1994	10,548	4,831	6,676	22,055	48%	22%	30%
1995	11,414	6,982	7,545	25,941	44%	27%	29%
1996	10,116	8,830	6,792	25,738	39%	34%	26%
1997	10,870	7,468	6,000	24,338	45%	31%	25%
1998	12,522	6,640	6,224	25,389	49%	26%	25%
1999	13,892	6,668	9,556	30,124	46%	22%	32%
2000	16,959	7,624	13,270	37,853	45%	20%	35%
2001	20,534	10,173	14,007	44,714	46%	23%	31%
2002	17,898	4,693	10,855	33,446	54%	14%	32%
2003	16,766	4,177	10,934	31,877	53%	13%	34%
2004	13,169	3,456	8,896	25,521	52%	14%	35%
Average	14,097	7,090	8,436	29,686	47%	24%	28%

*The "total" in some cases is more than the sum of Inland, Airport and Border, because a few claims have been identified as "other".

The table above shows that in no year has the number of claims been less than 20,000. Over the last four years, Canada has seen a steady decline in the number of claims from a high in 2001 of 44,714, to 25,521 in 2004. Already in 2004 the number of claims was significantly below the average of 29,686. This precipitous decline coincides with the Canadian government's increase at the end of 2001 in resources to interdiction officers posted overseas who work to stop asylum

⁸ The following statistical tables have been created from data provided to the Canadian Council for Refugees by Citizenship and Immigration Canada.

seekers among others from travelling to Canada.⁹ However, it should also be noted that 2001 was a year with a particularly high number of claims, perhaps in part due to the often observed phenomenon of an increase in claims in the period before implementation of a new law (the *Immigration and Refugee Protection Act* came into effect in June 2002).

Table 1 also shows that on average 28% of claims were made at the land border, with just under half made inland (i.e. at an immigration office within Canada) and nearly a quarter made at airports.

Statistics for the first eleven months of 2005 show a marked change, as set out in Table 2 below. The percentage of claims at the land border has gone down in 2005 to 20%, while inland claims represent nearly two-thirds of claims, an unprecedentedly high proportion. The table also highlights the extent of the drop in the number of claims since the advent of safe third country. Compared with 2004 (already a below average year), there were only 80% as many claims in 2005, while at the land border, there were only half as many claims.

Table 2

Claims made in Canada, January-November 2005, by point claim made, and comparison							
	Inland	Airport	Border	Total	Inland	Airport	Border
Jan.-Nov. 05	11,282	3,038	3,612	17,932	65%	15%	20%
Jan.-Nov. 04	12,137	3,146	7,151	22,434	54%	14%	32%
Jan.-Nov 2005 as percentage of Jan.-Nov. 04	93%	97%	51%	80%			

Based on the data from January to November, we can project a year-end total of fewer than 20,000 claims for 2005 (see Table 3 below). If we compare the 2005 figures to the average for the period 1989 to 2004, we find that in 2005 Canada is receiving only two-thirds of the average annual claims, and fewer than half the average at the border.

⁹ In December 2001, the US and Canadian governments agreed to “work to increase the number of Canadian and U.S. ICOs” [Immigration Control Officers working overseas]. *Joint Statement on Cooperation on Border Security and Regional Migration Issues*. 3 December 2001, <http://www.cic.gc.ca/english/press/01/0126-pre.html#statement>. In the December 2001 budget, the Canadian government allocated \$395 million over five years for “better and more accurate screening”, including additional immigration control officers stationed abroad, *Budget Plan 2001*, p. 97-98, <http://www.fin.gc.ca/budget01/pdf/bpe.pdf>. Another barrier facing claimants was created through the introduction of the direct back policy in January 2003 (see below, page 22)

Table 3

Claims made in 2005, as percentage of 2004 and average since 1989				
	Inland	Airport	Border	Total
2005 projection, based on Jan.-Nov. 05 data	12,308	3,314	3,940	19,562
Average 1989 – 2004	14,097	7,090	8,436	29,686
2005 as percentage of average 89-04	87%	47%	47%	66%

Table 4 below analyses the decrease in claims at the border compared to the decrease elsewhere, in order to help determine how much of the decrease may be attributed to safe third. Inland and airport claims (Jan.-Nov. 2005) combined came to 94% of the total for the equivalent period in 2004, whereas 2005 land border claims represented only 51% of the claims at the land border in 2004. If we assume that without safe third, land border claims could have been expected to drop to 94% of the 2004 numbers, we would expect there to have been 6,722 claims at the land border. In fact there were 3,110 claims fewer than that made, representing potentially 3,110 people who didn't make a claim because of safe third. These more than 3,000 people may be held in immigration detention in the US, trying to survive without status in the US in constant fear of arrest or exploring unattractive options for crossing the border into Canada in order to make a claim from within the country. Some have no doubt already been deported from the US and may be facing persecution in their country of origin.

Table 4

Decreases in claims, other points versus land border			
	Inland & Airport	Land Border	Total
Jan-Nov 04	15,283	7,151	22,434
Jan-Nov 05	14,320	3,612	17,932
05 as % 04	94%	51%	80%
94% of 04		6,722	
"Missing" at land border		3,110	

It is true that not only Canada, but most countries in the North, have seen a decrease in the number of asylum claims in recent years. Table 5 below, which is based on statistics from the UN High Commissioner for Refugees (UNHCR), shows that in 2005 claims in industrialized countries came to only 83% of claims in 2004 (assuming claims in the second half of 2005 continue at the same rate).

Table 5

Asylum applications in 36 countries, 2003 to second quarter 2005*				
	2003	2004	2005 (Q1 and Q2)	2005 as percentage 2004
Total asylum claims in 36 countries	483,529	375,982	156,156	83%
* Data from UNHCR, <i>Asylum Levels and Trends in Industrialized Countries – Second Quarter 2005</i> , UNHCR Geneva, September 2005				

It could therefore be argued that Canada might expect, based on international trends, to receive in 2005 83% of the claims in 2004, which would be 21,143. However, the projection based on claims January to November is 19,562. This leaves us 1,581 claims under, a shortfall which should be attributed to safe third country.

However, the decline in numbers of claims probably does not reflect a real decline in the number of people needing protection but rather an increase in the barriers in the way of asylum seekers trying to reach a place of safety.

The UNHCR, in its 2005 Note on International Protection, pointed out that:

Interception on land and at sea, security checks and other measures have made legal access to a territory where asylum can be claimed increasingly difficult. Resort to smugglers has increased, as has the exposure to trafficking of women and children moving on their own.¹⁰

The following are examples of barriers facing people with a well-founded fear of persecution who are seeking asylum:

- The US Coast Guard interdicts Haitians and others at sea, providing only the most inadequate of opportunities for those at risk to request asylum. The overwhelming majority of Haitians interdicted are returned to Haiti without any hearing into their reasons for fleeing.¹¹ In February 2004, in the context of a volatile and violent situation in Haiti, President George Bush announced in plain terms his government's policy: "I have made it abundantly clear to the Coast Guard that we will turn back any refugee that attempts to reach our shore."¹²
- People crossing the Mediterranean Sea by boat have been returned to Libya from Lampedusa by the Italian government in mass deportations. UNHCR has expressed concerns because of

¹⁰ UNHCR, Note on International Protection, 4 July 2005, A/AC.96/1008, §11. Available at www.unhcr.org.

¹¹ Bill Frelick, "The United States: Maritime Interdiction", in CCR, *Interdiction and Refugee Protection: Bridging the Gap, Proceedings of an international workshop*, 29 May 2003, <http://www.web.ca/ccr/interdictionproceedings.PDF>.

¹² The White House, News release, *President Bush Welcomes Georgian President Saakashvili to White House*, 25 February 2004, <http://www.whitehouse.gov/news/releases/2004/02/20040225-1.html>

inadequate procedures to ensure that those needing protection were receiving it and that people were even properly identified by nationality.¹³

- Migrants attempting to enter the Spanish enclaves of Ceuta and Melilla in Morocco were killed in August and September 2005. Amnesty International expressed concern at reports of excessive use of force by the officials of both Spain and Morocco, allegedly leading to the deaths.¹⁴
- Canada and other states impose large fines (“carrier sanctions”) on transport companies such as airlines that bring “improperly documented persons” (including asylum seekers) into their countries. In addition, the Canadian government posts interdiction officers, known as immigration control officers, abroad to prevent people, including asylum seekers, from travelling to Canada.¹⁵ The Canadian government boasts that it “succeeded in intercepting, prior to their departure, over 70% of improperly documented travellers destined for Canada in 2004-2005.”¹⁶

Even if refugees manage to get into an asylum country, in many cases they do not seek asylum and therefore are not included in the asylum statistics. Deterrence measures and other restrictive policies mean that asylum seekers in many countries face detention, poverty, lack of legal aid, broad ineligibility criteria and narrow interpretation of the refugee definition, xenophobia and racism, and the risk of deportation.¹⁷

The number of refugee claimants in Canada has been steadily declining since 2001, at the end of which year the Canadian government doubled the budget for interdiction officers posted overseas.¹⁸ The efforts of not only the Canadian government but other governments too seem to have been very successful in reducing the ability of those who face persecution to flee to safety. On top of the already existing interdiction barriers, the Canadian government has now largely closed the land border to refugees, thus leading to a still greater decline in the number of refugees able to reach Canada. As a result, Canada is receiving the lowest number of refugee claimants in twenty years.

How few refugee claims does the Canadian government consider few enough?

¹³ UNHCR Press Briefing, *UNHCR deeply concerned about Lampedusa deportations of Libyans*, 18 March 2005. Available at www.unhcr.org. See also Amnesty International, *Italy: Temporary stay - Permanent rights: The treatment of foreign nationals detained in 'temporary stay and assistance centres'*, EUR 30/004/2005, 20 June 2005, <http://web.amnesty.org/library/index/engEUR300042005>.

¹⁴ Amnesty International, Public Statement, *Spain/Morocco: Migrant rights between two fires*, EUR 41/011/2005, 3 October 2005, <http://web.amnesty.org/library/Index/ENGEUR410112005>

¹⁵ Andrew Brouwer, *Attack of the Migration Integrity Specialists: Interdiction and the threat to asylum*, <http://www.web.ca/ccr/interdictionab.htm>.

¹⁶ Canada Border Services Agency, *Departmental Performance Report, 2004-2005*, http://www.tbs-sct.gc.ca/rma/dpr1/04-05/BSA-ASF/BSA-ASFd4502_e.asp#prog-enforce.

¹⁷ See, for example, Amnesty International, *The human cost of "Fortress Europe": Detention and expulsion of asylum-seekers and migrants in the EU*, IOR 61/014/2005, 20 June 2005, <http://web.amnesty.org/library/Index/ENGIOR610142005?open&of=ENG-369>.

¹⁸ *Budget Plan 2001*, p. 97-98, <http://www.fin.gc.ca/budget01/pdf/bpe.pdf>.

4. IMPACT ON COLOMBIAN REFUGEES

The table below shows how dramatically Colombians in particular have been affected by the Safe Third Country Agreement. Colombia represented the top country of origin of claimants in 2004 (Colombians made up 14% of total claimants in Canada). The overwhelming majority of Colombians (97%) made their claims at the land border (among all claimants, only 35% made their claims at the border). This is to be expected since it is difficult to get to Canada from Colombia without passing through the US.

While some Colombians have a family member in Canada that exempts them from safe third country, many do not. Thus most Colombians that we would expect, based on past experience, to be seeking protection in Canada find that the door has been closed on them since the Safe Third Country Agreement went into effect.

Safe third has indeed been devastating for Colombians. Since implementation, there have been fewer than a quarter as many claims by Colombians at the land border as in 2004. Overall in 2005, there are only 30% of the number of claims made by Colombians in 2004. That difference represents a shortfall of over 2,500 Colombians who are “missing”, that is Colombians who would have sought refuge in Canada had they not found Canada’s door closed to them.¹⁹

Table 6

Claims by Colombians							
	2004	% by point in 2004	2005 Jan-Nov	% by point Jan.-Nov 05	2005 projected year end	2005 projected as percentage of 2004	Numbers "missing" in 2005
Border	3,521	97%	781	79%	852	24%	2,669
Airport	23	1%	41	4%	45	194%	-22
Inland	91	3%	163	17%	178	195%	-87
Total	3,635		985		1,075	30%	2,560

While overall the number of Colombian claims has decreased dramatically, inland and airport claims by Colombians are showing a small increase (as appears in Table 6 above). In 2004 only 91 Colombians made inland claims, but 163 Colombians made inland claims from January to November 2005. It is also worth noting that the number of inland claims by Colombians increased in the course of the year (an average monthly of 9 from January to August, shooting up to a monthly average of 29 from September to November). This trend suggests that Colombians may have begun to find alternative ways to enter Canada, although the numbers remain small.

¹⁹ It may be argued that there has been an overall decline in the number of claims, not just at the land border and therefore some of the decline in Colombian claims might have occurred even without safe third country. This is highly debatable: the acute human rights crisis in Colombia continues to force many of its citizens into flight and the US continues to offer inadequate protection to Colombians, and the numbers of Colombian claims inland and at airports have actually increased. However, even if we posit that the 2005 numbers for Colombian claims might have decreased to 94% of the 2004 numbers (equivalent to the overall drop in inland and airport claims in Jan-Nov. 2005), we still find that there are 2,432 Colombians “missing” attributable to safe third country.

The increase in inland claim numbers confirms the anecdotal evidence of Colombians who, because of the desperation of their situation in the US, are forced to seek ways to cross the border irregularly and make a claim inland.

A Colombian family contacted various Canadian and US border NGOs in mid-2005, looking for advice on how to find protection in Canada. They had received notice from the US authorities that they were to be deported back to Colombia, despite their fear for their lives. To avoid being arrested, they had moved house and the parents had given up their jobs. The children were told not to leave the apartment to reduce risks of being caught. The NGOs they contacted could only tell them that they could not make a refugee claim at the border because of safe third country. Several weeks later two members of the family were in Canada. It is not known how they crossed the border.

The human rights impact on Colombians of Canada's closed door is starkly highlighted by a comparison of the acceptance rates between Canada and the US. In 2004, 81% of Colombian claims in Canada were accepted, whereas Colombian claimants in the US had an acceptance rate of only 45% if they were able to make an affirmative asylum claim, and only 22% when appearing before an immigration judge.²⁰ In other words, if the 2,560 "missing" Colombians were allowed to make claims in Canada in 2005, some 2,074 (81%) could have expected to receive protection here. Instead, because they are forced to remain in the US only 1,152 (45%) are likely to receive protection, based on 2004 acceptance rates.²¹ This means that, in the first year of the safe third alone, some 922 Colombians who would have received protection in Canada will instead face detention and removal to Colombia, or lives without status and with constant fear of arrest in the US.

The prospects for Colombians seeking protection in the US have diminished since implementation of the Safe Third Country Agreement. In addition to other restrictions in the US asylum program, a particular barrier for some Colombians is the US rule regarding "material support" for terrorism. Colombians from rebel-held areas of the country have generally faced extortion from rebel groups and risk therefore being denied protection in the US on the grounds that they have offered material support for terrorism, even though the support was given only under duress. The expansion of the definition of terrorism in the REAL ID Act, passed in May 2005, only increases this barrier for Colombians seeking protection from persecution.²²

²⁰ The Canadian statistic is based on data provided by the Immigration and Refugee Board. US affirmative claim statistics are available from the Department of Homeland Security and those from the immigration courts are found at <http://www.usdoj.gov/eoir/efoia/FY04AsyStats.pdf>.

²¹ In fact, the real number who can find protection in the US is likely to be much lower, since many of the Colombians who attempt to make claims in Canada do so because they know they have little chance of obtaining asylum in the US, for example because the one-year bar makes them ineligible.

²² Refugee Council USA, *Material Support Backgrounder*, 31 October 2005, <http://www.refugeecouncilusa.org/finmatsupback10-31-05w.pdf>. See also below, page 19, re. REAL ID.

5. IMPACTS ON THE LIVES OF REFUGEES

It is extremely difficult to collect evidence on the full impact of the Safe Third Country Agreement on the lives of refugees. Beyond the obvious and crucial handicap of lack of resources, NGOs face serious challenges in gathering information. It is difficult to even begin to evaluate what is happening to people in the US who would otherwise have found refuge in Canada, but who heard that the border was closed. Because presenting themselves at the border would bring them no advantage, but would on the contrary likely expose them to detention when they are sent back to the US, they don't identify themselves as applicants in Canada and there is no way to track them. They are nevertheless affected by the Safe Third Country Agreement and anyone interested in the impacts of the Agreement must be concerned about whether the closing of the Canadian door means that asylum seekers face rights violations that they would have avoided had they been able to claim refugee status in Canada.

The following are three examples of people in the US who did contact NGOs and learned that they cannot make a refugee claim in Canada, thus closing off what seems like the last window to safety. They had already been denied protection in the US but in circumstances that might suggest that they could have been granted protection had they been able to make a claim in Canada.

- Joseph (not his real name) worked in the Kenyan Ministry of Lands and Administration where he used his position to secretly save some of the original land titles for those whose lands were being distributed by the government to its supporters. His activities were discovered and he fled for his life. Shortly after he left, his father was clubbed to death by men seeking Joseph's whereabouts. Joseph sought asylum in the US, but on the day of his hearing in a Chicago immigration court he was unavoidably delayed by heavy traffic and was ordered deported in his absence. The Immigration Judge advised him to file a motion to reopen. However, the motion was denied and the appeal on the motion's denial was upheld by the Board of Immigration Appeals. In spring 2005, Joseph approached a refugee NGO about making a claim in Canada, but was told his claim would not be eligible because of safe third country. Joseph believes that his life is still in danger in Kenya because he is known to the bureaucracy and is considered a threat to the owners of the appropriated lands. He sees no alternatives but to continue to live without status in the United States, hoping not to be caught by the immigration authorities.
- Mario (not his real name) was a Colombian agronomist who had worked for an agrichemical company and provided agricultural training to poor farmers in rural communities. He also used his position to organize the farmers politically on behalf of his local political party. He was committed to and well trusted by the farmers. When the guerrillas from FARC started offering the farmers credit on their farms, he explained to them that if they accepted the money from the guerrillas, they would be at risk of being killed by the paramilitaries hired by the wealthy landowners. Having received death threats from the guerrillas, Mario went into hiding and escaped an assassination attempt. He and his wife used the visas that were intended for their honeymoon to flee to the US. Unfortunately, they received bad legal advice and failed to apply for asylum within the one year filing deadline. His subsequent claim for withholding of removal was denied by the Immigration Judge. In his decision, the judge said that Mario's testimony was

believable but that there were some inconsistencies in the case. For instance, he had testified that he had received two written death threats but he could only produce one. (He had never seen the other threat addressed to him as it was received by his brother-in-law after he had gone into hiding.) Mario has appealed his case to the Board of Immigration Appeals (BIA) and is awaiting a response, but he was looking for alternatives because the chances of success at the BIA are slim, given the low acceptance rates for Colombians in the US and the high standard that needs to be met in order to be granted withholding of removal.

- Mahmood (not his real name) is a Palestinian who entered the USA in February 2004. He immediately contacted an NGO at the border, asking about applying for refugee status in Canada. However, he was unable to make a claim at the border at that time because he was diagnosed with cancer and had to undergo chemotherapy. By the time he was well enough to return to the NGO, safe third was in effect, making him ineligible to claim in Canada. Since he had been in the US for over a year, he was also ineligible to apply there and he did not expect decision-makers would grant him an exception to the one-year rule. When last contacted, he remained in limbo in the US.

The largest number of people affected by the Safe Third Country Agreement are probably those who would have made a refugee claim in Canada had they not heard that safe third has closed the door. As noted above, while we may be able to estimate the number of affected persons overall and by nationality, there is no way to systematically identify individuals and track the impact on their lives.

We do know that, before the implementation of safe third country, many refugees found a permanent home in Canada after being refused in the US or missing the opportunity to make a claim there. These cases illustrate that refugees do not come to Canada simply as a matter of taste or out of fondness for frigid winters, but because they need to in order to find protection. The following are examples of people who were able to enter Canada before implementation of the Safe Third Country Agreement:

- An Ethiopian woman of Oromo ethnicity was imprisoned in her home country because of suspicions by the authorities that she and her family were involved in the Oromo Liberation Front. She suffered serious abuse and her father remained in prison, while two brothers had previously fled the country and been recognized as refugees. A friend of the family arranged for her release from prison and she travelled to the US in November 2002. In May 2004 her asylum claim was rejected. The decision maker found her credible but refused her on the grounds that there was inadequate nexus, or in other words that she had not shown that the persecution feared was sufficiently tied to her race, religion, nationality, political opinion or membership in a social group. She made a claim in Canada just before the implementation of the Safe Third Country Agreement. On 22 August 2005 the Immigration and Refugee Board found to her to be a refugee without even requiring a hearing.
- A Colombian family entered the US on a visa. They missed the opportunity to make a claim within one year of arrival, but stayed on in the US having heard reports that there would be an amnesty for Colombians. When it failed to materialize and they were at risk of removal back to Colombia, they came to Canada where their refugee claim was accepted.

- An Albanian family of four claimed asylum in the US in 1999 and was rejected. Their claim of persecution was based on their membership in the Democratic Party. They were considered anti-government due to their political involvement and faced persecution. Their refugee claim in Canada was successful.

Refugees with similar experiences to those above now find that Canada has closed the door on them, leaving them with no obvious recourse in their effort to avoid return to persecution.

Even where people do make a claim at the border and are returned to the US, it is difficult to follow what happens to them. Those who don't meet an exception to safe third who claim at the border are almost all people who have no contact with any refugee NGOs, since those who contact knowledgeable NGOs or lawyers will be advised not to make a claim if they are ineligible. Claimants rejected under safe third country are at the border for only a matter of hours and they are not referred to any NGOs or given an opportunity to seek a lawyer. If they are detained on return to the US, they face the same difficulties in seeking assistance as other immigration detainees (such as restricted access to telephones, frequent transfers, detention in isolated locations, lack of money to pay for a lawyer and lack of publicly funded legal services).

From January to November 2005, 281 claimants were denied eligibility based on safe third country. The following are accounts of some individuals with whom NGOs had contact:

- A claimant presented himself at the Lacolle, Québec port of entry on 29 December 2004, the day the Safe Third Country Agreement came into effect. A citizen of an Asian country, he had flown into JFK airport in New York just a few days earlier and had taken the bus up to Lacolle, on the way to Montreal where he has a cousin. He spoke very little English but became very agitated as he tried to explain the persecution he had fled in his home country, as a member of a minority group. Among the words he spoke were "wife", "daughter" and "bodies." He seemed to be talking about a massacre. He also explained his objective using the words "Canada human right." He arrived about 7 hours after Canada closed its doors on refugees seeking protection of their human rights. On being sent back to the US, he was immediately detained and was then transferred to the immigration detention facility in Batavia, New York. Several months later, he remained in detention. It has not been possible to make contact with him.
- Moustapha (not his real name) is a citizen of Guinea. Having been in the US for more than one year, he was not eligible to apply for asylum in the US and enquired about making a claim in Canada. He said he had a sister in Canada and so was presumed to qualify under a safe third exception. However, at the interview Canadian immigration officials determined that his "sister" was in fact his cousin. Moustapha had understood "sister" in his own cultural terms. He was sent back to the US, where he was detained and deported back to his home country, after an unsuccessful attempt to obtain asylum in the US.
- A family from Pakistan (parents and two young children) had been in the US for several years on work/student visas. They made a claim at the Canadian border and were found ineligible because of safe third. On being sent back to the US, they were arrested and detained but subsequently released due to the young age of the children. Because of the one-year bar, they were ineligible to make an asylum claim in the US. They also felt that they

had little chance of winning any form of protection in the US, since Pakistanis are rarely accepted (this is perceived as being due to Pakistan's support for the US' "War on Terror"). The family therefore decided to accept immediate removal to Pakistan. Before they left the US, they arranged with family and friends to hide them upon their arrival in Pakistan, since they feared that they would not be safe due to their religion.

For some people, safe third means a painful delay while they wait to be eligible.

- A pregnant woman found herself forced to wait several months in the US despite the fact that her partner and the father of her child is Canadian. In order to qualify as common-law partners the couple needed to have co-habited for a year, which was a few months off. With her baby due before then, the woman faced the prospect of giving birth in the US without health care coverage.
- A woman whose young child was in Canada was ineligible to make a claim while he was a refugee claimant. The child had to pursue his claim in Canada without the support of either parent, while his mother waited in a shelter in the US close to the border. Once the boy was accepted as a refugee, his mother was eligible to make a claim and mother and son were reunited.

As NGOs feared, the Safe Third Country Agreement can have extremely damaging impacts on children. Although there is an exemption for unaccompanied minors, the definition excludes children who have a parent in either the US or Canada and there is no provision for reuniting an unaccompanied child claimant in Canada with a parent applying at the border. As a result the best interests of the child are not necessarily taken into account when separated children arrive at the border. The case of "Ernesto" below illustrates the problems that can arise, even where immigration officials are sympathetic and responsive to the situation of a refugee child separated from his parents.

At the beginning of August 2005, a seven-year old boy Ernesto (not his real name) was brought up to the Canadian border by his maternal grandmother, to be reunited with his mother and to seek protection from threats of violence from his father. However, under the Safe Third Country Agreement he was prevented from making a claim in Canada and being reunited with his mother. Although Ernesto's mother was in Canada, she was a refused refugee claimant and therefore did not meet the safe third country rules of exemption on family grounds. And because his mother was in Canada, Ernesto did not meet the safe third country definition of unaccompanied minor. He was therefore sent back to the US after a brief and emotional meeting with his mother in the immigration offices. His mother said that at that meeting, Ernesto "clung to me constantly and was devastated when he found out that he was not going to go to Canada to be with me, as he had been told by his grandmother that day."

Ernesto's mother had fled to Canada to escape her violent ex-husband. The Immigration and Refugee Board found her account of abuse credible but denied her claim on the basis that they believed she could find protection in her home country (something she contests). Since the denial of her refugee claim, her ex-husband had started making threats against Ernesto, leading his grandmother to take him up to the Canadian border to his mother.

Turned away by the Canadian authorities, Ernesto and his grandmother spent the next four months in a shelter close to the Canadian border, hoping for a solution. Ernesto's psychological state had already been a concern in his home country, and those caring for him after the aborted reunion with his mother worried about him (one said that the first time she saw him smile and talk for any length of time was when a visitor brought him a package from his mother).

Confronted with the young boy's separation from his mother, many Canadian immigration officials collaborated to try to bring about a reunion. Ernesto's mother's application for humanitarian and compassionate consideration was expedited, fortunately with a positive decision in principle in September 2005. At this point Ernesto met one of the safe third country exemptions (family member with status in Canada) but he was still ineligible to make a refugee claim because he had previously made a claim. So Ernesto's mother applied for a Temporary Resident Permit for him, a process that even when expedited took a further three months. It was also a costly process: \$75 for a visitor visa application; \$200 for a Temporary Resident Permit, \$400 for a special application to enter Canada because Ernesto was barred for a year. In addition there were costs for courier mailings to the Canadian Consulate in the US and a medical for Ernesto. From her earnings at Tim Horton's, Ernesto's mother was of course in no position to assume all these expenses.

In December 2005, five and a half months after being separated from his mother at the Canadian border, Ernesto entered Canada and had an emotional reunion with his mother.

Situations such as that experienced by Ernesto might be more easily avoided if the Canadian Government made better use of the public interest exception that exists in the Agreement. The US uses this exemption broadly, whereas Canada has limited it to specific situations codified in the Regulation. The Canadian government has recognized the need for a more flexible approach to public interest exceptions. In its response to the Parliamentary Standing Committee on Citizenship and Immigration, the Canadian government stated that "it is not possible to exhaustively describe in sufficiently objective criteria all the situations where the public interest exception should be exercised. Accordingly, the regulations are intended to be supplemented by guidelines outlining further situations where the Minister may exercise his discretion in the public interest."²³ A year into the operation of the Agreement, no guidelines have been issued.

One of the effects of the Agreement is to force people underground, where their situation requires them to be secretive and to keep their distance from officialdom. This is true of people who decide to live without status in the US, having been denied asylum there or having concluded that there is no point in claiming asylum because they would almost certainly be rejected. It is also true of people who find a way to cross the border irregularly into Canada. They are unlikely to discuss openly how they got into Canada, including the risks and hardships they underwent. NGOs have pointed out that the Agreement forces people into the hands of

²³ Citizenship and Immigration Canada, *Government Response to the Report of the Standing Committee on Citizenship and Immigration: Safe Third Country Regulations*, May 2003, p. 5, <http://www.cic.gc.ca/english/pub/safe-third.html>, hereafter *Government Response*.

smugglers: smugglers in turn often put pressure on those they smuggle not to tell anyone about their experience.²⁴

Even where asylum seekers turn to NGOs for support, they will increasingly find that the network of refugee-serving organizations has been seriously weakened as a result of safe third. A number of shelters for refugees are either closing down or considering closing down, representing the loss of years of accumulated experience in protecting refugees. As a result, refugee claimants will be less likely to benefit from skilled and knowledgeable orientation and reception services, especially if – as may well happen – the numbers of claimants subsequently go up again, as asylum seekers find alternative ways into Canada. While grappling with questions of their basic viability, these NGOs have very little time to monitor the other impacts of safe third and to play their role, on behalf of civil society, as defenders of human rights.

Like all interdiction measures, safe third prevents asylum seekers from gaining access to the territory of the country in which they hope to win protection. Because those interdicted never get past the border, they remain invisible and are usually unidentifiable. Unlike wrongly rejected asylum seekers within the borders, they cannot draw attention to their situation through the media and through appeals to concerned citizens and politicians, and they cannot challenge their removal through the courts. Concerns over the fate of interdicted refugees grow as governments put more and more resources into interdiction, apparently successfully.

Significantly, but not surprisingly given the circumstances, no refugees blocked by safe third country have yet succeeded in challenging any aspect of the Agreement's impacts in the courts.

6. GENDER IMPACTS

The Canadian Parliamentary Standing Committee on Citizenship and Immigration was concerned from the outset about the particularly negative impact of the Agreement on women fleeing domestic violence.²⁵ In its response to the Standing Committee the government stated its position that “at a policy level” the US and Canadian approaches are “substantively similar.”²⁶ This approach fails to measure the true impact of the Safe Third Country Agreement on female asylum seekers in the US. This position seems to assume a uniform approach to decision-making as well as to ignore the impact of procedural bars, access to legal representation and detention policies on female asylum seekers. When viewed as a whole, it is easy to see how female asylum seekers could and are falling through gaps in the US system.

²⁴ See below, page 28, for more information on smuggling.

²⁵ In fact they recommended that “until such time as the American regulations regarding gender-based persecution are consistent with Canadian practice, women claiming refugee status on the basis that they are victims of domestic violence be listed as an exempt category under section 156.9 of the proposed regulations.” *The Safe Third Country Regulations: Report of the Standing Committee on Citizenship and Immigration*, Joe Fontana, M.P., Chair, December 2002, Recommendation 2 (hereafter *Standing Committee Report*). Available from www.parl.gc.ca or at <http://192.197.82.11/infocomdoc/Documents/37/2/parlbus/commbus/house/reports/cimmrp01/03-cov-e.htm>

²⁶ *Government Response*, p. 2.

Sadly, a thorough discussion of this divergence between substance and procedure is sorely lacking in the government's own analysis of the differences between US and Canadian law.²⁷ In its analysis the government highlights the gender guidelines issued by the Immigration and Naturalization Service of the US.²⁸ While the analysis of the substance of these guidelines is correct, the report fails to mention that the guidelines are only binding on one entity within the asylum determination process in the US. Not only are the guidelines not binding on all decision-makers, the system is structured in such a way that female asylum seekers may be forced to enter the system at a level where the gender guidelines simply do not apply.²⁹ For example, if a female asylum seeker is apprehended upon entering the country and placed in removal proceedings, her case will never be heard by a decision-maker who is bound by the gender guidelines.

Even for female asylum seekers who are lucky enough to appear before a decision-maker who is bound by the gender guidelines, other procedural rules in US asylum law often deny them protection.

- Iman³⁰ (not her real name) fled from Guinea to the US in spring of 2000. In Guinea, 98.6% of women are the victims of female genital mutilation.³¹ When Iman was fifteen, she was kidnapped, held down and had her genitals mutilated with a curved knife. Iman suffers from extreme post-traumatic stress disorder. Iman has a young daughter. If Iman is returned back to Guinea she is sure her daughter will be the victim of female genital mutilation. Iman did not win in front of the decision-maker who is bound by the gender guidelines, because her claim was filed too late according to US procedures.³² Iman filed for asylum four years after her arrival. Her case has been referred to an immigration judge who is not bound by the gender guidelines.

²⁷ Even though the government's analysis does not spend much time on the structure or procedural rules of the US system, it still finds that "Canada and the United States have different approaches to the treatment of claims based on gender-based persecution [. . .]." *Treatment of Gender-Based Asylum Claims in the United States*, 31 March 2003, <http://www.cic.gc.ca/english/policy/asylum-gender-us.html>, (hereafter *Gender Analysis*)

²⁸ Immigration and Naturalization Service Memorandum, *Consideration For Asylum Officers Adjudicating Asylum Claims From Women*, 26 May 1995. (hereafter *INS Guidelines*)

²⁹ In the US there are two routes to apply for asylum, either affirmatively or defensively. Affirmative applications require the applicant to initiate the process through the asylum officer level, whereas in defensive applications, the asylum seeker has been apprehended by the US government and she must file at the immigration judge level, losing the benefits of the asylum officer interview, the only level actually bound by the INS guidelines.

³⁰ All of the cases discussed in this section of the report are either currently pending or were decided since the implementation of the Safe Third Country Agreement.

³¹ US Department of State Report, *Guinea: Report on Female Genital Mutilation (FGM) or Female Genital Cutting (FGC)*, 1 June 2001, <http://www.state.gov/g/wi/rls/rep/crfgm/10101.htm>. (Note this report covers the year that Iman fled Guinea).

³² In the US there is a one-year filing deadline. An asylum applicant must prove "[b]y clear and convincing evidence that the [asylum] application has been filed within 1 year of the date of the alien's arrival in the United States" 8 C.F.R. 208.4 (a)(2). There are exceptions to the one-year bar, including either "changed circumstances" or "extraordinary circumstances" but if you do not meet those exceptions you do not qualify for asylum protection.

- Gertrude Nkonye Chidi filed for asylum based on her fear that she would be a victim of female genital mutilation if she were returned to Nigeria. She presented evidence that up to 60% of Nigerian women are subject to female genital mutilation and that the government does not protect them.³³ However, Ms. Chidi filed for asylum after the one-year deadline. She appealed her case all the way up to the US Federal Court of Appeals Fifth Circuit. The Court noted that Ms. Chidi's application was time-barred and ruled that she did not meet the higher standard of withholding of deportation.³⁴ Ms. Chidi's case was decided on 29 March 2005; because of the implementation of the Safe Third Country Agreement she cannot seek refuge in Canada.

As the government's analysis highlighted, the situation for women fleeing persecution in the form of domestic violence has been unsettled in the US since the Board of Immigration Appeals' 1999 decision in *Matter of R-A*.³⁵ Over five years since the *Matter of R-A* decision was issued, refugee advocates are still awaiting the regulations that the US government promised they would issue to clarify the law. In the meantime female asylum seekers must decide whether to make a claim in light of this lack of guidance and the possibility of inconsistent decision-making.³⁶

The lack of clarity regarding how gender is categorized into particular social groups impacts cases outside of domestic violence claims. In the government's analysis, *Matter of Kasinga* is hailed as an "international landmark"³⁷ in the recognition of female genital mutilation as the basis for an asylum claim. While the government's analysis is again true, the impact and possible detrimental consequences of the US approach in *Kasinga* is more accurately seen when viewed in light of the entire asylum determination system. In the absence of clear guidance or gender regulations that are binding on the entire asylum system, the decision-makers in *Kasinga* had to form a particular social group that didn't solely rely on gender.³⁸ Without binding guidelines stating that gender constitutes a particular social group, decision-makers are free to use their discretion in a way that denies asylum to female asylum seekers but still allows the US law to look "substantively similar" to Canada at the policy level. For example, one of the criteria in the particular social group formed in *Kasinga* is opposition to the practice of female genital mutilation. While the government's analysis does not focus on this component of the group,³⁹ it is used by decision-makers when evaluating asylum claims.⁴⁰

³³ *Chidi v. Gonzales*, No. 04-60247, 127 Fed. Appx. 134 (5th Cir. Mar. 29, 2005)

³⁴ *Id.*

³⁵ In *Matter of R-A* a Guatemalan woman who had been brutally abused by her husband sought asylum in the US. Her asylum claim failed.

³⁶ Such asylum seekers are faced with the additional burden of knowing that if they file they are at risk of being detained.

³⁷ See *Gender Analysis*.

³⁸ The particular social group defined by the Board of Immigration Appeals was "young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice, are recognized as members of a 'particular social group.'" *In re Kasinga*, 21 I&N Dec. 357 (BIA 1996).

³⁹ The focus of the government's analysis seems to be only that at the policy level and in certain courts female genital mutilation can rise to the level of persecution.

⁴⁰ This approach is used even by decision-makers who are bound by the 1995 *INS Guidelines*, as Fatima's case illustrates.

- Fatima (not her real name), a woman from Guinea, began to suffer serious problems when her father died. Her uncle took all of the property that her father had left for her, her mother and her sister and told Fatima that she would have to marry his friend. He threatened to kill her if he saw her with her boyfriend. After about a month she was summoned to her aunt's house. As she walked into her aunt's living room, four of her aunts overpowered her, held her down, and ripped her clothes from her body. She then fainted when she saw them pull out a knife. As they were slicing through, removing her clitoris, more blood than usual gushed forth. To keep her alive, they had to stop and bring her to a hospital. Her uncle then came to see her while she was lying there and said that they would finish the job. Fatima knew that now that her father was dead she would have no protection from female genital mutilation. She had to flee. With the help of her mother and boyfriend, she got her passport, scraped together enough money and fled before her uncle found out. After her arrival in the US, her uncle called several times and threatened to kill her if she did not return. Fatima's application for asylum in the US was denied. In a response to her appeal the asylum officer admitted that Fatima had proven that she was the victim of female genital mutilation. She had filed within the one year bar, and the government admitted that Fatima had female genital mutilation performed on her. However, according to the reasons for the denial, Fatima had not proven that the female genital mutilation was done against her will. In other words she didn't fulfill the "oppose the practice" element of the particular social group formed in *Kasinga*.⁴¹

Within the government's own analysis are numerous citations of federal reversals⁴² of Board of Immigration Appeal decisions. These reversals demonstrate that the "substantively similar" law that the Safe Third Country Agreement is based on is not applied uniformly within the US asylum determination system. While refugee advocates appreciate the role of the federal courts in the asylum process, in reality not all asylum seekers have access to them. In light of US detention policies, lack of adequate representation, and the inherent difficulties in filing a federal appeal many asylum seekers do not have a chance to have their claims heard at the federal level.

When reviewed as an entire system and not simply at a policy level, the US and Canadian systems arguably are not "substantively similar" for female asylum seekers. In its response to the Parliamentary Standing Committee on Citizenship and Immigration, the Canadian government stated that it "agrees that monitoring of the Agreement will include gender-based analysis."⁴³ Since female asylum seekers are affected by procedure, detention policies, as well as substantive law and policy, it is hoped that when the government performs the promised gender-based analysis, it commits to analyzing the impact that the entire system has on female asylum seekers.⁴⁴ This type of analysis will more accurately highlight the plight of female asylum seekers who fall in the chasm between US asylum policy and protection.

⁴¹ Fatima is in the United States on a valid visa. Since she is still in status Fatima's final decision on her asylum case comes from the Department of Homeland Security. Because of her status, her case will not be referred to an immigration court.

⁴² See the *Gender Analysis* regarding US law on rape cases.

⁴³ *Government Response*, p. 3.

⁴⁴ See however below, page 21, on the lack of follow up by the Canadian government on this and other commitments.

7. EROSION OF REFUGEE RIGHTS IN THE US

While the governments of Canada and the US were working towards implementation of the Safe Third Country Agreement, efforts were underway in the US Congress to make legislative changes to the asylum system that would significantly reduce still further asylum seekers' chances of getting the protection they need. These efforts led to the signing into law on 11 May 2005 of the Real ID Act, despite the opposition of numerous refugee, human rights and faith groups, among others.⁴⁵ Since the Agreement is based on the principle, hotly contested by refugee advocates, that at the time of signing both countries met their international protection obligations towards refugees, it should be a concern that one of the countries has lowered the safeguards for refugees. Yet, the Agreement continues to be in force, without any formal review of whether the new US rules could mean that refugees forced to claim in the US will be denied protection.

Real ID contains a number of provisions that narrow access to protection, including:

- Restricting the definition of those who can win protection to those who can show not only that they have a well-founded fear of persecution on grounds of race, religion, nationality, political opinion or membership in a social group (the Convention refugee definition), but also that one of these grounds is a “central reason” for the persecution. This means that asylum seekers known to be at risk of persecution may be denied protection because a decision-maker decides that other reasons for the persecution predominate. Women fleeing gender-based persecution are likely to be among those to suffer most from this re-writing of the definition, since violence against women is often interpreted as being motivated by a variety of reasons.
- Increasing the demands on asylum seekers to provide documentary or corroborating evidence. Unless they are high profile individuals, refugees are often unable to provide documentary evidence of the persecution they fear. This is particularly true of refugees from poor countries that attract little international attention and of women and sexual minorities whose situation may be deemed not worth writing about.
- Allowing decision-makers to base credibility findings on “demeanour” or inconsistency with a statement made previously. This allows for arbitrary and culturally insensitive findings of non-credibility where an asylum seeker’s “demeanour” is considered not credible. The reference to inconsistency with previous statements could mean that an asylum seeker is found not credible because she mentions at her hearing that she was raped, a fact that she did not disclose to an immigration officer, perhaps male, when she first sought asylum at the border. A similar concern applies to members of sexual minorities who may not at first disclose persecution suffered on account of their sexuality, for example because they have learned to keep silent about this aspect of their identity in order to protect themselves.
- Expanding bars to asylum based on association with “terrorist” organizations, even if the only association was that they were victims of extortion (e.g. an armed group points a gun at your head and demands that you pay up or you will be killed). Spouses and children of such persons may also be barred, even if they had no knowledge of their family member’s association.

⁴⁵ Information about Real ID and opposition to it can be found on the Human Rights First website at http://www.humanrightsfirst.org/asylum/asylum_10_sensenbr.asp

These new restrictions on protection are added to already existing problems in the US system including:

- One year bar (this rule means that, with certain exceptions, persons who have been in the US for more than a year cannot make a refugee claim).
- Widespread use of detention (apart from the inherent rights violation in being deprived of freedom, those who are detained face significant barriers pursuing their claim, because they are locked up away from lawyers, NGOs, interpreters, libraries and documentation centres, etc).⁴⁶
- Unclear standards on claims based on domestic violence.⁴⁷
- Lack of legal aid (unrepresented asylum seekers have less chance of winning asylum).⁴⁸
- Inadequate quality of decision-making by immigration judges.⁴⁹
- Lack of social assistance or even the right to work (this represents a particular challenge for women with children).

As the year drew to a close, a new legislative threat to refugee rights appeared in HR 4437, a bill passed by the House of Representatives on 16 December 2005. Entitled the “Border Protection, Antiterrorism and Illegal Immigration Control Act”, the bill will if it becomes law significantly reduce still further the chances that those in the US needing refugee protection will receive it. The bill would:

- Treat asylum seekers as criminals by making it a felony to be “out of status” after overstaying a visa.
- Limit access to federal courts and deprive many asylum seekers of review by the federal courts.
- Increase the detention of asylum seekers and expand expedited removal.⁵⁰

⁴⁶ In the course of FY2003, approximately 13,800 asylum seekers were detained in the US. This number is calculated from the information that 6% of 230,000 immigration detainees in FY2003 were asylum seekers. US Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal*, 8 February 2005, Vol. II, p. 180, available at http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/index.html.

⁴⁷ See above, page 15, for more information on treatment of gender-based claims.

⁴⁸ A study shows that asylum seekers in the US are between four and six times more likely to be granted asylum when they are represented. Detained asylum seekers are represented at only half the rate at which non-detained asylum seekers are represented. Asylum Representation, Summary Statistics. Prepared by Andrew I. Schoenholtz, Director of Law and Policy Studies, Institute for the Study of International Migration, Georgetown University, May 2000. While the US government now funds a Legal Orientation Program in six of the major detention facilities, most detention centres (including all of the jails used) have no such legal assistance on offer to detained asylum seekers.

⁴⁹ New York Times, *Courts Criticize Judges’ Handling of Asylum Cases*, Adam Liptak, 26 December 2005, reporting on Federal Court excoriating immigration judges for a “pattern of biased and incoherent decisions in asylum cases.”

⁵⁰ Human Rights First, News Release, *Border Bill Passes in the House*, 19 December 2005, http://www.humanrightsfirst.org/media/2005_statements/asy_1219_bill.htm.

The threats to the rights of refugees must be seen in the context of broad erosions of civil liberties within the US, where the right to be free of torture and the rule of law appear to be in question.

8. CANADIAN GOVERNMENT'S DISREGARD FOR THE BROAD IMPACTS OF THE AGREEMENT

According to the preamble of the Agreement, the governments of the US and Canada are convinced that “agreements among states may enhance the international protection of refugees by promoting the orderly handling of asylum applications by the responsible party and the principle of burden sharing.”⁵¹

Despite this commitment, the Canadian Government has not shown an interest in exploring whether the Agreement is enhancing (or reducing) the protection of refugees. Nor has the Government appeared much concerned about how “orderly” the handling of refugee claims is since implementation and how this is affecting the protection of refugees.

NGOs on both sides of the border have been favourably impressed by the professionalism and consideration with which Canadian officials have handled most claims affected by safe third country. They have also appreciated the efforts made by officials, at the border and elsewhere within the immigration department, to try to resolve particular problems that have been brought to their attention.

These individual and collective efforts by immigration officials do not however change the fundamental damage done by the Safe Third Country Agreement to refugees who need Canada's protection and find that the border is closed to them. It is to this impact that the government has shown complete indifference.

a. Protection in the US

According to the *Immigration and Refugee Protection Act*, the following factors are to be taken into consideration in designating a country as a safe third country:

- (a) whether the country is a party to the Refugee Convention and to the Convention Against Torture;
- (b) its policies and practices with respect to claims under the Refugee Convention and with respect to obligations under the Convention Against Torture;
- (c) its human rights record; and
- (d) 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.⁵²

The Act also requires that Cabinet “ensure the continuing review” of these factors.

⁵¹ Agreement, P7.

⁵² *Immigration and Refugee Protection Act*, s. 102(2).

Despite this requirement, and Canada's international obligation not to return refugees directly or indirectly to face persecution or torture, the Canadian government does not appear to have given much attention to the considerable evidence suggesting that the US is not respecting its obligations under the Convention Against Torture, that its human rights record has many significant stains and that its policies and practices with respect to asylum seekers are problematic in many regards and have deteriorated since implementation of the Agreement.

The Canadian government has issued no statement concerning their evaluation of the implication of the REAL ID Act for refugees forced to seek asylum in the US because of the Safe Third Country Agreement.

b. Gender impact

The Canadian government's own analysis acknowledged that the Agreement "will likely have differential impacts by gender", drawing attention to the fact that Canada and the US have "different approaches to the treatment of claims based on gender-based persecution."⁵³ In its response to the Standing Committee on Citizenship and Immigration, which had recommended exempting women claiming status as victims of domestic violence, the government stated:

"While there may be some differences in approach on individual cases, it is Canada's position that, at a policy level, the approaches are substantively similar. Acknowledging the on-going debate, however, a review of these types of cases will form part of the review and monitoring process. The details of the review, including data needs, research issues and analysis will be undertaken in partnership with the UNHCR and relevant non-governmental organizations [...] The Government will be in a better position to assess the impact of the Safe Third Country Agreement on different groups after its implementation, once the data has been gathered and analyzed."⁵⁴

The CCR inquired about this review at a quadripartite meeting on the Safe Third Country Agreement held on 16 November 2005.⁵⁵ There was no indication that any such review is being conducted. It does not appear that the Government is actively seeking to find out whether there are differential impacts by gender, as it anticipated.

c. Direct backs

Since 27 January 2003 the Canadian government has had in place a policy of directing refugee claimants "temporarily" back to the US if they arrive at a moment that is inconvenient to the border officials, even if the claimant will be detained in the US and therefore unable to return to

⁵³ *Regulations Amending the Immigration and Refugee Protection Regulations*, Canada Gazette, Part I, 26 October 2002, page 3243, <http://canadagazette.gc.ca/partI/2002/20021026/html/regle-e.html#36>. The Regulatory Impact Analysis Statement also finds that the Agreement will likely have differential impacts with respect to diversity considerations, pointing out that US and Canada have different approaches to the treatment of "those who arrive and make a refugee claim without appropriate documents".

⁵⁴ *Response*, p. 2

⁵⁵ The quadripartite meeting involved representatives of the US and Canadian governments, the UNHCR and NGOs from both countries. It provided an opportunity for a sharing of perspectives on the implementation of the Safe Third Country Agreement.

pursue their claim in Canada.⁵⁶ Ironically this policy was introduced just after the Safe Third Country Agreement was signed (but before its implementation). Having boasted that the Agreement provided an orderly way to share responsibility for the determination of refugee claims with the US while respecting the rights of asylum seekers, the Canadian government brought in a new measure that effectively shifted responsibility for determining some claims, in an arbitrary and disorderly way, without attention to the rights of asylum seekers, based purely on the administrative convenience of Canadian border officials. Under the direct back policy, Canadian officials can send a refugee claimant back to the US with an appointment date to pursue the claim at a time more convenient to the officials. Since decisions to direct back are made without regard to whether they will be detained by the US authorities, some of those directed back are effectively denied their right to make a claim in Canada. While at some ports of entry it is possible to make an appointment in advance, and therefore normally avoid the danger of a direct back,⁵⁷ other ports refuse to make appointments and therefore claimants don't know until they arrive whether the officials will consider it a convenient time to process their claim.

After the implementation of the Safe Third Country Agreement, the Canadian government continues to rely on the policy of direct backs, making a mockery of the lofty principles on which the Agreement purports to be based.⁵⁸ While the Agreement proclaims that asylum seekers returned under the Agreement will benefit from certain safeguards and identifies categories of claimants who will be exempted from return, the direct back policy means that some claimants, simply on the basis of administrative convenience, may not benefit from those safeguards and will be returned to the US even though they meet one of the exempt categories in the Agreement.

The continuation of the direct back policy also seems perverse given that the stated justification for its introduction (the large number of claims at the border) no longer exists.

The Canadian government does not even provide any statistics on the numbers of claimants directed back.⁵⁹

⁵⁶ For further information on direct backs, see the Petition to the Inter-American Commission on Human Rights, 31 March 2004, <http://www.web.ca/ccr/IACHRpet.PDF>.

⁵⁷ We say "normally" because even an appointment does not necessarily prevent a direct back. In November 2004 a Togolese refugee claimant presented himself at the Emerson port of entry for an appointment to make a claim. The border officials decided that he should do the interview in French and, since there was no French-speaking official available, that he should be directed back. Despite his protests that this would mean that he would be detained, he was sent back to the US, where, as he predicted, he was detained. In December 2004 the US deported him to Togo, even though the Canadian government had indicated that he would be admitted to pursue his claim in Canada if he presented himself at the border. He was persecuted in Togo and fled the country again.

⁵⁸ For the period 1 January 2005 to 31 May 2005, 47 claimants were directed back, of whom 12 failed to re-appear for their scheduled interview, according to the *Supplemental Response of the Government of Canada to the petition of John Doe et al.*, Case no. P554/2004, Inter-American Commission on Human Rights, 20 October 2005.

⁵⁹ At the quadripartite meeting, 16 November 2005, the Canadian government indicated that they had begun to keep statistics on direct backs. See however footnote 58 above for statistics provided by the government for the first part of the year.

Sergio (not his real name) came up to the Canadian border in August 2005. He was accompanied by family members, who had status in Canada, making him eligible under safe third to claim refugee status in Canada. However, when he arrived at the border, officials decided that it was not convenient to process his claim immediately and directed him back to the US with a later date to return. Sergio and his family pleaded that he not be directed back, but without success. He was detained by the US authorities on arrival at the other side of the border and sent to Batavia immigration detention centre. Many people intervened in the case, and thanks to special efforts by Canadian immigration officials, Sergio was eventually released by the US and able to enter Canada at the beginning of September to pursue his claim in Canada. However, he spent several very difficult weeks in detention, in conditions so bad that he was considering abandoning his efforts to fight removal.

The Canadian government has indicated that it is reviewing the direct back policy, but after several months of review, it remains in place.

d. Slow processing of refugee claims

Despite the dramatic reduction of the numbers of refugee claims at the border, claimants have been made to wait for processing, suggesting that however few the claimants, the resources available will be reduced still further so as to be insufficient. In Windsor over the summer and fall claimants were made to wait two to three months for an appointment to file their claims. Waiting periods at Fort Erie stretched to four or five weeks, an inexplicably long delay given the low numbers. Claimants at Lacolle are not able to make appointments: they are processed on arrival but are sometimes expected to wait 24 or even 36 hours at the border, even when there is no apparent surge in numbers.

e. Casualties, smuggling and trafficking

The Canadian Standing Committee on Citizenship and Immigration recommended that the government conduct a full review of the Agreement after its first year and include among the findings a report on human smuggling and human trafficking activity and “reports on any migrants killed or injured in the course of attempting illegal entry into Canada.”⁶⁰

According to the government’s response, it is in broad agreement with this recommendation and proposes to work with UNHCR and with input from NGOs and the US Government.⁶¹ However, attempts by the CCR to inquire about monitoring of casualties at the border have been met with indifference on the part of the government.⁶² Officials have said that if NGOs have knowledge of abuse, it should be reported to the police or the Canada Border Services Agency for possible criminal investigation. There does not appear to be any attempt to collect information and investigate whether the Safe Third Country Agreement has led to casualties at the border or an increased vulnerability of asylum seekers to abuse by smugglers or traffickers.⁶³

⁶⁰ *Standing Committee Report*, Recommendation 17.

⁶¹ *Government Response*, p. 8.

⁶² For example at the 16 November 2005 quadripartite meeting.

⁶³ See below, page 28, for more information on concerns about smuggling and trafficking.

The indifference of the Canadian government to the broad impact of the Agreement on refugees tends to confirm that the purpose of the Agreement in fact has nothing to do with “enhancing the international protection of refugees”. As reported by the Canadian Standing Committee on Citizenship and Immigration, it seems that the purpose is simpler and meaner:

“Officials from Citizenship and Immigration Canada informed the Committee that the purpose of the Agreement is to reduce the number of refugee claims being referred to the IRB [Immigration and Refugee Board]”.⁶⁴

This purpose seems more in keeping with the clear statement by a Department of State official at a hearing of the House Judiciary Committee, that the Safe Third Country Agreement was negotiated because Canada wanted it.⁶⁵

9. LACK OF INFORMATION

One of the most important general findings about the impacts of safe third is that there is a serious problem of lack of information. The terms of the Agreement and corresponding regulations are complex and little understood. Even immigration lawyers have been found on occasion to be muddled about the basic provisions of the Agreement. Immigrant-serving agencies are not necessarily well-informed and may not know how to get accurate information about the new rules. The governments have made no effort to make information publicly available, leaving those interested to read the regulations or the immigration manual⁶⁶ – hardly accessible documents and not intended for use by the general public. Even those documents will not give you all the information you need to understand how the new rules work: one of the exceptions applies to nationals of moratoria countries, but the Canadian government nowhere publishes the list of moratoria countries. In the course of the year, one of the exempt countries (Sri Lanka) was removed from the list without any effort to communicate the information to the NGOs and lawyers that might be asked advice by claimants wishing to claim refugee protection in Canada.

Some findings relating to lack of information:

- A seven-year-old boy was brought to the border based on advice by a lawyer that he would be exempt from safe third because his mother was in Canada. In fact, his mother was a refused refugee claimant and he was therefore found ineligible, losing the only chance he will have in his life to make a refugee claim in Canada.
- A Canadian NGO representative explained how he had counselled by telephone various people in the US as to whether they are exempted from safe third country, including mistakenly advising one person that he was barred by safe third, when in fact the person was exempt.

⁶⁴ *Standing Committee Report*, page 6.

⁶⁵ Subcommittee on Immigration, Border Security, and Claims of the Committee on the Judiciary, House of Representatives, October 16, 2002, http://commdocs.house.gov/committees/judiciary/hju82363.000/hju82363_0.HTM

⁶⁶ The relevant manual is PP 1, *Processing Claims for Protection in Canada*, a 117 page document available on the CIC website.

- A Canadian NGO staff member serving Afghan refugee women was unaware of the exemption for Afghans (Afghanistan is a moratorium country).
- Immigration lawyers exchange emails querying whether safe third country bars a person who has been denied refugee protection in the US (it does not).

It goes without saying that refugees themselves are for the most part uninformed or ill-informed about the provisions. Women in particular are likely to have least access to information. There are many reports that the message that has got out is that the border is closed. This would seem to be confirmed by the dramatic decrease in numbers of claims that go well beyond the numbers we can estimate would be excluded by the Agreement, suggesting that people who meet one of the exceptions are not presenting themselves, believing that the door is closed on them too.

Inevitably refugees who are actually exempt from safe third but who have heard that the border is now closed will make choices based on misinformation, including perhaps crossing the border irregularly.

The Canadian government acknowledged at the November 2005 quadripartite meeting that there is a need for better communication about the practical implications of the Safe Third Country Agreement and committed to make changes.

10. PRE-IMPLEMENTATION

The Safe Third Country Agreement was implemented on 29 December 2004, a date that was widely agreed, both within and outside government, to be a particularly ill-advised time of the year, in the middle of the holiday season and in the depths of winter. The Canadian Council for Refugees had been assured previously by the Canadian government that consideration would be given to the best date for implementation and that a mid-winter date would be avoided.

In the event, not only was this sensible commitment disregarded, but the date of implementation was decided only a month in advance, leaving the governments, not to mention NGOs, scrambling to get themselves ready. The haste was particularly incomprehensible given that two years had passed since the signing of the Agreement by the two countries, indicating that the governments felt no urgency to implement it. One of the results of the extremely short lead-in time is that NGOs were invited to give comments on draft guidelines for implementation, but were later told that there had not been time to integrate the comments before finalization of the Canadian guidelines.⁶⁷

The timing of the implementation as well as the lack of adequate preparation led to a crisis at the border in late December 2004, as asylum seekers tried to make their claim before the implementation of the Agreement closed the door on them.

⁶⁷ These guidelines were incorporated into the CIC manual PP 1, *Processing Claims for Protection in Canada*, available at <http://www.cic.gc.ca/manuals-guides/english/pp/pp01e.pdf> (see update 2005-01-07).

Throughout the month of December, more and more asylum seekers assembled in Buffalo, registering with VIVE, an NGO with long years of service assisting asylum seekers who are preparing to make a claim at the Canadian border. The backlog grew day by day, because the number of officers processing claims on the Canadian side, at Fort Erie, was not increased in line with the (highly predictable) increase in numbers of claimants. Other border points were busy, but not working to capacity, because the direct back policy made them dangerous for claimants to approach without an appointment and some, such as Lacolle, refused to give claimants appointments.⁶⁸

Asylum seekers waiting for appointments in the growing backlog in Buffalo were repeatedly assured that a solution would be found to ensure that they were processed before implementation of the Agreement, but by 23 December, with only a handful of days left and no sign of a solution, the situation was desperate. Over 400 people approached the Fort Erie border on 23 December. Despite offers from shelters in the region that were willing to accommodate the refugee claimants, they were forced to wait long periods in the sub-zero temperatures, many held in school buses. Claimants were separated from their luggage, including basic necessities such as diapers and formula for babies. Overnight, a makeshift camp was set up in the immigration buildings, with people filling all available space including corridors. Many were inadequately clothed for the cold, and the stress and confusion of the situation was increased by the lack of information and interpretation (even French was apparently beyond the available range). NGO representatives present witnessed officials shouting at claimants and were in some cases treated rudely themselves. The chaotic situation was at risk of getting worse as more asylum seekers waiting in Buffalo were planning to come to the border on subsequent days.

The following day, Canadian government headquarters moved to avert an intensification of the crisis by announcing that Canadian immigration officials would travel to Buffalo to register any asylum seekers wishing to make claims in Canada before implementation of the Agreement, exempting them from the requirement of appearing physically at the Canadian border. With the collaboration of VIVE, this strategy was successful in allowing several hundred asylum seekers to qualify under pre-safe third country rules.

If the strategy had been implemented several days or weeks earlier, the crisis of 23 December could have been averted. It would also have saved the asylum seekers who, on being directed back from Fort Erie, were detained by the US authorities. With the assistance of VIVE, several were eventually released from detention, but some faced no alternative but deportation, with the result that they were deprived of their opportunity to pursue a refugee claim in Canada even though they had presented themselves at the Canadian border and made a claim before the implementation of the Safe Third Country Agreement.

The pre-implementation crisis also placed a heavy burden on hundreds of asylum seekers who were forced to wait up to 3 months on the US side of the border for their appointment date for processing in Canada. They received no financial support from either the US or Canadian governments during these long waits, despite the fact that many families had little money to cover the costs of living in a motel for several months.

⁶⁸ See above, page 22, for information on the direct back policy. In the month preceding implementation of safe third, 47 claimants were directed back by Lacolle.

11. PROMOTING SMUGGLING AND TRAFFICKING

The following experience at the US-Mexico border dramatically illustrates the dangers faced by migrants for whom the front door is closed.

A mature woman with grown-up children, Cecilia (not her real name), made a refugee claim in Canada in 2004, having crossed Mexico and the United States in her flight from a Central American country. Her journey began after her partner was found dead and Cecilia had received threats directed against her. In order to save herself, she engaged a smuggler to take her to the US. She paid half the price up front and promised to pay the other half after arrival. She travelled in a group of 15 men and 2 women.

Having entered and crossed Mexico they reached the Rio Grande, where they were told to take off all their clothes and put them in a plastic bag. At first Cecilia left her underwear on, but the smugglers claimed that even her underwear would be too heavy if wet and they verbally abused her into getting completely naked. They crossed over in two groups on a large inner tube. Not knowing how to swim, Cecilia feared for her life as she braved the strong currents of the river. Having made it to their other side, they were forced by the smugglers to run before they had even had time to get their clothes fully on. It was raining, the soil was slippery and Cecilia fell over several times, which caused her bruises.

The group was then transported in a vehicle, in which they were hidden in the trunk or on the floor, to a shelter, from which they were taken, hidden in a larger vehicle, to a place in the middle of nowhere. They were each given one bottle of water and three cans of food and had to walk for three days and four nights through the desert, accompanied by two smugglers. Cecilia became so utterly exhausted, thirsty and hungry that eventually she had no strength to continue. She thought she was going to die and put her passport between her underwear and her skin, where it would be found if someone came across her body. One young man tried to encourage her, saying, "Think of your children – they want to see you alive." One of the smugglers insulted her, saying it would be her fault if the group were caught by the immigration authorities. Cecilia was on the verge of fainting and her throat was dry and sore due to thirst and tiredness. The smuggler told her she must drink her urine, which she had no choice but to do. Two young men from the group of migrants helped her to continue, putting her arms around their necks and carrying her forward.

Finally, they arrived at a road and after a further day's wait, they were picked up in a car. Cecilia's feet and legs were swollen and bruised and she was bleeding at her thighs and between her legs from the days-old friction caused by the sand and sweat. In the car, she was squashed on the floor with four other people lying on top of her. When she got out, her legs were purple and numb from lack of blood circulation and she was unable to walk and fell down.

The group was taken to a garage where mattresses were set out. However, the two smugglers took the two women from the group, ordered them to take a shower and raped them. Cecilia pleaded for pity given her physical condition, but the man raping her covered her mouth and told her that if she didn't keep quiet she would not be able to speak to her sister who was waiting for her in New York. A young man from the group came to see what was happening and tried to intervene, but was threatened away with a gun.

Cecilia was finally delivered, after further delays, to her sister in New York. She still owed the smugglers half the price of their service.

Cecilia's experience highlights the vulnerability of migrants crossing borders to physical danger, humiliation and abuse. The risk for women is particularly acute. The scene described above will not be exactly reproduced at the US-Canada border (apart from anything else, the desert would not be a factor, perhaps replaced by winter storms and sub-zero temperatures). However, forcing women, men and children to look for a back door makes it likely that some will run serious physical risks and that some will be exploited and abused by smugglers.

In addition to the dangers faced in direct connection with the journey, women forced to rely on smugglers may be vulnerable in other ways. In some cases, women have little power to make their own decisions about their journeys: the men in their family will make the decisions and put them in the care of a smuggler who in turn will decide the route to get them to Canada, if that is the destination chosen for them. At the destination, NGOs, even those with close connections with the women's community, face great difficulties in giving adequate services when smugglers have warned women not to trust anyone.

While statistics on inland claims do not suggest that there are yet large scale irregular crossings of the border, they do provide evidence suggesting that they may be increasing as people find alternate routes across the border now that the front door has been closed on refugees. In each of the months of September, October and November, there were more than 1,200 inland claims, compared to a monthly average of just over 900 from January to August. The numbers of claims in each of October and November were higher than in any month in 2004.

Even though NGOs are not well-placed to know details of irregular border crossings, it is known that some people are finding ways to cross the border. The following are some of the cases that have been reported involving refugee claimants known to have crossed the border irregularly because of safe third.

- Two adult siblings crossed the border hidden in the trunk of a car. Their father died of a heart attack soon afterwards: the children believe it was brought on by the stress of worrying about how his children were going to get to safety.
- A man crossed the border on foot in the middle of winter, walking all day until he was so cold he had to be hospitalized.
- Families approached NGOs asking about making a claim in Canada and were told about the safe third country rules, which make them ineligible. A few weeks later, the NGO was approached again: one member of the family was now in Canada and the remaining members wished to make a claim on the basis that they have family in Canada.
- One family arrived in Canada having crossed a river in mid-winter.
- A Colombian crossed the border on foot in a rural area. Once in Canada he hitchhiked until he was stopped by police who determined he had no status in Canada. He was detained, made a refugee claim and was subsequently released.
- A Colombian crossed the border on foot and was immediately arrested by Canadian immigration authorities. He made a refugee claim but was nevertheless put in detention.
- A group of four asylum seekers in the US who had been told that the border was closed to them subsequently reported that they had successfully crossed into Canada. One had suffered a fracture to the arm in the process.

- Asylum seekers have indicated that smugglers are charging \$2,000 to take someone across the border.

In September 2005, a 24-year-old man, Shkelqim Harizi, drowned while trying to cross Lake St Clair on a personal watercraft with his mother.⁶⁹ It is not known whether his death is attributable to the Safe Third Country Agreement: if the government has conducted an investigation, it has not made public the results.

12. MONITORING THE IMPACT

Now that the Safe Third Country Agreement has been implemented, monitoring of the impacts is crucial since people's lives are at stake. Governments have primary responsibility to see that their actions are not endangering people's lives and violating international legal obligations. In light of the significant concerns raised about the potential effects of the Agreement, there is a particular responsibility to investigate whether the concerns were well-founded.

The Agreement itself at Article 8 commits the governments of Canada and the US to a review of the implementation of the Agreement, and calls for the UN High Commissioner for Refugees to monitor the Agreement and for input from non-governmental organizations to be sought.

The Canadian Standing Committee on Citizenship and Immigration lay considerable emphasis on the review of implementation to ensure that the various issues raised in its hearings were kept alive. They also stated that the safe third country "is clearly a matter that requires continued oversight by the Committee."⁷⁰

Unfortunately the Agreement does not require regular ongoing reviews. The first review must take place not later than twelve months from the date of implementation, but the Agreement imposes no schedule of reviews thereafter. The two governments could decide to wait five years, ten years or even a hundred years before conducting another review. There is no requirement that the UN High Commissioner for Refugees (UNHCR) participate in subsequent reviews.⁷¹ This is a matter of concern, given that patterns often take some time to emerge after a change in policy (when one route is blocked, people may be temporarily held back, but often find an alternative route after a while). Furthermore, officials may give a high degree of conscientious attention to newly implemented policies, but over time become less careful.⁷² Initial monitoring is no protection against problems in the implementation that may develop in the medium to long term.

⁶⁹ Windsor Star, *Deadly turn for border runners: Albanian man drowns in bid to enter Canada*, Kelly Patrick, 7 September 2005.

⁷⁰ *Standing Committee Report*, page 17.

⁷¹ The Agreement seems to distinguish between the first review in which "[t]he Parties shall invite the UNHCR to participate" and ongoing monitoring, in which "[t]he Parties shall cooperate with UNHCR".

⁷² In discussions prior to implementation, one immigration official admitted that they would probably start out by giving the benefit of the doubt to minor claimants who did not have proof of age, but that over time they might become more sceptical and less likely to give the benefit of the doubt to young people whose age was uncertain.

a) UNHCR monitoring

As noted above, the role of the UNHCR in monitoring the Agreement is specified in the Safe Third Country Agreement. The UNHCR is invited to participate in the governments' first review and the governments are required to cooperate with UNHCR in the monitoring.

While the UNHCR is undoubtedly an appropriate organization to undertake monitoring, the scope of its review has been defined so narrowly that it completely fails to address the vast majority of concerns raised by refugee advocates on both sides of the border and shared by the Standing Committee on Citizenship and Immigration. The UNHCR's monitoring project is directed towards a review of whether the Agreement is being correctly applied.⁷³ However, the opposition to the Agreement is based not on concerns that the Agreement might not be correctly applied, but rather that, when correctly applied, the Agreement will have devastating impacts on the lives of asylum seekers and promote irregular border crossings. The UNHCR's monitoring project looks almost exclusively at what happens at the ports of entry where eligibility to make a refugee claim is determined. But the harm caused by the Agreement does not occur at those ports of entry, but rather on the journey back to the United States, where the asylum seeker may be detained and deported, or in the lives of people who learn that the Canadian border is closed to them and are therefore forced into situations such as deportation from the US to face persecution, remaining in the US without status and at risk of arrest, or seeking the services of a smuggler.

13. CONCLUSION

This report represents an expression of the profound concern of refugee advocates in both the US and Canada about the closing of the front door that the Safe Third Country Agreement has meant for refugees. In a world that is increasingly hostile to refugees and other migrants, safe third represents a significant further retrenchment of the rights and respect that the privileged are prepared to accord to the least privileged.

The Canadian and US governments have stated that the purpose of the Agreement is to “enhance the orderly handling of refugee claims, strengthen the public confidence of our asylum systems and help reduce abuse of refugee programs.” In these respects, we maintain that the Agreement has failed. The orderly process of making claims at the border has been replaced by a disorderly situation where people are ill-informed and, when they do have information, often find that saving their lives may mean risking their lives – by having to seek recourse to smugglers. We represent at least one section of the public that now has a weakened confidence in the willingness of the two governments to ensure that refugees will find asylum. As for alleged abuse of refugee programs, there is no evidence that the Agreement has targeted or affected any such problem. On the contrary, the group most affected by the Agreement is Colombians, who have a very high rate of acceptance by the Canadian system as refugees in need of protection. Due to the Agreement, many Colombians will now be denied protection from persecution. The abuse that ought to worry us all the most – the abuse of the fundamental rights of asylum seekers – has increased as a result of the Agreement.

⁷³ The UNHCR defines the *Overall objective* of their monitoring project as follows: “The Agreement is implemented in keeping with the letter and spirit of the Agreement as well as in accordance with international refugee law.”

However, the Agreement has succeeded overwhelmingly with regard to the Canadian government's real purpose: reducing the number of refugee claimants in Canada. The evidence speaks for itself. Statistics from the first six months reveal numbers of refugee claimants so low that we have to look back to the mid-1980s to find anything comparable. This raises the question: how few claimants is few enough for the Canadian government? And, more fundamentally, is this goal an acceptable one, when Canada already accepts so few of the world's refugees, when there are so few places where refugees can find protection and when the consequences of closing the door on refugees means that their fundamental rights may be violated?

We renew our call for the cancellation of the Safe Third Country Agreement. Refugees deserve to find Canada's front door open to them.

APPENDIX I: LETTER OF SUPPORT, LUTHERAN IMMIGRATION AND REFUGEE SERVICE



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LETTER OF SUPPORT

Re: CCR Report on the First Year of the Safe Third Country Agreement

In a nation built by immigrants, Lutheran Immigration and Refugee Service (LIRS) has carried on the Lutheran tradition of welcoming newcomers to the United States since 1939. LIRS has a particular commitment to vulnerable populations, including asylum seekers, the detained, refugees, children, and families fractured by forced migration, and we are keenly aware of the vulnerability of asylum-seekers at our international borders. Over the past twenty-five years, LIRS has worked with the Canadian Council for Refugees (CCR) and with LIRS's partner NGOs at the U.S./Canada border, including Vermont Refugee Assistance (VRA) in Montpelier, VT, VIVE in Buffalo, NY, and Friendship House in Detroit, MI.

We commend CCR for its commitment to the protection of refugees' human rights and for its report, *Closing the Front Door on Refugees: Report on the First Year of the Safe Third Country Agreement*. The report illustrates that the safe third country agreement threatens the longstanding commitment and leadership of Canada and the U.S. to protecting refugees. We join CCR in calling for the cancellation of the agreement and are committed to partnering with the U.S. government as it considers addressing the consequences of the implementation of this agreement.

We are particularly struck by a number of the consequences of the implementation of the agreement that were documented in the report, including that:

- Canada is set to receive in 2005 the lowest number of asylum claims since the mid-1980s, with a projected year end total of just 19,562.
- there is a 50% decline in the number of land border asylum claims; and
- there is a more than 50% decline in the number of Colombian asylum claims.

LIRS has the two following major concerns about the agreement, both reinforced by this report:

1. it prevents asylum seekers from uniting with families and supportive social networks in Canada; and
2. it prevents more asylum seekers from accessing asylum.

For the above reasons, we join the Canadian Council for Refugees in calling for the cancellation of the agreement.

Sincerely,

Ralston H. Deffenbaugh, Jr.
President

December 23, 2005

Bringing New Hope and New Life

APPENDIX II: ADDITIONAL STATISTICS

This appendix contains some additional statistical information that may be of interest.

Table 7

Claims made at land border, January – November 2005						
	Refugee Protection Claims	Eligible	Ineligible	Deemed Referred	Suspended	Percent ineligible*
January	311	268	37	5	0	12%
February	443	389	34	1	1	8%
March	256	227	24	2	0	9%
April	235	206	25	0	0	11%
May	218	185	25	0	1	12%
June	299	252	42	0	0	14%
July	314	261	45	0	0	14%
August	418	378	28	1	1	7%
Sept.	392	342	37	0	0	9%
October	330	283	40	5	0	12%
November	396	360	18	12	0	5%
Total	3,612	3,151	355	26	3	10%

* as percentage of total eligibility determinations. Because of difficulties in gathering accurate statistics there are some discrepancies in the figures provided, and in this table the total of eligibility determinations is slightly less than the number of refugee protection claims made.

The table above (Table 7) shows that since the implementation of the Safe Third Country Agreement, relatively few claimants who don't meet one of the exceptions are presenting themselves at the border, presumably because the word has got out that it is to be avoided.

It should be noted that in January, February and March, a certain number of eligible claimants were actually people who had made their claims before safe third and who were directed back or processed in Buffalo.⁷⁴ They were processed under pre-safe third rules, thus inflating the number of eligible claimants since implementation of safe third.

Table 8 (below) shows the top 10 countries represented by claimants at the land border in January to November 2005. If we compare the numbers of claims with 2004 figures, we find that all nationalities except Zimbabweans and Burundians, saw a significant decrease in the numbers of claims made since safe third country was implemented.⁷⁵ The sharpest decline is seen in the case of Colombians, who claimed at only 24% the rate that they had claimed in 2004.

⁷⁴ See above, page 26, for a discussion of the pre-implementation period when these claimants first tried to enter Canada.

⁷⁵ Haiti, not included in the top ten, also saw a steep rise, from 6 in 2004 to 78 from January to November 2005.

Table 8

Claims made at land border, variations by country				
Top 10 countries (land border, 2005)	Jan.-Nov. 05	2005 year-end projection	Claims at land border in 2004	05 projection as percentage 04
Colombia	781	852	3,521	24%
Zimbabwe	490	535	24	2227%
United States of America*	302	329	610	54%
Sri Lanka	175	191	319	60%
Congo, Democratic Rep. of	121	132	165	80%
Peru	117	128	398	32%
Burundi	111	121	91	133%
El Salvador	111	121	133	91%
Pakistan	97	106	354	30%
Guatemala	95	104	140	74%

* Many claimants from the US are the children born in the US of other claimants who have no status in that country.

The dramatic increase in claims from Zimbabwe suggests that the news has circulated quite effectively among Zimbabweans that they are exempt from safe third (because of the moratorium on removals to Zimbabwe) and this has reached some who would not otherwise have known of the possibility of making a refugee claim in Canada. Other countries with an increase over 2004 (Burundi and Haiti) are also moratorium countries.

The following tables give some details of claims at the land border by grounds of exemptions (Table 9) and by gender and numbers of unaccompanied minors (Table 10).

Table 9

Safe third exemptions, January – Nov 2005 by ground of exemption							
Family member in Canada	Unaccompanied minor	Holds Canadian Visa*	No Canadian Visa Required	Possible Death Penalty	Moratorium country	Total	Total eligible at land border**
1,359	45	362	31	0	1,005	2,798	3,151

* Almost of all of these represent claimants processed in Buffalo before implementation of the safe third country and exempted from safe third through issuance of a Canadian visa.
 ** Because in some cases the grounds for exemption were not recorded in the database, the total of the number of exemptions is less than the total number found eligible at the land border. The difference may also be in part due to direct backs who were not subject to safe third.

Table 10

Claims at land border, January – Nov 2005, Gender and unaccompanied minors				
	Claims at the border	Female	Male	Principal applicants under 18 years
January	311	140	171	11
February	443	243	200	14
March	256	146	110	8
April	235	101	134	14
May	218	92	126	9
June	299	151	148	13
July	314	150	164	22
August	418	210	208	17
September	392	184	208	17
October	330	148	182	12
November	396	194	202	6
Total	3,612	1,759	1,853	143
		50%	50%	

APPENDIX III: GROUNDS OF OPPOSITION TO THE AGREEMENT

Refugee advocates have consistently challenged the Safe Third Country Agreement on the grounds that it is bad for refugees and for the two countries signing it. Among the concerns raised are the following:

- **The US is not safe for refugees because some refugees are denied protection**

The Agreement forces claimants to seek protection in the United States, a country that is not necessarily safe for refugees, since the US does not always give protection to refugees who need it. In the past, numerous claimants have been recognized as refugees in Canada after having been refused in the US, because of more restrictive rules and interpretation of the refugee definition. Eligibility rules in the US mean that claimants who apply after having been in the US for over a year are denied a hearing. Unlike Canada, the US law does not offer protection to people who face a risk to their life or of cruel and unusual treatment or punishment. If Canada turns away a refugee who is subsequently deported by the US back to persecution, Canada bears a part of the responsibility for whatever harm comes to the refugee.

- **The US is not safe for refugees because of the risk of detention**

Thousands of asylum seekers, including children, are held in detention in the US, for months and even years, often in jails alongside convicted criminals. Those who are detained have reduced chances of being granted refugee protection, because it is difficult for detainees even to make a phone call, let alone get the help they need to present their refugee claim adequately. There have recently been widely publicized allegations of abuses of detainees in US immigration jails.⁷⁶

- **The US is not safe for refugees because of discriminatory practices**

US policies and practices discriminate against some refugees and immigrants on the basis of their nationality, ethnicity or religion. For example, the US detains Haitian claimants based on nationality.⁷⁷ People from mainly Muslim countries are also particularly at risk of detention.⁷⁸

- **US policies are becoming increasingly hostile to refugees**

Since the Safe Third Country Agreement was implemented, the laws applying to refugees in the US have become more restrictive. The Real ID Act, signed into law by the US President on 11 May 2005, makes it harder for refugee claimants to obtain asylum in the US, increasing the chances that refugees in need of protection who are turned away by Canada will be wrongly rejected by the US and sent back to face persecution.⁷⁹ In December, the House of

⁷⁶ See for example, National Public Radio, *Immigrant Detainees Tell of Attack Dogs and Abuse*, 17 Nov. 2004, <http://www.npr.org/templates/story/story.php?storyId=4170152>; US Office of the Inspector General, *Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York*, December 2003, <http://www.usdoj.gov/oig/special/0312/index.htm>

⁷⁷ Florida Immigrant Advocacy Center, *Haitian Refugees: A People in Search of Hope*, 1 May 2004, available at <http://www.fiacfla.org>.

⁷⁸ See for example ACLU, *Memo to Interested Persons on the Civil Liberties Record of Designate Michael Chertoff*, 28 January 2005,

<http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=17378&c=206>

⁷⁹ For information on Real ID, see below page 19.

Representatives passed HR 4437 containing a whole series of restrictive immigration measures, which will, if they become law, erode further the protection of refugees in the US.⁸⁰

- **The US was not safe for Maher Arar**

Despite being a Canadian citizen, Maher Arar was deported by the US to Syria where he was detained for nearly a year without charge and subjected to torture. If the US is not safe even for someone with the relative protection of a Canadian passport, how can we think that it is safe for refugee claimants who have no government to protect them?

- **The Agreement makes the US-Canada border less secure**

Before the Safe Third Country Agreement, refugee claimants presented themselves at the border in an orderly manner, were interviewed and given a security check at the very outset of the process. Now refugee claimants needing Canada's protection have to seek ways to cross the border irregularly. This was the experience in Germany when rules were changed in a similar way: overnight claimants stopped making a claim at the border and appeared inside the country. The principal beneficiaries of the Safe Third Country Agreement are smugglers and traffickers.

- **Refugee claimants may face danger trying to enter Canada**

Irregular border crossings are often dangerous for migrants: each year many suffer accidents, are victims of violence or lose their lives while attempting to cross borders around the world. It is therefore almost inevitable that safe third will lead to increased casualties at the border as desperate refugees seek Canada's protection.

- **Canada is giving the US a say over its resettlement program in exchange for the Agreement**

In exchange for signing this deal, the US is being given a say in which refugees are resettled to Canada, as part of an originally secret side-deal. Canada is thereby giving up to another country the right to decide which refugees should be resettled in Canada. Ironically, the US now has more power to identify refugees for resettlement than Canadian immigration officers, who under the new law cannot consider refugees for resettlement unless they have been referred by the UNHCR.⁸¹

- **The US adds to its backlog of claimants**

The effect of the Agreement is to force refugees who would prefer to be in Canada into the US's already overburdened asylum system. The US refugee determination system is significantly slower than the Canadian system. Some of the people who would have found refugee protection in Canada, had safe third not barred them, will remain without status in the US because they fear that there is nothing to be gained by attempting to make a claim in the US.⁸² The principal beneficiaries of this situation are those who depend on vulnerable labour sources that can be easily exploited.

⁸⁰ For more information on HR 4437, see page 20 above.

⁸¹ A group of Haitian refugees was resettled from Guantanamo to Canada in early 2005 under the terms of the side-deal.

⁸² For example, there are known to be large numbers of Colombians in the US, many of whom never apply for asylum, because of lack of information about or lack of confidence in the system.

- **Canada is slamming the door on refugees**

The goal and the effect of the Agreement is a decrease in the number of refugees who can claim refugee protection in Canada. By implementing this Agreement, Canada joins a sorry group of countries that take the “Not in my backyard” approach to refugees. Even before the introduction of the Safe Third Country Agreement, Canada had received in 2004 the lowest annual number of refugee claims in 6 years. Canada receives less than one half of one per cent of the world’s refugees.⁸³ One may ask how much further Canadians want to reduce their contribution towards the persecuted and the displaced.

It was not only refugee advocates who had concerns about the Safe Third Country Agreement before its implementation. The Canadian House of Commons Standing Committee on Citizenship and Immigration published a report on the Safe Third Country Regulations in December 2002 in which they voiced a whole series of concerns about the potential impact of safe third country.⁸⁴ These included concerns that:

- “some people may be detained in the U.S. who would likely not be detained in Canada” (page 8);
- gender-based claims are treated differently in the two countries (the Committee recommended an exemption for women with claims based on domestic violence “until such time as the American regulations regarding gender-based persecution are consistent with Canadian practice” (Rec. 2);
- claimants may be denied access to US asylum system due to the one-year bar (Rec. 4)
- the Agreement will lead to an increase in “irregular migration” (Rec. 5). The Committee also called on the government to conduct a full review of implementation, including a report on human smuggling and human trafficking and “reports on any migrants killed or injured in the course of attempting illegal entry into Canada” (Rec. 17);
- the public interest exception is too narrowly defined in the Canadian regulations (the Committee recommended additional exceptions for francophone claimants, claimants who would be accepted in Canada but not in the US and an open exception to respond to particular cases that might be of public interest (Rec. 10-12).)

⁸³ UNHCR calculates that at the end of 2004 there were 9,236,521 refugees and 839,107 asylum seekers, for a total of 10,075,628 refugees and asylum seekers. (UNHCR, 2004 Global Refugee Trends, 17 June 2005). In 2004, Canada received 36,000 resettled refugees and asylum seekers. The Canadian total represents 0.36% of the global total.

⁸⁴ *The Safe Third Country Regulations: Report of the Standing Committee on Citizenship and Immigration*, Joe Fontana, M.P., Chair, December 2002. Available from www.parl.gc.ca.

In addition to the majority report, three opposition parties went on the record opposing the Agreement.⁸⁵

In the US, concerns were raised about the potential impact of the safe third country on numbers of asylum seekers. The addition of the cases of persons who would otherwise have gone to Canada was expected to lead to longer backlogs and involve extra costs due to the increased caseload.⁸⁶

⁸⁵ Bloc Québécois Dissenting Opinion: "...the Bloc Québécois firmly believes that the agreement is not in the best interests of asylum seekers. We are concerned about the stated objective of reducing the number of refugee claimants in Canada. As a signatory to the Convention on Refugees, Canada has a moral responsibility to make sure that all asylum seekers have access to a fair and equitable system." New Democratic Party Dissenting Opinion: "The New Democratic Party stands in firm opposition to the 'Safe Third Country Agreement' [...] As several witnesses have testified, the United States is not a safe haven for some refugees and that alone should prevent Canada's entry into this Agreement." Progressive Conservative Dissenting Opinion: "On the surface, the STCA appears to be a good idea. Closer examination shows that it is not [...] The manner in which this agreement was put together is irresponsible and if enforced will tarnish our reputation in the world community."

⁸⁶ Letter by Dana Leigh Marks, President, National Association of Immigration Judges, to the Office of Management and Budget, 9 November 2004.