The Safe Third Country Agreement and Global Order

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Abstract

The Safe Third Country Agreement (SCTA) is a bilateral agreement between Canada and the United States that involves the mutual recognition of each party as an effective refugee host. This paper argues that although the agreement appears to be pro-refugee protection, in practice it functions as a non-arrival measure, barring refugees from entering Canada. The paper invokes the English School approach to investigate how both parties use the STCA to capitalize on values of order, while appearing to empower the principles of justice prevalent in international refugee norms. Using SCTA provisions, different theoretical approaches, and a thorough inventory of international refugee regime norms, the analysis seeks to contextualize the SCTA. The paper concludes that civil society's push towards justice and refugee protection forces governments to consider values outside of order, with the potential of addressing both concerns harmoniously.

Introduction

State practice in the international refugee regime is characterised by an order-based hegemony. It undertakes measures that securitize refugees, externalize borders, implement visa regimes, and employ carrier sanctions designed to keep refugees out. One such measure is the Safe Third Country Agreement (STCA 2002) between the United States and Canada, which bars asylum seekers from entry at the official land border between the countries, given that both are recognized as "safe" by the agreement.

At a first glance, the STCA appears to be a piece of legislation in line with existing international norms around refugee protection. However, upon a closer examination of the treaty and its history, its function as a non-arrival measure becomes clear. Given Canada's particularly welcoming rhetoric on refugee protection, STCA's largest function in keeping asylum seekers out of Canada is significant. The STCA further elucidates the ways in which the US and Canadian governments capitalize on the power of a limited pluralist system while appearing to give voice to the rising justice-oriented civil society. I will investigate this using the English School, a theory of international relations that understands states to be in a society with one another and consequently shaped by the normative structures within this society (Bull 1977). This lens

is valuable for this analysis as the refugee can be best examined by looking at relations between states and the norms that govern their interactions. Using this approach, I will examine the role of the refugee within global order and the distinction that the English School makes between a system based on 'order' versus one based on 'justice.' Here, a system valuing order is driven by a power-based hierarchical structure. Meanwhile, a system valuing justice prioritizes the rights of all people within it, regardless of societal cleavages.

In marking this distinction, I will examine the STCA to study the ways in which state powers continue to operate by valuing order, despite civil society actors pushing for a justice-based approach. This push against order is important because it highlights that the privileging of order is not inherent; the fact that there are states who organize themselves based on justice implies a choice for states between justice or order-based organization. Rather, order is maintained for the purposes of the powerful and reinforces their control and domination of the state system. Furthermore, by analyzing the actions of the US and Canadian governments with regards to the STCA, we see that the push towards justice becomes politically necessary. This is due to pressure on both countries to subscribe to international protection norms so that they maintain their standing within the international sphere. At the same time, allowing deeper penetration of pro-justice norms would run counter to the hegemonic state system that the US currently dominates and thus running counter US interests (Hurrell 2007). For this reason, the push to a truly justice-privileging state-system meets a fundamental challenge. I will argue that we must look to civil society for the response.

What is the Safe Third Country Agreement?

Over the course of 2017, there has been a significant increase in the number of asylum seekers crossing irregularly at unofficial border points into Canada (Forrest 2017). One of the main reasons for these irregular border crossings is the Safe Third Country Agreement between Canada and the United States. Though it has been in effect since 2004, the current political climate of the US has reopened discussion on the agreement, which requires that both countries recognize the other as 'safe.' If this is the case, refugees should be able to access equally effective protection in either country, in line with the *1951 UN Convention Relating to the Status of Refugees* and *1967 Protocol*. Under the STCA, asylum seekers are therefore required to lodge their refugee claim in whichever territory they enter first (Macklin 2003). Most refugee claimants come from Latin America; if travelling by land, they will arrive in the US first. Thus, as stipulated in the STCA, if an asylum seeker tries to cross the US-Canadian border at an official port of entry, they will be turned back to the US. This generally means that claims are filed in the United States rather than in Canada. However, given that the STCA

only applies at official land border points, refugee claimants that enter Canada irregularly can then file their claim inland, which falls under different provisions (STCA 2002). This is largely due to the difficulties in determining whether the asylum seeker arrived via the US, since they would have "every reason to conceal it" if that were the case (Macklin 2003).

I will briefly clarify a few core concepts implied in this agreement. Firstly, the concept of a "safe third country" as a rhetorical device must be deconstructed. In denoting another country as 'safe,' the recognizing country is supporting the mechanisms of protection employed by the 'third' country, which is neither the country recognizing nor the country of origin. In turn, as mentioned above, the recognizing country is confirming that it holds the 'third' country to be able to provide effective protection for those in need. Secondly, the term 'asylum seeker' or 'refugee claimant' refers to someone who is seeking protection but whose status as a refugee has not yet been recognized. This means that they do not yet have the legal protection that comes with official refugee status and are therefore vulnerable. Lastly, the idea of crossing 'irregularly' rather than 'illegally' is important to clarify. In terms of international and Canadian law, the right of refugees to flee to safety is protected; they cannot be penalized for exercising that right (AI and CCR 2017), making the crossing 'irregular' but not 'illegal.' In addition, it is an important distinction in terms of the connotations for representation of refugee claimants. Politicians and the media have perpetuated a trend of referring to the border crossings as illegal, implying that the asylum seekers are not merely people who committed an illegal act, but people who are illegal themselves (Macklin 2003).

As a result of this agreement, Canada had, until recently, seen a decrease in asylum claimants. However, following the inauguration of US President Donald Trump in January 2017, irregular crossings increased, in large part due the negative rhetoric of the Trump administration on refugees and migrants, which heavily contrasts with the increasingly positive and pro-refugee rhetoric in Canada. Given Canada's reputation for welcoming refugees, it is surprising that this agreement came into existence in the first place, and even more so that it was initiated by Canada (Macklin 2003, 1). The STCA primarily serves to stem refugee flows to Canada and leave the decisions up to the US system for processing claimants, a goal that is counterintuitive to the pro-refugee position of the Canadian government. Thus, the question becomes: why does the STCA exist? I will examine how it appears as a piece of pro-refugee protection legislation that, while theoretically fitting the Canadian image, serves to act in an exclusionary and protectionist manner, more concerned with the security of the state rather than that of humans.

Order and Justice in International Society

The STCA specifically targets refugee claimants who have not been formerly granted asylum or refugee status. To further investigate why the STCA was enacted, a more developed understanding of the international society that it functions within is key. To do this, I will turn to a study of refugee claimants, who, as the product of the breakdown of international society, offer insight into how it comes apart and how it is intended to come together. In this case, the relationship of citizenship-state-territory is severed. Arendt outlines this relationship as central in having the rights, since rights come from our status as citizens, and our status as citizens is enforceable by the state (Arendt 1973, 231). But it is only when the relationship is broken that we see how it functioned as the right-giver in the first place, revealing aspects that are much less apparent than they were before. Namely, it points to the shortcomings of the state system, while simultaneously revealing the norms and practices inherent within it. When the relationship breaks down, there is necessarily a reaction. I argue that this is where the competing values of order and justice come apart, and where the role each plays within the system is made clear.

Examining international society and states as actors within it from the English School lens raises the question of who and what motivates action. Bull understands international society as a group of states, conscious of certain common interests and values, who form a society bound by a general set of rules, and who share in the working of common institutions (Bull 1977). There are two versions of an understanding of international society that I will explore: a limited pluralist viewpoint and a solidarist one. In particular, Hurrell outlines the US as challenging to understanding international society because it does not fit neatly into either reading.

The limited pluralist view privileges the value of order within the state system. As a result, it creates and sustains a global order characterised by sovereignty and non-intervention, reminiscent of the Westphalian system (Betts 2009, 51). An example of this system is non-arrival measures that respond to issues pertaining to refugee claimants irregularly crossing borders (Gibney 2008). Conversely, looking to actors within transnational civil society such as non-governmental organizations (NGOs), advocacy groups, and intergovernmental organizations (IGOs), there is a response that focuses on the idea of protection for those without it and that pushes for open borders and the extension of protection. This response privileges justice rather than order. Justice operates heavily within the solidarist viewpoint that prioritises respect for the rights of individuals. In the varied response of states versus transnational society to the issue of refugee claimants, the different values become apparent. This supports Bull's claim that the privileging of order in international society is not inherent, and that the capacity for norms to favour justice exists (Bull 1977).

Furthermore, the consideration of civil society makes apparent that states

are not the only actors shaping international society, as Hurrell outlines. In examining the STCA case, I will employ neither a solely limited pluralist view nor a purely solidarist account of international society. On one hand, the role that justice plays in international norms and rhetoric makes it clear that the system is not solely made up of sovereign states preoccupied with balancing power and security. On the other, state responses in this breakdown are tied to order; 'cosmopolitan values enshrined in international norms' have not penetrated quite deeply enough, despite a veil of saliency. The STCA proves that neither have full explanatory power. Rather, Hurrell's lens of complex governance, which highlights the continuation of state-centrality, the rise of non-state actors, and the importance of international norms, might offer greater insight.

The Refugee & International Society

When investigating how Western states exercise power, the refugee acts as a particularly neat example of the phenomenon of solidarist aspirations falling short on the state level. Firstly, within the regime there is a narrative of refugees as vulnerable people in need of aid. As long as refugees fit this portrayal as rightless 'scum of the earth' (Arendt 1973, 267), state and non-state actors can feel they are being generous and benevolent in any amount of protection that they extend. This particular portrayal is important in the functioning of the current regime. Given that aid to refugees is construed as generosity, states feel justified in employing measures to maintain strict control over their borders for the sake of their own citizens. With this, they create a narrative that portrays the refugee, or any 'other,' as a potential domestic security risk. In this case, states apply the language of justice around refugee and citizen protection to maintain a system of order and control. Hurrell explains the narrative of securitization of refugees and borders as a function of the continued prevalence of order on the state level:

The increased salience of national security concerns and the growth of racism and xenophobia in many developed states have pressed further in this direction which further moves to undermine the formal right to asylum. These include sanctions on carriers, off-shore processing, the use of 'safe-third country' concepts…if we add to all of this the structural capacity of the rich to set the terms of global burden-sharing on refugee protection and at least some of the links between global economic inequality and the generation of refugees, then the progress of liberal solidarism appears limited (in terms of practicality and normative ambition). (Hurrell 2011, 95)

This demonstrates the current problem that challenges effective refugee protection and the particular role that the STCA plays in contributing to this dialogue, upholding this system, and undermining the right to asylum. It further exposes the shortcomings of the liberal solidarist project. In essence, solidarism

as a framework operates on the idea that there is a transnational community in solidarity with one another, from which norms and institutions can grow. However, in this misuse of the right to asylum, it is clear that gaps exist. From Hurrell, we see that neither the limited pluralist state-based and state-oriented system nor the solidarist transnational community can give a full account. Rather, in Hurrell's system of 'complex governance,' transnational civil society must be recognised and continued state-centrality must be engaged with for effective governance. This system of 'complex governance' allows for a framework other than the binary between limited pluralism and solidarism. Moreover, it allows for nuance within a system that can operate on notions of both justice and order.

By recognising the continued prevalence of state-centrality and power, we return to the idea presented by Haddad that the "modern refugee is only fully intelligible within the context of a pluralist system of states in which individual political communities fail to guarantee the content of substantive sovereignty" (Haddad 2008). As long as global burden-sharing is determined by inequalities persistent in state powers, as Hurrell writes, these inequalities will be exacerbated, and so too will states' (in)abilities to guarantee effective protection increasing the generation of refugees. Therefore, only in our current system, which values territories confined by strict borders, does the breakdown of such states create the refugee (Haddad 2008). However, a further notion of 'refugee' comes not only from the breakdown of the state, but from having no other state that is immediately 'yours.' Haddad elaborates that refugees thus act to reinforce the imagined construct of the nation-state by forming the 'other' in relation to whom the identity of the nation exists (Haddad 2008). In other words, by being an outsider, the refugee enables insiders to further ostracize them, while they further serve to maintain a system and order for the states.

Accordingly, refugees are an integral part of the system of global order. Hurrell, however, is critical of Haddad's claim that the creation of the modern refugee is unique to a limited pluralist system, pointing to other factors that create refugees, such as developmental or environmental causes emphasizing the necessary 'other' of any political community (Hurrell 2011). Perhaps it is true that for any specific political community to exist there must be those who are not a part of it, but the methods by which 'others' are excluded could be manifested in a radically different manner. The criticism of Haddad therefore holds only so long, as the system that political communities organize privileges a value of order. A necessary tenet of international society, though, is that the privileging of one value over the other is not inherent and is changeable (Bull 1977). Thus, this criticism only holds in this specific conception. I aim to show that this system imagined by Haddad, in which order is not fundamental, could be practically possible if we become aware of these two separate logics at work and the necessary inter-play between them as set out by Hurrell. To examine

these logics at work, I will shift my focus back to the STCA and civil society's work in resisting it.

STCA: Protection or Protectionist?

Canada's earliest iteration of a general safe third country clause was in 1989 but was ultimately unsuccessful and never implemented. It was withdrawn after a meeting with refugee advocates and organisations in the early 1990s, given the difficulties of establishing the definition of a 'safe third country' (Lacroix 2004). At this point, the role of justice-based civil society is clear, and their position has remained the same since. However, through a changing political climate in the US, Canada seems to have become more focused on state power as it has grown and its relationship with the US has developed.

In December 2002, the STCA was created in the wake of the 2001 September 11th terrorist attacks. Even at this time, Macklin points to "the deficiencies in the US asylum system—compounded by the recent registration system and moral panic directed at Muslims and Arabs—generate serious concern about whether implementation of this Agreement will impose on Canada a share of indirect responsibility for the excesses, the harms and the rights of violations inflicted by law and otherwise in the US." (Macklin 2003) This indicates a political climate built upon a strong and exclusive nationalism, not unlike today's, raising concerns about the tactics used to justify this agreement in the first place. Given the rise of terrorism-related fears in the aftermath of 9/11, it was an opportune moment to create such an agreement and play on the fear of the 'other,' which state powers effectively used to consolidate control of their borders.

The timing of the second attempt at reaching an agreement was a key factor in its success. The refugee advocates who were consulted in the early 1990s had not changed their minds. Rather, Canada and the US were able to garner public support based on fear-mongering while advocates continued to decry the agreement. In particular, pro-refugee groups labelled the agreement an attack on the principle of *non-refoulement*—a key norm protecting refugees from being returned to a country in which they fear persecution—but even this seemed to have little effect (CCR). However, the US continues to be designated as the only 'safe third' by Canada (Lacroix 2004; AI and CCR 2017). This shows the growth of a North American identity permeating amidst fear as Canada pushes to contribute to the US rhetoric employed at the instigation of this agreement.

In 2004, the STCA was finally implemented as a part of the US-Canada Smart Border Action Plan to help "both governments better manage access to their refugee systems" (STCA 2002). The agreement states that it was made with the desire to uphold asylum as an indispensable instrument of the international protection of refugees, and that it resolves to strengthen the integrity of the institution and the public support on which it depends (STCA 2002). However,

while it clearly uses the right language to say the right things, the steps planned to achieve its aims are unclear. For example, the STCA, in preventing asylum seekers from crossing the US-Canada land border at official border points, creates a culture of irregular crossing (AI and CCR 2017, 3). The stated aim — to strengthen the public support on which international refugee protection depends — is undermined by an increasing number of asylum seekers in Canada being deemed 'illegal' and accused of cutting corners. This tactic has been long used by states to construct refugee claimants as "vectors of insecurity and terror, particularly at border crossings" (Hyndman and Mountz 2007, 77). Rather than garnering support, this derails positive refugee rhetoric, thereby creating a reaction in direct opposition to the STCA's intentions and drawing a contradiction between rhetoric based on justice, and practice based on order.

The STCA further notes that if refugee status claimants arrive at the Canadian or US land border directly from the other territory, they could have found effective protection in the previous country. If 'effective' protection is available to all, why have irregular crossings become an issue? The most recent report on refugee determination of asylum seekers who have come to Canada since January 2017 notes that almost 70% of claims were accepted, highlighting that these people are indeed in need of protection that they feel the US cannot give them at this time (Keung 2017). This draws a sharp contrast with some areas of the US. For example, in Atlanta in 2015, 98% of asylum claims were refused (AI and CCR 2017, 51).

Again, the language and content of the STCA seem to truly be in the interest of those seeking asylum. It acknowledges that, in practice, sharing responsibilities ensures that persons in need of international protection are identified. In addition, it recognizes that the possibility of indirect breaches of non-refoulement must be avoided, ensuring that each refugee claimant has access to a full and fair refugee status determination procedure. However, the US has consistently turned away those at their Southern Border with no opportunity for a claim to be heard, conducting mass prosecutions of groups of 100+ people and denying the opportunity for these people to even lodge a claim (AI and CCR 2017, 47). Furthermore, there are well-documented 'asylum free zones' where some states refuse disproportionate numbers of asylum claims, pointing to the 'refugee roulette' that the US system plays (AI and CCR 2017, 47). This draws out the contradiction within this policy, and in Canada's overall pro-justice, pro-refugee dialogue.

The U.S. as a Safe Third Country

The extent to which the US is a 'safe third' and a partner of Canada in providing refugee protection is essential to understanding the underlying motivations of the STCA. I will show that the US consistently, and in many

respects, fails to meet the requirements of a safe third country. Despite this, the agreement continues, pointing to the prevalence of the logic of order, rather than that of justice at play in its implementation. In addressing the ongoing designation of the US as a safe third country, the STCA highlights that the US must be a signatory to the *1951 Convention on the Status of Refugees* and its *1967 Protocol*. While the US is a signatory to the Protocol, it is not, in fact, a signatory to the Convention. Furthermore, the US must be a party to the 1984 Convention Against Torture (CAT), and, while this is true, the US has not signed onto the CAT's optional protocol, which allows for the individual complaint mechanism. This is relevant because by not allowing individual complaints, the US removes itself from any accountability measures in terms of its compliance with the treaty.

Ultimately, by examining the stipulations of the Agreement itself, it becomes clear that fulfilling the intentions to increase protection, rather than to simply manage refugee movement, are deeply limited. I argue that by adjusting our viewpoint to understand state action as operating on a level of order and state-centrality, we see how motivations and rationale for the STCA fall apart. The application of the STCA relies on order, appealing to a limited pluralist understanding; the stated goals of the STCA however rely on justice, appealing to a solidarist account of state organization. It has been shown that the STCA appears as both a mechanism for refugee protection and a mechanism for nationalist securitization and deterrence. Furthermore, it does not solely operate within a conception of a state-based system because the importance of adhering to norms of protection remains. However, it does not operate solely in a solidarist international community, given the ability and willingness of the state to exert control.

The Value of Order in the Power of the State

In order to further highlight this distinction between the privileging of a value of justice and the value of order, I will examine the key actors from each system. I will do this by briefly exploring the history of US asylum laws since the mid-twentieth century and the construction of the STCA by specifically highlighting the ways in which the US asylum system values order.

Before becoming a signatory to the 1967 Protocol, refugee protection in the US was not particularly robust. The first real move towards upholding norms of international law in the country's own legislation came with the 1980 Refugee Act. In this act, the 1967 Protocol was incorporated into domestic law (Fitzpatrick 1997, 1). This was a significant move, although not surprising given the context and the importance being placed on strengthening international institutions at the time. While in this instance the actions of the US happened to coincide with a value of justice, this was spurious because it was still operating in a state-centric mode, aiming to maintain order by placing itself in line with the popular move of the period.

However, there were several positive policy changes that came out of the 1980 Act. For example, it made the summary exclusion of asylum seekers a violation of both international and domestic law. This altered the traditional practices in refugee protection in the US, as it created an obligation to extend asylum based on protecting the most persecuted, rather than the most politically useful. In this case, it created a legal right for Haitians and refugees from non-communist countries to have their claim heard (Gibney 2004, 155). This was a novel approach, since asylum had previously been used by the US as a political tool to consolidate both power and order. For example, the US granted asylum to undermine the legitimacy of communist regimes. In this new iteration of the refugee regime in America, it had at least moved away from blatantly privileging an idea of order over one of justice in the sense that summary exclusion was still possible, but only if the state was prepared to violate the law (Gibney 2004, 161).

Gibney highlights that this created a politicization of a new kind of refugee issue amongst civil rights groups and the general electorate. While the issue of refugees was no longer politically useful for the state on the international stage as a tool to influence communism, it had become politically useful to maintain an image of respect for norms. However, this was often done without abiding by them, creating backlash from the international community (Gibney 2004, 160). Moreover, what seemed like a move towards granting asylum based on need coincided with the rise of preventative measures designed to impede access to asylum (Gibney 2004, 160). In this case, there was a failure to deeply value justice, and state interest persists.

However, by 1996, a new immigration system based on the 1996 Illegal Immigration Reform and Immigrant Responsibility Act was implemented by the Clinton administration. It replaced the 1980 Act and brought with it harsh and stringent restrictions running counter to international refugee law. This system persists today and provided the foundation for the STCA. This 1996 Act specifically set up the one-year entry rule, which stipulates that a claim cannot be lodged after one year of presence in the territory. While seemingly minor, a 2007 Federal Court found that this rule might put some refugees returned to the US by Canada at greater risk of refoulement. Antonio Guterres, the UN High Commissioner for Refugees, requested it be repealed, as it diverged from international standards and made it more difficult for asylum seekers to establish their need for protection (AI and CCR 2017, 15). Moreover, the provision disproportionately affects women, who file late claims at a rate 50% higher than men, indicating that US is potentially even less safe for vulnerable women (AI and CCR 2017, 15). The 1996 Agreement further created an expansion of the grounds on which to reject asylum claims, increased the scope for authorities to remove those suspected of committing crimes or being involved in terrorist

activities, and introduced the highly controversial 'expedited removal' practices (Gibney 2004, 170).

The expedited removal process allows officers to remove 'improperly documented aliens' arriving in the United States without any further review or hearing. Those who immediately clarify their desire to apply for asylum are referred, but there is little opportunity to do so (AI ad CCR 2017). Furthermore, during the determination process, they are held in detention and immediately removed if no 'credible fear' is found. The US Committee for Refugees reported that in 1999, 89 521 people were removed through expedited procedure, and 86 000 were removed in 2000, causing concern amongst refugee advocates as to how many refugees had a credible asylum claim but never made it past 'control-minded immigration officers' to see an asylum officer (Gibney 2004, 253). This practice, as well as others existing today and prior to the STCA, emphasize the effective use of non-arrival measures by Western states in order to maintain notions of order, while adhering to justice just enough to be legitimized in the eyes of other states.

The Safe Third Country Agreement exemplifies state control over migration and asylum through non-arrival measures, despite maintaining the opposite image. Watson highlights that "the increased use of detention and deportation and the implementation of a safe third country agreement undermine the humanitarian principles of international refugee law that have been a fundamental aspect of Canada's approach to asylum seekers and refugee claimants" (Watson, 95). The STCA presents an image of Canada as norm abiding country to those who would criticize it, all while fulfilling the country's desire for order and security.

The Value of Justice in Civil Society

While the persistence of the value of order is visible at the state level, the same is not true at the civil society level. Civil society organizes itself, presents itself, and applies itself based on norms of justice rather than order. However, in the same way that justice can permeate order, order can permeate justice, as Hurrell's complex governance approach illustrates. Throughout the discussion thus far, it has been shown that when states try to exert power with no regard for justice civil society has steadily and unwaveringly pushed back. The value here falls on a respect for humanity, for individuals, and for the idea of a transnational community.

Regarding the STCA in Canada, for example, the Canadian Council for Refugees and Amnesty International Canada have published reports highlighting the dangers that the agreement creates for asylum seekers, have run several public campaigns, and have twice brought the Federal Government to Court. In this, they are operating on the level of justice and bringing the privileging of order

to light. This demonstrates that while justice is not totally entrenched, neither is the system of order, and the possibility of each persists. In the case of the US, civil society organizations underline several key issues in their report for the Human Rights Council's 2015 Periodic Review. Namely, they stress that the US immigration system fails to protect fundamental human rights to fair deportation proceedings, humane detention conditions, freedom from persecution or torture, and family unity (Working Group on the Universal Periodic Review 2015). Moreover, the National Immigrant Justice Center (NIJC) stated that the government denied migrants the right to a fair hearing and judicial review through removal processes, which contradicts its support of a recommendation during the last periodical review (Working Group on the Universal Periodic Review 2015). Amnesty called for detention only in exceptional circumstances in human conditions, with other groups calling attention to issues ranging from the protection of minors in immigration custody to the exclusion of all those who are undocumented from most public benefits, which violates their basic human rights (Working Group on the Universal Periodic Review 2015)

The pushing of key issues that fall outside the scope of state interest is of fundamental importance to the maintenance of the empathy in our societies, especially in response to refugee claimants. While the gains of working within these advocacy groups and NGO communities might seem marginal—for example, from one periodic review to the next, little might seem to change as they are still advocating what was supposed to have been undertaken before—the continual push is an essential mechanism to how the system functions and will remain essential so long as order is over-privileged.

Push to Justice: International Law & Norms in Power Maintenance

In the realm of international law and international norms, the interplay between justice and order is clearly shown: "deformity is evident in the limited capacity of international law and institutions to constrain effectively the unilateral and often illegal acts of the strong" (Hurrell 2007). In the US in particular, one should expect "a high level of consciousness of international obligation and a close congruence between domestic law and international norms" because of how directly the 1951 Convention was enshrined in US domestic law (Fitzpatrick 1997). The case of international refugee law and norms surrounding it are elucidatory in the effects of a push towards justice, yet in looking at non-compliance or ways that these norms are skirted, the challenges are clear. This is especially true of Article 33, which stipulates the principle of *non-refoulement*. However, despite what is laid out in law, in key respects the practice of US refugee law is 'out of sync,' meaning that what is stipulated in theory is often contradicted in practice (Fitzpatrick 1997). I will argue that it is in direct violation of key international norms, despite a façade of compliance.

Central to the designation of another country as a 'safe third' is a mutual responsibility, and with that, mutual accountability (Macklin 2003). Canada, as laid out in the STCA, maintains a responsibility to review and ensure that its designations of safe third countries are made in the best interests of the refugees themselves. If Canada fails to hold itself to this standard, it is in fact validating the actions of the US, and so is at the very least complicit in the actions of the United States and at most partially responsible. The STCA, in this sense, operates as a go ahead for US asylum policy, without ensuring the protection of those it is meant to protect. Specifically, I will argue that the STCA brings Canada into violation of three key articles of the 1951 Convention. It does this in some cases through its own actions, and otherwise through recognition of shared responsibility with the US. Importantly, both states continue to insist that they are fulfilling their obligations under international law.

Three articles best demonstrate the contradiction: Article 31 states that asylum seekers must not be punished for irregularly entering a country; Article 3 stipulates non-discrimination in the granting of asylum; and Article 33 establishes the norm of *non-refoulement*. Due to the STCA, Canada is tied to the US, and therefore shares responsibility for the violations of international refugee law that the US commits (AI and CCR 2017, 3). In examining the violations of the above articles, I will clarify the discrepancy between the rhetoric of both countries in relation to the international norms and their apparent traction, as well as the transgressions that consistently occur in practice.

Despite Article 31 stipulating that Contracting States shall impose no penalties on refugees on account of their illegal entry or presence, asylum seekers are placed in detention facilities (Goodwin-Gill 2001). The US has set up detention centers for this specific purpose and uses regular jails for the purpose of immigration detention (Goodwin-Gill 2001). Because of this policy, two thirds of asylum seekers who are detained are in a county or state prison (AI and CCR 2017, 3). Furthermore, in 2017 alone, the Trump administration expanded immigration detention by adding 33 000 beds to centers across the country. However, it must be noted that such policies have been standard practice in the US. Even during the Obama administration, it was common practice to hold women and children fleeing Central American countries in detention before turning them back (AI and CCR 2017, 23). In addition, there are no safeguards from prosecution, with asylum seekers being prosecuted 100 people at a time as early as one day after their apprehension. Furthermore, only fourteen percent of all asylum seekers have access to legal counsel, even though access to legal assistance makes their claims ten times more likely to succeed (AI and CCR 2017, 23). Clearly, these practices violate the purpose of Article 31 and the principle of effective protection.

Similarly, practices at the Southern Border such as detainment and rejection of asylum seekers bring the US into violation of the principle of *non-refoulement*, Article 33 of the Convention. The US conducts mass hearings of claimants at one time, and frequently fails to give the opportunity to lodge a refugee claim. These practices at the Southern Border dehumanize and deny the possibility of protection to these people. Moreover, one study documented via local newspapers over a hundred deaths of asylum seekers who had been returned by the US to Central American countries (AI and CCR, 2017). Article 3, non-discrimination, further challenges the prosecution of migrants as the US continues to treat refugee claimants differently at their Southern Border depending on their country of origin (AI and CCR, 2017).

The purpose of highlighting these large gaps in protection in the US is to demonstrate that while violations occur, a blind eye if often turned, despite the robust international norms of protection enshrined in international law which the US—at least in theory—agrees to. The laws themselves are treated as norms, easily violated and rarely enforced. In separating what occurs in practice versus what occurs in theory, the elements which serve justice and order can be seen more clearly.

Looking Forward to a Justice-Oriented System

Given the analysis thus far, we find ourselves at a bit of a stand still. How do we face this challenge of a system of order that respects justice only insofar as it is politically useful? What is to be said of this constant push that justice makes against order? The contention lies in the role of civil society. It acts as a relief valve for a system it does not wish to perpetuate, and yet cannot escape.

To understand this relationship, I will turn to Haddad's conception of such a relationship between the refugee and the state. Haddad writes that "we can readily accept that the conception of individual rights has been expanded but should not forget that this has only taken place within the framework of the state. A realistic approach to refugee rights should, therefore, acknowledge the existence of the present state system and attempt to formulate a workable ethics of refugee politics within it" (Haddad, 21, 2010). In a similar vein, acknowledging, as Hurrell does, the continued state centrality, civil society's best option might be to continue to understand the world it is operating within, and to do what it can within those parameters.

McNevin also raises the question of the role of political belonging within the school of international relations, as it relates to the Westphalian state system (2011). More specifically, what avenues are there for the representation of political belonging within such a system? In her search for an answer, she turns to the link of territory-state-citizen that Arendt proposes, and investigates the extent to which political belonging in our current conception is intrinsically tied to this. She argues that this ingrained relationship can account for why the

"policing of territorial borders against unwanted non-citizens currently attracts unprecedented levels of rhetorical, financial and technological investment" (McNevin 2011). Moreover, she highlights that to employ a radical questioning of what it means to belong, irregular migration opens an important window. In her terms, "irregular migration, by its very definition, is a reminder of the centrality of the state to prevailing notions of belonging" (McNevin 2011). This connects very closely to Haddad's idea that it is within this state system, operating on a notion of order that the refugee becomes a necessary consequence.

Thus, the role of the asylum seekers becomes connected to the idea that they are at once able to test the boundaries and parameters of the state system and reinforce the notion of 'state.' As Haddad wrote, the refugee becomes the 'other' which allows there to be an 'us.' However, underlying both Haddad's assertion that refugees are the product of our particular system, and McNevin's aim for radical questioning, is a system in which justice can be the privileged value, fundamentally altering our natural assumptions about the ways in which communities can exist.

This is central to the notion of civil society and the promoters of justice because in many ways, a system where justice is privileged holds space for the push. Moreover, when that space does not have to interact with states, the sorts of communities that McNevin imagines can begin to exist. A key example featured by McNevin is an instance in which, in the face of anti-immigrant rhetoric, demonstrations were held in cities across the US. In these demonstrations, hundreds of thousands of irregular migrants and their supporters operated within a space of justice and protested the restrictive immigration legislation (McNevin 2011). In these spaces, a glimpse of true pushback exists, and this push is consistently made by civil society in its many iterations.

The Role of Order in Justice

The above being said, the state does not have to be discounted, and can even offer mechanisms to increase justice through using order as a function of it, rather than as the basis. Regarding the use of non-arrival measures, Macklin highlights that "Canada's prodigious efforts to prevent asylum seekers from reaching our border, including this Agreement, are inconsistent with the spirit of our international commitments toward refugees" (Macklin 2003, 19). While this seems to be in the same vein as other criticisms considered, the notion of it being inconsistent with the 'spirit' of our commitments is of note. This relays the notion that full-fledged citizens with full-fledged rights who are safely members of a state do not have a need for justice in the same sense as those who do not have this 'belonging.' Even for those who are safe, there should be a commitment to justice. When evaluating contemporary programs such as the Private Sponsorship System, we see that when a human element is present, responses become hugely different. By this, I mean that when faced with a question of proximity and providing help to someone who is in need, political rhetoric and implications seem to largely fall away. This is in many senses an idealistic portrayal, but as Macklin argues, it still largely holds, as individuals interacting with other individuals in their circles generally do so in a spirit of kindness, and in a spirit of justice.

This can be applied to the notion that order has a role within justice. If built upwards to form an order, rather than to have an order imposed upon, the narrative changes drastically. The tension between the two is strongest when the idea of 'other' exists, and importantly, when power rather than justice is at the root of order, as is the case in many Western states and in the actions of Canada and the US in the STCA. In the case of the United States, Nyers highlights a securitization of migration that results in restrictive laws, policies and deportations. This is the opposite of McNevin's example, as it undermined and criminalized anti-deportation activism (Nyers 2010). Alternatively, extrapolating from McNevin's example, there is a way that order on local levels can support action when not carried out in the pursuit of power. Hurrell writes that:

Insofar the United States seeks to pursue a hard, exclusivist conception of its own interests and to propound a narrow hegemonic conception of order, then it is likely to generate not a Pax Americana but rather an empire of insecurity, both for itself and for others. The challenges to the inherited structures of international society are likely to grow more serious and the difficulties of institutional repair will grow more intractable. (Hurrell, 2007, 283)

This recognizes the importance of not only grasping on to power, but in taking care to understand how it can be built. This further emphasizes the shortcomings of focusing on a solely order-based system, ultimately pointing out that what the US hopes to achieve within the global order cannot be accomplished simply through force and control.

Conclusion

Ultimately, by reviewing a case study of the Safe Third Country Agreement through the lens of the English School, an understanding of the space for civil society and how it can materialize in conjunction with the space of the refugee emerges. By first developing an understanding of how the STCA functions seemingly in line with norms of protection, and then turning to an understanding of it as a non-arrival measure, the tensions of justice and order in each become apparent. The STCA develops into an important tool for examining policy gaps or inconsistencies in both parties' approach to refugees and highlights the circumstances in which Canada and the United States fail to act in line with international refugee protection norms. Furthermore, by understanding how

states value order and civil society values justice, the interplay between the two and the potential of each is clarified. Ultimately, the effects that the push to justice can have, even given the order-based actions of states, demonstrated that justice is very important. Moreover, the potential for a justice-based system is certainly possible given the right approaches, and it is not mutually exclusive from order when employed in a justice-oriented conception.

References

Amnesty International Canada and Canadian Council for Refugees (AI and CCR). 2017. "Contesting the Designation of the US as a Safe Third Country." Canadian Council for Refugees. https://ccrweb.ca/sites/ccrweb.ca/files/stca-submission-2017.pdf.

Arendt, Hannah. 1973. *The Origins of Totalitarianism*. New York, USA: Meridian Books: The World Publishing Company. Print.

Betts, Alexander. 2009. *Forced Migration and Global Politics*. Chichester, U.K: Wiley-Blackwell. Print.

Bull, Hedley. 1977. *The Anarchical Society: A Study of Order in World Politics*. London: Macmillan.

Fitzpatrick, Joan. 1997. "The Internatinoal Dimension of U.S. Refugee Law." *Berkeley Journal of International Law* 15 (1): 1–26. https://doi.org/10.15779/z383s83.

Forrest, Maura. 2017. "More than 32,000 Asylum Seekers Have Arrived in Canada so Far in 2017." *National Post*, September 28, 2017. https://nationalpost.com/news/politics/more-than-32000-asylum-seekers-have-arrived-in-canada-so-far-in-2017.

Gibney, Matthew J. 2004. *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees*. Cambridge, UK: Cambridge University Press. Print.

----. 2006. "4. 'A Thousand Little Guantanamos': Western States and Measures to Prevent the Arrival of Refugees." In *Displacement, Asylum, Migration: The Oxford Amnesty Lectures 2004*, edited by Kate E. Tunstall, 139–75. Oxford, United Kingdom: Oxford University Press. http://ebookcentral.proquest.com/lib/mcgill/detail.action?docID=422767.

Goodwin-Gill, Guy S. 2001. "Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection." In *Refugee Protection in International Law*, edited by Erika Feller, Volker Türk, and Frances Nicholson, 185–252. Cambridge: Cambridge University Press. https://doi.org/10.1017/CBO9780511493973.011.

Haddad, Emma. 2003. "Refugee Protection: A Clash of Values." *The International Journal of Human Rights* 7 (3): 1–26. https://doi.org/10.1080/13642980310001726106.

Hurrell, Andrew. 2007. *On Global Order: Power, Values, and the Constitution of International Society*. Oxford: Oxford University Press. Print.

----. 2011. "Refugees, International Society and Global Order." *Refugees in International Relations*, edited by Alexander Betts and Gil Loescher, Oxford University Press. Print.

Hyndman, Jennifer, and Alison Mountz. 2007. "Refuge or Refusal: The Geography of Exclusion." In *Violent Geographies: Fear, Terror, and Political Violence*. Edited by Derek Gregory and Allen Pred. New York: Taylor and Francis, Routledge.

Immigration, Refugees and Citizenship Canada, and Refugees and Citizenship Canada Immigration. 2002. "Final Text of the Safe Third Country Agreement." Aem. December 5, 2002. https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/safe-third-country-agreement/final-text.html.

Jr, Charles J Ogletree. 2000. "America's Schizophrenic Immigration Policy: Race, Class, and Reason." *Boston College Law Review* 41 (4): 17.

Lacroix, M. 2004. "Canadian Refugee Policy and the Social Construction of the Refugee Claimant Subjectivity: Understanding Refugeeness." *Journal of Refugee Studies* 17 (2): 147–66. https://doi.org/10.1093/jrs/17.2.147.

Macklin, Audrey. 2003. "The Value(s) of the Canada-US Safe Third Country Agreement." ISBN 1-55382-070-3. Ottawa, Canada: The Caledon Institution of Social Policy.

McNevin, Anne. 2011. *Contesting Citizenship: Irregular Migrants and New Frontiers of the Political*. Columbia University Press. http://columbia.universitypressscholarship.com/view/10.7312/columbia/9780231151283.001.0001/upso-9780231151283.

Nicholas Keung. 2017. "New Data Show 69% of Illegal Border-Crossers Are Being Granted Asylum | The Star." Thestar.Com. October 19, 2017. https://www.thestar.com/news/canada/2017/10/19/new-data-show-69-of-illegal-border-crossers-are-being-granted-asylum.html.

Nyers, Peter. 2003. "Abject Cosmopolitanism: The Politics of Protection in the Anti-Deportation Movement." *Third World Quarterly* 24 (6): 1069–93. https://doi.org/10.1080/01436590310001630071.

Office of the High Commissione for Refugees. n.d. "Convention and Protocol Relating to the Status of Refugees." United Nations. https://www.unhcr.org/en-us/3b66c2aa10.pdf#zoom=95.

OHCHR. n.d. "Human Rights Council Universal Periodic Review Working Group to Hold Twenty-Third Session in Geneva from 2 to 13 November 2015." OHCHR. Accessed January 4, 2019a. https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16675&LangID=E.

----. n.d. "United States of America." OHCHR. Accessed January 4, 2019b. https://www.ohchr.org/EN/Countries/LACRegion/Pages/USIndex.aspx.

Working Group on the Universal Periodic Review. 2015. "National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21 United States of America." Human Rights Council Country Report A/HRC/WG.6/22/USA/1. United Nations. https://daccess-ods.un.org/TMP/7026973.96278381.html.