Seeking Asylum Across the International Boundary: Legal Terms and Geopolitical Conditions of Irregular Border Crossing and Asylum Seeking between the United States and Canada, 2016 - 2018

Exploring the Evolving Nature of Temporary Protected Status in the United States and Asylum in North America under the Canada-US Safe Third Country Agreement

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TABLE OF CONTENTS

ABSTRACT

CHAPTER 1: Introduction to the Project
- Evolution of Research

CHAPTER 2: Methodology
- Qualitative Research
- Quantitative Research

CHAPTER 3: Literature and Fact Review
1. Essential Background:
    - The Global Forced Displacement Crisis; Literature of Migration and Displacement; The Convention and Definition of a 'Refugee;' The Right to Asylum; Protection of the Rights of Asylum Seekers in Canada
2. Haitian Crisis and Migration to North America
3. Relevance of Temporary Protected Status
4. Temporary Protected Status Under the Trump Administration
5. Relevance of the Safe Third Country Agreement
6. Executive Orders, Racialization and Imagery of 'Mass Invasions' in Crisis Mentality

CHAPTER 4: Temporary Protected Status and Its Annulment

I. Overview of the Program
- Environmentally Induced Displacement and Temporary Protected Status
- Safe Haven in Temporary Protected Status
- Environmentally Induced Displacement and the Definition of a 'Refugee'
- Environmentally Induced Displacement in Global Context
- Designation of Haiti for Temporary Protected Status

II. Production of Populations In Need of Protection
- Citizenship
- Temporality of Temporary Protected Status
- 'Should I Stay or Should I Go?' Evaluating the options for TPS populations upon expiry
- Legal Challenges to the Annulment of Temporary Protected Status
- Closing Thoughts: Industry Impact 'Case Study'

CHAPTER 5: Claiming Asylum Across the International Boundary
- Introduction to the Claim
- Canadian Refugee Determination System
- The Canada-US Safe Third Country Agreement
    I. Overview of the Agreement
    II. Application of the Agreement
    III. Background on the Agreement
    IV. Review of the Designation of the US as a Safe Third Country
    V. Contesting of the Designation of the US as a Safe Third Country

VI. Deficiencies of the US Asylum System
VII. Constitutional Challenges to the Agreement in the Federal Court of Canada
VIII. Documentary Findings on the Deficiencies of the US Asylum System
IX. The US Asylum System Under the Trump Administration
X. Closing Thoughts: Status of the Agreement

CHAPTER 6: Findings and Discussion
I. Quantitative Findings
- Chronological Findings on Quantitative Data

II. Qualitative Findings
- Semi-Structured Interview Series
  I. The annulment of temporary protected status in the US
    A. Production of undocumented populations in need of protection
    B. Spread of misinformation within populations in the US
    C. Push factors motivating irregular border crossing
  II. Deficiencies of the US asylum system and impact of the Trump administration
    A. Return to the restrictive US immigration laws of the 1920s and 1950s
    B. Historic phases and patterns of "pass-throughs" in the US
  III. Ongoing application of the Canada-US Safe Third Country Agreement
- Discussion of IRCC and UNHCR Canada Public Communications: Findings on the intersection between the annulment of TPS and influx of irregular claims
  - Ad Hoc Intergovernmental Task Force on Irregular Migration (IRCC
  - Snapshot of UNHCR Canada Response (April 2018)

CONCLUSIONS AND FUTURE STUDY

ABSTRACT

This thesis explores the surge in the irregular border crossings of asylum seekers across the International Boundary into Canada between 2016 to 2018. The goal of this project is to compile an account of the legal terms and geopolitical conditions that act to generate and shape this migration. The trajectory of this research necessitated study of the evolving nature of Temporary Protected Status (TPS) in the United States as well as the US-Canada Safe Third Country Agreement (STCA) and its controversy. I came to explore how both respectively act to produce and structure these irregular border crossings. While the annulment of TPS is situated within a broader landscape of anti-immigrant and anti-refugee policy in the US under the Trump administration, I place a particular focus on TPS because of the way in which its capacity for protection has been reduced by 75 percent over the course of this research.

This project considers how the problematizing of asylum seekers has eroded the refugee determination regime in North America as situated within unprecedented levels of forced displacement globally. The accumulating deficiencies of the US asylum system, in particular, have led both the US and Canada to fail to meet their obligations to international standards of protection under the application of the STCA. This is a distinct concern in consideration of the way in which the annulment of TPS under the Trump administration has swelled the ranks of vulnerable populations in need of protection within the US. While the deteriorating conditions of the US asylum system simultaneously produce and criminalize populations in need of protection, Canada seeks to reduce and deter access to their own asylum system. I explore how the intersection between the annulment of TPS and the antecedent conditions of the STCA act to generate the legal and geopolitical environment that produces and structures this particular contemporary migration event.

CHAPTER 1: Introduction to the Project

This research began in September 2017 as an inquiry into the irregular (illegal) border crossings of asylum seekers across the International Boundary into Canada. This surge in vulnerable populations fleeing the United States in the hopes of finding sanctuary on Canadian soil began in 2016 and continues to this day as this project concludes in April 2018. This research commenced with three sets of primary questions. First, I intended to examine the populations that are seeking asylum, the push factors driving them across the border, and the reasons for seeking asylum in Canada. Second, I planned to review how law and geopolitics structures the lives of these particular asylum seekers in consideration of the driving forces behind this policy and the differentiations in status and rights to protection between asylum seekers, refugees, and undocumented immigrants. Third, I hoped to consider what the future may hold for those seeking asylum in Canada.

To answer the first set of questions, I sought to conduct qualitative research in the form of semi-structured interviews. I did this in order to better understand who is seeking asylum and why they are crossing the border. I completed a series of six interviews with a range of key informants. I interviewed lawyers from both the US and Canada, academic professionals engaged in research related to migration and refugee rights, a Canadian government official, and a Haitian community leader in Montreal. I was not able to interview asylum seekers themselves due to their incredibly vulnerable position. These interviews led me to reconsider my research strategy and focus more acutely on the Canada-US Safe Third Country Agreement (the "Agreement" or STCA) and the evolving nature of Temporary Protected Status (TPS) in the United States. These conversations with key informants offered a great depth of insight to the nuances and intricacies that surround this migration event. I draw from this wisdom in my

analysis throughout this paper. I also came to find a historical precedent to the "pass-throughs" of vulnerable populations crossing through the US in order to file their asylum claim on Canadian soil. This phenomenon is insufficiently documented and there is a need for further research on this topic.

My study of the STCA and the evolving nature of TPS in the United States proved essential to answering the second set of questions related to the legal and geopolitical conditions that contribute to this migration event. I originally hoped to include study of the Trump administration's parallel efforts to end DACA -- as there is some resemblance and overlap between the annulment of TPS and the repeal of DACA -- but this proved to be beyond the scope of this project. Nonetheless, this research remains situated within the broader context of contemporary displacement, border crossing, immigration, and asylum. The ongoing application of the STCA and the advancing annulment of TPS each act to respectively structure and produce these trends in irregular border crossing and asylum claims. Herein, I also came to research the asylum systems of both the US and Canada as situated within the international treaties and standards of protection that shape them.

As for my final questions related to what the future may hold for these populations, it proved very difficult to research and answer this due to two primary factors. First, both this migration and the legal and geopolitical conditions that surround it continue to be ongoing and evolving upon the conclusion of this project. Second, asylum is granted entirely on a case-by-case basis and as such it is infeasible to analyze or conceptualize the future of this population as a whole. Similarly, it is unproductive to analyze the future of asylum seekers based on either nationality or TPS status because asylum claims are not evaluated on the basis of this type of group affiliation. According to the most recent data released by the IRB upon the conclusion of

this project, the vast majority of asylum claims made by irregular border crossers in 2017 are still pending (IRB 2018). This leaves an incredible degree of uncertainty regarding the future of these vulnerable populations.

Throughout this project, I also engaged in quantitative research through gathering and analyzing the trends in RCMP interceptions and asylum claims as data was released from the Government of Canada. While this analysis is essential to understanding the quantitative trends in irregular border crossing and asylum seeking between 2016 to 2018, this data does not provide insight particular to how many TPS recipients or habitual US residents left the US to seek asylum in Canada. As such it is impossible to make a quantitative determination of how many persons are "fleeing" the US or instead "passing-through" the US. Such data has not been collected and it is unclear whether or not it would be possible to count or track these statistics. There is potential for future study in this area.

Evolution of Research

Upon embarking on this research, it became nearly immediately apparent that many -- greater than one third -- of those seeking asylum were of Haitian origin (IRB 2018). The border crossings of asylum seekers between the US and Canada are governed by the bilateral Canada-US Safe Third Country Agreement (the "Agreement" or "STCA"). While the terms of the Agreement bar claims of asylum at official land ports of entry between the US and Canada, the law allows for claims to be made if asylum seekers cross unauthorized, between official ports of entry ("irregular border crossings") (IRB 2018; IRCC 2018). Thus irregular border crossings of asylum seekers are incentivized under the STCA (Harvard 2006; Arbel & Brenner 2014; AIC & CRC 2017). This surge of asylum seekers (particularly those of Haitian origin) fleeing the US was motivated in part by the fear that they would soon lose their Temporary Protected Status

(TPS) in the US under the incoming Trump administration and, as result, be at high risk of deportation (NPR 2017; NYTimes 2017; CBC 2017; Reuters 2017).

These suspicions were confirmed when then-Department of Homeland Security (DHS) Secretary Kelly extended Haiti's TPS designation for six months (the minimum allowed by statute) on May 24, 2017 and encouraged beneficiaries to "prepare for their return to Haiti" should its designation be terminated after these six months (82 FR 23830); and finally, on November 20, 2017, then-Acting Secretary Duke announced her decision to officially terminate Haiti's TPS designation (DHS 2017 PR). On November 20, then-Acting Secretary Duke announced an 18-month transition period with an end-date of July 22, 2019 (DHS 2017 PR). As such the fears that generated the initial surge of Haitians across the US-Canada border in the hopes of seeking asylum have, in fact, been realized during the course of this research.

Since the start of this project, the DHS under the Trump administration has also announced the terminations of TPS programs for Sudan, Nicaragua, and El Salvador (DHS 2018). These cancellations affect over 75 percent of the TPS beneficiaries passed to the new administration. This evidences the way in which the Trump administration has "adopted a new, far narrower interpretation of the federal law governing TPS" and applied that interpretation to the DHS decisions regarding the terminations of El Salvador, Haiti, Nicaragua, and Sudan (ACLU 2018). Thus the bipartisan program has been entirely transformed under the Trump administration as its size has been curtailed to 25 percent of its former capacity of protection. TPS does not offer a pathway to permanent residence and, because TPS is a form of relief from removal (deportation), the termination of a TPS program revokes the legal status of its former beneficiaries and, as such, returns them to their prior status in the US as 'deportable aliens' under the *Immigration and Nationality Act* (INA). These terminations affect an estimated 327,439

vulnerable individuals, including approximately 58,557 of Haitian origin (USCIS 2017). Thus my research came to focus on the evolving nature of TPS under the Trump administration. The evolving nature of TPS in the US coupled with the further erosion of the already deficient US asylum system, both as impacted by the Trump administration, play a key role in shaping the conditions that drive this particular migration of asylum seekers out of the US in the hope of gaining protection in Canada.

CHAPTER 2: Methodology

I conduct a thorough analysis of the legal terms and geopolitical conditions that respectively structure and produce this migration event. I have engaged in an exhaustive study of the evolving nature of temporary protected status in the US. This includes its origins, statutes, basis in law and the context of its capacity for humanitarian protection. I consider the conditions that necessitate the program as situated within the global refugee determination regime and its shortcomings. I examine the statistical and demographic profiles of these populations as well as their economic and familial ties to the US. In particular, I examine the implications of the ongoing annulment of the program. I then consider this in relation to the actions taken under the Trump administration as coupled with the emergent immigration and refugee policy put forth by President Trump. I draw legal analysis from four class action lawsuits filed in the past four months specifically challenging the legality of the annulment of each TPS program.

I have also engaged in a careful study of the STCA. I consider the political and policy motivations behind its signing, the geopolitical context in which it was produced, the implications of its application, and controversy that surrounds it. I analyze the basis of the legal challenges that contest the constitutional validity of the Agreement in the Federal Court of Canada. I have researched the asylum systems of both the US and Canada in consideration of

their basis in international law, their adherence to international standards of protection, and their critiques and deficiencies. I draw from an extensive body of scholarly literature and research, and I apply this knowledge to the specific conditions of this particular migration event. I use data analysis triangulation to verify the credibility of all informational sources (Leech and Onwuegbuzie, 2007). Throughout, I consider the impact of President Trump's first three Executive Orders, issued in January 2017, and the manifestation of his anti-immigrant and anti-refugee rhetoric in the policies and practices of the new administration

I draw from a number of primary source documents. This includes INA, the IRPA, the Convention and its Protocol, the Declaration, the Torture Convention, TPS publications on the Federal Register, President Trump's Executive Orders, and the final text of the STCA. I draw from secondary sources including reports issued by the Harvard Immigration and Refugee Clinical Program (HIRC), Amnesty International Canada (AIC), the Canadian Council for Refugees (CCR), and lawsuits pertaining to both TPS and the STCA. The irregular border crossings of asylum seekers cannot be analyzed or understood without this careful consideration of both the evolving nature of TPS in the US and the legal terms of the STCA.

Qualitative Research

I gather qualitative data from a series of six interviews with a wide range of key informants from both sides of the border. On the Canadian side, this includes a Canadian Government official, a knowledgeable Canadian law professor, and Marjorie Villefranche, Director General of La Maison d'Haiti in Montreal. On the US side, I interviewed Pablo Bose, Ph.D., an academic professional engaged in research related to migration, diasporas, and displacement; as well as a local immigration expert well-versed in cross-border asylum seeking, and a professional researcher from an NGO working to defend the rights of refugees and asylum seekers. Some of

these key informants opted to remain confidential due to the sensitive diplomatic and political implications of this study. As such I have removed the identifiers for four of these subjects. I refer to them as they themselves asked to be described. Because those crossing the border are in an incredibly vulnerable position, I was not able to interview any asylum seekers themselves. Instead, I spoke with a range of key informants who work on various levels of this migration on both sides of the border. I have removed any and all identifiers for asylum seekers referred to in these subjects' comments.

I engaged in these interviews to answer my primary qualitative questions related to who is seeking asylum, why they are crossing the border, and what the future may hold for these vulnerable populations. These interviews are semi-structured to allow flexibility and open response in the participants' own words (Clifford et al., 2016, p. 145). These qualitative interviews are necessary to "elicit biographical meanings related to the present but also the past and future" (Bryman et al., 2004, p. 524). These interviews serve to obtain "descriptions of the life world of the interviewee with respect to interpreting the meaning of the described phenomena" (Kvale as cited in Bryman et al., 2004, p. 521). I follow the methodology for geography studies prescribed by Clifford, Cope, Gillespie, and French (2016) for such qualitative research. Namely I adhere to the methods for semi-structured interviews under their guidelines for working in different cultures and different languages, understanding of difference and sameness, power relations and positionality (Clifford et al., 2016). These interviews allow me to obtain contextual accounts of this migration and its conditions, beyond surface review of available data and basic policy analysis.

I utilized a structured interview instrument with open-ended research questions. This instrument was adapted to fit the knowledge and expertise of each of these key informants. I

prepared this in consultation with my thesis advisor, Dr. Bose. As prescribed by Bryman et al. (2004), these interviews consist of 10-15 questions -- "about the life worlds of correspondents" -- as well as prepared probes (p. 522). I am "careful and systematic with the things people tell [me]" (Clifford et al., 2016, p. 144). I audiotaped and transcribed all interviews. These transcriptions serve as the textual basis for analysis in which I will identify conceptual patterns (Bryman et al., 2004, p. 521). Dr. Bose and I discussed best practices for counting frequencies (content), examining themes (discourse), and coding. I utilize these interviews and their codes in consideration of data reduction, systematization of organization and search aids, content analysis and the distinction between manifest and latent messages.

To supplement this interview series, I also engage qualitative analysis of the public communications released by Immigration, Refugees and Citizenship Canada (IRCC) and the United Nations Refugee Agency in Canada (UNHCR Canada). I am careful and systematic in my reading and discussion of these systems of information exchange. I consider these press releases and publications in consideration of their temporal and political context. Throughout the qualitative methodology described herein, I consider the best practices discussed by Dr. Bose for reading data in content analysis, including both manifest (dominant) messages and latent (oppositional, negotiated, rogue) messages found within.

Quantitative Research

I situate statistical data profiles of irregular claims within a chronological account of the political and environmental conditions that surround the trends in these crossings. There are a few important considerations in evaluating this quantitative account of these crossings. Prior to March 2017, immigration data collected by the CBSA and IRCC did not take account of how an asylum seeker entered Canada and the IRB did not track their decisions on the basis of entry

because it does not factor into their determination on an asylum claim. As such it was not possible to track how many individuals intercepted by the RCMP went on to file a claim of asylum. Despite the irrelevance of entry on the claims themselves, the Office of the Minister of Public Safety announced in March that the government would begin to release data on a monthly basis that would provide statistics for asylum claims made by irregular border crossers (CBSA, 2017; IRCC, 2017; Globe and Mail, 2017; CBC, 2017). The IRB (2018) notes that it is unable to report on irregular border crossers until February 2017 when the implementation of system changes provided the capacity to capture data on this population. However, due to some early inconsistencies in data entry, the IRB also notes that it is possible that not all irregular border crossers are reflected in the statistics for irregular border crossers between February to December 2017. In addition, only partial data is available for the months of February and March 2017.

All quantitative data on irregular border crossings and asylum claims is gathered from primary sources; namely original reports from the Government of Canada and its official immigration agencies. Much of this data comes directly from the official government websites for IRCC and the IRB. Some data analytics have been pulled from the Canadian Citizenship & Immigration Resource Center (CCIRC) Inc. The CCIRC is recognized and authorized by the Government of Canada to provide legal counsel for immigration to Canada (CCIRC, 2018). Any and all statistics or data analytics from the CCIRC or primary news sources has been cross-checked with the original primary data from IRCC and/or the IRB. While I consider this data in relation to the intersection between the annulment of TPS and the application of the STCA, These statistics do not reflect the numbers of claimants who had TPS status in the US as such data has not been recorded or released.

CHAPTER 3: Literature and Fact Review

1. Essential Background

The Global Forced Displacement Crisis

This migration of asylum seekers is situated within the ongoing global forced displacement crisis. The magnitude of this contemporary crisis is unprecedented in recorded history. Over the past two decades, the global population of forcibly displaced persons has grown from 33.9 million in 1997 to 65.6 million by the end of 2016. The current crisis eclipsed previous records of displacement in 2013 when the number surpassed 50 million for the first time since World War II. This means that around 1 percent of the world's population is "an asylum seeker, internally displaced, or a refugee" (UNHCR, 2017). Today this number remains at a record high. The Migration Policy Institute (MPI) (2017) explains that "the link between migration and development policies has become increasingly prominent in global policy debates" – this has been articulated in two major policy documents: the United Nations' 2030 Agenda for Sustainable Development and the New York Declaration For Refugees and Migrants, adopted in September 2016. In the latter, UN Member States committed themselves to negotiate a 'Global Compact for Safe, Orderly, and Regular Migration.' This will be the first, intergovernmentally negotiated agreement to cover all dimensions of international migration in a holistic and comprehensive manner (UN [Refugees and Migrants], 2018). Upon the conclusion of this project, the most recent revised draft of the Global Compact is dated March 26, 2018.

Currently, the United Nations High Commissioner for Refugees (UNHCR) counts and tracks the numbers of refugees, internally displaced people, asylum seekers, and stateless persons. The UNHCR defines a refugee based on grounds of personal persecution and location external to one's own country of nationality or habitual residence. Displaced persons who can

legally meet these qualifications are referred to as “Convention refugees” and afforded certain rights and protections under international law. Those who do not fall into the category of Convention refugees do not qualify for the same type of recognition under international standards of protection. Internally displaced persons (IDPs) do not qualify for Convention refugee status because they fail to meet the requirement for external location and, as such, legally remain under the protection of their own government. Those affected by environmentally induced displacement (EID) do not qualify for Convention refugee status because they most often fail to meet the requirement of personal persecution.

While 65.6 million people are forcibly displaced worldwide, only 22.5 million are recognized as Convention refugees. Of these, just 189,300 are referred for resettlement in a safe third country each year (UNHCR, 2016). While the UNHCR estimates that 8 percent of the refugee population may be in need of resettlement, less than 1 percent of the world’s refugees are being resettled. The number of refugees resettled dropped by over 50 percent worldwide between 2016 to 2017 (UNHCR, 2018). This leaves an incredible margin of vulnerable forcibly displaced persons who can neither return to their home country nor live safely in their current host country. This includes vulnerable populations within those formerly protected under TPS who are now at risk of return to their country of origin.

Literature of Migration and Displacement

On the historical-structural origins of global migration and displacement, Dickinson (2017) writes that while globalization is eliminating barriers between countries and facilitating the flow of goods and capital around the world, the industrialized countries of the Global North are simultaneously erecting barriers to restrict the flow of people. This acts to inhibit migration of those from the Global South (Haitians and Latin Americans) to the Global North (the U.S. and

Canada). He thus describes how we have arrived at this paradoxical point in history in which governments are "enacting policies that protect borders instead of people" (Dickinson, 2017). Such policies include the Safe Third Country Agreement enacted by the US and Canada as well as several policies contained within the deficiencies of the US asylum system. These policies will be discussed later in this paper in Chapter 5.

Dickinson (2017) also emphasizes the recent developments in global politics as well as the effects on climate change on international migration and restrictions thereupon. While the 2010 earthquake in Haiti, coupled with other related environmental crises, cannot itself be directly attributed to climate change, it is an established scientific fact that climate change increases the frequency and intensity of environmental disasters and crises. This includes those experienced in Haiti (Ackerman, 2015). These environmental crises displaced thousands of people, prompting the U.S. to grant TPS status to Haitians in the wake of the earthquake and related infrastructural breakdown (Ackerman, 2015). Ackerman (2015) critically examines the role of climate change in the displacement of Haitians and the resulting long-term damage to the country that inhibits voluntary repatriation today.

Martin et al. (2014) provide a useful case study of displacement and migration in Haiti, most vitally noting that "[b]y most indicators Haiti has been in crisis almost since its independence in 1804, and migration has been an essential part of Haitians' strategies for coping with their situation" (p. 91). At large, this work also maps the global governance of crisis migration and highlights gaps in current provisions for crisis-related movement across multiple levels (Martin et al., 2014). Such analysis is useful in considering the migration movement of Haitians across the International Boundary today.

On the broader topic of contemporary border crossings and policy, Sassen has contributed significantly to understanding the politics of immigration. In this work, under the premise of making immigration policy today, Sassen (2000) analyzes migration as an embedded process, the geopolitics of migration, cross-country regularities -- the "where, when, and who of immigration" (p. 140) -- and the transnationalizing of immigration policy. Sassen (2000) asserts that, "migrations do not simply happen. They are produced" (p. 155) and outlines the way in which migrations are embedded in historical phases and patterns. This understanding helps to explain the production of these crossings today as well as define them within their own distinct historical phase. As Sassen (2000) notes, "acknowledging these traits opens up the immigration policy question beyond the familiar range of border control, family reunion, naturalization and citizenship law" (p. 155) and thus allows a broader analysis and understanding of related policy. Throughout this project, I have considered the fundamental "where, when and who" in examining the way in which this migration was produced. This analysis led me to identify the annulment of TPS as a factor of production as situated within both historical phases and patterns -- particularly that of Haitian crisis and migration to North America, as discussed in Section II of this chapter.

The Convention and Definition of a 'Refugee'

ARTICLE 1:

> "~~As a result of events occurring before 1 January 1951~~[1] and owing to well- founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as

[1] **The 1967 Protocol** removed the geographic and temporal limits of the 1951 Convention.

> a result of such events, is unable or, owing to such fear, is unwilling to return to it" (UNHCR, 1951; UNHCR, 1967).

The 1951 Convention Relating to the Status of Refugees (the "Convention") was produced in response to the Holocaust and thus designed to protect Europeans displaced prior to 1951. It is grounded in Article 14 of the 1948 Universal Declaration of Human Rights (UDHR or the "Declaration"). The 1967 Protocol Relating to the Status of Refugees (the "Protocol") removed the geographic and temporal limits of the Convention. As such, states must sign and ratify, or accede to, the Protocol in addition to the Convention in order to be legally obligated to protect all refugees. As of January 2017, 145 states have committed to the implementation of the Protocol and 146 have committed to the implementation of the Convention.

According to the legislation, this means that states are expected to cooperate with the UNHCR to ensure the rights of refugees are respected and protected. Canada became a party to both the Convention and the Protocol on June 4, 1969. The United States became a party to the Protocol on November 1, 1968 and remains party to the Protocol only (UNHCR, 2017). The work of the UNHCR is built upon the foundation of the Convention as it is the primary legal document describing the standards of protection for refugees. As such, the UNHCR serves as the 'guardian' of the 1951 Convention and its 1967 Protocol. In addition to these two primary legal instruments, both Canada and the United States have been party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention") since 1985 and 1988, respectively (UNTC, 2018). In theory, states are legally bound to uphold the standards of protection described within these documents.

The Right to Asylum

This paper deals exclusively with asylum seekers and will not further discuss Convention refugees. An asylum seeker is defined as someone who may meet the standards of qualification

for a Convention refugee, but whose request for sanctuary has yet to be processed. In other words, an asylum seeker is an individual who has applied for asylum and is waiting for a decision as to whether or not they will be recognized as a refugee. Because this claim is made directly to a state, it is the national government that will process the application and either grant or deny refugee status. The national asylum systems of each state are in place to determine who qualifies for international protection within their own borders. This makes it somewhat difficult to estimate numbers of asylum seekers worldwide. The last UNHCR global estimate stated that approximately 1.8 million people around the world waiting for a decision on their asylum claims (UNHCR, 2018). This project discusses the asylum systems of both the US and Canada in consideration of their critiques and deficiencies in relation to this migration event.

The right to asylum is protected in Article 14 of the UDHR. The UDHR, however, does not itself constitute a legal obligation on states to implement its articles. The rights described in the UDHR must be formalized within a treaty to create the legal obligation for states to uphold these standards of protection. A treaty is defined as a formal agreement between two or more states in which they commit to implement the obligations described within. The 1951 Convention is the treaty that builds upon the right to asylum defined in the UDHR and, as such, the Convention is the primary legal instrument that prescribes the standard of global refugee protections. The Convention defines the term 'refugee' and describes the rights of the forcibly displaced. The core principle of the Convention is non-refoulement as described in Article 33 of the Convention as well as Article 3 of the Torture Convention. Non-refoulement asserts that a refugee should not be returned to a state in which they face serious threats to their life and freedom -- as defined within the definition of a Convention refugee. This means that a state cannot return ("refouler") a refugee who has reached its borders to a place where their lives or

freedom may be threatened on account of race, religion, nationality, membership of a particular social group or political opinion. Asylum claims and obligations to non-refoulement are evaluated entirely on a case-by-case basis. As such, neither pertain to risk under generalized instability or violence (such as the gang-related violence in Central America) or environmental devastation (such as the ongoing situation in Haiti). This is critical to keep in mind when considering the asylum claims of former-TPS recipients. Though the risk of return for these populations may be empirically evident, these individuals will not meet the requirements of asylum unless they can prove personal terms of persecution. It is increasingly more difficult to prove such persecution the longer one is away from the state in which it occurred. This is relevant to TPS populations in that many of these individuals have lived in the US for a number of years.

Protection of the Rights of Asylum Seekers in Canada

This paper will primarily focus on the rights of asylum seekers in Canada because this research deals with those asylum seekers who have crossed out of the US in order to make their claim on Canadian soil. The deficiencies of the US asylum system will later be discussed in consideration of Canada's own obligations to uphold the rights of asylum seekers per the international standards of protection of which they are party.

Under Canadian law, an international treaty that has been signed and ratified or acceded to by the Government of Canada does not immediately become national law. To actually implement the treaty, the federal government must work with the provinces and territories to pass domestic laws that give the terms of the treaty the force of law in Canadian legislation (IRCC, 2017). There are a number pieces of domestic legislation that serve to implement Canada's international obligations to refugees under Canadian law. The primary legal document

describing refugee protection within Canada is the 2001 *Immigration and Refugee Protection Act* ("IRPA") (S.C. 2001, c. 27). Section 115 of the IRPA enshrines the principle of non-refoulement into Canadian law. Particular to the protection of asylum seekers is the decision made in the *Singh v. Minister of Employment and Immigration* ([*Singh v. Minister*, 1985) by the Supreme Court of Canada. This applied the rights contained in the constitutional Canadian Charter of Rights and Freedoms (the "Charter") to asylum seekers, regardless of their immigration or migratory status. This decision recognized that although not all asylum claimants will receive refugee status, all claims must be heard and the principle of non-refoulement must be respected. This is a landmark case in the protection of the rights of asylum seekers in Canada.

The Canada-US Safe Third Country Agreement (the "Agreement" or STCA) governs the flow of asylum seekers between the US and Canada. In Chapter 5: "Claiming Asylum Across the International Boundary" this paper will explore the implications of the Agreement in consideration of whether or not Canada violates its own Charter as well as the Convention and the Protocol as have been adopted into Canadian law.

2. Haitian Crisis and Migration to North America

While this paper discusses research on these irregular border crossings, TPS, and North American asylum at large, there is a particular focus on Haitian asylum seekers because of their centrality in this migration event. There is a long history of Haitian immigration to Quebec with a significant influx between the mid-1960s to 1970s. Haitian migration to Quebec began in 1963 and, by 1973, 92.9 percent of Haitian immigrants were settling in Montreal (Jadotte, 1997, p. 489-490). This early immigration built the foundation of the large and vibrant Haitian community currently present in Montreal. Villefranche (2014) has written on the history of Haitian diaspora in Montreal. This francophone community seems to play a role in drawing

today's Haitian asylum seekers towards Montreal today. All the same, there has been "an uninterrupted stream of Haitian immigration to the United States" first peaking between 1791-1810 during the Haitian revolutionary era and its aftermath (Laguerre, 2016, p. 2). As such, there is also a significant Haitian diaspora in the US.

Yet Haitian presence in the US is colored by a long history of discrimination and racism, particularly in terms of the policy and practice related to the treatment of Haitians seeking asylum (Laguerre, 2017; Little, 1993). While TPS has been the primary vehicle for the protection of displaced Haitians in the US -- and the only form of blanket relief offered to displaced Haitians -- there is a lengthy record of Haitians fleeing to North America in the hope of seeking asylum and gaining protection. When the first boatload of Haitians seeking asylum arrived in the US in 1963, "all were denied political asylum and deported" (Little, 1993, p. 270). Emblematic examples of this type of discriminatory treatment include between 1972 and 1980 when "approximately 50,000 Haitians sought asylum in the United States" yet "only twenty-five succeeded" (Laguerre, 2017, p. 82). Again, during the first Reagan administration between 1981 to 1985, approximately 3,000 asylum seeking Haitians were intercepted by the US Coast Guard and "not one Haitian was found by US authorities to have presented a valid claim to asylum" or taken to the US to have their claim more carefully examined (Laguerre, 2017, p. 82). In 1990, only two percent of claims for asylum by Haitians were accepted, "giving Haitians the lowest rate of asylum approval of any nationality" (Little, 1993, p. 272). There was "well-documented political oppression in Haiti" (Little, 1993, p. 270) throughout these decades that should have feasibly qualified higher numbers of Haitians for political asylum in the US during this time (p. 270-281). C. Little argues that examples such as these demonstrate that "the fundamental principles of refugee protection have been abandoned time and again in favor of returning

Haitians to a country where its people [have been] routinely victimized" (1993, p. 270) and as such, the US has established a long history of singling out Haitians for discriminatory treatment, particularly in terms of denial to the right of asylum.

This racially biased discrimination against Haitians in the US continues to this day as evidenced by the policy and practice of the Trump administration. Since the termination of Haiti's TPS designation as coupled with President Trump's racially discriminatory rhetoric regarding, in particular, Haitians (NYTimes 2018; NAACP 2018; ACLU 2018; NIPNLG 2018) three lawsuits have been filed by major civil society organizations in the US between January to March 2018. These suits are based upon the discriminatory agenda and racial animus exhibited by President Trump and administration officials towards Haitians (*NAACP v. DHS* 2018; *ACLU v. DHS* 2018; *Saget v. Trump* 2018). In addition, another lawsuit filed by the American Immigration Council (AIC) et al. argues that the DHS has violated the *Immigration and Nationality Act* (INA) and *Administrative Procedure Act* (APA) in refusing to recognize that TPS holders, including Haitians, have the right to adjust to a legal status in the US upon the termination of their TPS program (*Moreno v. Nielson* 2018). Perhaps most infamously, President Trump has made his position clear in labeling Haiti (and some African nations) as "shithole countries" alongside discriminatory statements regarding Haitians, including but not limited to: "[Haitians] all have have AIDS," "[w]hy would we want any more Haitians?" and the desire to "take them out" of a proposed bipartisan immigration deal (*Saget v. Trump* 2018; NYTimes 2018). Such statements reveal the discriminatory agenda and racial animus described in the lawsuits filed by the NAACP, ACLU, and NIPNLG on behalf of Haitian TPS beneficiaries.

In regard to the migration of Haitians to North America in the past two decades, the succession of major natural disasters in Haiti, coupled with political and economic structural

factors, has "brought about the extreme vulnerability of the Haitian society" thus producing mass emigration and expansion of the Haitian diaspora in North America (Audebert, 2017). Significant environmental displacement over the past 15 years has been primarily produced by Hurricane Jeanne in 2004, four storms in hurricanes in 2008, and the 7.1 magnitude earthquake in 2010 (Audebert, 2017). It is estimated that the 2010 earthquake displaced 1.5 million Haitians (AI 2014; ReliefWeb 2014). The relationship between this environmental insecurity and immigration explains the location of Haitian asylum seekers in North America today, however, "the complex roots of Haitian emigration have often left the field open to fluctuating and ambivalent migration policies in the countries of destination" and as such Haitian migrants are considered alternately as economic migrants or as refugees (Audebert, 2017). While it is widely recognized that "Haitians are fleeing in order to survive" many do not fit into the legal definition of a Convention refugee (Edmonds, 2017, n.p.) This is largely due to the fact that Convention refugee status does not afford protection for those displaced by environmental disaster, as will be discussed later in this paper. This will be considered under the conditions of the annulment of TPS in Chapter 4.

3. Relevance of Temporary Protected Status

The revocation of legal status in the US for TPS beneficiaries upon each program's end-date will render these former beneficiaries as undocumented immigrants or asylum seekers if they are to remain in the US. Transitioning to either category puts these formerly-protected persons at high risk of detention or deportation. This risk is intensified by the fact that these individuals are registered with the Department of Homeland Security (DHS) and its component agencies, including US Citizenship and Immigration Services (USCIS) and US Immigration and Customs

Enforcement (ICE). As such, their personal data is available for the purposes of identification and monitoring -- facilitating the ease of arrest, detention, and deportation of these populations.

While the 18-month transition period for former Haitian beneficiaries is presented as time allowed for these populations to either self-deport or adjust to alternative legal status (DHS 2017 PR), neither of these options proves either entirely feasible or reasonable upon review of the conditions in both Haiti and the US. In regard to the current conditions in Haiti, it is widely recognized that Haiti has not yet been able to sufficiently recover from the 2010 earthquake that introduced Haiti's TPS designation (Edmonds 2017; NPR 2017; World Bank 2018; HWR 2018). The World Bank notes that "Haiti is extremely vulnerable to natural disasters with more than 90 percent of the population at risk" as well as the fact that Hurricane Matthew (the most devastating disaster since the 2010 earthquake) caused damage equivalent to 32% of GDP, affecting one third of hospitals, and resulting in long-term losses in agriculture, fishing, and livestock (2018). Thus as Haiti's TPS designation under INA § 244 (b) was granted upon review of "environmental disaster … resulting in a substantial, but temporary, disruption of living conditions" and there *still* "exist extraordinary and temporary conditions" that prevent its nationals from returning safely, and in consideration of the fact that Haiti has, again "officially" (Edmonds 2017; NPR 2017; World Bank 2018; HWR 2018) requested TPS as recently as November 2017 (Edmonds 2017), it seems unreasonable to expect Haitians to self-deport from the US in review of the current conditions in Haiti and the terms of TPS designation.

In regard to the Secretary Duke's suggestion to adjust to alternative legal status (DHS 2017 PR), TPS beneficiaries are not offered a path to permanent residence and lack access to options for adjustment of legal status in the US. In February 2018, the American Immigration Council (AIC), the Northwest Immigrant Rights Project (NIRP), and several TPS holders filed a

class action lawsuit against officials at the DHS and USCIS challenging "the government's unlawful practice of depriving [TPS beneficiaries] … from becoming lawful permanent residents" (AIC 2018; *Moreno v. Nielsen* 2018). As such, Haitians who remain in the US after the end-date of September 22, 2019 will be rendered undocumented immigrants and become immediately at risk of deportation. This will be further discussed in Chapter 4.

Because these populations are unable to return to their countries of origin in safety, many are put in the position to seek asylum. However, due to both the deficiencies of the US asylum system and the changes to the US asylum system under the Trump administration, these populations have a poor chance of receiving asylum in the US (Laguerre, 2017; Little, 1993). This reality, coupled with a well-documented spread of misinformation regarding the "ease" of claiming asylum in Canada (CBC 2017; Globe and Mail 2017; NPR 2017), pushed thousands of Haitian TPS beneficiaries across the border in the hope of gaining protection under the Canadian asylum system. Upon the rejection of a claim for asylum, these Haitians will again be subject to risk of removal and return to Haiti.

4. Temporary Protected Status Under the Trump Administration

Since the start of this project in September 2017, Acting-DHS Secretaries appointed by President Trump have announced the termination of four TPS designated countries: Sudan, Nicaragua, Haiti, and El Salvador (DHS 2017). Then Acting-DHS Secretary Duke failed to make a decision on the TPS designation of Honduras in November 2017 and as such the program has been granted an automatic six month extension. It is reported that the John F. Kelly, President Trump's Chief of Staff unsuccessfully tried to pressure Secretary Duke to terminate the program in November (Nixon & Sullivan [NYTimes], 2017). As the new deadline approaches in May 2018, there is a strong likelihood that the program will also be terminated.

TPS recipients from the four countries already terminated account for approximately 75 percent (CRS 2017) of all TPS beneficiaries passed from the Obama administration to the Trump administration. If the designation of Honduras is terminated next month, nearly 90 percent of TPS' capacity for protection will have been eliminated since the inauguration of President Trump. With such a massive annulment of TPS executed under the Trump administration, alongside overt anti-immigrant and anti-refugee practice and policy (particularly the Executive Orders of January 25 and 27, 2017), the evolving nature of TPS in the US became an increasingly urgent element of this project. As such, I have reoriented my research to encompass the ongoing changes to the program and the conditions that surround them. Chapter 4 will consider TPS and its annulment under the Trump administration.

5. Relevance of the Safe Third Country Agreement

While the Canadian refugee determination regime better meets international standards of asylum, a bilateral agreement between the US and Canada acts to prevent asylum seekers from leaving the US to seek asylum in Canada. This treaty, the known as the *Canada-US Safe Third Country Agreement* (the "Agreement" or "STCA"), requires that persons seeking refugee protection must make a claim in the first country in which they arrive. In other words, an asylum seeker who wishes to seek refugee status in Canada will typically be denied the ability to do so if they attempt to enter Canada by land from the United States. While the STCA proposes the aim of better managing the flow of refugee claimants between the two countries, it acts to deter eligible asylum seekers from accessing the more lawful refugee determination in Canada and therefore functionally restricts would-be refugees from accessing their right to asylum as guaranteed under international law.

However, a "legal loophole" exists in the in the Agreement as it pertains only to official land ports of entry. It therefore applies to the arrivals of asylum seekers at US-Canada land ports of entry, by train, and at airports. But because the Agreement specifies its application as pertaining to *official* land ports of entry, the STCA creates a situation in which persons seeking to enter Canada for reasons of protection are incentivized to cross the border unauthorized and illegally away from official land ports of entry. If a person seeking protection crosses from the US into Canada at an official land port of entry, the STCA applies and they are ineligible to make a claim of asylum in Canada. However, if a person seeking protection leaves the US to illegally cross the border into Canada away from an official land port of entry, they are allowed to make a claim of asylum and will be considered for asylum under the same standards as those who enter Canada legally. Because the Agreement is designed only to apply to official land ports of entry, these border crossings do not occur through a "loophole" but rather the terms of the Agreement itself.

While the premise of the Agreement is that each country recognizes the other as a safe country for refugees, the STCA is broadly criticized for two reasons. First, because many advocates of refugee rights argue the the US is not, in fact, a safe country for asylum seekers; and second, because this "loophole" incentivizes unauthorized, unregulated, and often dangerous border crossings. This will be further discussed in Chapter 5: "Claiming Asylum Across the International Boundary."

6. Executive Orders, Racialization and Imagery of 'Mass Invasions' in Crisis Mentality

Sassen (1999) identifies a series of dynamics associated with immigration in the US: "anti-immigrant feelings, racialization, [and] a crisis mentality about controlling immigration" (p.

XIII). While this seems particularly consistent with the policy and practice of the Trump administration, these dynamics are embedded in the historical phases and patterns of immigration policy in the US; specifically that of the 1920s and 1940s. Sassen (1999) asserts that such racialization informed and instructed US immigration policy throughout the twentieth century. I argue that this racialization continues to inform and instruct US immigration policy today, especially in regard to vulnerable populations in need of protection. Such animus is particularly evident in the efforts to repeal DACA and the Executive Orders issued by President Trump during his first week in office. These measures, alongside the ongoing annulment of TPS, reveal the crisis mentality in the Trump administration's racialization and imagery of 'mass invasions' regarding immigration practice and policy.

The first two orders, "Enhancing Public Safety in the Interior of the United States" (hereinafter "Interior Enforcement Order") and "Border Security and Immigration Enforcement Improvements" (hereinafter "Border Enforcement Order"), were signed on January 25. The third order, "Protecting the Nation from Foreign Terrorist Entry into the United States" (hereinafter "Seven Country Ban"), was signed on January 27.

The first, EO 13767 "Border Enforcement Order," includes measures that would curtail due process and expand problematic detention and enforcement practices. The AIC ([Summary of EO 13767], 2017) asserts "the order will likely result in asylum seekers, families, children, and others being turned away and denied access to humanitarian protection guaranteed for decades under U.S. and international law." The second, EO 13768 "Interior Enforcement Order," introduced a massive expansion of immigration enforcement in the interior. The AIC ([Summary of EO 13768], 2017) asserts "the order defines enforcement priorities so broadly as to place all unauthorized individuals at risk of deportation, including families, long-time residents, and

'Dreamers.'" This order prioritizes all undocumented immigrants for removal, rather than convicted criminals or those who recently crossed the border as was practice under the Obama administration. The order also encourages abusive and discriminatory practices by local law enforcement as well as additional criminal prosecutions for illegal entry into the US. The third, EO 13769 "Seven Country Ban," imposed a suspension of the US Refugee Admissions Program (USRAP), a ban on Syrian refugees, and a ban on entry of nationals from Muslim-majority countries -- thus functionally imposing a "Muslim ban." This ban is perhaps the most explicit it its racialization of immigration policy.

While these EOs do not name TPS recipients explicitly, they do place the them in the crosshairs of the Trump administration's immigration enforcement policy. These measures place a new emphasis on enforcement in the interior and as such are of particular concern to TPS populations in the US. These populations already held the fear that their protected status would be terminated under the Trump administration per his anti-immigration rhetoric. These EOs represent the manifestation of such discriminatory rhetoric into actual immigration policy and law. While the legality of these EOs have been challenged in court, their articulation of suspension of humanitarian protections and racialized animus towards immigrants remains well established. Sassen (1999) sets us free from the imagery of mass invasion that motivates such restrictive and discriminatory immigration policy. I argue that President Trump's immigration policy -- as articulated in the annulment of TPS and these Executive Orders -- represents a return to the restrictive US immigration laws of the 1920s and 1950s. This will be further discussed in the qualitative findings of my interview series.

These are the legal and geopolitical conditions in which I have explored this research.

CHAPTER 4: Temporary Protected Status and Its Annulment

This project explores Temporary Protected Status (TPS) because it became immediately apparent that many asylum seekers crossing from the US into Canada were doing so in the fear of losing their TPS in the US under the Trump administration. This is particularly true in the case of Haitians. This chapter will provide an overview of the program, the factors that necessitate such a program, and the implications of its annulment under the Trump administration.

I. Overview of the Program

US law offers two primary vehicles for noncitizens within the US who do not qualify for refugee or asylum status but who could face violence or hardship if returned home. The first is Temporary Protected Status (TPS) for persons from states (or regions within states) that the Department of Homeland Security (DHS) designates for protection. The second is the exercise of an executive decision not to pursue removal, either in the normal course of enforcement of the law or in the form of special programs for individuals in particular groups (Kerwin, 2014). TPS applies to foreign nationals within the US who may otherwise face removal (deportation) due to their legal status in the US. TPS grants temporary immigration status and work authorization to eligible nationals (or stateless habitual residents) of a country designated for TPS under Section 244 of the INA. While TPS recipients can lawfully work in the US, they are not eligible for most public benefits because they are *not* considered to be present in the US under color of law (MPI, 2017). Under the INA, the Secretary of the Department of Homeland Security (DHS) "may designate" a foreign state (or part of a foreign state) for TPS upon the finding that:

- "there is an ongoing armed conflict within the state and due to such conflict," the return of its nationals "would pose a serious threat to their personal safety";
- **"there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected [emphasis added]";**

- the state is "unable, temporarily, to handle adequately the return" of its nationals, and the state has "officially" requested TPS; OR
- "There exist extraordinary and temporary conditions" in the state that prevent its nationals from safely returning, unless allowing them to stay would be "contrary to the national interest of the United States."
    - [Immigration and Nationality Act (INA) § 244 (b)(1)]

During the TPS designation period, TPS beneficiaries are eligible to remain in the United States, may not be removed (deported), and are authorized to work and obtain Employment Authorization Documents (EADs) so long as they continue to meet the requirements of TPS. To be eligible for TPS, nationals (and stateless habitual residents) of designated states must: (1) satisfy continuous presence (from the date of designation or re-designation of their state) and continuous residence requirements; (2) register for TPS during a set period; (3) pay a fee; and (4) be otherwise admissible as an immigrant [INA § 244 (c)].

TPS is a form of blanket relief from removal. The term "blanket relief" refers to protection from removal that is administered to a group of individuals based on their ties to a foreign country. It is premised on generalized conditions of turmoil or deprivation in the country of origin. This stands in contrast to asylum, which is relief administered on a case-by-case basis to individuals based on their personal circumstances and tied to persecution (Seghetti et al., 2015). While TPS is explicitly temporary in nature, the program has been routinely extended by all previous administrations since its formalization in 1990. Prior to the creation of TPS, the Executive Branch used ad hoc practices to provide similar relief for decades. While terminations of TPS designations overall are not rare, "they are for beneficiaries who have lived in the country for prolonged periods of time – groups that happen to constitute the vast majority of current TPS holders" (Chishti et al., 2017). This refers to those from El Salvador, Haiti, Nicaragua, and Sudan. Past administrations, both Democratic and Republican, have continually extended TPS designations for these populations, based on the lack of improvement in the conditions of these

countries. The Trump administration's complete annulment of the program represents an unprecedented departure from this norm. This paper will focus primarily on TPS granted in the aftermath of environmental disaster because it accounts for more than 90 percent of the program's capacity for protection passed from the Obama administration to the Trump administration. This chapter will explore the factors that led to the necessity of a TPS program in the US as well as the implications of the annulment of this type of protection.

Environmentally Induced Displacement and Temporary Protected Status

Per capita, the vast majority of TPS blanket relief has been granted in response to environmental disasters and their aftermath. In 2017, TPS beneficiaries from El Salvador, Nicaragua, Honduras, and Haiti accounted for more than 90 percent of all TPS beneficiaries. TPS designations for all three of these countries were based on environmental disaster (DHS, 2018). In granting TPS to these populations, the US recognized their need for protection, despite their lack of eligibility for asylum as defined under the either the Convention or the INA. As previously noted, the Trump administration has announced the termination of TPS status for El Salvador, Nicaragua, and Haiti. This has effectively curtailed the program's capacity for protection by 75 percent over the course of this research. It is likely that the DHS will announce the termination of Honduras' designation next month, in May 2018. This would represent termination of TPS status for 90 percent of beneficiaries and an unprecedented annulment of the program. All four of these states retained their designation for many years, as noted in Table 1. This chapter discusses EID because it is the root cause of displacement of 90 percent of TPS beneficiaries passed from the Obama to Trump administrations. Upon the terminations of these programs, these populations formerly-protected by TPS are especially vulnerable because EID itself does not qualify a vulnerable individual for refugee protections.

Table 1. Countries Designated for Temporary Protected Status, 2017

Country	Original Designation Year	Reason for Designation	Continuous Physical Presence Required Since	Deadline for Decision on Extension	Expiration Date	Number of Beneficiaries
El Salvador	2001	Aftermath of earthquakes	3/9/2001	1/8/2018	3/9/2018	262,528
Honduras	1999	Aftermath of Hurricane Mitch	1/5/1999	5/6/2018	7/5/2018	86,031
Haiti	2010	Aftermath of earthquake	7/23/2011	N/A	7/22/2019	58,557
Nepal	2015	Aftermath of earthquake	6/24/2015	4/25/2018	6/24/2018	14,791
Syria	2012	Civil conflict	10/1/2016	1/30/2018	3/31/2018	6,916
Nicaragua	1999	Aftermath of Hurricane Mitch	1/5/1999	N/A	1/5/2019	5,306
Yemen	2015	Civil conflict	3/4/2017	7/5/2018	9/3/2018	1,116
Sudan	1997	Civil conflict	5/3/2013	N/A	11/2/2018	1,048
Somalia	2012	Civil conflict	9/18/2012	7/19/2018	9/17/2018	499
South Sudan	2011	Civil conflict	5/3/2016	3/3/2019	5/2/2019	77
Total						**436,869**

Sources: U.S. Citizenship and Immigration Services, "Temporary Protected Status," accessed November 19, 2017, available online; Jill Wilson, *Temporary Protected Status: Overview and Current Issues* (Washington, DC: Congressional Research Service, 2017), available online.

Note. Reprinted from *Tens of Thousands in United States Face Uncertain Future, as Temporary Protected Status Deadlines Loom,* by Chisti et al., (2018, January 17), Retrieved from https://www.migrationpolicy.org/article/tens-thousands-united-states-face-uncertain-future-temporary-protected-status-deadlines-loom

Safe Haven in Temporary Protected Status

TPS is the statutory embodiment of safe haven for foreign nationals who may not meet the legal definition of "refugee" but are nonetheless fleeing -- or unwilling or unable to return to -- potentially dangerous situations in their country of origin. The concept of "safe haven" embraces humanitarian migrants as it covers those who may not meet the legal definition of a Convention refugee but are nonetheless fleeing potentially dangerous situations. In the US, safe haven has been granted through TPS primarily to those affected by environmentally induced displacement (EID). Safe haven assumes that the host country (in this case the US) is the first country in which the migrant arrives safely or is the country where the migrant is temporarily residing when the

unsafe conditions occur. Safe haven is implicitly temporary in nature because it is given prior to any decision on the long-term resolution of the migrant's status (Seghetti et al., 2015). In the case of TPS, there is an absence of long-term resolution of the migrant's status. This will be discussed under subsection II of this chapter.

Safe haven in TPS "expands the protection of forced migrants who cannot satisfy the criteria [of refugee or asylum status]…it promises group-based protection when the determination of an individual's status proves impossible" (Fitzpatrick, 2000, p. 280 qtd in Menjívar, 2017, p. 1). This refers to the necessity of the program. In other words, this means that, unlike refugee or asylum status, TPS is granted on country conditions and nation of origin, rather than the case-by-case terms of personal persecution outlined in the Convention definition of a refugee. Hence the group, rather than individual, determination of TPS. However, while is intended to serve "as a short-term strategy to secure the immediate physical safety of [humanitarian migrants]" (Fitzpatrick, 2000, p. 280), TPS designations have been routinely extended for up to two decades by all previous administrations since its formalization in 1990.

It is also important to note that TPS is only granted if the measure is consistent with US national interests (Segerblom, 2007 qtd in Menjívar, 2017, p. 1; Seghetti et al., 2015). The ongoing annulment of TPS under the Trump administration represents the temporal end of safe haven for the humanitarian migrants it protected for the past ten to twenty years. This chapter explores the need for safe haven in TPS as a result of EID and the limitations of the Convention definition of a 'refugee.'

Environmentally Induced Displacement and the Definition of a 'Refugee'

As discussed in Chapter 3, the Convention defines a refugee is a person who is "unwilling or unable to return to his country of nationality or habitual residence because of a well-founded fear

of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion" (UNHCR, 1967). The basis of the definition of a "Convention refugee" rests on the protection of persons from political or identity-based persecution that affects an individual personally. This often includes conditions of war or conflict and, "[e]xcept in contexts of conflicts and persecution, there is no lead UN agency that has at its core the protection of people forced to flee owning to disasters, including those triggered by climate change, and which could coordinate an international response" (UN News, 2014). Thus because the legal definition of a refugee requires that a person claiming such status must experience a form of persecution, persons affected by EID are some of the most vulnerable populations in the world. This includes those affected by the earthquakes in El Salvador and Haiti as well as the hurricanes in Honduras and Nicaragua that led to the designations of these populations for TPS.

The Convention also mandates a claimant for status as a refugee must have fled beyond the borders of their own state in that they are "unwilling or unable to return to their country of origin" and as such a person may only make a claim for refugee status from a country other than their own (UNHCR, 1967). This renders internally displaced persons (IDPs) ineligible for a claim of refugee status. Environmental displacement often produces large numbers of IDPs and, as such, these displaced persons are "not protected by international law or eligible to receive many types of aid" (UNHCR, 2018). This is because they remain within the borders of their own country and thus legally remain under the protection of their own government. Such narrow delineations in the definition of a Convention refugee necessitate additional programs of protection -- such as TPS -- for forcibly displaced populations that do not meet these particular legal qualifications. Until the current annulment of the program, TPS provided vital protection

for those dislocated by EID. In global context, EID is a growing concern in relation to forced displacement around the world.

Environmentally Induced Displacement in Global Context

Climate change and its related environmental disasters, displacement and development are a significant concern for expanding global displacement. Millions of people have already been forcibly uprooted by worsening environmental conditions (UNHCR, 2018). It is estimated that there has been an average of 25.4 million new displacements associated with disasters each year since 2008; most of those affected are IDPs. This is more than twice as many displacements caused by conflict and violence (IDMC, 2016). In 2010, an estimated 42 million people worldwide were displaced from their homes as the result of immediate and long-term changes in the physical environment (Yonetani [IDMC], 2011). This estimate is roughly equal to the number of people displaced by war and persecution during the same period (UNHCR, 2010). The UNHCR (2015) warns that "increasing incidence and changing intensity of extreme weather events due to climate change will lead directly to the risk of increased levels of displacement." Such extreme weather events that render a place uninhabitable and cause large-scale forced displacement include those experienced by El Salvador, Honduras, Nicaragua and Haiti.

While the term "environmental refugee" is first attributed to Essam El-Hinnawi, a United Nations Environment Programme researcher, in 1985, this term is misleading because international law (as articulated in the the Convention) defines a "refugee" as a person who is (1) fleeing persecution, and (2) has crossed an international border. El-Hinnawi describes an environmental refugee as "those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption […] that jeopardized their existence and/or serious affected their quality of life" (El-Hinnawi, 1985 qtd in Bose &

Lunstrum, 2014, p. 6). This definition, however, is criticized for being "so wide as to render the concept virtually meaningless" (Suhrke & Visentin qtd in Bose & Lunstrum, 2014, p. 6). The legal application of the term and concept of "environmental refugees" has sparked considerable debate. For example, Bose & Lunstrum (2014, p. 6) explain that the UNHCR "'has serious reservations with respect to the terminology and notion of environmental or climate refugees.'" The UNHCR has itself noted:

> "[T]he terminology and notion of environmental or climate refugees … have no basis in international law … UNHCR is actually of the opinion that use of such terminology could potentially undermine the international legal regime for the protection of refugees whose rights and obligations are quite clearly defined and understood … UNHCR considers that any initiative to modify this definition would risk a renegotiation of the 1951 Refugee Convention, *which could not be justified by actual needs* [emphasis added]" (UNHCR qtd in Bose & Lunstrum, 2014, p. 6).

This leaves those displaced and affected by natural disasters 'out in the cold' as they lack legal recognition under the international standards of protection that govern the asylum systems of both the US and Canada as well as the global refugee determination regime at large. While TPS offered safe haven for those affected by EID from El Salvador, Nicaragua and Haiti, the termination of this protection renders these vulnerable populations without access to protection or legal status in the US. This will be discussed further in subsection II of this chapter.

Designation of Haiti for Temporary Protected Status

Haiti was designated for TPS by the Obama administration in 2010 following the 7.1 magnitude earthquake (DHS 2018) and, while explicitly temporary in nature, the events surrounding the aftermath of the earthquake have significantly impeded the country's recovery. This includes most notably "the largest cholera epidemic in the world" introduced by UN Peacekeepers immediately following the earthquake (Frerichs et al., 2012) and the devastation of Hurricane Matthew -- "the most powerful storm in a decade" -- in October 2016 (BBC, 2016). In review of the current conditions as coupled with ongoing political instability -- much of which is tied to

foreign political interests (including Canada's) -- the President of Haiti formally requested that Haiti's TPS designation be extended in November 2017 (Edmonds, 2017). This occured immediately before Secretary Duke's decision to terminate was announced on November 20, 2017 (DHS, 2017). Thus, over the course of this project, the fears of return or removal to Haiti have been realized as nearly 60,000 Haitians face the impending July 2019 end-date of their TPS designation.

Yet, what many Haitian TPS recipients in the US do not realize is that Canada suspended its own temporary protection program for Haitians back in 2014 (Toronto Sun, 2017; CBC, 2017; IRCC, 2016). Also introduced in the wake of the 2010 earthquake, Canada offered similar protection against deportation in a Temporary Suspension of Removals (TSR) program and a special visa for those who qualified on humanitarian and compassionate (H&C) grounds. This project will consider whether or not the prior lifting of Canada's TSR program will impact Haitians seeking asylum in Canada today. The Government of Canada released a public notice stating that the protections would be lifted December 1, 2014 and the program was formally terminated in August 2016 under Prime Minister Trudeau. However, unlike TPS in the US (which offered *no path* to permanent residence), Haitians protected by TSR in Canada were eligible to apply for permanent residence under H&C grounds upon the termination of TSR without risk of removal from Canada (IRCC 2016). Thus the termination of Haiti's TPS designation functions to produce populations in need of protection in a way that Canada's TSR program did not. Upon the retraction of their TPS status, Haitian beneficiaries are not presented with attainable options for remaining in the US.

II. Production of Populations In Need of Protection

To understand the production of refugees, displaced persons, and asylum seekers today, we must first look towards the formation of the nation-state to understand the creation of these vulnerable groups. The production of such populations comes as a consequence of the formation of modern independent nation-states, as defined and first realized by the Westphalian model in Europe. This modern system of states was formally established as the dominant world order framework by way of the Peace of Westphalia in 1648 (Falk, 1998). This framework defined the sovereignty of states within their own territorial boundaries. Sassen (1999) identifies the intimate connection between the formation of these independent nation-states and the creation of the refugee, the displaced person, and the asylum seeker. The formation of the modern state "contributed to the production of the refugee through [the] aspiration to administrate sovereignty, particularly in their assertion of the right to determine entitlement to citizenship" (Sassen, 1999). It is the ongoing annulment of TPS under the Trump administration that is producing these populations in need of protection. Within this, it is the lack of citizenship -- or the availability of a path thereto -- that renders these noncitizens protected by TPS vulnerable to becoming asylum seekers.

Citizenship

As citizenship historically developed within the framework of state building, "in an ideal world, the political and cultural boundaries of a people would neatly correspond with divisions drawn between independent political units" (Aleinikoff, 2000). Thus while ideally all members of a nation would share the same status as citizens, contemporary international migration and forced displacement locates many within the territorial boundaries of states in which they cannot access citizenship. This is the case of noncitizen populations in the US who are granted TPS. It is the

lack of access to US citizenship for these populations residing in the US that necessitates the program and produces populations in need of protection upon its terminations.

Aleinikoff (2000) defines three main features characterize modern citizenship. First, citizenship is a juridical status granting civil, political, and social rights and duties to the individual members of a state. Second, citizenship refers to a specific set of social roles (voter and so on) performed by citizens and "through which they express choices with regard to the management of public affairs and, hence, participate in government" and gain access to the political system. Third, citizenship also refers to a set of "moral qualities thought to be crucial for the existence of a good citizen" (Aleinikoff, 2000). Thus while citizens have the ability to use their status in order to defend their interests in the political arena, noncitizens lack this fundamental privilege of self-representation and self-defense without access to the political system.

As noncitizens, TPS populations -- though full participants of the civil and social duties of members of a state -- lack the civil, political, and social rights granted by citizenship. As such, these noncitizens fulfill such duties through the payment of taxes but lack the right to access the federal benefits funded by these taxes. Noncitizens must adhere to both federal and state law, but they are denied the right to vote on the legislation that structures this law. Noncitizens are denied the ability to express choices in the management of public affairs and, hence, the ability to participate in the government that governs their status. Thus while TPS populations are demographically and statistically represented as 'good citizens' (high labor force participation, English-speaking, education-seeking, and low criminal activity) (Warren & Kerwin, 2017), they lack the actual membership to defend their status within the state and are thus vulnerable to the retraction of their legal status and the resulting risk of detention and deportation.

A key example of the paradox of noncitizenship for TPS populations is evident in the fact that, because that they are authorized to work, they must pay taxes. They are not, however, eligible to access the federal safety-net benefits (SNAP food benefits, Medicaid, etc.) funded by such taxes (USDA, 2010; DTA, 2004). The irony of this becomes clear when they leave the US, they are "taking their production with them, taking their output with them; taking their work with them is a total net loss and there's no kind of savings on the taxpayer side" (Nowrasteh qtd in Noguchi [NPR], 2017). It is estimated that the loss of the contributions from the TPS populations will result in a $6.9 billion reduction to Social Security and Medicare contributions over a decade (Baran & Magana-Salgado, 2017, p. 1). Here, while the burden of noncitizenship falls to these TPS populations, there is simultaneously no benefit to citizens in the departure of these noncitizen populations.

Temporality of Temporary Protected Status

While TPS is explicitly temporary in nature, high percentages of TPS beneficiaries have lived in the US for 20 years or more, arrived as children, and have US citizen children (Warren & Kerwin, 2017). This reveals the intrinsic rootedness of TPS populations to the US and their vested interest in remaining in the US (or North America) -- with or without legal status. TPS beneficiaries from El Salvador, Honduras, and Haiti account for more than 90 percent of all TPS beneficiaries; of these, 51 percent of Salvadorans, 63 percent of Hondurans, and 16 percent of Haitians have lived in the US for 20 years or more (Warren & Kerwin, 2017). With the termination of TPS programs comes the retraction of TPS beneficiaries' legal status in the US and the impending risk of detention and deportation.

While TPS beneficiaries have an estimated 273,000 US citizen children (born in the US) and high percentages have resided in the US for twenty years or more (Warren & Kerwin, 2017),

TPS does not offer a path to naturalization nor the option to adjust to legal permanent residence (LPR). TPS does not, in itself, lead to permanent status or other durable solutions (Kerwin, 2014). This leaves TPS recipients with three prospects upon the termination of their program: they may self-deport to their country of origin, they may remain in the US as undocumented immigrants, or they may flee across the border in the hopes of receiving asylum in Canada.

'Should I Stay or Should I Go?'

Evaluating the options of TPS populations upon expiry

Because TPS does not confer any form of citizenship, permanent residency, or any right to ongoing immigration status, these populations revert to their prior immigration status upon the expiry of their program (Messick & Bergeron, 2014). Herein is the production of populations in need of protection noted earlier in this chapter. While these former TPS recipients have a vested interest in continuing their lives in the US, the impending risk of detention or deportation can act to motivate these populations to cross the border into Canada. This is in part because life in Canada may retain some degree of normalcy for these former beneficiaries and their children when compared to the alternative of return to a developing country of origin -- either through self-deportation or deportation by USCIS.

Voluntary repatriation is presented by the US government as the natural next step for former beneficiaries upon termination of their TPS status. This proposal, however, is impractical for a number of reasons. Perhaps most notable, in consideration of pragmatic decision-making on the part of these former beneficiaries, is the nature of their strong personal, familial, and economic ties to the US. Between six to ten percent of TPS recipients are married to a legal resident of the US. TPS beneficiaries who have lived in the US for over 20 years as well as those who arrived as children themselves are closely linked and tightly embedded in the US,

presumably more so than they are to their countries of origin because these beneficiaries have spent the better part of their lives establishing social and familial ties to the US.

The statistical portrait of TPS beneficiaries reveals a hard-working population who are deeply embedded in the US (Warren & Kerwin, 2017; Menjívar, 2017). In addition to social and familial connections, TPS beneficiaries have substantial economic ties and obligations in the US. The labor force participation rate for TPS populations ranges from 81-88 percent (well above the rate for the total US population [63 percent] and the foreign-born population [66 percent]). About 27,100 of those in the labor force are self-employed and have created jobs for both themselves and others. TPS recipients live in over 206,000 households, almost one-half of which have mortgages. More than one-half of TPS beneficiaries have health insurance in the US (Warren & Kerwin, 2017). Families and individuals who have built lives for themselves in the US over the past ten to twenty years are simply not likely to return themselves to a resource-constrained state. This is especially valid in consideration of the high proportion of TPS recipients who are the parents of US citizen children. A return to their country of origin would almost certainly represent the splitting of tens of thousands of families as these children have evidently better prospects for education and employment should they remain in the US.

While TPS termination notices from the DHS delay the effective date of termination to "provide time for individuals with TPS to arrange for their departure or to seek an alternative lawful immigration status in the US, if eligible" (Nielsen Announcement on El Salvador, 2018), the latter proves very difficult for beneficiaries of TPS (Chishti et al., 2017). As TPS itself is a provisional protection against deportation, many TPS beneficiaries entered the US illegally. This fact limits all legal avenues towards an alternative legal status and negates most options for adjustment of immigration status (Chishti et al., 2017). This issue was taken to court in February

2018 when the AIC, NIRP, and several TPS holders filed a class action lawsuit against officials at the DHS and USCIS challenging "the government's unlawful practice of depriving [TPS beneficiaries] … from becoming lawful permanent residents" (AIC, 2018; *Moreno v. Nielsen* 2018). For the majority of TPS recipients who entered the US unlawfully, the ineligibility to seek an alternative lawful immigration status in the US leaves few options available. For many, migrating to a third country is a more feasible option than either remaining in the US illegally or returning to their country of origin (Chishti et al., 2017). Herein is the push factor driving these populations across the border in search of protection. Fleeing to Canada in search of asylum proves a more feasible option than remaining in the US given the limited legal avenues to adjust to an alternative legal status.

Remaining in the US as an undocumented immigrant is a high risk option for three key reasons. First, TPS recipients' work authorization has been publically revoked through the widely televised TPS termination reports; second, arrests and deportations of undocumented immigrants from the interior of the US are rising under the Trump administration (Sacchetti [Washington Post], 2017); and third, TPS recipients are registered with USCIS, meaning that their personal information could easily be used for purposes of tracking and arrest. President Trump campaigned on a platform prioritizing a legislative crackdown on illegal immigration. While the Trump administration's stated chief goal is to deport criminals, it is arresting and deporting significant numbers of people who never committed any crimes beyond entering the US without the proper documentation for a legal arrival. From January to September 9, 2017, ICE deported a total of 142,818 immigrants from the border and the U.S. interior, including 59,564 of these noncriminal noncitizens (Sacchetti [Washington Post], 2017). When asked about the deportation of these undocumented but otherwise law-abiding immigrants, Thomas Homan,

President Trump's nominee for director of US Immigration and Customs Enforcement (ICE), made his position clear: "I get asked a lot why we arrest somebody that's not a criminal, [but] those who do enter the country illegally … violate the law. That is a criminal act" (Bendix [The Atlantic], 2017). While levels of deportation rose under the Obama administration, this enforcement targeted criminals convicted of what the DHS defines as "serious crimes" and the deportation of unauthorized border crossers who had recently entered the US (Chishti et al., 2017). Now, however, the enforcement policies of the Trump administration focus instead on the interior, putting former TPS recipients at high risk of detention or deportation upon the end-date of their status.

While this social and political environment puts any and all undocumented immigrants at high risk of arrest or deportation, former-TPS beneficiaries are at an intensely increased risk because the DHS has all of their personal data on-file. As such these populations will be very easy to track for purposes of arrest, detention, and deportation at the whim of the current administration. Coupled with the politically charged and public nature of the TPS terminations, populations formerly protected by TPS may either risk remaining in the US as undocumented immigrants or migrate to a third country to seek asylum. In consideration of geographic and socioeconomic limits, Canada is the only safe third country accessible to these populations.

Legal Challenges to the Annulment of Temporary Protected Status

In Spring 2018, four lawsuits were filed in response to the patterns of discrimination in the recindments of TPS status and the lack of availability for adjustment of legal status for TPS beneficiaries who face the impending end dates of their programs. Three of these suits are based upon the discriminatory agenda and racial animus exhibited by President Trump and administration officials, particularly towards Haitians (*NAACP v. DHS* 2018; *ACLU v. DHS*

2018; *Saget v. Trump* 2018). On January 24, 2018 the NAACP filed a lawsuit against Duke and Nielsen in their official capacities as DHS Secretaries. The lawsuit attests that the DHS's November 2017 decision to rescind TPS for Haitian immigrants reflects an egregious departure from the TPS statute's requirements and an intent to discriminate on the basis of race and/or ethnicity (*NAACP v. DHS* 2018). On February 22, 2017 a class action lawsuit was filed by the American Immigration Council, the Northwest Immigrant Rights Project, and several TPS holders against officials at USCIS and DHS. This lawsuit argues that the US government acted unlawfully in depriving certain TPS holders with close family relationships or employment in the US from becoming lawful permanent residents. Specifically, the lawsuit attests that USCIS is acting unlawfully by denying the adjustment applications of TPS holders who have been "inspected and admitted" (*Moreno v. Nielsen* 2018) and thus eligible for adjustment of status in accord with the INA .

On March 12, 2018 the ACLU filed a class action complaint against the DHS and its Acting Secretaries. The plaintiffs in this case are US citizen children and their non-citizen parents. The complaint asserts that the DHS acted unlawfully in "adopting a new, novel interpretation of the TPS statute that eschews consideration of any intervening country conditions" (*ACLU v. DHS* 2018). This case also argues that this annulment of TPS violates the Fifth Amendment in its race- and national-based animus. Three days later, on March 15, 2018 the National Immigration Project of the National Lawyers Guild (NIPNGL) filed a class action suit alleging violations of law and the Constitution by Trump administration officials in "seeking to operationalize the President's racial animus toward Haitians" (*Saget v. Trump* 2018) and asserts that the termination of Haiti's TPS status will endanger the lives of the nearly 60,000 recipients and their 27,000 US citizen children .

These four lawsuits articulate the critical legal concerns that accompany the annulment of TPS as discussed both in this chapter and Chapter 3. Thus not only is the Trump administration's annulment of TPS entirely unprecedented, the very legality of these measures is in question. This reaffirms the analysis herein regarding danger of such production of populations in need of protection. It also reveals the acute targeting of TPS populations -- particularly Haitians -- by the Trump administration that acts as an additional push factor motivating these populations across the border into Canada in the hopes of finding protection. These lawsuits are in their preliminary stages upon the conclusion of this project in April 2018.

Closing Thoughts: Industry Impact 'Case Study'

TPS recipients' involvement in the labor force is so significant that the construction industry has lobbied the US government in the effort to protect and retain their TPS workers (Noguchi [NPR], 2017). An estimated 51,000 TPS recipients are employed in the construction industry, primarily concentrated in California, Texas, and Florida (Warren & Kerwin, 2017). These states are each in the midst of rebuilding efforts following devastating environmental disasters in the past year. The 2017 California wildfire season was the most destructive one on record (California Dept. of Forestry and Fire Protection, 2017) while, in Texas, Hurricane Harvey is tied with Hurricane Katrina as the costliest tropical cyclone on record (National Hurricane Center, 2018) and, in Florida, Hurricane Irma was the most intense hurricane to strike the continental US since Hurricane Katrina. The combination of losses from Hurricane Harvey and Hurricane Irma are projected to make 2017 the most costly hurricane season for the US on record (BBC, 2017). While each storm is not individually the result of climatic change, the increasing incidence and intensity of such events may be triggered by our warming climate (Stott et al., 2015).

With 50,000 TPS recipients working in the construction industry in states that are struggling to rebuild in the wake of crippling environmental disasters, the prospect of losing this workforce puts an incredible strain on areas where labor shortages in construction are already especially acute (Noguchi [NPR], 2017). The business community, including the Chamber of Commerce and the National Association of Home Builders, among other groups, has come out in opposition of the Trump administration's termination of TPS designations. Those lobbying emphasize the significant role TPS workers are playing in recovery efforts following hurricanes Harvey and Irma as well as the California wildfires. The policy director for the American Immigration Council reports that his level of industry support of TPS workers is unprecedented. Construction companies involved in the lobbying efforts argue that stripping TPS workers of their legal status and employment authorization will strain their preexisting labor shortages (Noguchi [NPR], 2017). This is especially interesting as the increasing incidence and intensity of extreme weather events related to climate change comes full circle. The impact of such events that first necessitated the protection of these populations now employs these populations and necessitates their labor in the US.

CHAPTER 5: Claiming Asylum Across the International Boundary

This chapter will explore and discuss the legal terms by which individuals may leave the US and make an asylum claim on Canadian soil. This activity is governed by Canada's own body of national law as well as its obligations to uphold international standards of protection. Specifically, the Canadian asylum system is governed by the constitutional Canadian Charter of Rights and Freedoms, *Immigration and Refugee Protection Act* ("IRPA") (S.C. 2001, c. 27), and the Canada-US Safe Third Country Agreement ("STCA" or the "Agreement"). These documents

incorporate the standards of protection contained within the Convention, the Protocol, and the Torture Convention. From these, Canada draws the definition of a Convention refugee and a 'person in need of protection.' This chapter will place a particular focus on the STCA and the controversy that surrounds it, specifically in regard to the deficiencies of the US asylum system. It is the terms of the STCA that serve as the legal mechanism by which asylum seeking through irregular border crossing is codified and incentivized. While this chapter does not discuss TPS populations by name, the legal terms examined herein pertain specifically to this demographic because they are inherently crossing from US to Canadian soil for the purpose of claiming asylum in Canada.

Introduction to the Claim

Under Canadian law, asylum claims are referred to as "claims for refugee protection." Individuals may make a claim for refugee protection on Canadian soil at an official port of entry, a CBSA inland office or an IRCC inland office. The IRPA (S.C. 2001, c. 27) requires that every person seeking to enter Canada must appear for an examination at a port of entry so that the CBSA can determine whether that person has a right to enter Canada, or may become authorized to enter and remain in Canada. However, per section 133 of the IRPA as reflected in Article 31 of the Convention, no enforcement actions are taken against persons who cross irregularly (illegally) into Canada without prior authorization or proper documentation *if they are seeking asylum.* These protections recognize that asylum seekers may need to enter a country without official documents or authorization in order to make their claim of refugee protection, per UNHCR standards (CIC [Asylum Claims], 2018; UNHCR Canada, 2018). This is the legal mechanism by which asylum seekers may enter Canada through irregular border crossing.

Under the legislation of the bilateral Canada-US Safe Third Country Agreement (STCA), persons seeking entry to Canada from the US are *ineligible* to make a claim for refugee protection in Canada at official land border ports of entry. The STCA, however, *does not apply* to border crossings *in between* ports of entry. Thus the terms of the STCA incentivize irregular (illegal) border crossing from the US into Canada. Upon this irregular border crossing, asylum seeking individuals either turn themselves over to or are intercepted by the RCMP. The RCMP takes these persons into custody for the purposes of bringing them to a CBSA designated port of entry or inland office. They are then examined so that CBSA can determine whether that person may become authorized to remain in Canada and file their claim for refugee protection.

It is at this point that persons seeking refugee protection may make their claim at a CBSA designated port of entry or inland office and thus begin the application process from within Canada. CBSA or IRCC officials will determine if an individual's claim is eligible to referral to the IRB. Grounds of ineligibility include, but are not limited to: entry through an official land border port of entry (per the STCA), criminal activity or human rights violations, rejection of a previous claim by the IRB, or an active removal order. If the immigration officer determines that the refugee claim is not eligible to be heard, the claimant may file for judicial review in the Canadian Federal Court or, in certain cases, file for a Pre-Removal Risk Assessment. If the claim is determined to be eligible to be heard, it will be referred to the Refugee Protection Division of the Immigration and Refugee Board of Canada (IRB) for a hearing. The IRB is an independent tribunal responsible, through its Refugee Protection Division (RPD), for deciding refugee protection claims in Canada. Under Canadian law, asylum seekers are referred to as "refugee claimants" (IRB [Refugee Claims], 2018).

While a refugee claimant waits for their claim to be heard by the RPD -- a process that can take months to complete -- the claimant is permitted to remain in Canada with certain rights and access to refugee services. Here is where the asylum system of Canada differs perhaps most tangibly from that of the US. While asylum seekers in the US are not authorized to work and subject to detention, those seeking asylum in Canada can obtain work permits and are free to move freely. Their children are allowed to attend school and they are provided temporary coverage of healthcare benefits while they await their hearing. Canada allows asylum seekers rights and access to refugee services that, in the US, are reserved exclusively for resettled refugees, if offered at all. Such deficiencies of the US asylum system will be discussed later in this chapter. It is important to keep such a juxtaposition between the US and Canadian asylum systems in mind when considering the pragmatic decision making on the part of potential asylum seekers in the US deciding whether to make their claim on US or Canadian soil

The RPD's decision on a claim rests upon the definition of a Convention refugee (as defined in Chapter 3) or a 'person in need of protection.' The definition of a Convention refugee has been incorporated into Canadian law under section 96 of the IRPA (IRB [Legal References], 2016). The latter is a person within Canada who cannot return to their country of origin safely due to either danger of torture, risk to life, or risk of cruel and unusual treatment or punishment (CIC [Eligibility], 2017). To return such a person to these conditions would violate the principle of non-refoulement. This reflects Canada's obligations to uphold to the Convention and the Protocol as well as the Torture Convention as incorporated into national law (CCLA [Canada & the UN], 2016). As such, claims for refugee protection are governed in part by the international treaties to which Canada is party as well as Canada's own national body of law and refugee determination system.

Canadian Refugee Determination System

While Canada has a proud history of welcoming refugees and those in need of protection, the Canadian refugee determination system was fundamentally altered in 2012 under Bill C-31 *Protecting Canada's Immigration System Act* (PCISA) which amended the IRPA*,* the *Balanced Refugee Act,* and the *Department of Citizenship and Immigration Act* (S.C. 2012, c. 17)*.* This legislation imposes disproportionately harsh treatment on refugee claimants seeking asylum in Canada (Hout et al., 2015; Atak et al., 2018) in measures including: expedited refugee claim hearings, reduced procedural guarantees and reviews, growing use of socioeconomic deterrents, and increased immigration detention. These policy changes reflect similar contemporary shifts in other Western countries, including the US (Hout et al., 2015). I concur with the argument made this year by Atak et al. (2018) that there is a correlation between these legislative measures in Canada and the increase in irregular migration to Canada.

Research on the implications of these new measures has revealed violations of asylum seekers' human rights under international standards of protection. It is argued that the government utilized language of security to rationalise these measures (Atak et al., 2018) through "problematizing asylum seekers as posing multiple threats to Canadian society" (Hout et al., 2015). Such language includes, but is not limited to, representation of asylum seekers as posing threats to the economy, the integrity of the refugee system, and national security. This language draws upon discursively constructed subjectivities including queue jumpers, uninvited guests threats to public security, and drains on public resources (Grove & Zwi, 2006). These mechanisms position refugee claimants as "the other" -- particularly in opposition to refugees resettled from abroad. While Convention refugees are referred for resettlement through the

UNHCR (a process that often takes several years to complete), refugee claimants present themselves directly to the government of the country in which they hope to receive protection.

This use of discursive mechanisms and the 'othering' of refugee claimants in Canada -- particularly those who come through irregular border crossing -- within the legislation of the PCISA as produced by the Government of Canada "creates a constructed binary between 'other' [refugee claimants] and 'legitimate' refugees who are resettled from abroad" (Hout et al. 2015). Such dominant discourse influences and constructs understanding of "problems" and their proposed "solutions" as written into policy (Bauder, 2008; Grove & Zwi, 2006). This discursive dichotomization between "deserving" refugees and "undeserving" asylum seekers (Sales, 2005) follows similar trends in contemporary immigration and refugee policy in Europe.

The UNHCR has noted that Canada was previously "featured among the top-10 recipient countries a few years ago but have registered significantly lower numbers of asylum seekers in recent years. This can potentially be the result of reforms of law and asylum policies" (Elgersma, 2015). Despite these dramatic changes to the previous Canadian refugee determination system, this chapter will discuss the deficiencies of the inferior US asylum system in consideration of whether or not Canada's designation of the US as a 'safe third country' violates refugee claimants' rights under Canada's obligations to uphold international law as well as Canada's own Charter of Rights and Freedoms.

The Canada-US Safe Third Country Agreement

The *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* (the "Agreement" or "STCA")

Selected excerpts from the Introduction to the Final Text of the Agreement [emphasis added]:

> **CONSIDERING** that **Canada** is a party to the 1951 Convention relating to the Status of Refugees, done at Geneva, July 28, 1951 (**the "Convention")**, and the Protocol Relating to the Status of Refugees, done at New York, January 31, 1967 (**the "Protocol"**), that the **United States** is a party to **the Protocol**, and reaffirming their obligation to provide protection for refugees on their territory in accordance with these instruments;
>
> **ACKNOWLEDGING** in particular the international legal obligations of the Parties under the principle of **non-refoulement** set forth in the **Convention and Protocol**, as well as the **Convention** Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, done at New York, December 10, 1984 (**the "Torture Convention "**) and reaffirming their mutual obligations to promote and protect human rights and fundamental freedoms.
>
> **NOTING** that refugee status claimants may arrive at the Canadian or United States land border directly from the other Party, territory where they could have found **effective protection**;
>
> **AWARE** that such sharing of responsibility must ensure in practice that persons in need of international protection are **identified** and that the possibility of indirect breaches of the fundamental principle of non-refoulement are avoided, and therefore determined to safeguard for each refugee status claimant eligible to pursue a refugee status claim who comes within their jurisdiction, **access to a full and fair refugee status determination procedure as a means to guarantee that the protections of the Convention, the Protocol, and the Torture Convention are effectively afforded** (IRCC [Final Text of the STCA], 2002).

I. Overview of the Agreement

Section 102 of the IRPA permits the designation of safe third countries for the purpose of sharing the responsibility for refugee claims. The criteria for the designation of a safe third country is outlined in subsection 102(2) of the IRPA. A safe third country is defined as "a country where an individual, passing through that country, could have made a claim for refugee protection" (IRCC [STCA], 2016). As such, the premise of the Agreement is that each country recognizes the other as a safe country for refugees. This assertion has been contested and legally challenged by advocates for the protection of refugee rights for the past 13 years, since before the STCA came into force in December 2004 (CCR, 2018). To date, the US is the only country that is designated by Canada to be a safe third country under Canada's IRPA (S.C. 2001, c. 27).

As such the STCA applies only to refugee claimants who are seeking entry to Canada from the US. The Agreement is in effect at Canada-US land border crossings and border crossings by train. The STCA is in effect at airports *only if* the person seeking refugee protection in Canada has been refused refugee status in the US and is in transit through Canada after being deported from the US. The Agreement does not apply to US citizens or habitual residents of the US who are not citizens of any country ("stateless persons"). There are four narrow exceptions to the agreement that "consider the importance of family unity, the best interests of children and the public interest" (IRCC [STCA], 2016). These exceptions allow for certain family member reunification, eligibility of unaccompanied minors, document holders, and public interest exceptions under specific conditions (IRCC [STCA], 2016). This project will not further delve into these exceptions because of their narrow delineations and limited impact on this particular migration event.

II. Application of the Agreement

Application of the STCA requires refugee claimants to request refugee protection in the first safe country in which they arrive and set foot (either the US or Canada), unless they qualify for one of the four narrow exceptions to the Agreement. This means that an individual who first arrives in the US must make their claim on US soil and an individual who first arrives in Canada must make their claim on Canadian soil. As such, an individual is ineligible to make a refugee claim at the Canada-US land border because that person has implicitly already touched either US or Canadian soil. The Agreement states that the "receiving country" may return a refugee claimant to the "country of last presence" (either the US or Canada) upon an ineligible claim of asylum at an official land border point of entry (IRCC [Final Text of the STCA], 2002). Thus the STCA permits Canada to return to the US asylum seekers who are attempting to enter Canada from the

US at an official land border port of entry, and vice versa, *without substantively reviewing the merits of the claim*.

However, because the STCA was designed to apply *only* at official ports of entry, it does *not* apply to refugee claimants who cross *in between* ports of entry, i.e., those who cross unauthorized -- without prior approval or examination at designated ports of entry -- between the US and Canada. This is the legal mechanism by which asylum seekers may leave the US and become eligible to make an asylum claim on Canadian soil. As such, application of the STCA incentivizes irregular (illegal) border crossings away from and in between official land ports of entry. These irregular entries enable otherwise ineligible asylum seekers to leave the US and make a claim of asylum on Canadian soil.

III. Background on the Agreement

The STCA is a bilateral agreement between the Governments of Canada and the US. Both countries signed the STCA on December 5, 2002 and the final agreement came into effect on December 29, 2004. The STCA is part of the US-Canada Smart Border Action Plan and is intended to "to better manage the flow of refugee claimants at the shared land border" (CBSA [STCA], 2009) as well as "help both governments better manage access to the refugee system in each country for people crossing the Canada-US land border" (IRCC [STCA], 2016). Canada advocated for such an agreement with the US since the 1990s largely because, prior to the STCA, approximately one-third of Canada's yearly refugee claimants passed through the US before apply for asylum in Canada (Harvard, 2006, p. 10). This is predominantly due to Canada's geographic inaccessibility and "the simple fact that many asylum seekers who wish to claim protection in Canada must first travel through the United States" (Arbel, 2014, p. 248). As

such, while the Agreement was designed as a "burden sharing" mechanism, the STCA keeps large numbers of asylum seekers *out* of Canada and *in* the US (Arbel, Brenner, 2013, p. 7).

While Canada and the US engaged in negotiations in the 1990s, an agreement was not produced until negotiations were resumed in the aftermath of the September 11 attacks on the US. These renewed discussions were "fuelled in large part by a growing concern with national security" (Arbel, 2014, p. 246). The Smart Border Declaration and Action Plan was issued by the two states within three months of the attacks. The Declaration and Action Plan was designed to enhance security along the US-Canada border and, while the STCA does not explicitly address the overarching concern with national security, Audrey Macklin explains:

> The subtext is security, and the unstated argument goes as follows: the integrity of asylum is weakened through its abuse by terrorists; the Canadian system is more lax and vulnerable to abuse than the US system; public support for refugees on both sides of the border is eroding because admission of asylum seekers is perceived to (or does) constitute a menace to security; *ergo*, deflecting asylum seekers into the allegedly more vigilant US system enhances security (Macklin, 2003, p. 17 qtd in Arbel, 2014, p. 247).

Arbel clarifies, "that none of the perpetrators of the 11 September 2001 attacks entered the United States as asylum seekers or through Canada proved immaterial. The need to fortify the border in the aftermath of the attacks 'acquired the status of conventional wisdom' (Macklin, 2003, p 17) that fed upon and was justified through broader societal anxieties about refugees as markers of risk" (Côte-Boucher, 2008, p. 151 qtd in Arbel, 2014, p 248). Yet, while the US was motivated by concerns for national security, Canada instead sought to implement the STCA to "'limit the significant irregular northbound movement of people from the United States who wished to access the Canadian refugee determination system'" according to a USCBP, CBSA, and RCMP report dated July 2010 (USCBP et al., 2010, p. 12 qtd in Arbel, 2014, p. 248). As such, Canada's "primary goal in implementing the STCA was to deter asylum seekers from making refugee claims in Canada" (Arbel, 2014, p. 248). This explicitly identifies Canada's goal

of reducing the number of asylum seekers eligible to seek refugee protection in Canada under the Canadian refugee determination system.

IV. Review of the Designation of the US as a Safe Third Country

The IRPA requires the "continual review" of all countries designated as safe third countries under subsection 102(3) in order to ensure that "the conditions that led to the designation continue to be met" (IRCC [STCA], 2016). In Canada, subsection 102(2) of the IRPA outlines the criteria for designating a country as a safe third country. Specifically, the legislation requires that the review of a designated country is based on four factors:

1. whether it is party to the 1951 Refugee Convention and the 1984 Convention Against Torture;
2. its policies and practices with respect to claims under the 1951 Refugee Convention, and its obligations under the 1984 Convention Against Torture;
3. its human rights record; and
4. whether it is party to an agreement with the Government of Canada for the purpose of sharing responsibility with respect to claims for refugee protection (IRCC [STCA], 2016).

Of the review process, the IRCC ([STCA], 2016) attests that "reviews incorporate information obtained from a number of sources, including United Nations organizations, international human rights organizations, government agency reports, statistical records and policy announcements, relevant academic research, and media reports." For the designation of the US, the Minister of Immigration, Refugees and Citizenship ("Minister of Immigration") monitors, on a continual basis, the four factors described above. Should circumstances warrant, the Minister will report to the Governor in Council if the conditions that led to the designation fail to be met (IRCC [STCA], 2016). Upon the conclusion of this research in April 2018, the Minister of Immigration maintains that the US continues to meet the above criteria for the designation of a safe third country (IRCC, 2018; CBC, 2017; Vancouver Sun, 2017).

However, despite these prescribed review measures, the Agreement is widely criticized because actual formal review of the STCA and designation of the US is limited. While a clear need for continual oversight is identified, the STCA does not actually require regular ongoing reviews; and, although the STCA provides for UNHCR monitoring, "UNHCR's review is narrowly focused on whether the STCA is being correctly applied, not on whether the STCA when correctly applied, endangers asylum seekers or promotes illegal border crossings" (Harvard, 2006, p. 8). In addition, it is difficult for NGOs to monitor the effects of the STCA simply because it is nearly impossible to communicate with asylum seekers who are returned to the US and thus impossible to determine or evaluate what actually happens to the individuals who are barred from making their asylum claim in Canada (Harvard, 2006, p. 8). In 2007, the Justice Phelan decision found that it is unreasonable to conclude that the US complies with its non-refoulement obligations under the Convention as well as the Torture Convention and, as such, the application of the STCA violates refugees' Charter rights to life, liberty and security of the person (section 7) and to non-discrimination (section 15). The Court also found that "the federal Cabinet failed to comply with its obligation under the law to ensure continuing review of the status of the US as a safe third country" (CCR [STCA Overview], 2018).

Nevertheless, upon the conclusion of this project, the Government of Canada states that "the United States continues to meet the requirements for designation as a safe third country" (IRCC [STCA], 2018). According to the IRCC ([STCA] 2018), the US continues to meet the four factors listed above upon review of the following conditions:

Factor 1: Whether the United States is party to the 1951 Refugee Convention and the 1984 Convention Against Torture

- The United States is signatory of two international treaties that provide protection to people fearing persecution or at risk of torture in their countries of origin: the 1951 Refugee Convention and its 1967 Protocol, and the 1984 Convention Against Torture.

Factor 2: Policies and practices with respect to claims under the 1951 Refugee Convention and obligations under the 1984 Convention Against Torture

I. There exists in the United States an extensive administrative system, subject to judicial checks and balances, for assessing refugee protection applications. The refugee status determination system offers a high degree of protection to refugee protection claimants.

Factor 3: Human rights record of the United States

- The United States meets a high standard with respect to the protection of human rights. It is an open democracy with independent courts, separation of powers and constitutional guarantees of essential human rights and fundamental freedoms.

Factor 4: Whether the United States is party to an agreement with Canada for the purpose of sharing responsibility with respect to claims for refugee protection

- The Safe Third Country Agreement between Canada and the United States was signed on December 5, 2002, came into force on December 29, 2004, and remains in force.

V. Contesting of the Designation of the US as a Safe Third Country

Despite these assurances on the part of the Canadian Government, advocates for the protection of refugee rights on both sides of the border have contested the designation of the US as a safe third country since before the Agreement took effect over 13 years ago. These critiques and legal challenges continue to this day and have substantially intensified since the inauguration of President Trump and the transition to the Trump administration (AIC & CRC, 2017; HIRC, 2017). In light of these numerous reports and critiques, there is significant and compelling documentary evidence that the continual review of the designation of the US as a safe third country by the Government of Canada has failed in adequately reviewing the four factors listed under subsections 102(2) and (3) of the IRPA.

Before the implementation of the Agreement, nearly 100 non-governmental organizations from both the US and Canada submitted an open letter to US and Canadian government officials opposing the signing of the STCA. In 2002, this letter foresaw the incentivization and resulting increase in irregular border crossing in the effort to seek asylum (CCR et al., 2002) that we now witness today. The CCR, AIC, and CCC contested the designation of the US as a safe third country in 2005 before the Federal Court of Canada soon after the Agreement came into force

(*Canada v Canadian Council for Refugees et al.* [*Canada v CCR*] 2007). The CCR also presented submissions to the Government of Canada and parliamentary committees in 2006 and 2007 outlining the deficiencies of the US asylum system and issues in considering the US a "safe country" for asylum seekers (AI & CRC, 2017, p. 6).

The most recent comprehensive reports contesting the designation of the US as a safe third come from Amnesty International Canada (AIC) and Canadian Council for Refugees (CRC) as well as the Harvard Immigration and Refugee Clinic (HIRC). Following the inaugural months of the Trump administration, AIC and CRC submitted a 52-page brief to the Government of Canada in May 2017 and HIRC released a report in conjunction with a letter to Prime Minister Trudeau and the Minister of Immigration in February 2017. Both reports address the systemic failings of the US asylum system and refugee determination regime as well as the exacerbation of these deficiencies under the Trump administration. Due to the lack of governmental action in response to the AIC/CRC brief, these two organizations again came together with the CCC and an anonymous asylum seeker to challenge the legal legitimacy of the US designation before the Federal Court of Canada in July 2017. These court proceedings are currently underway as this project concludes in April 2018.

VI. Deficiencies of the US Asylum System

There is extensive scholarly critique of the US asylum system (particularly related to criminalization and detention) and, while this paper will discuss the deficiencies herein, a comprehensive discussion is outside the scope of this project. Primarily, reports identify how the US asylum system deviates from international protection standards in relation to: detention of asylum seekers; expedited removal; withholding of removal; risk of refoulement; and statutory bars to asylum (Harvard, 2006, p. 11-15; Arbel & Brenner, 2013, p. 67-86). Because of clear

deficiencies in the US asylum system, Canada jeopardizes asylum seekers' ability to obtain fundamental legal protections by returning them to the US per the STCA protocol (Arbel & Brenner, 2013, p. 8). This is because the STCA operates so that Canada obligates a refugee who first sets foot on US soil must make their asylum claim under US law and the US refugee status determination system -- a determination system that fails to adequately meet international standards of protection as well as Canada's own legal obligations to refugee protection.

These and other critiques of the US asylum system attest that several key aspects of US asylum law and policy fall below international standards and fail to ensure adequate protection. Prior to the implementation of the STCA, "deserving asylum seekers denied asylum or barred from asylum in the United States successfully obtained protection in Canada" (Arbel & Brenner, 2013, p. 9) and as such, application of the STCA largely closes this important safety valve and functionally bars genuine refugee claimants from obtaining their fundamental legal protections.

In the Federal Court of Canada in 2007, Justice Phelan's findings noted the following deficiencies in the US asylum system as it pertains to Canada's designation of the US as a safe third country:

> . . . there are a series of issues, which individually, and more importantly, collectively, undermine the reasonableness of the GIC's conclusion of U.S. compliance [with international conventions]. These include: the rigid application of the one-year bar to refugee claims; the provisions governing security issues and terrorism based on a lower standard, resulting in a broader sweep of those caught up as alleged security threats/terrorists; and the absence of the defence of duress and coercion. Lastly, there are the vagaries of U.S. law which put women, particularly those subject to domestic violence, at real risk of return to their home country (*CCR v. Canada* 2007).

Because the operational legitimacy of the STCA hinges on the assumption that the US and Canada are equally 'safe' countries for refugees (Efrat, 2014, p. 47), these deficiencies undermine the legal legitimacy of the STCA and thus open constitutional challenges to the STCA in the Federal Court of Canada.

VII. Constitutional Challenges to the Agreement in the Federal Court of Canada

The argument that the US should not be designated as a safe third country because of the deficiencies of the US asylum system is central to legal challenges and criticisms of the STCA. The first challenge to the constitutional legitimacy of the STCA was a judicial review brought before the Federal Court of Canada soon after the STCA went into force in 2004. A coalition comprising the CCR, AIC, the Canadian Council of Churches (CCC), and a plaintiff identified as John Doe (a Colombian asylum seeker in the US) challenged the validity of the Agreement in seeking "a declaration that the designation of the United States as a 'safe third country' and the resulting ineligibility triggered by the STCA were invalid and unlawful" (Arbel, 2014, p. 243). Specifically, the applicants sought a declaration that the Agreement was a breach of the Canadian Charter for Rights and Freedoms (the "Charter") and international human rights and refugee law, including the Convention and the Protocol.

Justice Phelan found the STCA unconstitutional in the Federal Court of Canada in November 2007 and, as such, declared the STCA to have no force and effect (*CCR v Canada* 2007 [338]). Justice Phelan ruled that "the United States human rights and refugee protection record at that time did not meet the requirements of Canadian law and overturned the designation on administrative and Charter grounds" (AI & CRC, 2017, p. 8). Justice Phelan listed a series of issues that "individually and collectively undermined the claim that the United States complied with its *non-refoulement* obligations as outlined in Article 33" of the Convention (*CCR v Canada* 2007 [239-240]) and he concluded that the US' "non-compliance with Article 33 are sufficiently serious and fundamental to its refugee protection that it was unreasonable for the [Governor-in-Council] to conclude that the US is a 'safe country'" (*CCR v Canada* 2007 [240]). In assessing the STCA's constitutionality, Justice Phelan also emphasized the treatment of gender-related

asylum claims under the US regime and found that, in part, the STCA could not be determined constitutional because "[w]omen and certain nationals are affected more harshly than other refugee claimants covered by the STCA" (*CCR v Canada* 2007 [323]) in facing return to the inadequate protection standards of the US.

Justice Phelen's decision was overturned by the Federal Court of Appeal in June 2008. The Court of Appeal decision restored the STCA's validity (*Canada v Canadian Council for Refugees et al.* [*Canada v CCR*] 2008) through focusing "largely on the discretionary authority of Canada's Governor-in-Council, and overturned Justice Phelan's findings on these grounds" (Arbel, 2014, p. 244). That is to say, the Phelan decision was overturned on technicality rather than review of whether or not the US meets the criteria for designation as a safe third country. Upon restoring the validity of the STCA, the Court decision did not in fact find that the US is a safe country for refugees (CCR 2018). The Supreme Court of Canada denied leave to appeal and as such the STCA remains in operation (*CCR et al. v Canada* 2009 qtd in Arbel, 2014, p. 245).

The same three organizations announced on July 5, 2017 the launch of a new legal challenge to the designation of the US as a safe third country for refugees. CCR, AIC, and CCC joined an individual litigant who is asking the Canadian Federal Court to strike down the STCA and allow her to make a refugee claim in Canada. The litigant is a Salvadoran woman whose gang-related persecution would not likely be recognized in the US and, as such, has little chance of protection if she were forced to make a claim of asylum in the US, rather than Canada (AI [STCA], 2017). In December 2017, CCR, AIC, and CCC affirmed that they believe that Canada's designation of the US as a safe third country violates refugee rights under international

law and the Canadian Charter of Rights and Freedoms. This argument is based upon the following findings (CCR, 2017, p. 1-2):

1. The US does not fully comply with its refugee obligations and therefore is not safe for all refugees:
    a. The one-year bar to asylum (most individuals cannot make a claim if in the US for more than one year);
    b. Expedited removal (allows for removal from the US without due process);
    c. Detainment of Asylum Seekers (arbitrary, with limited or no access to legal counsel);
    d. Operation Streamline ("zero-tolerance" fast-track prosecution and criminalization of unauthorized border crossing);
    e. Prosecution of asylum seekers (contrary to international law, asylum seekers face prosecution for illegal entry);
    f. Push-backs at the southern border (illegal refusal of entry to asylum seekers at ports of entry);
    g. Inconsistent recognition of gender-based asylum claims in the US;
    h. Inconsistent adjudication of claims and "asylum-free zones" (rates of acceptance of similar claims vary drastically between different regions in the US).
2. The US is becoming even less safe for asylum seekers under the Trump administration.
3. The Federal Court of Canada already ruled that the US is not safe for refugees and the STCA violates refugees' rights.

On December 11, 2017 the Federal Court granted CRC, AIC, and CCC standing as public interest litigants (CCR [STCA Overview], 2017). The case is still in the preliminary stages upon the conclusion of this project in April 2018.

VIII. Documentary Findings on the Deficiencies of the US Asylum System

Extensive research has been done on the deficiencies of the US asylum system. My analysis draws from the documentary findings of the following four key sources:

1. *Bordering on Failure: The U.S.-Canada Safe Third Country Agreement Fifteen Months After Implementation* (Harvard, 2006)
2. *Bordering on Failure: Canada-U.S. Border Policy and the Politics of Refugee Exclusion* (Arbel & Brenner, 2013)
3. *The Impact of President Trump's Executive Orders on Asylum Seekers* (HIRC, 2017)
4. *Contesting the Designation of the US as a Safe Third Country* (AIC & CRC, 2017)

A Harvard report released in 2006, titled *Bordering on Failure: The U.S.-Canada Safe Third Country Agreement Fifteen Months After Implementation*, concluded that at that time, the STCA "not only fails to accomplish its stated goal of securing the border, but indeed makes the border less secure, endangering the lives of refugee claimants and threatening the security of the United States and Canada" (Harvard, 2006, p. 2). The report questions the claims of both the US and Canadian governments to offer "generous systems of refugee protection" and argues that "several aspects of the U.S. asylum system violate international legal standards" as well as that "the STCA is jeopardizing the ability of refugee claimants to receive fundamental protections" (Harvard, 2006, p. 2).

The report raises key issues with the US asylum system and refugee determination regime that continue to this day, for example: "asylum applicants in the United States cannot receive employment authorization, benefits, or government-sponsored legal representation while awaiting determination of their claim. Further, individuals are wary of entering what is too often a dysfunctional and arbitrary U.S. asylum system" (Harvard, 2006, p. 3).

The fact-finding investigation reached the following four major conclusions (Harvard, 2006, p. 2-4):

1. **The STCA endangers refugee applicants by denying them access to fundamental protections.**

"Statistics collected from NGOs along the United States-Canada border demonstrate that the STCA has caused a significant decline in the number of refugee claimants legally crossing from the United States to Canada, disproportionately affecting the Columbian refugee community. Although the U.S. and Canadian governments both claim to offer generous systems of refugee protection, several aspects of the U.S. asylum system violate international legal standards" (Harvard, 2006, p. 2).

2. **The STCA makes the border more hazardous for refugee claimants by threatening the existence of NGOs along the US-Canada border.**

"Prior to STCA implementation, NGOs along the border worked jointly with immigration officers to move applicants through the inspection and application process. As the number of refugee claimants being processed and sheltered by the NGOs has decreased since the STCA went into effect … if NGOs close their doors, the border will become

> increasingly dangerous for refugees who will have fewer and fewer places to turn for information, food, and shelter" (Harvard, 2006, p. 3).
>
> **3. The STCA encourages individuals who would normally have entered Canada's refugee determination system to [instead] illegally cross the border or remain without status in the United States.**
>
> "Refugee claimants who are stranded in the United States frequently are statutorily barred from applying for asylum … For those who seek legal refugee protections, often the only option is to enter Canada and file an asylum claim there" (Harvard, 2006, p. 3).
>
> **4. The STCA contributes to a rapidly deteriorating refugee protection regime in North America.**
>
> While citing that Canada served for decades as a "model whose example raised the standards of refugee protection worldwide" the report argues that Canada's adoption of the STCA contributes to the deterioration of refugee protection in North America, asserting that "other, earlier reports have described in detail that the United States is not a 'safe country' for many refugees" which thus challenges the underlying legitimacy and supposed rationale of the STCA (Harvard, 2006, p. 3-4).

Seven years after the first *Bordering on Failure* report, the Harvard Immigration and Refugee Clinic released *Bordering on Failure: Canada-U.S. Border Policy and the Politics of Refugee Exclusion* in November 2013. This report examines the STCA and border measures implemented under the rubric of the Multiple Borders Strategy (MBS) and analyzes their effects on asylum seekers. The report concludes that, through the STCA and MBS, "Canada is systematically closing its borders to asylum seekers, and circumventing its refugee protection obligations under domestic and international law" (Arbel & Brenner, 2013, p. 1). In arguing that these measures "deter, deflect, and block asylum seekers from lawfully making refugee claims in Canada in arbitrary and unprincipled ways", the report finds that:

> 1. Canada is systematically closing its borders to asylum seekers and avoiding its refugee protection obligations under domestic and international law;
> 2. Through the STCA, Canada jeopardizes asylum seekers' ability to obtain fundamental legal protections by returning them to the US despite clear deficiencies in the US asylum system;
> 3. The STCA has prompted a rise in human smuggling across the Canada-US border, making the border more dangerous and disorderly, and raising concerns for Canada and the US (Arbel & Brenner, 2013, p. 1-14).

IX. The US Asylum System Under the Trump Administration

There are two primary documents released in response to the further erosion of the US asylum system under the Trump administration. The first, released in February 2017 by HIRC, addresses the effect of the President Trump's Executive Orders on people seeking asylum protection in the US and, in view of these findings, argues that Canada reconsider application of the STCA. The HIRC report urges Canada to halt enforcement of the STCA on the grounds that it must do so to live up to its legal obligations to refugee protection. In conjunction with the report, the Director of HIRC and her colleagues sent a letter to Prime Minister Trudeau and the Minister of Immigration urging this immediate action (HIRC, 2017). The second document, released in May 2017 by AIC and CCR, is a 52-page brief presented to the Minister of Immigration and the Minister of Public Safety. This brief calls on the Government of Canada to rescind its designation of the US as a safe country under the STCA. AIC and CCR draw upon both evidence of the systemic failings of the US asylum system as well as the actions taken by President Trump that will further exacerbate these deficiencies (AIC & CRC, 2017).

1. ***The Impact of President Trump's Executive Orders on Asylum Seekers*** **(HIRC, 2017)**

This report specifically addresses the impact of President Trump's Executive Orders on asylum seekers. The report analyzes the effects of the three Executive Orders issued by President Trump during his first week in office. The first two orders, "Enhancing Public Safety in the Interior of the United States" (hereinafter "Interior Enforcement Order") and "Border Security and Immigration Enforcement Improvements" (hereinafter "Border Enforcement Order"), were signed on January 25. The third order, "Protecting the Nation from Foreign Terrorist Entry into the United States" (hereinafter "Seven Country Ban"), was signed on January 27.

The report lists the following deficiencies of the US asylum system in conjunction with the policies of the Trump administration that will most detrimentally impact asylum seekers (HIRC, 2017, p. 1-12):

- Large-scale detention of asylum seekers
- Parole
- Discrimination against asylum seekers on the basis of religion and/or national origin
- Expedited deportation of asylum seekers, possibly without a right of appeal
- Sending asylum seekers entering the US through Mexico back to their countries of origin: *Refoulement*
- Denial of family reunification
- Delays in adjudication
- Unfounded increase in the criminal prosecution of asylum seekers
- Gender-based asylum cases

In view of the report's findings, HIRC attests that "'the United States is not a safe country of asylum' for those fleeing persecution and violence" (HIRC, 2017, p.1).

2. *Contesting the Designation of the US as a Safe Third Country* (AIC & CRC, 2017)

The brief calls on the Government of Canada to "rescind its designation of the US as a 'safe country' in light of the ample documentary evidence on systemic failings of the asylum system and widespread human rights abuses against asylum-seekers" (AIC & CRC, 2017, p. 3) including exposure to the risk of refoulement (p. 51). While the findings note that "the US asylum system has long suffered from significant failings" the brief argues that "these deficiencies have been exacerbated under the Trump administration" and goes on to list actions taken by President Trump to implement a number of policies that are "likely to significantly erode already deficient protections for asylum seekers" (AIC & CRC, 2017, p. 3). In particular, the brief lists the following deficiencies of the US asylum system as evidence of the US' failure to fulfill their obligations under the Convention, the Torture Convention, and international standards of human rights protection (AIC & CRC, 2017, p. 3-5):

- The One-Year Bar to Asylum
- Expedited Removal

- Detainment of Asylum Seekers
- Operation Streamline and the Prosecution of Asylum Seekers
- Turning back Asylum-Seekers at the Southern Border and Extraterritorial Processing of Applications
- Inconsistent Recognition of Gender-Based Asylum Claims
- Inconsistent Adjudication of Claims and "Asylum-Free Zones"

This report documents the failings of the required continual review under subsections 102(2) and (3) of the IRPA in adequately reviewing the human rights record of the US as well as the "policies and practices with respect to claims under the Refugee Convention and with respect to obligations under the Convention Against Torture" and attests that "the continued application of the [STCA] poses a significant threat to refugees in North America" due to the failings of the US asylum system and refugee determination regime as exacerbated under the Trump administration (AIC & CRC, 2017, p. 3). The Government of Canada did not rescind its designation of the US as a safe third country as called upon thus leading AIC, CRC, and CCC to launch the new legal challenge of the STCA in the Federal Court of Canada in July 2017.

X. Closing Thoughts: Status of the Agreement

Upon the conclusion of this project in April 2017, the Minister of Immigration continues to maintain that "[there is] absolutely no need to tinker with [the] Safe Third Country Agreement" as well as that "analysis continuously shows that the domestic US asylum system is the way it was prior to the incoming administration" (CBC, 2017; Vancouver Sun, 2017) despite the substantial documentary evidence that discredits this claim as discussed in this chapter. In consideration of this extensive professional research and analysis, I concur with the argument made by the HIRC, AIC and CCR. The preexisting deficiencies of the US asylum system have, in fact, been empirically exacerbated under the policy and practice of the Trump administration. This particularly affects former TPS populations under the Executive Orders issued by President Trump in January 2017, as discussed in Chapter 3. In addition, the ongoing application of the

STCA coupled with the transformation of the Canadian refugee determination system under the PCISA continue to incentivize and increase trends in irregular border crossing.

The most recent case posing a constitutional challenge to the STCA in the Federal Court of Canada is still in the preliminary stages upon the conclusion of this project. Some analysts suggest that, despite several calls for Canada to suspend its designation of the US as a safe third country, the Government of Canada will not act take action on the STCA at this time due to fear of compromising their bargaining position with the US during the ongoing renegotiation of NAFTA (CCIRC [Surge], 2017). There is potential for future research on the legal standing of the STCA, its role in the ongoing migration of asylum seekers across the International Boundary, and the deficiencies of the US asylum system under the Trump administration. I hope to return to this study in the future.

Organizations calling for a suspension of the Canada-US Safe Third Country Agreement (CCR, 2018; OCASI, 2018):

1. Amnesty International (AI)
2. Amnesty International Canada (AIC)
3. British Columbia Civil Liberties Association (BCCLA)
4. Canadian Association of Refugee Lawyers (CARL)
5. Canadian Civil Liberties Association (CCLA)
6. Canadian Council for Refugees (CCR)
7. Canadian Council of Churches (CCC)
8. Canadian Paediatric Society (CPS)
9. Canadian Union of Public Employees (CUPE)
10. The Canadian Bar Association (CBA)
11. Harvard Immigration and Refugee Clinic (HIRC)
12. Ontario Council of Agencies Serving Immigrants (OCASI) in partnership with 231 member agencies
13. 100+ US and Canadian non-governmental organizations in a open letter to US and Canadian government officials (2002)
14. 200+ Canadian Law professors in open letters to the Minister of Immigration, Refugees and Citizenship and Prime Minister Trudeau (2017)
15. 845 Canadian Law students in a report presented to the Government of Canada (2017)

CHAPTER 6: Findings and Discussion

I. QUANTITATIVE

Chronological Findings on Quantitative Data

This chapter will discuss quantitative findings on the surge of irregular border crossing and asylum seeking between 2016 and 2018. This section has been updated with the most recent data available as of April 16, 2018. I evaluate this data with TPS populations in mind but such analysis is not authoritative and should be read with discretion as these statistics do *not* record or reflect asylum claimants in consideration of TPS status or lack thereof.

When I began this project in September 2017, the RCMP reported that they had processed 13,211 asylum seekers between January - August, 2017. The majority of these asylum seekers voluntarily reported themselves to the RCMP. At this time, hundreds of asylum seekers were crossing the border each day; most through rural back roads in upstate New York en route to Montreal, Quebec (BBC, 2017; Government of Canada, 2017). By the end of the year, this number climbed to nearly 20,600 (IRCC, 2017 qtd in CCIRC [2017], 2018). Throughout 2017, 18,836 of these crossings took place specifically at Roxham Road near the Lacolle border in Quebec.

The RCMP continues to be stationed here full time in April 2018 (UNHCR Canada [Backgrounder], 2018). These asylum seekers are defined as “irregular border crossers” (individuals who enter Canada between official ports of entry) by Canada’s IRB and referred to as “irregular claims” by UNHCR Canada (UNHCR Canada [Backgrounder], 2018). This chapter will chronologically explore these trends in irregular border crossing and asylum seeking from 2016 to present day.

Calendar Year 2016

The IRB (2018) notes that it is unable to report on asylum claims made through irregular border crossing until February 2017 when the implementation of system changes provided the capacity to capture data on this population. The Migration Policy Institute (MPI) (2017) reports that Canadian authorities intercepted 2,000 irregular border crossers in all of 2016. Nevertheless, most reports and key informants refer to the start of this migration event in 2016. This may be partially due to the fact that the rumors surrounding the irregular border crossings of asylum seekers began in 2016. I first became aware of such rumors in November 2016 through my internship with the Vermont Refugee Resettlement Program. These rumors remained hearsay, however, through the increase between January to February 2017 and was not verified with statistical data until the IRB's system changes took effect in February 2017. Even so, the IRB notes that only partial data is available through March 2017 (IRB [Irregular], 2018) and as such these statistics should be read with discretion. 2016 marks the peak of Donald Trump's presidential campaign can be associated with increased anxiety in immigrant communities within the US.

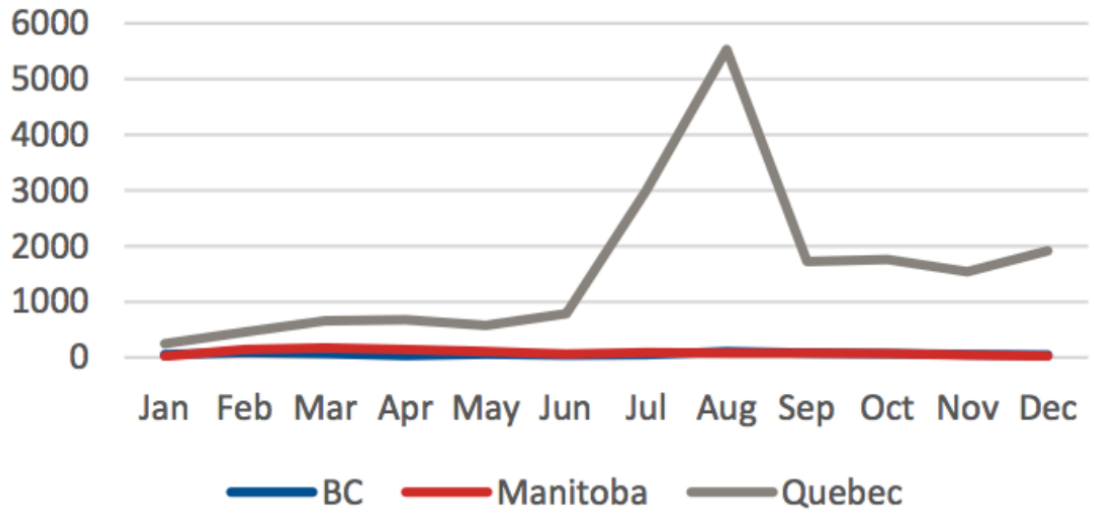
January - February 2017

Data released by CBSA reveals that the RCMP intercepted 1,134 irregular border crossers in the first two months of 2017. This accounts for over half of all the interceptions in the full 2016 calendar year. Nearly 60 percent of these interceptions occured in Quebec (IRCC, 2017; CBC, 2017; Globe and Mail, 2017). This rapid increase may be linked to President Trump's inauguration, held on January 20, as well as President Trump's first set of Executive Orders (EOs) on immigration, released on January 25 and 27 (as discussed in Chapter 3).

Summer 2017

The surge in irregular border crossings of asylum claimants peaked between June to September 2017. This may be partially due to the warm weather and the increased ease and safety of irregular crossing without snow, freezing temperatures, or winter storms. In the summer, numbers of irregular crossings peaked around 300 per day during July and August, with the vast majority crossing at Roxham Road near the Lacolle border in Quebec (CCIRC [Surge], 2017). Between July and September, the RCMP intercepted approximately 11,000 irregular border crossings, including several thousand Haitians (MPI, 2017). A number of temporary shelters were set up during this time, including the use of Montreal's Olympic Stadium.

RCMP Interceptions of Irregular Border Crossings (Jan-Dec. 2017)



Note. Reprinted from *Irregular Crossings at The Border: Challenging Myths and Preconceptions*, by UNHCR Canada, (2018, April 16), Retrieved from https://www.unhcr.ca/wp-content/uploads/2018/04/PressBackgrounder-Border-16April.pdf

October - November 2017

In early October, the IRB was scheduled to hear 8,000 refugee claims against a growing backlog of 40,000. The IRB reported an annual processing capacity of 24,000 in 2017 and announced that these trends were expected to continue into 2018. At this time, the wait time for a hearing was 16 months and officials noted that they expected this to increase over the coming months (CCIRC [Surge], 2017; IRB [Irregular], 2018). Of the asylum claims from irregular border crossing cases, IRB officials reported that approximately 50 percent of the claims heard had been rejected (CCIRC [Surge], 2017). These numbers were widely reported in both US and Canadian news media (Globe & Mail, Oct. 3, 2017; NYTimes, Oct. 19, 2017). This likely served, in some capacity, to reduce interest in irregular border crossing.

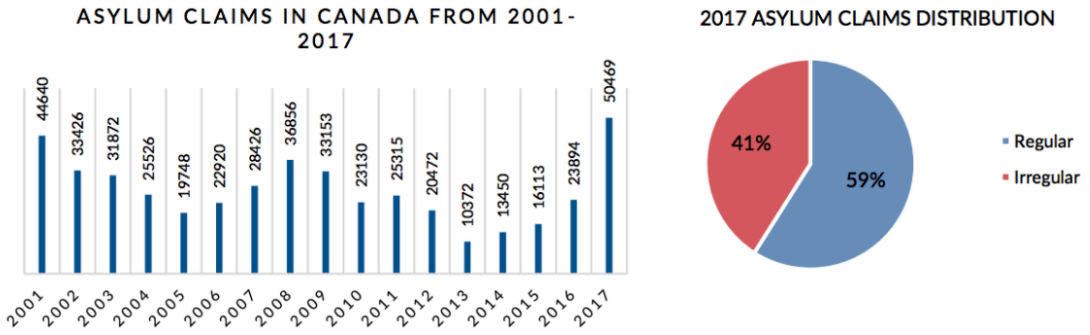
In late October, however, Reuters reported that "asylum seekers who illegally crossed the U.S. border into Canada this year are obtaining refugee status at higher rates, new data shows, as authorities accept claims from people who say they feared being deported by U.S. President Donald Trump's administration" citing IRB figures (Paperny [Reuters], 2017). Between March and September, 592 claims from irregular border crossers were finalized and 69 percent were accepted; this figure represents a higher acceptance rate than that of all refugee claims made in 2016 (IRB, 2017 qtd in Paperny [Reuters], 2017; IRB, 2017 qtd in CCIRC [70%], 2017). This represents only a fraction, however, of the more than 15,000 asylum seekers had made an irregular crossing. Reuters conducted a series of interviews and many asylum seekers reported being in the US legally but "said they might have stayed were it not for an immigration crackdown" (Paperny [Reuters], 2017). This could likely include TPS populations.

By November 2017, the IRB reported that 44 percent of all irregular claimants were of Haitian origin; and, at this same time, the CBSA reported that 742 Haitians were subject to

removal and listed for deportation (IRB, 2017; CBSA, 2017 qtd in Harris [CBC], 2017). While these two figures were widely reported together, in association, most news reports failed to note that none of the Haitians listed for deportation were, in fact, irregular border crossers seeking asylum. These Haitians set for removal would have been those who overstayed their TSR protection in Canada and either failed to apply or were rejected for permanent residence on Humanitarian and Compassionate grounds.

Unless individuals failed to be found eligible by the CBSA for referral to the IRB (due to criminality, etc.), the vast majority would have had their claims pending by the IRB during this time due to the substantial backlog. As such, they would not be listed for deportation. They may be subject to removal should their claim be rejected, but most of the Haitians set for removal at this time would not have been irregular claimants coming from the US. While the evidence that Canada was deporting such a large number of Haitians may serve to represent that the Government of Canada considered the conditions of Haiti safe for return, it fails to account for the fact that asylum claims are evaluated entirely on a case-by-case basis and many Haitians fled the country due to political persecution.

2017 Irregular Claims in Context



Note. Reprinted from *Irregular Crossings at The Border: Challenging Myths and Preconceptions,* by UNHCR Canada, (2018, April 16), Retrieved from https://www.unhcr.ca/wp-content/uploads/2018/04/PressBackgrounder-Border-16April.pdf

End of Year, 2017

By the end of the 2017 calendar year, 20,593 refugee protection claims made by irregular border crossers had been referred to the RPD. This represents 41 percent of *all* claims received by Canada, with a grand total of 50,380. This is a record peak compared to the past two decades, but near the figure of 44,640 in 2001 (UNHCR Canada [Backgrounder], 2018). These figures are represented below:As discussed in Chapter 5, claims are **referred** to the IRB's Refugee Protection Division (RPD) if individuals are determined to be eligible by the CBSA (on grounds of criminality, etc.). The IRB notes that this process for irregular border crossers follows the same protocol as for any other refugee claimant, regardless of means of entry. The RPD hears all claims for refugee protection and makes the following determinations:

- **Finalized:**
  - **Accepted:** The RPD has determined that the claimant is either a Convention refugee or a person in need of protection;
  - **Rejected:** The RPD has determined that the claimant is not a Convention refugee or a person in need of protection;

    - **Abandoned**: The RPD has declared that the claim has been abandoned because, for example, the completed Basis of Claim Form was not provided on time, etc.;
    - **Withdrawn & Other:** "Withdrawn" describes cases in which the claimant does not continue with their claim;
    - **Total:** Total of all claims accepted, rejected, abandoned, withdrawn & other (claims finalized in the time period indicated may have been referred to the RPD in a previous time period);
- **Pending:** All claims that have not been finalized by the end of the identified time period;
- **Country of Alleged Persecution:** The first listed country of alleged persecution as entered into the IRB case management system by the officer from CBSA or IRCC when the claim was made and referred to the RPD (IRB, 2018).

In January 2018, the IRB released the following trends in refugee protection claims made by irregular border crossers in 2017. This table represents claims from the top ten countries of alleged persecution between February to December 2017. These claims represent approximately 80 percent of all irregular border crosser refugee claims referred to the IRB during this time (IRB [Irregular], 2018). In total, these statistics account for 18,149 claimants were determined to be eligible by CBSA and referred to the IRB for a hearing. Of these, the vast majority (15,597) were still pending as of December 31, 2017. These statistics have not been updated upon the conclusion of this project. Of the 2,552 claims finalized, 1,360 were accepted and 806 were rejected. In addition, 386 were either abandoned or withdrawn & other. This confirms the substantial backlog discussed earlier. By country of alleged persecution, those claiming prosecution in Haiti constitute by far the largest group with 6,869 individuals. It is impossible to determine how many of these individuals lived in the US under TPS as this information has not been recorded.

Refugee Protection Claims Made by Irregular Border Crossers, Top 10 Countries of Alleged Persecution - February to December 2017

	Referred	Finalized					Pending (as of 2017/12/31)
		Accepted	Rejected	Abandoned	Withdrawn & Other	Total	
Total [1]	**18,149**	**1,360**	**806**	**207**	**179**	**2,552**	**15,597**
Haiti	6,869	43	278	131	66	518	6,351
Nigeria	3,641	101	104	15	8	228	3,413
Turkey	751	252	5	6	9	272	479
Syria	611	151	7	3	7	168	443
Eritrea	583	167	4	2	1	174	409
Yemen	489	84	3	1	1	89	400
United States of America	408	0	31	13	6	50	358
Sudan	342	56	12	4	1	73	269
Djibouti	315	45	8	0	1	54	261
Pakistan	303	4	7	0	2	13	290

[1] Partial data for February and March 2017.

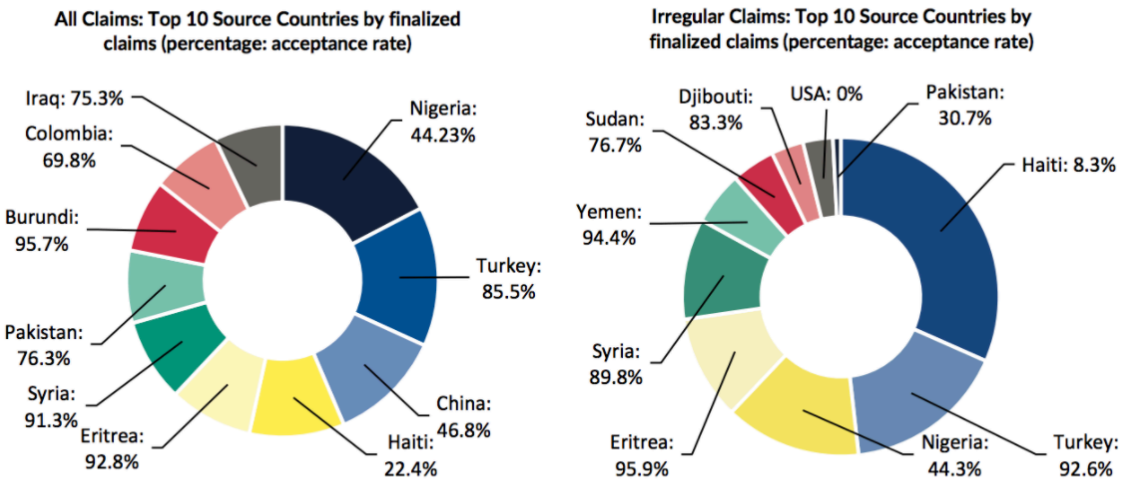
Note. Reprinted from *Refugee Protection Claims Made by Irregular Border Crossers, Top 10 Countries of Alleged Persecution*, by Canada's IRB, (2018, January 17), Retrieved from http://www.irb-cisr.gc.ca/Eng/res/stat/Pages/irregular-border-crossers-countries.aspx

Of those claims finalized, UNHCR Canada reported the statistics on the national acceptance rates by top 10 source countries. These trends indicate that the national acceptance rate of asylum claims is 63.12 percent while the national acceptance rate of irregular asylum claims is 10 percent lower, at 53.29 percent. These statistics are posted with the reminder that "refugee status must be determined on a case-by-case basis" (UNHCR Canada [Backgrounder], 2018). These statistics are especially interesting in consideration of the claims made listing Haiti as the source country. While, as mentioned, data regarding TPS status of claimants has not been recorded, one can assume that irregular claims made by those listing Haiti as source country *may* have likely come from TPS populations. Similarly, one can infer that some of the claims listing

the US *may* have come from TPS populations in the US. However, it is pertinent to note that Sudan is the *only* other TPS designated state listed as a source country.

In regard to all claims made listing Haiti, the acceptance rate was 22.4 percent. While approximately one third of irregular claims list Haiti as source country, only 8.3 percent of these claims were accepted. This can be read to signify that Haitian TPS populations seeking asylum through irregular border crossing might have a substantially lower acceptance rate than those who come more directly from Haiti through regular claims. This might be because those who come more recently from Haiti, rather than those who have resided in the US, have a more direct link to political persecution and the evidence by which to prove this claim in court. It would be difficult for those who have resided in the US for a number of years to prove ongoing political persecution in Haiti if they had not experienced such persecution in a number of years.

2017 Trends in Finalized Asylum Claims by Top 10 Source Countries



Note. Reprinted from *Irregular Crossings at The Border: Challenging Myths and Preconceptions*, by UNHCR Canada, (2018, April 16), Retrieved from https://www.unhcr.ca/wp-content/uploads/2018/04/PressBackgrounder-Border-16April.pdf

January - March 2018

As this project comes to a close in April 2018, the IRCC has only reported on RCMP interceptions and claims of asylum processed by the CBSA in January and February 2018. A total of 3,082 asylum seekers were intercepted by the RCMP during this time with a nearly equal distribution between the two months. 95.5 percent of these interceptions occured in Quebec. These figures are near those of January and February of 2017, but much lower than the peaks seen in July and August. The temperature in Quebec between January to February 2018 ranged between an average low of -18°C and an average high of -5°C (AccuWeather, 2018) which likely deterred irregular border crossing. The CCIRC ([Increase], 2018) reports that Canadian authorities are preparing for another potential surge this summer, with numbers peaking during in the warm weather as they did last year.

On April 9, 2018, the CCIRC ([Increase], 2018) reported that this latest influx consisted of mostly Nigerian nationals without any legal status in the US. This suggests these populations represent "pass-throughs" rather than a group that resided in the US for any length of time. This is reported to have caught Canadian officials off-guard as their information campaign has focused on Central and South American communities in the US, including TPS populations. This displays the Government of Canada's continued concern with the ongoing annulment of TPS as well as an increase in the patterns and phases of pass-throughs. There is need for additional research in this area.

II. QUALITATIVE

Semi-Structured Interview Series

These findings draw from a series of six semi-structured interviews from which I gathered qualitative data based upon six emergent themes. I have organized this data into three sections,

one of which includes three related subsections and another that includes one subsection. These are as follows:

I. The annulment of temporary protected status in the US
    A. Production of undocumented populations in need of protection
    B. Spread of misinformation within populations in the US
    C. Push factors motivating irregular border crossing
II. Deficiencies of the US asylum system and impact of the Trump administration
    A. Return to the restrictive US immigration laws of the 1920s and 1950s
    B. Historic phases and patterns of "pass-throughs" in the US
III. Application of the Canada-US Safe Third Country Agreement

In presenting these qualitative findings I have selected the data that enables me to respond to my primary research questions. This follows a parallel course to the evolved trajectory of my research. Throughout, these findings and quotes from key informants reference Haitians specifically.

I. The annulment of temporary protected status in the US

A. Production of undocumented populations in need of protection

The greatest concern expressed by key informants regarding the annulment of TPS is the way in which it spontaneously produces undocumented populations upon the end-date of each program. In comparing the annulment of TPS to the efforts to repeal DACA, a key informant identifies the similarities and differences between these two vulnerable immigrant populations in the US:

> *It's a bit like the Dreamers and DACA. That was also a concern that the government has their data. But here, this is very different in the sense that they have all their data but now a legal protection has ended and that means you're clearly not here with legal protection. And so if you remain, then you are so-called illegal. That is very worrying. I could see this being used, they are cracking down on this (Researcher, personal communication, February 28, 2018).*

There is a high degree of uncertainty regarding how this will manifest in the future. Pablo Bose, Ph.D., illustrates the paradox within:

> *This is the big question. Many people are saying that all you're going to do is swell the ranks of the undocumented. Because what we're really talking about when [the Trump*

> *administration decides] to end TPS or DACA is that people are just going to, en mass, "self deport." That is something that people have talked about for ages but the reality is that people have built lives here. They have families. They have kids who might be American citizens. What do you do about that? Are people going to abandon their families? I find that highly unlikely, but it then sets up this situation where there's all sorts of people [subject to removal] – I mean are you going to set up a big police force to deport everyone? It's very, very unclear (Bose, personal communication, January 7, 2018).*

Key informants warned that "there are rumblings that they simply want to close down TPS altogether, which would not be surprising" (Bose, personal communication, January 7, 2018). As discussed in Chapter 4, if the DHS decides to announce the termination of the designation of Honduras next month (May 2018) this will represent termination of 90 percent of TPS' capacity for humanitarian protection.

In regard to this production of undocumented populations in need of protection, a professional researcher working on issues related to the rights of refugees and asylum seekers, explains the shortcomings of the refugee determination regime in accounting for forcibly displaced and dislocated groups such as these. This applies most specifically to those affected by EID, such as Haitians, as discussed in Chapter 4.

> *In terms of international human rights treaties and standards, they are covered as a migrant but they are not covered as a refugee [...] And so what we have is a whole class of people who are fleeing for their lives but at this point the refugee definition doesn't cover them. There will have to be a new form of protection developed to help them or existing frameworks will have to bend to accommodate them (Researcher, personal communication, February 28, 2018).*

In addition, this means that the principle of non-refoulement does not apply to these groups and, as such, they can be legally returned to unsafe conditions in their countries of origin. This is because the principle of non-refoulement also follows the basis of individual persecution. Thus vulnerable populations can be deported from either the US or Canada and returned to conditions of gang violence, economic instability, and environmental catastrophe -- as long as these

conditions represent *generalized* risk rather than *personal* persecution. These conditions represent those of all TPS states so-far terminated by the Trump administration.

This also means that many formerly protected by TPS will not meet the requirements for refugee protection in Canada. This may be linked to the issue of misinformation spread within TPS communities in the US regarding the "guarantee" of receiving asylum in Canada.

B. Spread of misinformation within populations in the US

Key informants stressed that this spread of misinformation has particularly impacted Haitian communities. In reference to the phenomenon described above, Bose asserts that this creates a dangerous situation in which these populations may flee across the border in the hope of avoiding deportation from the US, but eventually be deported from Canada as their asylum claims are rejected. This has happened before, in phases and patterns consistent with the annual cycles of renewal for TPS (Bose, personal communication, January 7, 2018). This evidences historical context to the intersection between TPS and the migration of asylum seekers fleeing to Canada through irregular border crossing.

> *[Of Haitians] looking at the border crossings, there have been issues in the past. At different times when TPS was about to come up for renewal, we had movements of people across the border. About five years ago we had warnings [from USCIS] that there were fraudulent claims being made in places like Miami where people were being encouraged to come up to Vermont and northern New York to cross the border there. [This misinformation] suggested that there was a sympathetic government in Canada, that there was a Haitian community in Montreal, these kinds of things (Bose, personal communication, January 7, 2018).*

> *One of the big problems with the misinformation is that while TPS is up for termination in the US, in the case of Haitians, it was actually removed in 2014 by Canada and that is something that people didn't know, so the people who actually went up to Canada ended up being deported (Bose, personal communication, January 7, 2018).*

As discussed in the public communications from the IRCC, the Government of Canada has signified concern with the extent of this misinformation and its implications in irregular border

crossing. The Government of Canada has been proactive in attempting to combat this spread of misinformation. In conversation with a Canadian official this spring, he spoke of the communications and relations built between the Government of Canada and the Haitian diaspora in the US.

> *For instance there's local Haitian television stations in the Greater Boston area where [...] our senior officials did a public service program speaking about Canada and our immigration policies, our high level refugee policies and what the legal processes are [...] Canada is reaching out to various communities and different organizations within those communities to provide proper information to try to dissuade people from getting caught up in misinformation (Canadian official, personal communication, February 28, 2018).*

While the dissemination of correct information regarding the immigration policies of Canada is, of course, a self-evident benefit to anyone hoping to immigrate, such a proactive stance also reveals the Government of Canada's trepidation regarding the influx of asylum seekers entering through irregular border crossing.

> *… as the US goes through and cancels TPS, after TPS, after TPS, you see a very clear sense of anxiety that Canada doesn't want 200,000 Salvadorans. They don't want people continually streaming across the border. So there's been a quiet but very consistent pushback. I think that Canadian politicians sort of … they aren't trying to dissuade, but they aren't welcoming people with the same kind of open arms (Bose, personal communication, January 7, 2018).*

C. Push factors motivating irregular border crossing

There is a heightened degree of anxiety regarding the potential deportation of these populations because of the fact that they are individually registered with the US government in order to receive TPS. As such, all of their personal data and information was passed to the Trump administration. This puts former-TPS beneficiaries at significant risk of deportation because of the ease by which the DHS can track and monitor these populations.

> *"[B]ased on this administration's intent to so-call secure the borders, and knowing that these populations are at the end of their status and they know where they live – they are*

> *documented through TPS – I would be very concerned if I were them. Because they will be easy to identify" (Researcher, personal communication, February 28, 2018).*

Key informants stressed that these populations are under significant fear of detention and deportation under the anti-immigrant and anti-refugee policy and practice of the Trump administration. This fear is a tangible push factor motivating these asylum seeking populations to cross the border into Canada.

> *I think there's a direct correlation – and I think causation – that people who are here who are undocumented, or have some form of relief – like TPS – or are in the asylum system, they are fearful that they will be rounded up and deported without due process. [This is why] they are going to Canada. I don't think that they think in terms of due process, but that they will be targeted because of how they look and they will be detained and deported (Researcher, personal communication, February 28, 2018).*

While rates of deportation were high under the Obama administration, the priorities of enforcement policy were very different than those of the current administration. Obama-era policies focused on the deportation of criminals convicted of what the DHS defines as "serious crimes" and the deportation of unauthorized border crossers who had recently entered the US (Chishti et al., 2017). Current policy under the Trump administration instead prioritizes the arrest and deportation of undocumented immigrants in the interior of the US. President Trump's Executive Order 13768 ("Interior Enforcement Order") targets "all removable aliens" in the interior and asserts that many noncitizens who illegally enter the US, overstay, or otherwise violate the terms of their entry present a "significant threat" to national security and public safety (Executive Order 13768 qtd in Pierce & Capps, 2017). A key informant translates how this change in policy produces the fear described above.

> *"[T]he Obama administration did prioritize enforcement of the laws and this administration, first of all, this is very clear – the executive orders said that as well as press releases, policy memoranda – 'everybody is subject to deportation' even if you have not been convicted of something. So there is no priority and what they want are numbers. Numbers sound good, they feed the political base. There's also the immigrant detention complex. You need to keep the beds and there's a lot of money there. So I would*

> *like to think, but I cannot think, that there would be any compassion or discretion here. And that scares me" (Researcher, personal communication, February 28, 2018).*

Key informants also identified the racialization of immigrant populations within this policy. This puts TPS populations in the crosshairs of President Trump's deportation targets.

> *An analysis of these trends "suggest[s] that there are often arrests and deportations on the interior that are based on some form of racial profiling" (Researcher, personal communication, February 28, 2018).*

II. Deficiencies of the US asylum system and impact of the Trump administration

A. Return to the restrictive US immigration laws of the 1920s and 1950s

As discussed in Chapter 3, the immigration policy and practice of the Trump administration represent a return to the restrictive immigration laws of the 1920s and 1950s. This is particularly evident in President Trump's first three Executive Orders issued in January 2017. This also includes a fundamental annulment of the US asylum system. Two key informants articulated this phenomenon:

> *This is not the first time there's been a backlash against immigration. It is disheartening that we are talking about things that seem to fit more with the 1920s than the 2020s (Bose, personal communication, January 7, 2018).*

> *The Executive Orders of January 25, 2017 laid out the blueprint for what we see the administration is trying to implement now, which very clearly is an attempt to undermine and in some ways shutter the asylum system as we know it. That is through casting what is a sound and secure system as an incentive for what would be so-called illegal immigration as well as national security concerns or criminal safety concerns – by calling certain procedures "legal loopholes" – this is in my analysis. I trained as a historian in my first iteration of a career and this is an attempt to return us to the restrictive immigration laws of the 1920s and 1950s. In some ways the 1952 Immigration Act and particularly the 1920 Immigration Act (Researcher, personal communication, February 28, 2018).*

These measures and the dominant rhetoric that surrounds them are prime examples of the discursively constructed subjectivies in the problematizing of asylum seekers discussed in Chapter 5. What is missing from this discourse, however, is the way in which asylum itself has

been written into US law as representative of American values. A key informant illustrates the paradox herein:

> *By demonizing foreigners, casting this in a lens of 'people are gaming the system' and 'bringing insecurity with them,' 'bringing crime,' or that our policies are 'just a magnet' instead of offering protection – they're trying to reframe the argument…*
>
> *… What they're missing, what is totally lost, is that the US believes so strongly in the protections for refugees and asylum seekers that it took international law and made it US law in the 1980 Refugee Act. They amended the Immigration and Nationality Act. The right to seek asylum is INA Section 240. That's the missing part of this conversation. How many times has the US taken international human rights treaties, standards, law, principles – however you want to frame it -- and made it US law? But Congress did that, [the US government] did that, the president signed it, and it is US law (Researcher, personal communication, February 28, 2018).*

B. Historic phases and patterns of "pass-throughs" in the US

Upon embarking on this research, I hoped to look into the historical context to the flow of asylum seekers crossing from the US into Canada. Though I did find reference to such a pattern, I was not able to initially identify a body of scholarly research or discussion on the topic. The phenomenon of "pass-throughs," however, proved an emergent theme in my interview series. "Pass-throughs" refer to the pattern in migration of asylum seeking groups transiting through the US by land with the hope of crossing the International Boundary and making their claim on Canadian soil. As discussed in Chapter 5, the Government of Canada advocated for a safe third country agreement with the US in the 1990s largely because one-third of their yearly refugee claimants passed through the US en route to Canada (Harvard, 2006, p. 10). This speaks to the long-standing deficiencies of the US asylum system, also as discussed in Chapter 5. Even so, only four key informants were familiar with this particular trend. They described this pattern in the following ways:

> *… there's a long history of asylum seekers coming to Canada, including those transiting through the US [...] what's interesting is that for me, growing up and living in Toronto, there's a whole series of Central American communities in Ontario that were all about*

> *coming up through Detroit and going through Windsor [to reach Canada]. There's a Salvadoran community, there's a Nicaraguan community ... So there's always been this sense, for Central Americans, that the US was never going to give you asylum; that you [needed] to go up to Canada (Bose, personal communication, January 7, 2018).*

In reference to the Reagan era, during which the US Government buttressed the repressive governments of Guatemala, a local immigration expert reflects on her personal experience working in relation to these particular pass-throughs:

> *[I was] introduced to these Guatemalan farmworkers -- they were fleeing over land from Guatemala. They didn't stop in the US because less than 5% of the asylum claims were being granted here [...] so they were coming through Vermont to go to Canada (Local immigration expert, personal communication, January 2018).*

The same key informant also has experience with the pass-throughs of Haitians through Vermont:

> *In 2007, I helped over 700 Haitians access Canada successfully. These were people who really didn't know about the STCA and they also didn't know that, despite their immigration background in the US, they could still go to Canada [to seek asylum] … It was very organized … All these people were underground or had lost their asylum case [in the US], for some reason (Local immigration expert, personal communication, January 2018).*

Marjorie Villefranche, the Director General of La Maison d'Haiti in Montreal (a large organization that supports asylum seekers) explains that this pattern continues to this day:

> *We do not receive only Haitians living in the US under TPS, we also see Haitians living in the US and Haitians who are just crossing through the US [...] You have people who had TPS, but you also have other Haitian people who crossed the border because they were trying, in the US, to be accepted as an asylee. As they found that it was not possible, they crossed the border…*
>
> *… Haitians are leaving Haiti trying to find security and a place to live. So they try the US and some of them tried Brazil, they tried Chili, and then some migrate through the border. They hope that in the US it will be better for them. Then they see that they could be deported, so they cross the border and arrive in Canada (Villefranche, personal communication, February 12, 2018).*

A Canadian official also indicated that, although they do not have the figures to prove it, the Government of Canada believes that those crossing through New England en route to Quebec are "not necessarily originating from this region, they transit through" (Canadian official, personal communication, February 28, 2018).

The evidence of this pattern of pass-throughs does not detract from the current intersection between the annulment of TPS and the irregular border crossings of asylum seekers but rather situates it within a broader context of asylum seeking in North America. Specifically, it illustrates the juxtaposition between the respective asylum systems of the US and Canada.

III. Ongoing application of the Canada-US Safe Third Country Agreement

As discussed in Chapter 5, there is a substantial body of research on the deficiencies of the US asylum system in relation to Canada's own application of the STCA. There are also current publications on the impact of the Trump presidency, yet the Minister of Immigration maintains that "the domestic US asylum system is the way it was prior to the incoming administration" (CBC, 2017; Vancouver Sun, 2017). When questioned about the Minister's statement, a key informant shared the following:

> *I am of the opinion that there have been significant changes to US asylum system as a whole subsequent to President Trump's coming into office (Canadian law professor, personal communication, March 29, 2018).*

This reflects the findings of reports such as that released by the HIRC, discussed in Chapter 5. This key informant also offered insight into the divergence between the respective asylum systems of the US and Canada. While both states incorporate the UN definition of a Convention refugee, she explains that:

> *Canada and the US interpret the elements of that definition in profoundly different ways – certain elements of the definition at least. The US approach to asylum determinations has been heavily criticized and, in my view, does not comply with basic standards of international refugee protection such that the US refugee determination regime – in*

> *several key respects – falls below international standards of refugee protection. The Canadian refugee determination system, while not without its problems, has produced a body of law that more effectively responds to international refugee protections standards and interprets the definition in a way that mirrors those standards more closely than the US regime does (Canadian law professor, personal communication, March 29, 2018).*

This key informant also emphasized that the irregular border crossings of asylum seekers across the International Boundary is not actually a "loophole" in the STCA (as it is often colloquially referred to) but actually written into the terms of the Agreement itself.

> *The Safe Third Country Agreement was designed to apply only at ports of entry. Asylum seekers who cross in between ports of entry and set foot on Canadian soil are entitled to the protections that Canadian law entitles every individual on Canadian soil irrespective of legal status (Canadian law professor, personal communication, March 29, 2018).*

However, speaking on this means of irregular entry by asylum seekers, a Canadian official seemed to suggest that such allowance to the protections of Canadian law is not lawful or permissible. Speaking on the work of his office in combating the spread of misinformation, he explains:

> *Our work here is related to reaching out to communities within [the region] who may be tempted to cross the border illegally, to help them know and understand the facts and the implications of crossing illegally [...] it could significantly put in jeopardy their current status or their future status, not only in Canada, but also in the US…*
>
> *[this public service program is intended] to really discourage people from attempting to enter Canada illegally and really encourage them to follow proper legal processes. That would be an example of the type of work that goes on (Canadian official, February 28, 2018).*

As discussed in Chapter 5, enforcement actions are not taken against asylum seekers who cross the border irregularly. This is because international standards of protection, as incorporated into Canadian law, recognize that asylum seekers may often lack the proper documentation or authorization to cross international borders in order to make their claim for asylum. When asked about the statements of the Canadian official, above, another key informant noted that claims for refugee protection "are not impacted in any way as the result of their mode of entry into Canada"

(Canadian law professor, personal communication, March 29, 2018). Thus this may evidence a degree of misunderstanding related to the application of the STCA on the part of this particular Canadian official. If this quote is representative of flaws in the understanding of this official and his office, this statement is problematic in consideration of the role of this official and his office in combating the spread of misinformation.

My reading of this quote is situated the CCR's contention that the Canadian government was sending an 'obviously false' message to would-be asylum seekers in the midst of their public relations campaigns targeting misinformation. In August 2017, Member of Parliament Emmanuel Dubourg was sent to Miami to discourage Haitians from crossing irregularly to seek asylum. Dubourg argued that "there is no advantage" to coming to the Canada through irregular entry. Prime Minister Trudeau also contended that this "is one of the myths that we are having to dispel… There are no advantages in terms of the immigration system to arrive irregularly versus arriving regularly" (Raj [Huffington Post], 2017). The obvious advantage to irregular crossing, per the terms of the terms of the STCA, is of course that it is the only way these individuals would be eligible to make a claim in Canada. Whether the flaws within the information of the Canadian government's own anti-misinformation campaign either intentional or accidental is unclear, but this is an emergent and problematic trend.

Discussion of IRCC and UNHCR Canada Public Communications:

Findings on the intersection between the annulment of TPS and influx of irregular claims

Ad Hoc Intergovernmental Task Force on Irregular Migration

I analyze the official News Releases of this Task Force in consideration of the intersection between the annulment of TPS in the US and the influx of asylum seekers entering Canada at irregular border crossings. These documents are the primary form of ongoing, direct public

communications released by the IRCC on behalf of the Government of Canada in relation to this migration event. Specifically, I chronologically evaluate and discuss the evolving response of the Task Force -- as it represents the interests of the Government of Canada -- in anticipating and negotiating the effects of the annulment of TPS.

The creation of this Task Force was announced on August 17, 2017. The stated purpose of the Task Force is to work on "issues related to the recent and sustained increase in asylum seekers entering Canada from the United States" in collaboration between six federal ministers (IRCC [News Release], Aug. 24, 2017). Prime Minister Justin Trudeau joined the first meeting, suggesting the priority of the Task Force for the Government of Canada. The first meeting included the stated goals of "find[ing] suitable temporary accommodations for asylum seekers until their claims have been fully processed" and "collaborat[ing] efforts to provide for the basic needs of asylum claimants" (IRCC [News Release], Aug. 24, 2017). This suggests prioritization of the immediate needs of those seeking asylum as well as the expectation that the influx would continue over the coming months.

By the Task Force's third meeting on September 1, 2017, Member of Parliament, Emmanuel Dubourg, visited Miami in his official capacity to meet with Haitian community leaders and Haitian-based media to "dispel the myths on social media channels, such as WhatsApp, which had suggested that Canada gives asylum seekers a free pass into Canada" (IRCC [News Release], Sept. 1, 2017). This reveals the Government of Canada's specific concern regarding the misinformation disseminated within Haitian communities in the US. By the fourth meeting on September 28, 2017, Member of Parliament, Pablo Rodriguez, was able to update the Task Force on his "successful" visit to Los Angeles. The News Release notes that "the initial focus was on organizations that interact directly with citizens of the Central American

countries that will be affected by TPS expiry later this year" (IRCC [News Release], Sept. 29, 2017). This refers to TPS populations from El Salvador, Honduras and Nicaragua -- terminations for these countries had not yet been announced at this time and as such this reveals foresight on the part of the Government of Canada in predicting and preparing for the annulment of TPS under the Trump administration *before* it was actually underway. Again, this visit revolved around misinformation within TPS communities, which Mr. Rodriguez "advocated strongly to correct" (IRCC [News Release], Sept. 29, 2017). These outreach efforts in the US center on the correction of misinformation specifically within communities affected by the annulment of TPS, revealing the Government of Canada's primary concern with the continued influx of TPS populations seeking asylum through irregular border crossing.

At this fourth meeting of the Task Force, Minister of Immigration, Ahmed Hussen, noted that "this is a global issue and that many countries, not just Canada, are facing similar challenges" thus situating the current influx of irregular border crossings and asylum claims within the context of the global displacement crisis (IRCC [News Release], Sept. 29, 2017). There is not, however, any mention of the new administration in the US or the political and social climate surrounding the annulment of TPS -- despite the numerous reports, including my own interview series, that many asylum seekers cite exact fears of targeting or deportation under the Trump administration as the primary force driving their migration across the border.

The News Release following the meeting of the Task Force on October 16, 2017 states that outreach efforts in the US to correct misinformation among "groups of potential migrants" continues (IRCC [News Release], Oct. 17, 2017). Similarly, this News Release refers to the "influx of irregular migrants" rather than the "influx of asylum seekers" (IRCC [News Release], Oct. 17, 2017) that appeared to be the prior norm within these releases. While the semantics of

the News Release may be entirely immaterial and one should be cautious to assume any motivations behind such a change of phrase, the shift in discourse may well evidence the Government of Canada coming to realize that many of those seeking asylum did not, in fact, meet the requirements of either of a Convention refugee or a 'person in need of protection.'

Of the Task Force meeting on November 24, 2017, the News Release notes that "given the potential for an increase in irregular migrants following the recent US decision to terminate the [TPS] of Nicaraguans and Haitians, Minister Goodale stressed that we cannot afford to become complacent and that we must be ready for every possible scenario" (IRCC [News Release], November 24, 2017). This apprehension regarding the annulment of TPS produced the development of a national strategic plan between CBSA, the RCMP, Public Safety, IRCC, and the Public Health Agency of Canada. Here, the "National Plan" acts to provide "high-level guidance to enable regional planning for a potential increase" (IRCC [News Release], November 24, 2017). This type of national-scale response protocol for an expected surge of asylum seekers as a direct result of the *anticipated* ongoing annulment of TPS again evidences the direct linkage between these events. These terms of caution and forewarning regarding the annulment of TPS display the trepidation of the Government of Canada in preparing for the effects of such actions.

At this time in November 2017, the IRB created a special response team to process these claims for refugee protection. Of the claims finalized to date, the News Release notes that acceptance rates "reflect the diversity of claimants' countries of origin" -- for example, the acceptance rate for Haitians was 10 percent while the acceptance rate for Nigerians was approximately 46 percent (IRCC [News Release], November 24, 2017). This is particularly interesting because asylum claims are evaluated entirely on a case-by-case basis without regard to country of origin. When asked about acceptance rates of claims as they pertained to nationality

or country of origin, all key informants stressed this fact and asserted that analysis on such a group basis was unproductive. Nevertheless, these trends reflect conditions in these source countries.

Following the first Task Force meeting of 2018 on January 9, the News Release notes that Mr. Rodriguez will be returning to Los Angeles "in light of the recent US decision to end the [TPS] of Salvadorans" (IRCC [News Release], January 10, 2018). Then Acting-DHS Secretary Nielsen announced the decision to terminate the TPS designation of El Salvador only one day prior, on January 8 (DHS [Press Release], January 8, 2018). Such a rapid response of the Task Force reveals the continued and specific concern with the irregular border crossing and asylum seeking of TPS populations. This IRCC News Release also announces IRCC's launch of a "targeting advertising campaign to reach key populations in the US" and notes specifically the emphasis that "crossing the border illegally [for purposes of claiming asylum] is not a free ticket to Canada" (IRCC [News Release], January 10, 2018). This use of language -- "illegal" instead of the usual "irregular" and reference to a "free ticket" -- might be analyzed in consideration of the discursively constructed subjectivities of asylum seekers referenced in Chapter 5. While it is true that not all persons crossing irregularly in the hopes of gaining asylum in Canada may actually meet the requirements for such protection, it remains the legal obligation of the Government of Canada to consider each claim fairly and independently from all others. As discussed in Chapter 5, the problematizing of asylum seekers evident here is concerning in light of the way in which such discourse influences and constructs the understanding of "problems" and their proposed "solutions" as written into policy.

Such policy might manifest in the "[adapted] contingency planning to adequately address future irregular movement" (referenced directly after the above quote) as well as well as the note

that “significant work was completed in response to the irregular migration movement” most notably, the reduction of the backlog of claimants waiting for an eligibility interview from “a peak of about 6,000 in August to 238 in mid-December” (IRCC [News Release], January 10, 2018). While the expedited processing of eligibility interviews may represent the priority of efficiency within the bureaucracy, such a rapid decrease in backlog raises concerns for the fair and attentive treatment of each asylum claimant. To uphold their obligations to international standards of protection, the Government of Canada must ensure the capacity to process and hear each claim for refugee protection lawfully and impartially. This must be done to afford all claimants due process under Canadian and international law.

Upon the conclusion of this project, the most recent News Release on the Task Force is dated March 16, 2018. It is noted that “flows of irregular migrants crossing the border in Lacolle, Quebec have remained steady in 2018 with an average of 50 interceptions per day in January” as well as that the IRCC “continues to examine volumes to identify any possible changing patterns with irregular migrants especially for those nationalities for which [TPS] in the [US] will soon expire” (IRCC [News Release], March 16, 2018). This displays the Government of Canada’s ongoing and specific interest in deflecting would-be refugee claimants in TPS populations. This also reveals the expectation that the annulment of TPS will continue into the coming year and the anticipation that these populations will hold onto the hope of seeking asylum in Canada. I argue that the precise intersection between the annulment of TPS and the ongoing influx of asylum seekers through irregular border crossing is evident throughout these public communications from IRCC and the Government of Canada’s strategy and action referenced herein.

Final Notes on IRCC Public Communications

Upon the conclusion of this project, the official IRCC website displays an 'Irregular border crossings and asylum in Canada' link at the top of its 'Refugees and asylum' webpage. This link directs visitors to a two minute video titled 'Claiming Refugee Status in Canada: What You Need to Know.' This video is available in three languages: English, Kreyòl, and Spanish. This suggests that the target audience of the video is Haitians and Latin Americans. As noted, these populations account for the vast majority of those affected by the annulment of TPS. The video was published by CIC on December 18, 2017. Text next to the video notes the following:

> There are specific requirements to be considered a refugee. Not having or losing **Temporary Protected Status** in the U.S. is not grounds for a refugee claim. And Canada does not have any special programs for people with **Temporary Protected Status**. Learn the facts about Canada's refugee system before you put the life you built at risk [emphasis added] (IRCC, 2018).

The narrator of the video explains that "making a refugee claim is not a free ticket into Canada" and that "the refugee system is not for those seeking a better economic life" (IRCC, 2018). He goes on to assert that "crossing the US border into Canada between ports of entry is against the law and you will be arrested" (IRCC, 2018). While it is true that asylum seekers who enter through irregular border crossing will be intercepted and taken into custody by the RCMP, it is not technically true that this is against the law as section 133 of the IRPA states that no enforcement actions will be taken against persons who cross irregularly (discussed in Chapter 5).

The narrator specifically addresses TPS twice in the video. He states that "not having Temporary Protected Status in the US, or losing that status, is not grounds for a refugee claim" as well as that "Canada does not have any special program for people with Temporary Protected Status" (IRCC, 2018). In conclusion, the narrator advises, "if your refugee claim is rejected, you may not be able to return to the United States, and most importantly, you will most likely be sent to your country of origin" (IRCC, 2018). This video serves to deter TPS populations from

irregularly crossing the border in the hopes of making a claim for asylum in Canada. IRCC addresses these populations specifically, by name, in directing this video towards former-TPS beneficiaries and those related to them. This video warns potential irregular border crossers and asylum seekers that they will likely be deported from Canada, to their country of origin, should they attempt to immigrate to Canada through these means.

This webpage also includes an audio clip with the title 'Listen to a message about claiming asylum in Canada' (IRCC, 2018). This audio clip is also available in English, Kreyòl, and Spanish and also speaks directly to TPS populations. The recording opens stating that it is "an important message from the Government of Canada" and goes on to warn viewers of the misinformation surrounding asylum in Canada and TPS:

> Beware of misleading or false information about claiming asylum in Canada. The Government of Canada has no special programs to grant refugee status to individuals in the United States currently under **Temporary Protected Status** or otherwise [emphasis added] (IRCC, 2018).

The video concludes with the warning that, should individuals fail to meet the eligibility requirements for asylum, they will be "asked to leave or be removed" (IRCC, 2018). The webpage does not state when this audio clip was published, but the page itself was last modified on February 2, 2018 (IRCC, 2018), suggesting that both the video and the associated audio clip are currently relevant in April 2018. The video and the audio clip reveal that the Government of Canada is actively working to advise TPS populations against irregular border crossing and asylum seeking. Specifically, these measures warn against the risk of deportation to a country of origin -- the very thing these populations are trying to avoid in uprooting their life in the US to seek asylum in Canada.

Snapshot of UNHCR Canada Response (April 2018)

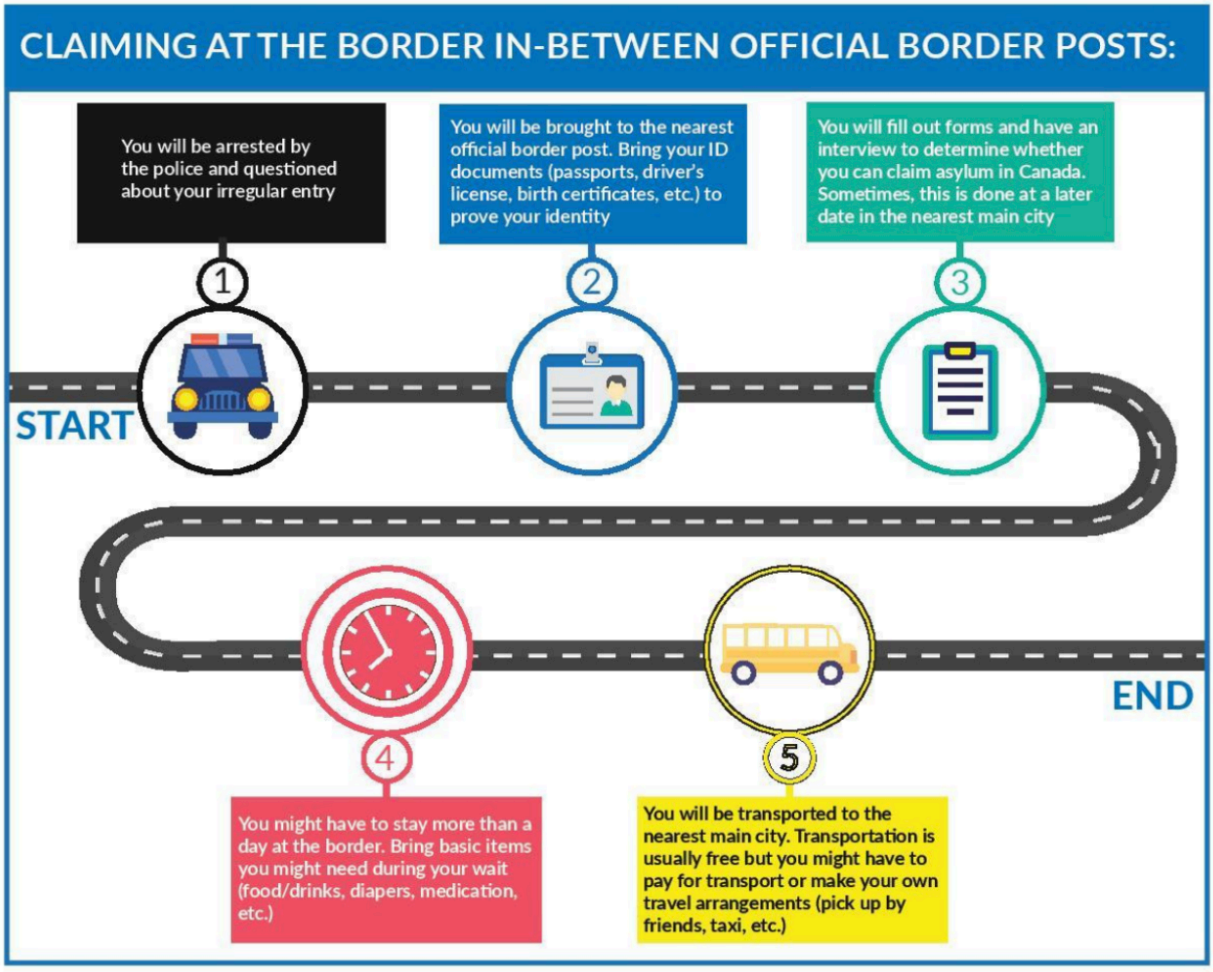
On April 16, 2018, UNHCR Canada published a four-page Press Backgrounder titled "Irregular crossings at The Border: Challenging Myths and Preconceptions" (UNHCR Canada [Backgrounder], 2018). This briefing includes statistics comparing 2017 trends in asylum claims to those of the past ten years, "regular" asylum claims compared to "irregular claims," and acceptance rates of "all claims" to that of "irregular claims." Most notably, the release asserts that "*most* asylum seekers are recognized as fleeing violence and persecution [emphasis added]" (UNHCR Canada [Backgrounder], 2018). This explicitly validates the claims of irregular border crossers as deserving asylum in equal measure to those who enter Canada legally. Headings of the briefing also assure that "Canada's border remains secure" and "Canada's asylum system is not broken" (UNHCR Canada [Backgrounder], 2018). In conclusion, the release notes that UNHCR Canada is working to produce and disseminate accessible infographics, charts, and factsheets to asylum seekers in the effort to combat the spread of misinformation within potential asylum seeking communities. In regard to TPS populations specifically, the briefing refers to TPS once (at the top of the second page), noting that:

> Since the U.S. administration's decision to stop renewing **TPS** designations for Salvadorans and Hondurans, and DACA status holders (mainly Mexicans), there has been speculations of spikes in their asylum claims to Canada. However, there has been no increase in *claims made at the border* by persons originally from such countries [emphasis added] (UNHCR Canada [Backgrounder], 2018).

In this reference to the annulment of TPS in the US, the briefing seems to be "challenging the myths and preconceptions" regarding the "speculations" of TPS populations seeking asylum in Canada. However, this statement only refers to "claims made at the border" which implicitly excludes claims made through irregular border crossing. Through this research, it seems clear that many TPS populations are aware of the "loophole" within the STCA that prohibits claims "made at the border" but allows claims made through irregular border crossing. Thus this

statement seems misleading because, to be eligible to make a claim for asylum, TPS populations *cannot* "ma[ke] a claim at the border" because they are inherently already in the US and as such are barred from such a claim under the terms of the STCA.

At the same time, this statement explicitly only refers to Salvadorans and Hondurans and notably does not pertain to Haitians. It also only refers to finalized 2017 trends in asylum claims (of which Haitians are the largest group). Again, this suggests that such a statement that may be read as intended to "challenge the myths and preconceptions" regarding the intersection of the annulment of TPS and these trends in asylum; and again, this seems to mislead readers. The DHS announcement for the termination of El Salvador's TPS designation was released on January 8, 2018 (DHS [Press Release], January 8, 2018) and the decision for Honduras will not be announced until next month, in May 2018. The lack of Salvadorans and Hondurans in these statistics may either be a result of the limited timeframe of the statistics or may well be a result of the Government of Canada and UNHCR Canada's public information campaigns targeting TPS communities over the course of the past year. As of April 2018, statistics including the countries of origin for asylum claims made through irregular border crossing have not yet been released for 2018, so it is as yet impossible to gauge how many Salvadorans or Hondurans are seeking asylum through irregular border crossing in 2018.



Note. Reprinted from *Irregular crossings at The Border: Challenging Myths and Preconceptions*, by UNHCR Canada, (2018, April 16), Retrieved from https://www.unhcr.ca/wp-content/uploads/2018/04/PressBackgrounder-Border-16April.pdf

Perhaps the most interesting aspect of this briefing is the "UNHCR 1-Pager Sample" included in the Appendix at the end of the document. This a clear example of the "accessible infographics" for asylum seekers mentioned earlier. Titled "What happens when you claim asylum at the border?" the factsheet first outlines claiming asylum at an official border post and provides a link to another document advising eligibility of claims under the STCA. The second half of the page outlines claiming asylum in between official border posts. As pictured above, this is a five-step process from 'Start' to 'Finish.' The graphic advises potential asylum seekers on the protocol for

irregular border crossing. This includes recommending that potential claimants have their identification documents on hand when irregularly entering Canada as well as that they may have to spend more than a day at the RCMP's workstation (assuming they cross at Roxham Road near the Lacolle border, where "most" of irregular border crossings take place). This suggests a 'regularizing' of the trends in irregular border crossing. UNHCR Canada is effectively providing potential asylum claimants in the US with the information needed to navigate the legal terms of the STCA and seek asylum through irregular border crossing. This suggests first, UNHCR Canada expects these trends to continue into the foreseeable future; and second, the clear objective to equip potential claimants in the US with the advice and instruction necessary to retain the right to seek asylum in Canada.

CONCLUSIONS AND FUTURE STUDY

In consideration of these findings and discussion, I expect the irregular border crossings of asylum seekers to continue over the course of the next year. Specifically, I anticipate rates in irregular claims to follow similar seasonal trends to that of 2017. While I argue that the intersection between the annulment of TPS and the surge in irregular claims can be distinctly identified within this research, particularly in the case of Haitians, I anticipate that the migration of TPS populations seeking asylum in Canada will continue to plateau. I postulate that this is largely a result of the Canadian government's far-reaching public relations campaigns in the US. Through proactively targeting TPS communities, the Government of Canada is effectively discouraging potential asylum seeking populations from pursing irregular border crossing. This can be read in two ways. First, the Government of Canada may be reducing the number of individuals who do *not* meet the legal requirements of asylum from uprooting their lives only to be deported once their claim is rejected. Second, the Government of Canada may be dissuading

genuine refugees from accessing their rights to protection on Canadian soil. There is an immediate need for future research in this area.

In regard to the annulment of TPS itself, I argue that the Trump administration has already evidenced a radical departure from the program's intended terms. As the programs' capacity for protection has already been curtailed by 75 percent, the evolution of TPS over the course of the past year represents an unprecedented transformation of the program. I contend that this spontaneously produces populations in need of protection. As these populations face the impending expiry dates of their programs, they face a high risk of detention and/or deportation as it will be very easy for immigration enforcement actions to target these individuals. It is unknown how many former beneficiaries will either attempt to remain in the US undocumented, flee to Canada, or return to their countries of origin. I anticipate that many will prioritize the unity of their families and as such will first attempt to remain in North America and retain some semblance of normalcy in their lives. In particular, I believe that the considerable proportion with US citizen children will avoid the separation of their families at all costs and will thus first attempt to remain in the US, undocumented. I cannot postulate how many will cling to their lives in the US or uproot themselves in the hope of finding security in Canada, but I do not expect these TPS populations to self-deport en mass.

As this is an active and ongoing migration event, there remains a high degree of uncertainty regarding the future of these vulnerable populations, both those who still remain in the US and those waiting for their cases to be heard in Canada. There is an immediate need for advocacy on behalf of these populations and an urgent need for future research on the conditions that structure and produce this migration event.

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