CANADIAN COUNCIL FOR REFUGEES

LESS SAFE THAN EVER
Challenging the designation of the US as a safe third country for refugees

November 2006

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

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A Executive Summary

Since 29 December 2004, when the US-Canada Safe Third Country Agreement came into force, the United States of America has been designated as a safe third country for refugee claimants arriving at Canada's border with the US. This means that, with some exceptions, their claims are ineligible to be heard in Canada: they are expected to find protection instead, if they need it, in the United States.

The Canadian Council for Refugees, which has consistently and strenuously opposed the Safe Third Country Agreement, maintains that the US is not a safe country for all refugees. Furthermore, the situation in the US has grown significantly worse since its designation as a safe third country.

A safe third country is defined in Canada's *Immigration and Refugee Protection Act* as a country that complies with its non-refoulement obligations, i.e. the obligations not to return refugees to persecution or anyone to torture (Article 33 of the Refugee Convention and Article 3 of the Convention against Torture).

Canadian law requires that the federal Cabinet ensure the continuing review of the status of the US as a safe third country, taking into consideration a series of factors. It does not appear that the Cabinet has conducted any such review to date.

The Canadian Council for Refugees urges the Cabinet to withdraw the designation of the US as a safe third country, in the light of the new developments. The US does not comply with its obligation under Article 33 of the Refugee Convention to provide protection from refoulement for all refugees. There is also extensive evidence that the US has, through its practices of "rendition", systematically violated its obligation under the Convention against Torture not to remove anyone to torture. On this basis alone, the US cannot properly continue to be designated a safe third country.

The Act directs the Cabinet to take into consideration the US's policies and practices with respect to claims under the Refugee Convention and obligations under the Convention against Torture, and its human rights record.

The new evidence in relation to these factors, added to pre-existing shortcomings, compels the conclusion that the US, if it ever was, can no longer be considered a safe third country.

In summary, the principal new elements, organized according to the relevant statutory factors for consideration, are as follows:

I US policies and practices with respect to claims under the Refugee Convention

- *Real ID Act*

In May 2005, President Bush signed into law the *Real ID Act*, which significantly exacerbates systemic problems with respect to access to refugee protection in the US. The *Act* dramatically expands the category of persons ineligible for refugee status on the basis of their supposed "engagement in terrorist activity". Refugee status is denied to persons who have provided

"material support" to a "terrorist organization". The broad terms used in this law exclude from protection large numbers of refugees who have never engaged in terrorist activity or whose only connection with a "terrorist organization" was involuntary and coerced. For example, a Colombian farmer, from whom armed rebels had extorted money, was denied asylum in the US on the basis that he had provided "material support" to a terrorist group. He was deported back to Colombia after spending a year in detention in the US.

The exclusion of persons from refugee protection based on this notion of "material support" is incompatible with the Refugee Convention and leads to refugees facing refoulement in violation of the Convention.

The *Real ID Act* also makes it significantly more difficult for asylum seekers to satisfy decision-makers that they deserve asylum. The Act places new demands on asylum seekers with respect to the motives of the persecution feared and corroboratory evidence. In addition, decision-makers are now explicitly granted discretion to base the determination of an asylum seeker's credibility on factors such demeanour and inconsistencies, even if the inconsistencies are irrelevant to the heart of the claim. This means, for example, that a claimant can be found not credible because she did not give a full account of her experiences at her first meeting with a US immigration officer (something that often happens, particularly with women who have experienced sexual violence). By introducing these new rules, the *Real ID Act* makes it more likely that asylum seekers who meet the Convention definition of a refugee will be wrongly denied status and the Convention's protections, including the protection against refoulement.

- *Report of the US Commission on International Religious Freedom*

In February 2005, the US government's Commission on International Religious Freedom published a report, *Asylum seekers in expedited removal*, that contained stinging criticism of the US refugee determination system. The Commission found that asylum seekers are consistently detained in jails or jail-like facilities judged inappropriate for non-criminal asylum seekers. Criteria relating to the release of detained asylum seekers are not consistently implemented. There are wide statistical variations of acceptance rates of individual immigration judges, even among asylum seekers of the same nationality or among judges with the same caseload sitting in the same court. There are significant differences in acceptance rates depending on whether a lawyer was present. There has been a substantial decrease in the granting of appeals by the Board of Immigration Appeals since the Board decided to permit "affirmances without opinion" (i.e. no reasons provided).

The report's findings reveal that the refugee determination process in the US depends on many factors other than the personal situation of the claimant. As a result, people who in fact qualify as refugees under the Refugee Convention risk being wrongly denied status and the Convention's protections, notably the protection against refoulement.

- **Immigration Project of the Transactional Records Access Clearinghouse**

In July 2006, the Transactional Records Access Clearinghouse published results of a study of 297,240 refugee cases between 1994 and 2005. The study found significant disparities in the treatment of refugee claims in the US, depending on the decision-maker. These inconsistencies must mean that some refugees are wrongly denied refugee protection and thus face refoulement.

II US policies and practices with respect to obligations under the Convention against Torture

a) **Removal to torture** (art. 3 of the Convention against Torture)
The *Immigration and Refugee Protection Act* defines a safe third country as a country that complies with Article 3 of the Convention against Torture, which prohibits removal to torture.

- **Arar Commission**

In September 2006, Justice O'Connor presented the Canadian Commission of Inquiry's Report of the Events relating to Maher Arar. He concluded that the United States removed Mr. Arar to torture in Syria. A Canadian judicial inquiry has thus made a finding relating to non-compliance by the US with its Article 3 obligation not to remove anyone to torture.

- **Diplomatic Assurances**

In April 2005, Human Rights Watch published a report on the use of "diplomatic assurances" in cases of return to risk of torture (i.e. promises from a State that it will not torture a person). Human Rights Watch reported that "diplomatic assurances" are increasingly being used by the US. They were apparently used to justify Mr. Arar's deportation to Syria and clearly failed to prevent his torture. US officials have acknowledged both their use and their limited value in actually protecting a person from torture, putting the US in violation of its Article 3 obligation.

- **Return to torture from Guantánamo**

In February 2006, five United Nations experts published a report on the *Situation of detainees at Guantánamo Bay*. They reported on allegations of rendition and forcible return of Guantánamo detainees to countries where they are at serious risk of torture. On the basis of the information available, the Special Rapporteur on torture concluded that the US practice of "extraordinary rendition" constitutes a violation of article 3 of the Convention against Torture. In April 2005, the Council of Europe's Parliamentary Assembly similarly reached the conclusion that the US's practices of "rendition" have allowed detainees to be subjected to torture and to cruel, inhuman or degrading treatment, in violation of the prohibition on refoulement.

- **Renditions to secret detention facilities**

In September 2006, President Bush confirmed the existence of CIA-run secret detention facilities. The secret nature of these facilities, combined with the testimony of detainees, make it likely that torture and inhuman and degrading treatment are part of both the conditions of detention and the interrogation practices. In his June 2006 report of an investigation conducted for the Council of Europe, Dick Marty found that the US has been placing and keeping captured terrorist suspects outside the reach of any justice system. In several of the cases examined, the detainees had been tortured. The Council of Europe Parliamentary Assembly adopted a resolution opposing secret detention and unlawful inter-state transfers of detainees, using strong language to condemn the United States' departure from international law and human rights standards.

b) **Other violations of obligations under the Convention against Torture**
In reviewing the status of a safe third country, the *Immigration and Refugee Protection Act* requires that the Cabinet take into consideration the policies and practices of the country with respect to all obligations under the Convention against Torture.

- **UN report on Guantánamo**

The above-mentioned February 2006 UN report, *Situation of detainees at Guantánamo Bay*, also presented a series of other findings about violations of the Convention against Torture at Guantánamo Bay. The report concluded that interrogation techniques authorized by the US government, particularly if used simultaneously, amount to degrading treatment in violation of article 16 of the Convention. If the victim experienced severe pain or suffering, these acts amounted to torture. The excessive violence used in many cases during transportation, in operations by the Initial Reaction Forces and in the force-feeding of detainees on hunger strike was assessed by the UN experts as amounting to torture. The impunity of the perpetrators was found to amount to a violation of articles 12 and 13 of the Convention.

- **Concluding observations of the UN Committee against Torture**

In May 2006, the United Nations Committee against Torture published observations following its examination of the United States' compliance with the Convention against Torture. The Committee found that the US needs to make many significant changes to its current policies and practices in order to conform to its obligations under the Convention. Among the areas of concern identified were: US failure to recognize that the Convention applies at all times and in any territory under its jurisdiction; its failure to register all detainees; the establishment of secret detention facilities, which are not accessible to the International Committee of the Red Cross; the involvement of the US in enforced disappearances; the absence of clear legal provisions ensuring that there is no derogation from the prohibition against torture; indefinite detention at Guantánamo Bay; the authorization of interrogation techniques that have resulted in the death of some detainees during interrogation; reliable reports of acts of torture or cruel, inhuman and degrading treatment or punishment committed by US personnel in Afghanistan and Iraq; lenient sentences for the perpetrators of such acts; and reliable reports of sexual assault of detainees including those in immigration detention.

- **Concluding observations of the UN Human Rights Committee**

In July 2006, the UN Human Rights Committee, in a report on the US's compliance with the International Covenant on Civil and Political Rights, raised concerns relevant to compliance with the Convention against Torture, specifically with respect to the existence of secret detention and the need for prompt and independent investigations into all allegations of suspicious deaths and torture or cruel, inhuman or degrading treatment or punishment by agents of the US government in Guantánamo, Afghanistan, Iraq and other overseas locations.

- **The Detainee Treatment Act**

In December 2005 the *Detainee Treatment Act* was signed into law, further compromising US compliance with the Convention against Torture, by removing from federal courts any competence to review the situation of Guantánamo detainees. The Act also provides for tribunals to take into consideration evidence obtained through coercion (thus potentially under torture).

President Bush attached a signing statement to the Act, saying that he could, as Commander in Chief, waive the prohibition on the use of torture or cruel, inhuman or degrading treatment.

- **Systematic use of torture**

In May 2005 Physicians for Human Rights published a report providing extensive evidence that use by the US of psychological torture was systematic and central to the interrogation process of detainees in Iraq, Afghanistan and Guantánamo Bay. The report documents the use of prolonged isolation, sleep deprivation, severe sexual and cultural humiliation and use of threats and dogs to induce fear of death or injury. The report notes that "it is difficult to ascertain what forms of psychological torture are currently in use" because of the extreme secrecy regarding detention operations. The American Civil Liberties Union and Amnesty International have both also reported on the evidence of systemic patterns of torture of detainees in US custody.

- **Detainee Abuse and Accountability Project**

The preliminary conclusions of the Detainee Abuse and Accountability Project, a joint study by a number of human rights organizations, were published in April 2006. They concluded that abuse of detainees in US custody has been widespread, involving cases in Afghanistan, Iraq and at Guantánamo Bay. Over 400 persons have been implicated in the cases of abuse investigated by US authorities, but there have been few convictions and there does not seem to have been adequate investigation by US authorities of numerous allegations of abuse.

III The United States' human rights record

In addition to the human rights violations pointed to above, there has been a deterioration in the overall human rights record of the US since the implementation of the Safe Third Country Agreement.

- **Deliberate attacks on civilians in Iraq**

Since the coming into force of the Safe Third Country Agreement, there have been allegations of deliberate killings of civilians by US forces in Iraq. These include 24 Iraqis massacred in Haditha, 11 civilians allegedly executed in Ishaqi and an Iraqi civilian killed in Hamdania by US soldiers who subsequently falsified reports of his death. Such attacks constitute grave human rights abuses.

- **Detention of minors**

In October 2005, Amnesty International and Human Rights Watch published the results of a national study of sentences of life without parole imposed on children in the US. The report focuses on the practice of judging minors as adults and sentencing them to life sentences to be served in adult prisons, without possibility of parole. The report found 2,225 persons condemned to life without parole for offences committed while a minor. For some this involves being held while still a minor in an adult prison. These practices violate international human rights standards.

- **Military Commissions Act of 2006**

In October 2006, the *Military Commissions Act* was signed into law by the President of the United States. The Act denies non-citizens the fundamental right to habeas corpus, eliminates numerous protections from abuse to which detainees are entitled under the Geneva Conventions, provides officials with retroactive immunity from accountability for past abuses and allows for the introduction of evidence obtained through coercion.

B Introduction

On 5 December 2002 Canada and the United States of America signed a Safe Third Country Agreement[1], which came into force on 29 December 2004. Through this agreement the two countries recognized each other as safe third countries for refugees and closed the land border between the two countries to most refugees seeking asylum. In practice, the chief impact of the Agreement is on asylum seekers trying to reach protection in Canada.[2] Because the Canadian government has designated the US a safe third country[3], asylum seekers who attempt to make a refugee claim at the land border are with some exceptions simply sent back to the US, where it is alleged they can find protection from return to torture or persecution.

Canada's *Immigration and Refugee Protection Act* gives the authority to the Governor in Council (the Cabinet) to adopt regulations:

> "Designating countries that comply with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture." (IRPA 102(1)(a))[4]

The Act further stipulates at subsection 102(2) that the following factors are to be considered in so designating a country:

> (a) whether the country is a party to the Refugee Convention and to the Convention against Torture;
>
> (b) its policies and practices with respect to claims under the Refugee Convention and with respect to obligations under the Convention against Torture;
>
> (c) its human rights record; and
>
> (d) whether it is party to an agreement with the Government of Canada for the purpose of sharing responsibility with respect to claims for refugee protection.

The Canadian Council for Refugees (CCR) has consistently and strenuously opposed the Safe Third Country Agreement and the designation of the United States as a safe third country, arguing that the US is not in fact a safe country for many refugees.[5] Among the reasons advanced

[1] For the text of the agreement, see http://www.cic.gc.ca/english/policy/safe-third.html.
[2] Although the Agreement is reciprocal and also applies to asylum seekers seeking to claim asylum in the US at the Canada-US border, there are few such asylum seekers. The overwhelming majority of claimants at the land border are people trying to enter Canada from the US.
[3] Regulation SOR/DORS/2004-217, 12 October 2004, published in the *Canada Gazette*, Vol. 138, No. 22, 3 November 2004.
[4] Article 33 of the Refugee Convention and Article 3 of the Convention against Torture contain the non-refoulement obligations, i.e. the obligations on states not to send refugees back to persecution or anyone to torture.
[5] See for example, CCR, *Comments on Proposed agreement for cooperation in the examination of refugee status claims from nationals of third countries*, 30 July 2002, http://www.ccrweb.ca/commentss3c.html and *Closing the Front Door on Refugees: Report on the First Year of the Safe Third Country Agreement*, 29 December 2005, http://www.ccrweb.ca/closingdoordec05.pdf. On 29 December 2005, the CCR joined with Amnesty International, the Canadian Council of Churches and a Colombian asylum seeker to launch a legal challenge in the Federal Court of the safe third country rule: *CCR et al v Her Majesty the Queen*, IMM-7818-05.

by the CCR and other refugee advocates for opposing the designation of the US as a safe third country were: detention practices incompatible with international standards; eligibility bars to asylum (notably excluding most claimants who have been in the US for more than a year); restrictive interpretations of the refugee definition (notably with respect to gender-based claims); patterns of discrimination, particularly against Muslims and Arabs; and eroding standards of procedural protections, such as restrictions on access to meaningful review by the Board of Immigration Appeals.

Since the United States was designated as a safe third country, effective 29 December 2004, the situation for asylum seekers in that country has only grown worse. Furthermore, there have been very significant developments with respect to compliance by the US with the Convention against Torture, and more general with respect to its human rights record.

The federal government is required by the *Immigration and Refugee Protection Act* to monitor the situation in the US to determine whether it should continue to be designated a safe third country. Subsection 102(3) states that "[t]he Governor in Council must ensure the continuing review of factors set out in subsection (2) [quoted above] with respect to each designated country".

Two years have passed since the Governor in Council designated the US a safe third country.[6] Despite significant changes that have taken place in the US and new information now available, the Canadian government has not reported on the results of any review by the Cabinet of the US as a safe third country. In fact, it appears that no such review has been conducted.

This submission is intended to assist the Governor in Council in undertaking its legal obligation to review the status of the US in light of the factors established in the Act. Given the length of time since the situation in the US was last assessed by Cabinet, and the significant developments in the US relating to human rights, it is urgent that a full review be conducted.

We ask the government to withdraw the designation of the United States as a safe third country, on the basis that it is now less safe than ever.

We find compelling evidence that the US fails to meet the safe third country test on the basis of the definition of a safe third country and the factors identified in paragraphs 102(2)(b) and (c). This evidence consists of new developments in the US as well as information that has come to light since the initial designation of the US as a safe third country. These new elements need to be considered in the light of pre-existing shortcomings.

The evidence is organized according to the relevant factors identified by the Regulations:

- US policies and practices with respect to claims under the Refugee Convention.
- US policies and practices with respect to obligations under the Convention against Torture.
- The US' human rights record.

[6] The Cabinet designated the US as a safe third country on 12 October 2004, to take effect when the Canada-US Safe Third Country Agreement came into force, SOR/DORS/2004-217 (see above, footnote 3). The Agreement came into force on 29 December 2004.

The evidence presented below speaks strongly against the continued designation of the US as a safe third country, on the basis of the factors to be taken into consideration. Furthermore, the evidence points to the conclusion that, according to the definition established in the Act, the US is not a safe third country. There are serious reasons for concluding that the US does not comply with its Article 33 non-refoulement obligations under the Refugee Convention. The evidence that the US does not comply with its Article 3 non-refoulement obligations under the Convention against Torture is overwhelming.

C US policies and practices with respect to claims under the Refugee Convention

1. Real ID Act

The *Real ID Act*[7], signed into law on 11 May 2005 by President Bush, significantly exacerbates systemic problems with respect to access to refugee protection in the United States. The broad definition of material support for terrorist activities along with the provisions in the law relating to nexus, credibility and corroboration as they apply to refugee determination undermine the rights articulated in the 1951 Geneva Convention relating to the Status of Refugees (the Refugee Convention), including the Article 33 non-refoulement obligation.

"Material support"
The *Real ID Act* dramatically expands the category of persons ineligible for refugee status on the basis of their supposed "engagement in terrorist activity".[8] Thus, following the amendments introduced via the *Real ID Act*, refugee status is denied to persons who have provided "material support" to a "terrorist organization". The broad terms used in this law exclude from protection large numbers of refugees who have never engaged in terrorist activity.

The notion of "material support" is not defined in the Act, with the result that any kind of support, no matter how minimal, can be considered. The definition of "terrorist organization" is likewise very broad, since it includes two or more persons, whether organized or not, who engage in terrorist activities.[9] The government and the courts have interpreted the provisions in the Act very broadly with the result that they exclude from protection people who have only the slimmest connection with a terrorist organization and persons whose only connection with such organizations was involuntary and coerced.

The provisions exclude from protection:

- All those who under coercion provide support to terrorist groups. (For example, a Sierra Leonean woman was considered to have offered material support to terrorists after a group of rebels attacked her house, killed one family member, burned another and raped the woman and her daughter. Because the rebels remained in her house for four days, with the woman as their captive, she is considered to have given them shelter, which counts as material support).[10]

[7] *Real ID Act* 2005, P.L. 109-13, Div. B §§103(a)-(c).
[8] The material support bar existed within US immigration legislation since 1990, but was significantly broadened by amendments in the *USA PATRIOT Act* of 2001 and again in the *Real ID Act*, bringing the issue to crisis proportions in the most recent period. Georgetown University Law Center, *Unintended consequences, Refugee victims of the war on terror*, May 2006, http://www.law.georgetown.edu/news/releases/documents/UnintendedConsequences-RefugeeVictimsoftheWaronTerror.pdf, p. 9.
[9] 8 U.S.C. § 1182(a)(3)(B)(iv)(IV)(dd)(2005): "two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in 'terrorist activities'."
[10] *Unintended consequences,* p. 23.

- All those who provide support to terrorist groups under explicit or implicit threat.[11] (For example, a Colombian farmer was judged to have provided material support to the FARC[12], a group that regularly extorts payment from civilians. On several occasions FARC sent armed men to surround his farm and demand payment. He believed that he would be harmed, if not killed, if he refused. He later fled Colombia, fearing persecution from paramilitaries who had identified him as a FARC supporter. After a year in detention in the US, he was deported back to Colombia, having been denied asylum on the basis that he had provided "material support" to FARC.)[13]

- All those who provide even minimal support to a group resisting a repressive regime, if the group has engaged in "terrorist activities". (For example, a Burmese elementary school teacher was found to have offered material support to terrorists because he allowed representatives of the Chin National Front to speak about democracy and to stay two nights in the school. For his actions, the teacher was beaten and imprisoned by the Burmese authorities. After escaping imprisonment, he fled to the US but was denied asylum because offering two nights' lodging was considered material support and the Chin National Front meets the "terrorist" definition because it has an armed wing.)[14]

> "In sum, what we have in this case is an individual who provided a relatively small amount of support to an organization that opposes one of the most repressive governments in the world, a government that is not recognized by the United States as legitimate and that has engaged in a brutal campaign against ethnic minorities. It is clear that the respondent poses no danger whatsoever to the national security of the United States. […] And yet we cannot ignore the clear language that Congress chose in the material support provisions; the statute that we are required to apply mandates that we find the respondent ineligible for asylum for having provided material support to a terrorist organization."
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> Board of Immigration Appeals, *In re S-K-*, 23 I&N Dec. 936 (BIA 2006) I.D. #3534

The case of Colombia illustrates the necessity of reconsidering the status of the US as a safe third country. According to UNHCR representatives in Ecuador, between 70 and 80% of Colombian refugees could be excluded based on US law on "material support".[15] Similarly, significant

[11] The Department of Homeland Security (DHS) has argued vigorously against any exception on the basis of duress. In a case involving a Sri Lankan fisherman who had paid a ransom to his kidnappers, DHS argued that "there is no duress exception to the material support definition" and that "had Congress intended to include a duress exception to the material support definition, it could have done so." Human Rights First, *Abandoning the Persecuted*, 2006, pp 7-8, http://www.humanrightsfirst.info/pdf/06925-asy-abandon-persecuted.pdf.

[12] Fuerzas Armadas Revolucionarias de Colombia (Revolutionary Armed Forces of Colombia), the main rebel group in Colombia.

[13] *Abandoning the Persecuted*, p. 17.

[14] *Abandoning the Persecuted*, p. 13.

[15] Interview with Walter Sanchez, Resettlement Officer, UNHCR, in Quito, Ecuador (March 2006). Another UNHCR representative estimated that as many as 80% of Colombian refugee claims were affected by the issue of "material support". Interview with Simone Schwartz, Protection Officer, UNHCR, in Quito, Ecuador (March 2006). As cited in *Unintended consequences*, p. 9.

numbers of Burmese refugees have been found to be excludable on these grounds.[16] The *Real ID Act* leads thus to the exclusion of large proportions of some categories of refugees who are entitled to protection under the Refugee Convention.

It is true that the law provides for grants of protection to asylum seekers who can show that they could not reasonably have known that their material support was going to a terrorist organization as defined in the law.[17] However, it is extremely difficult for asylum seekers to prove what they did not know, and in any case, the law still excludes persons who provide support for a designated terrorist organization.[18]

The jurisprudence relating to "material support" since the entry into force of the Agreement confirms the shortcomings in the US refugee protection system.

In the case of *Arias v. Gonzales*, a Colombian farmer was refused refugee status for having paid FARC his employer's "war tax" (*vacuna*), even though the money did not belong to him.[19] In *Matter of R.K.* in 2005, a judge found that the money paid as a ransom to the Liberation Tigers of Tamil Eelam by a man who had been kidnapped constituted material support.[20]

A provision of the law allows the material support bar to be set aside on a discretionary basis, permitting the person to be granted refugee status.[21] However, the practical application of this provision is very limited, given that it requires the prior approval and discretionary intervention of the Secretary of State, the Secretary of Homeland Security and the Attorney General.

> "Today, however, a new challenge faces the [U.S. Refugee] Program: thousands of refugees in need of protection are being denied access to asylum and resettlement in the United States due to the overly broad application of the material support ground of admissibility. […] Despite the Presidential Determination (PD) authorizing 70,000 refugee admissions for FY06, refugee arrivals in FY06 total only 31,912. The low arrivals in FY06 and the anticipated even lower arrival numbers for FY07 are largely explained by the increased application of the material support bar to refugee admission."
> Refugee Council USA[22]

[16] For example, the Harvard Immigration and Refugee Clinic interviewed over 150 Burmese refugees in Thailand and Malaysia and found that 82% could be considered to have provided "material support" to a "terrorist organization". Immigration and Refugee Clinic & The International Human Rights Clinic, Human Rights Program, Harvard Law School, *Preliminary Findings and Conclusions on the Material Support for Terrorism Bar as Applied to the Overseas Resettlement of Refugees from Burma*, February 2006, http://www.refugeecouncilusa.org/ms-reschrpt-hrvdstdburma2-06.pdf.

[17] 8 U.S.C.1182 (a)(3)(B)(iv)(VI)(cc)(2005): "[…] unless the actor can demonstrate that he did not know, and should not reasonably have known, that the act would further the organization's terrorist activity".

[18] 8 U.S.C. 1189 *Designation of foreign terrorist organizations*.

[19] *Arias* v. *Gonzales*, 143 Fed. Appx. 464 (3d Cir. 2005).

[20] United States Immigration Court, Elizabeth, New Jersey, 9 May 2005, *Matter of RK*, oral opinion of Judge Mirlande Tadal. Cited in *Unintended consequences*, p. 11.

[21] 8 USC §1182 (d)(3)(B)(i)(2005).

[22] RCUSA, *The Impact of the Material Support Bar. U.S. Refugee Admissions Program for Fiscal Year 2006 and 2007*, Sept. 2006, p. 1.

The material support bar of the *Real ID Act* puts the US in violation of the Refugee Convention, because the bar is significantly broader than the exclusion clauses at Article 1F of the Convention. According to these clauses, refugee protection is not available to a person:

> "with respect to whom there are serious reasons for considering that:
> (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
> (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
> (c) He has been guilty of acts contrary to the purposes and principles of the United Nations."

In a comment on the application of the exclusion clauses, the UNHCR has maintained that they should not apply where the alleged actions are not very serious:

> "Moreover, although providing funds to "terrorist groups" is generally a criminal offence, (and indeed instruments such as the 1999 International Convention for the Suppression of Financing of Terrorism require this), such activities may not necessarily reach the gravity required to fall under Article 1F(b). The particulars of the specific crime need to be looked at – if the amounts concerned are small and given on a sporadic basis, the offence may not meet the required level of seriousness."[23]

The UN High Commissioner for Refugees has on a number of occasions objected to the US material support bar. In a letter sent to the US government in February 2006, the High Commissioner expressed deep concern that "the manner in which this bar is being applied and the rejection or indefinite deferral of refugee cases by the United States, on the grounds that those individuals provided "material support" to terrorist organizations, could have unintended but profound effects on refugee protection."[24]

The impact of the material support bar is that people who are entitled, under international law, to asylum, face refoulement from the US to situations of persecution, in violation of its Article 33 obligations under the Refugee Convention. Furthermore, even where affected refugees are not actually deported, for example because their cases are put on indefinite hold as a result of the material support provisions,[25] they are denied many other rights to which they are entitled under

[23] UNHCR, *Background note on the application of the exclusion clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, §82; see also Kolude Doherty, Regional Representative for the United States and The Caribbean, *UNHCR Response to Mr. Edward Neufville, Re: Request for Advisory opinion, June 15, 2005* as cited in *Unintended consequences*, p. 15.

[24] Letter from António Guterres, UN High Commissioner for Refugees, to Stephen Hadley, Assistant to the President for National Security Affairs, 7 February 2006, http://www.refugeecouncilusa.org/ms-orgadv-unhcr-ltrnsa2-7-06.pdf. UNHCR senior protection officer Andrew Painter has commented: "The law as currently written and interpreted, denied refugee protection to those who are clearly entitled to it under international standards. This places the US at risk of violating its obligations under the refugee treaty that it signed and of returning bona fide refugees to persecution." Quoted in UNHCR, *Anti-terrorism legislation delays entry of refugees to United States*, 6 September 2006, Tim Irwin, http://www.unhcr.org/cgi-bin/texis/vtx/news/opendoc.htm?tbl=NEWS&id=44fec79f4.

[25] *Abandoning the Persecuted*, p. 2.

the Refugee Convention, such as the right to employment (Article 17), the right to travel documents (Article 28), the right to freedom of movement (Article 26) for those who are held in detention and the facilitation of naturalization (Article 34). The material support bar is thus affecting the US' compliance not only with its Article 33 obligations, but also with its other obligations under the Refugee Convention.

Nexus

The *Real ID Act* increased the burden on the asylum seeker of showing the motivation of the feared persecution. The US already made heavy demands of claimants to demonstrate the intent of the persecutors. *Real ID* has made it even more difficult by requiring that the asylum seeker show that the Convention reason was a "**central**" motive. The *Real ID Act* states that:

> "[t]o establish that the applicant is a refugee within the meaning of [INA §101(a)(42)(A)], the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant."[26]

By referring to "one" central reason, rather than "the" central reason, this provision does foresee that persecutors may have "mixed" motives, of which one but not all may be related to the Convention grounds. However, the situation in the US was already difficult with respect to establishing a nexus, given that the US is one of the few countries to make such strict demands of claimants in terms of proving the intent of the persecution. The *Real ID Act* makes this situation more difficult by adding the requirement that asylum seekers show that the Convention ground was a **central** motive for the persecutor.

The *Real ID Act*'s imposition on asylum seekers of this new requirement increases the likelihood that some people who are refugees under international law will be wrongly denied refugee status in the US and thus face refoulement to persecution, in violation of Article 33 of the Refuge Convention.

Corroboration

The *Real ID Act* also makes additional demands of asylum seekers with respect to corroboration, providing for a denial of asylum or withholding[27] where the applicant does not produce documentary or corroborating evidence, "unless the applicant demonstrates that the applicant does not have the evidence and cannot reasonably obtain the evidence".[28] Furthermore, the Act instructs federal judges not to reverse corroboration-based decisions unless "compelled to conclude that such corroborating evidence is unavailable".[29]

The increased demands for corroboration will particularly affect detained asylum seekers (who have little opportunity to seek such evidence) as well as claimants whose situation is generally less documented (such as women, the poor and people from rural areas).

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[26] *Real ID Act*, at sec. 101 (codified as amended at 8 U.S.C. § 1158(b)(1)(B)(i)).
[27] "Withholding of removal" is a provision under US immigration legislation through which persons claiming a fear of persecution or torture can win a stay of removal, even if they are not granted asylum (or are not eligible to be considered for asylum).
[28] *Real ID Act*, at sec. 101 (codified as amended at 8 U.S.C. § 1229(c)(4)(B)).
[29] Ibid. (codified as amended at 8 U.S.C. § 1252(b)(4)).

The additional requirements for corroboration, like the new standards regarding nexus, increase the risk that refugees will be wrongly denied protection in the US and face refoulement to persecution, in violation of the US' Article 33 obligations under the Refugee Convention.

Credibility determination

The *Real ID Act* imposes new criteria for determining an asylum seeker's credibility, which are likely to lead to denials of protection to refugees whose claim is in fact well-founded. The Act states that the decision-maker may base a credibility determination on:

> "the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not made under oath), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim."[30]

This provision appears to contradict principles regarding refugee determination as established in the UNHCR Handbook which states that "[u]ntrue statements by themselves are not a reason for refusal of refugee status and it is the examiner's responsibility to evaluate such statements in the light of all the circumstances of the case."[31]

Following the adoption of the *Real ID Act*, the decision-maker can, for example, refuse asylum to claimants who do not express their emotions in a sufficiently compelling way. They can also reject applications from claimants based on minor and irrelevant discrepancies between statements made at different times, even though statements are often taken from asylum seekers in conditions that make errors and omissions likely (e.g. in detention, or on arrival at the border after a long journey).

Asylum seekers whose claims are based on gender persecution are likely to be particularly affected by this provision of the *Real ID Act*. A decision-maker can, for example, refuse a woman who was raped in her country of origin because she failed to tell the whole story on her arrival in the US. Despite the obvious difficulty for claimants to speak on arrival about the traumatic details of what caused their flight, the *Real ID Act* allows decision-makers to reject claimants based on a failure to reveal everything from the beginning. These restrictive provisions of the *Real ID Act* reduce the possibility for gender-based claims to be accepted.

[30] *Real ID Act*, at sec. 101 (codified as amended at 8 U.S.C. § 1158(b)(1)).
[31] United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* ¶ 199 (1988). The UNHCR Handbook was prepared at the request of the States Members of the Executive Committee of the UNHCR, for the guidance of governments. It constitutes a pre-eminent standard for the determination of refugee status, and is regularly cited by courts of many jurisdictions, including Canadian.

The new rules relating to credibility assessment introduced by the *Real ID Act* increase the likelihood that refugees will be wrongly denied status and face refoulement to persecution, putting the US in violation of its Article 33 obligations under the Refugee Convention.

2. Report of the US Commission on International Religious Freedom

In a 500-page report published in February 2005, entitled *Asylum seekers in expedited removal*, the US government's Commission on International Religious Freedom, made up of Republican and Democratic congresspersons, presented a stinging criticism of the US refugee determination system. While refugee claimants sent back to the US on the basis of the Safe Third Country rule are not generally subject to the "expedited removal" process[32], many of the Commission's criticisms relate to aspects of the system that also affect asylum seekers not in expedited removal. Their criticisms are in any case relevant to the general question of the US' policies and practices with respect to the Refugee Convention, which must be taken into consideration in the review of the US as a safe third country.

Detention of asylum seekers
The Study found that "asylum seekers are consistently detained in jails or jail-like facilities, which the experts found inappropriate for non-criminal asylum seekers."[33] The report also noted that "while DHS has developed criteria relating to the release of detained asylum seekers, the implementation of these criteria […] varies widely from place to place."[34]

Variations in acceptance rates
The Study found significant differences in acceptance rates depending on the location in which the claim is made and depending on the official deciding the case. The authors concluded that "[t]he outcome of an asylum claim appears to depend not only on the strength of the claim, but also on which officials consider the claim […]."[35]

"The Study identified wide statistical variations of grant rates of individual immigration judges for asylum seekers in Expedited Removal proceedings even among aliens of the same nationality or among judges with the same caseload sitting in the same court."[36]

Significance of legal representation
The Study also found significant differences in acceptance rates depending on whether a lawyer was present. The authors reported that "asylum seekers without a lawyer had a much lower chance of being granted asylum (2%) than those with an attorney (25%). This difference was consistent whether the alien resided – or was detained – in an area with a high rate of representation, or a low rate of representation."[37]

[32] "Expedited removal" is a process introduced into US immigration legislation in 1996. It provides for the summary removal of improperly documented persons arriving in the US.
[33] United States Commission on International Religious Freedom, *Report on Asylum seekers in expedited removal,* February 2005, http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/index.html, p. 4.
[34] Ibid.
[35] Ibid.
[36] Ibid. p. 58.
[37] Ibid. p. 4.

Decrease in grants of appeals
According to the Study, there has been a substantial decrease in the granting of appeals by the Board of Immigration Appeals (BIA). Since the BIA decision to permit "affirmances without opinion" (rather than opinions specifying the reasons for the decision), the BIA "has gone from reversing 23 percent of immigration judge decisions to reversing only two to four percent of such decisions. With wide variations in asylum approval rates among judges […], and only two to four percent of those decisions now being overturned on appeal, the BIA may now offer limited protection from the possibility of erroneous immigration judge decisions."[38]

Failure to refer some asylum seekers who express a fear of return
The Study found that some persons under expedited removal were not referred for an examination of their asylum application, despite the fact that they had expressed a fear of return that was clearly related to the grounds of asylum in the Refugee Convention.[39] This points to the inadequacy of the expedited removal process to ensure the protection of refugees as required under the Refugee Convention.

These various points show that the outcomes of refugee determination in the US depend on many factors other than the personal situation of the claimant, and that there are flaws in the expedited removal process with respect to refugee protection. The report highlights the barriers to refugee status faced by people who are in fact refugees under the Refugee Convention. As a result of these barriers, refugees are denied protection and placed in a situation where they face refoulement, in contravention of the US' obligations under Article 33.

3. Immigration Project of the Transactional Records Access Clearinghouse (TRAC)

In July 2006, the Transactional Records Access Clearinghouse[40], an organization associated with Syracuse University, published the results of a study that showed significant disparities in the treatment of refugee claims in the US, depending on the decision-maker.[41] The study was based on data originally collected by the Executive Office for Immigration Review (EOIR). The authors examined all 297,240 recorded cases of asylum decisions between 1994 and early 2005.

The study found striking differences in recognition rates by decision-maker. They reported that "the data showed that while ten percent of the judges examined denied asylum in 86% or more of their decisions, another ten percent of the judges had denied asylum in only 34%."[42]

In order to exclude variables that might explain disparities, the study selected a group of similar cases: asylum seekers from China who were represented by counsel and whose applications were decided by judges sitting in New York City. Judges hearing detained asylum seekers were also

[38] Ibid. p. 58.
[39] Ibid. p. 6. The Study found that in 15% (12/79) of observed cases where the person expressed a fear of return, the person was not referred. Among these twelve cases were "several" persons who expressed a fear that was clearly related to the grounds for asylum.
[40] The Transactional Records Access Clearinghouse is a data gathering, data research and data distribution organization associated with Syracuse University: http://trac.syr.edu/aboutTRACgeneral.html.
[41] TRAC Immigration, *Immigration Judges*, July 2006, http://trac.syr.edu/immigration/reports/160/.
[42] Ibid.

excluded. This more focused study involved 34 judges all of whom had made at least 100 decisions on applications by Chinese asylum seekers. The results here also showed a wide range of results: from a judge who denied 94.5% of these claims at one end, to a judge who denied 6.9% of these claims at the other end. There were five judges who denied 80% or more of the claims and six judges who denied 25% or fewer.[43]

The study's authors conclude that the disparity in the acceptance rates by judge challenges "the EOIR's commitment to providing a 'uniform application of the nation's immigration laws in all cases'." [44]

The data analysed by TRAC reinforce the findings of the Commission on International Religious Freedom with respect to the significant inconsistencies of outcomes in the US refugee determination process. These inconsistencies must mean that some refugees are wrongly denied refugee protection and thus face refoulement from the US, in violation of its Article 33 obligations under the Refugee Convention.

[43] Ibid.
[44] Ibid.

D US policies and practices with respect to obligations under the Convention against Torture

1. Removal to torture (Article 3)

The *Immigration and Refugee Protection Act* requires the Canadian government to take into consideration all of the United States' policies and practices with respect to obligations under the Convention against Torture. However, Article 3 of the Convention is particularly relevant, because the Act states that a country must comply with this article in order to be designated a safe third country.

Article 3 of the Convention states: "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

There is compelling evidence now available that the United States has failed to comply with Article 3 of the Convention by removing persons to countries where they are at risk of torture.

New information on this issue has come to light since the coming into force of the Agreement, calling for the immediate reconsideration of the United States as a "safe third country".

a) Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar

In his *Report of the Events Relating to Maher Arar*, Justice Dennis O'Connor found that:

- According to the US government October 2002 removal order for Maher Arar, the Commissioner of the INS had determined that his removal to Syria would be consistent with the Convention against Torture "meaning that he was satisfied that Mr. Arar would not be tortured, apparently because of an assurance received from Syrian authorities."[45]

- Syria's reputation for committing serious human rights abuses was well-established at the time of Mr. Arar's removal. The U.S. State Department reports indicated that there was credible evidence of the use of torture by Syrian security forces. "Torture was most likely to occur while detainees were being held at one of the many detention centres run by the various security services throughout the country, especially when authorities were attempting to extract a confession or information."[46]

- "[The Syrian Military Intelligence] tortured Mr. Arar while interrogating him during the period he was held incommunicado."[47]

[45] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar, Analysis and Recommendations,* September 2006, 2.6, pp. 155-156.
[46] Ibid. 2, pp. 179-180.
[47] Ibid. 3.4, p. 187.

The report of the Arar Commission thus establishes, through a Canadian judicial inquiry, that the United States knowingly removed Mr. Arar to torture, despite their legal obligation under Article 3 of the Convention not to remove anyone to a risk of torture.

Furthermore, Mr Arar's claims against the US government for his removal to torture were dismissed by the United States District Court in February 2006 on grounds of "national security and foreign policy considerations."[48] This defence effectively shields US officials from accountability for violations of obligations under the Convention against Torture.

> "The administration's tendency to dodge accountability for lawless actions by resorting to secrecy and claims of national security is on sharp display in the case of a Syrian-born Canadian, Maher Arar, who spent months under torture because of United States action. A federal trial judge in Brooklyn has refused to stand up to the executive branch, in a decision that is both chilling and ripe for prompt overturning."
> New York Times editorial, *A Judicial Green Light for Torture*, 26 February 2006

b) Diplomatic Assurances

According to an April 2005 report by Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture*, "diplomatic assurances" are increasingly being used by the US to transfer people to a risk of torture.[49] These were apparently used to justify Mr. Arar's deportation to Syria and clearly failed.

> "Reliance on diplomatic assurances when transferring persons at risk of torture is an increasingly common practice by the United States."
> Human Rights Watch[50]

The Human Rights Watch report notes that senior government officials have acknowledged the existence of the practice of "rendition", which they justify by insisting that assurances are always sought that those "rendered" will not be tortured. However, they have also admitted the limits to the government's ability to enforce diplomatic assurances. In February 2005, Director of Central Intelligence Porter J. Goss testifying before Congress said, "We have a responsibility of trying to ensure that they are properly treated, and we try and do the best we can to guarantee that. But of course once they're out of our control, there's only so much we can do."[51]

In March 2005, U.S. Attorney General Alberto Gonzales said in a similar vein with respect to detainees subject to transfer, "We can't fully control what that country might do. We obviously

[48] *Arar v. Ashcroft*, --- F.Supp.2d ---, 2006 WL 346439 (E.D.N.Y. 2006).
[49] Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture*, April 2005, Vol. 17, No. 4 (D), p. 28.
[50] Ibid.
[51] Ibid. p. 37.

expect a country to whom we have rendered a detainee to comply with their representations to us… If you're asking me, 'Does a country always comply?' I don't have an answer to that."[52]

The use of diplomatic assurances has also been criticized by the UN Committee against Torture in its concluding observations following its examination of the United States[53]:

> The Committee is concerned by the State party's use of "diplomatic assurances", or other kinds of guarantees, assuring that a person will not be tortured if expelled, returned, transferred or extradited to another State. The Committee is also concerned by the secrecy of such procedures including the absence of judicial scrutiny and the lack of monitoring mechanisms put in place to assess if the assurances have been honoured (art. 3).
>
> When determining the applicability of its *non-refoulement* obligations under article 3 of the Convention, the State party should only rely on "diplomatic assurances" in regard to States which do not systematically violate the Convention's provisions, and after a thorough examination of the merits of each individual case. The State party should establish and implement clear procedures for obtaining such assurances, with adequate judicial mechanisms for review, and effective post-return monitoring arrangements. The State party should also provide detailed information to the Committee on all cases since 11 September 2001 where assurances have been provided.

The admitted reliance by the US on diplomatic assurances, including in situations where, given known practices of torture, it is particularly clear that they are not effective, puts the US in violation of its Article 3 obligations, as recognized by the UN Committee against Torture.

c) Return to torture from Guantánamo

A report by five United Nations experts, *Situation of detainees at Guantánamo Bay*,[54] states that:

> "There have been consistent reports about the practice of rendition and forcible return of Guantánamo detainees to countries where they are at serious risk of torture. An example is the transfer of Mr. Al Qadasi to Yemen in April 2004. He has since been visited by his lawyer and international NGOs. According to his lawyer, he was not warned about his imminent return to Yemen and therefore had no possibility to appeal. In early April he received an injection against his will, which led to loss of consciousness and hallucinations. When he woke up several days later, he found himself in prison in Sana'a, where he alleges he was been [sic] beaten and deprived of food. On the basis of the information available to him, the

[52] Ibid.
[53] CAT/C/USA/CO/2, 25 July 2006, para. 21. See also below (p. 25) for further comments from the Committee against Torture.
[54] United Nations Economic and Social Council. *Situation of detainees at Guantánamo Bay.* E/CN.4/2006/120, 15 February 2006, http://www.ohchr.org/english/bodies/chr/docs/62chr/E.CN.4.2006.120_.pdf. See below (p. 24) for further details on the UN experts' report.

> Special Rapporteur [on torture and other cruel, inhuman or degrading treatment or punishment] takes the view that the United States practice of "extraordinary rendition" constitutes a violation of article 3 of the Convention against Torture and article 7 of [the International Covenant on Civil and Political Rights (ICCPR)]."[55]

The same conclusion was reached in April 2005 by the Council of Europe's Parliamentary Assembly, which found, on the basis of "an extensive review of legal and factual material", that:

> "vii. the United States has, by practising "rendition" (removal of persons to other countries, without judicial supervision, for purposes such as interrogation or detention), allowed detainees to be subjected to torture and to cruel, inhuman or degrading treatment, in violation of the prohibition on *non-refoulement*;
>
> viii. the United States' proposals to return or transfer detainees to other countries, even where reliant on "diplomatic assurances" concerning the detainees' subsequent treatment, risk violating the prohibition on *non-refoulement*."[56]

The UN Committee against Torture, in its concluding observations following its examination of the United States, also expressed concern that the US "considers that the non-refoulement obligation, under article 3 of the Convention, does not extend to a person detained outside its territory" and at the US's "rendition of suspects, without any judicial procedure, to States where they face a real risk of torture (art. 3)."[57]

There is thus compelling evidence that the US, in both its policy and practice, is in violation of its Article 3 obligations, with respect to detainees at Guantánamo Bay and elsewhere.

d) Renditions to secret detention facilities

The existence of secret detention facilities run by the CIA was confirmed by President Bush on 6 September 2006.[58] Earlier information had clearly pointed to the fact that the US was transferring persons suspected of links with terrorism to these prisons where they are detained and interrogated.[59] The secret nature of these facilities, combined with the testimony of persons who have been detained in them, make it likely that torture and inhuman and degrading treatment are part of both the conditions of detention and the interrogation practices.

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[55] Ibid., para. 55.
[56] Council of Europe Parliamentary Assembly. *Resolution 1433: Lawfulness of detentions by the United States in Guantánamo Bay*, 26 April 2005, para. 7, http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta05/ERES1433.htm.
[57] CAT/C/USA/CO/2, 25 July 2006, para. 20.
[58] CBC, *Bush acknowledges secret CIA prisons for terror suspects*, 6 September 2006, http://www.cbc.ca/world/story/2006/09/06/bush-prisons.html.
[59] See for example, American Civil Liberties Union, *Enduring Abuse: Torture and Cruel Treatment by the United States at Home and Abroad*, April 2006, pp. 68-72, including citations of various key media reports, and Amnesty International, *Below the Radar: Secret flights to torture and 'disappearance'*, 5 April 2006, AMR 51/051/2006.

In June 2006, the Council of Europe published the report, *Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states* prepared by its investigator, Dick Marty, Chairperson of the Council's Committee on Legal Affairs and Human Rights.[60]

Reviewing the history of the US 'rendition program', Mr Marty notes that:

> "Rendition operations have escalated in scale and changed in focus. The central effect of the post-9/11 rendition programme has been to place captured terrorist suspects outside the reach of any justice system and keep them there. The absence of human rights guarantees and the introduction of "enhanced interrogation techniques" have led, in several cases examined, as we shall see, to detainees being subjected to torture."[61]

The report analyzes how the rendition program relies on "a network that resembles a "spider's web" spun across the globe".[62] Ten individual cases are presented: in most there are allegations of torture. Mr Marty concludes that various European states share a degree of responsibility for the rights violations suffered by a number of the persons caught up in the US renditions program.[63]

Following the publication of the report, the Council of Europe Parliamentary Assembly adopted a resolution opposing secret detentions and unlawful inter-state transfers of detainees.[64] The resolution contains unusually strong language directed against the US:

> "4. The United States of America finds that neither the classic instruments of criminal law and procedure nor the framework of the laws of war (including, *inter alia*, respect for the Geneva Conventions) have been apt to address the terrorist threat. As a result, the United States has introduced new legal concepts, such as "enemy combatant" and "rendition", which were previously unheard of in international law and stand contrary to the basic legal principles that prevail on our continent.
>
> 5. Thus, across the world, the United States has progressively woven a clandestine "spiderweb" of disappearances, secret detentions and unlawful inter-state transfers, often encompassing countries notorious for their use of torture. Hundreds of persons have become entrapped in this web, in some cases merely suspected of sympathising with a presumed terrorist organisation."

[60] Marty, Dick. *Alleged secret delegations and unlawful inter-state transfers of detainees involving Council of Europe member states.* Committee on Legal Affairs and Human Rights. #10957. 12 June 2006. http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf.
[61] Ibid. para. 36.
[62] Ibid. para. 280.
[63] Ibid. para. 288.
[64] Council of Europe Parliamentary Assembly. *Resolution 1507: Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states*, 27 June 2006, http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta06/Eres1507.htm.

> "7. The facts and information gathered to date, some of which are still in the process of being brought to light, clearly indicate that the key elements of this spiderweb include, among others: a worldwide network of places of secret detention on CIA "black sites" and in military or naval installations; the CIA's programme of renditions, under which persons suspected of terrorism are transferred from one state to another on civilian aircraft, outside of the scope of any legal protections, often to be handed over to states who customarily resort to degrading treatment and torture; and the use of military airbases and aircraft to transport detainees as human cargo to Guantánamo Bay in Cuba or to other detention centres.
>
> 8. The Assembly condemns the systematic exclusion of all forms of judicial protection and regrets that, by depriving hundreds of suspects of their basic rights, including the right to a fair trial, the United States has done a disservice to the cause of justice and has tarnished its own hard-won reputation as a beacon of the defence of civil liberties and human rights."

The US practices of renditions violate Article 3 of the Convention against Torture, by sending persons to a risk of torture. These practices, in addition to the other evidence of Article 3 violations cited above, mean that the US cannot properly be designated as a safe third country, since to be so designated a country must comply with Article 3 of the Convention against Torture.

2. Other violations of obligations under the Convention against Torture

a) UN report, *Situation of detainees at Guantánamo Bay*

The above-mentioned United Nations report, *Situation of detainees at Guantánamo Bay*, was published in February 2006. It is the result of a joint study conducted by the Chairperson of the Working Group on Arbitrary Detention, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on freedom of religion or belief and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

Starting in June 2004, the mandate holders sought access to Guantánamo Bay and finally in October 2005 received from the US Government an invitation for a one-day visit for three of the five experts, but with the stipulation that the visit not include private interviews with detainees. The mandate holders decided not to visit given the refusal to allow them to speak privately with detainees. The report is based on information provided by the US government and other sources available to the experts.[65]

In addition to the findings mentioned above with respect to violations of Article 3 of the Convention, the experts conclude that:

[65] *Situation of detainees at Guantánamo Bay*, p. 5-6.

- "The interrogation techniques authorized by the Department of Defense, particularly if used simultaneously, amount to degrading treatment in violation of article 7 of ICCPR and article 16 of the Convention against Torture. If in individual cases, which were described in interviews, the victim experienced severe pain or suffering, these acts amounted to torture as defined in article 1 of the Convention." (para. 87)

- "The excessive violence used in many cases during transportation, in operations by the Initial Reaction Forces and force-feeding of detainees on hunger strike must be assessed as amounting to torture as defined in article 1 of the Convention against Torture." (para. 88)

- "The lack of any impartial investigation into allegations of torture and ill-treatment and the resulting impunity of the perpetrators amount to a violation of articles 12 and 13 of the Convention against Torture." (para. 90)

b) Concluding observations of the UN Committee against Torture

In May 2006, the United Nations Committee against Torture published its concluding observations following its examination of the United States.[66] In addition to the concerns noted above with respect to Article 3, the Committee found that the US needs to make many significant changes to its current policies and practices in order to conform to its obligations under the Convention. The following are only some of the concerns raised by the Committee:

- "The Committee regrets the State party's opinion that the Convention is not applicable in times and in the context of armed conflict […] The State party should recognize and ensure that the Convention applies at all times, whether in peace, war or armed conflict, in any territory under its jurisdiction." (para. 14)

- "The Committee notes with concern that the State party does not always register persons detained in territories under its jurisdiction outside the United States, depriving them of an effective safeguard against acts of torture (art. 2). The State party should register all persons it detains in any territory under its jurisdiction, as one measure to prevent acts of torture." (para. 16)

- "The Committee is concerned by allegations that the State party has established secret detention facilities, which are not accessible to the International Committee of the Red Cross. Detainees are allegedly deprived of fundamental legal safeguards, including an oversight mechanism in regard to their treatment and review procedures with respect to their detention. The Committee is also concerned by allegations that those detained in such facilities could be held for prolonged periods and face torture or cruel, inhuman or degrading treatment. The Committee considers the "no comment" policy of the State party regarding the existence of such secret detention facilities, as well as on its intelligence activities, to be regrettable (arts. 2 and 16). The State party should ensure that no one is detained in any secret detention facility under its de facto effective control. Detaining persons in such conditions constitutes, per se, a violation of the Convention." (para. 17)

[66] CAT/C/USA/CO/2, 25 July 2006. The Conclusions were reached during the Committee against Torture's May 2006 session. The report of the Conclusions is dated 25 July 2006.

- "The Committee is concerned by reports of the involvement of the State party in enforced disappearances. The Committee considers the State party's view that such acts do not constitute a form of torture to be regrettable (arts. 2 and 16). The State party should adopt all necessary measures to prohibit and prevent enforced disappearance in any territory under its jurisdiction, and prosecute and punish perpetrators, as this practice constitutes, per se, a violation of the Convention." (para. 18)

- "[T]he Committee remains concerned at the absence of clear legal provisions ensuring that the Convention's prohibition against torture is not derogated from under any circumstances, in particular since 11 September 2001 (arts. 2, 11 and 12). The State party should adopt clear legal provisions to implement the principle of absolute prohibition of torture in its domestic law without any possible derogation. Derogation from this principle is incompatible with paragraph 2 of article 2 of the Convention, and cannot limit criminal responsibility. The State party should also ensure that perpetrators of acts of torture are prosecuted and punished appropriately." (para. 19)

- "The Committee, noting that detaining persons indefinitely without charge constitutes per se a violation of the Convention, is concerned that detainees are held for protracted periods at Guantánamo Bay, without sufficient legal safeguards and without judicial assessment of the justification for their detention (arts. 2, 3 and 16)." (para. 22)

- "The Committee is concerned that in 2002 the State party authorized the use of certain interrogation techniques that have resulted in the death of some detainees during interrogation. The Committee also regrets that "confusing interrogation rules" and techniques defined in vague and general terms, such as "stress positions", have led to serious abuses of detainees (arts. 11, 1, 2 and 16)." (para. 24)

- "The Committee is concerned by reliable reports of acts of torture or cruel, inhuman and degrading treatment or punishment committed by certain members of the State party's military or civilian personnel in Afghanistan and Iraq. It is also concerned that the investigation and prosecution of many of these cases, including some resulting in the death of detainees, have led to lenient sentences, including of an administrative nature or less than one year's imprisonment (art. 12)." (para. 26)

- "The Committee is concerned at reliable reports of sexual assault of sentenced detainees, as well as persons in pretrial or immigration detention, in places of detention in the State party. The Committee is concerned that there are numerous reports of sexual violence perpetrated by detainees on one another, and that persons of differing sexual orientation are particularly vulnerable. The Committee is also concerned by the lack of prompt and independent investigation of such acts and that appropriate measures to combat these abuses have not been implemented by the State party (arts. 16, 12, 13 and 14)." (para. 32)

c) Concluding observations of the UN Human Rights Committee

Having examined the United States' report, submitted seven years late, the UN Human Rights Committee in July 2006 raised a number of serious concerns with the US' compliance with respect to the International Covenant on Civil and Political Rights.[67] Several of these concerns are relevant also to compliance with the Convention against Torture:

- "The State party should immediately cease its practice of secret detention and close all secret detention facilities. It should also grant the International Committee of the Red Cross prompt access to any person detained in connection with an armed conflict. The State party should also ensure that detainees, regardless of their place of detention, always benefit from the full protection of the law." (para. 12)

- "The State party should conduct prompt and independent investigations into all allegations concerning suspicious deaths, torture or cruel, inhuman or degrading treatment or punishment inflicted by its personnel (including commanders) as well as contract employees, in detention facilities in Guantanamo Bay, Afghanistan, Iraq and other overseas locations. The State Party should ensure that those responsible are prosecuted and punished in accordance with the gravity of the crime." (para. 14)

d) The Detainee Treatment Act

The *Detainee Treatment Act*, signed into law on 30 December 2005, as Title X of the *Department of Defense Authorization* bill, puts the United States at odds with its obligations under the Convention against Torture. While the US Supreme Court recognized in its 2004 decision Rasul v. Bush[68] that the Guantánamo detainees could ask US courts to rule on the legality of their detention, the *Detainee Treatment Act* challenges this fundamental right to habeas corpus, an important safeguard against torture.

Section 1005 of the Act, (the Graham-Levin amendment),[69] removes from federal courts any competence to review the situation of Guantánamo detainees:

> (A) IN GENERAL- Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.

The UN Committee against Torture, in its concluding observations on the US cited above, challenged this section of the Act:

> "The Committee is concerned that the Detainee Treatment Act of 2005 aims to withdraw the jurisdiction of the State party's federal courts with respect to habeas

[67] United Nations Human Rights Committee. *Consideration of reports submitted by states parties*, 87th session (10-28 July 2006), CCPR/C/USA/CO/3.
[68] *Rasul c. Bush*, 542 U.S. 466 (2004).
[69] Available at http://jurist.law.pitt.edu/gazette/2005/12/detainee-treatment-act-of-2005-white.php.

> corpus petitions, or other claims by or on behalf of Guantánamo Bay detainees, except under limited circumstances."[70]

The same section of the Act also authorizes the tribunals responsible for reviewing combatant status (at Guantánamo) to take into consideration evidence obtained through coercion (thus potentially under torture):

> (b) Consideration of Statements Derived With Coercion-
>
> (1) ASSESSMENT- The procedures submitted to Congress pursuant to subsection (a)(1)(A) shall ensure that a Combatant Status Review Tribunal or Administrative Review Board, or any similar or successor administrative tribunal or board, in making a determination of status or disposition of any detainee under such procedures, shall, to the extent practicable, assess--
>
> (A) whether any statement derived from or relating to such detainee was obtained as a result of coercion; and
>
> (B) the probative value (if any) of any such statement.

In signing the bill, President George W. Bush included a signing statement that signals that the President considers himself empowered to interpret the Act, including the protections of the rights of detainees, as he sees fit:

> "The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks."[71]

A Task Force of the American Bar Association, in a July 2006 report, highlighted this signing statement as one of the perhaps three "most prominent signing statements which conveyed refusals to carry out laws involved".[72] The Task Force pointed out that while the bill forbids the use by any US official of torture or cruel, inhuman or degrading treatment on prisoners, "the President said in his statement that as Commander in Chief he could waive any such requirement if necessary to prevent terrorist attacks".[73]

[70] CAT/C/USA/CO/2, 25 July 2006. para. 27.
[71] Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 30 December 2005. Available at http://www.presidency.ucsb.edu/ws/index.php?pid=65259
[72] American Bar Association. *Task Force on Presidential Signing statements and the separation of powers doctrine, Report & Recommendations*, 24 July 2006, p. 15, http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf.
[73] Ibid. p. 16.

e) Systematic use of torture

Physicians for Human Rights (PHR) published a report in May 2005 providing extensive evidence that use of psychological torture was systematic and central to the US interrogation process of detainees in Iraq, Afghanistan and Guantánamo Bay.[74] The report documents the use of prolonged isolation, sleep deprivation, severe sexual and cultural humiliation and use of threats and dogs to induce fear of death or injury. The report notes that "it is difficult to ascertain what forms of psychological torture are currently in use" because of the extreme secrecy regarding detention operations.

> "A source familiar with conditions at Guantánamo in 2004 told PHR that US personnel there had devised a system to break people through a combination of humiliating acts, solitary confinement, temperature extremes, and use of forced positions."
> Physicians for Human Rights[75]

As Physicians for Human Rights underline, "the use of psychologically abusive interrogation methods is immoral and is illegal under the Geneva Conventions and other sources of international law to which the United States is a party."[76]

> "Detainees have been beaten; forced into painful stress positions; threatened with death; sexually humiliated; subjected to racial and religious insults; stripped naked; hooded and blindfolded; exposed to extreme heat and cold; denied food and water; deprived of sleep; isolated for prolonged periods; subjected to mock drownings; and intimidated by dogs."
> ACLU[77]

The American Civil Liberties Union (ACLU) provided a detailed submission to the UN Committee against Torture in April 2006, in preparation for the examination by the Committee of the US' compliance with the Convention against Torture.[78] The ACLU had available to it evidence from a range of sources, "including over 100,000 government documents produced to the ACLU through Freedom of Information ("FOIA") litigation." This evidence, they concluded, shows "a systemic pattern of torture and abuse of detainees in U.S. custody. This abuse was the direct result of policies promulgated from high-level civilian and military leaders and the failure

[74] Physicians for Human Rights, *Break Them Down: Systematic Use of Psychological Torture by U.S. Forces*, May 2005, http://www.phrusa.org/research/torture/report_breakthemdown.html. Physicians for Human Rights is a US organization that "mobilizes health professionals to advance the health and dignity of all people through action that promotes respect for, protection of, and fulfillment of human rights."
[75] Ibid. p. 8
[76] Ibid. p. 1.
[77] Ibid.
[78] American Civil Liberties Union, *Enduring Abuse: Torture and Cruel Treatment by the United States at Home and Abroad*, April 2006, A shadow report prepared for the United Nations Committee Against Torture. http://www.aclu.org/safefree/torture/25354pub20060427.html.

of these leaders to prevent torture and other cruel, inhuman or degrading treatment by subordinates."[79]

Amnesty International has similarly reported on the evidence of "widespread torture and other cruel, inhuman or degrading treatment of detainees held in US custody".[80] They reject the US government's argument that the problem amounts to a "few "aberrant" soldiers and lack of oversight", finding that "there is clear evidence that much of the ill-treatment has stemmed directly from officially san[c]tioned procedures and policies, including interrogation techniques approved by Secretary of Defense Rumsfeld for use in Guantánamo and later exported to Iraq."[81]

Amnesty International also points to the pattern of deaths of detainees:

> "It is now known that at least 34 detainees who died in US custody have had their deaths listed by the army as confirmed or suspected criminal homicides. The true number of such deaths may be higher as there is evidence that delays, cover-ups and deficiencies in investigations have hampered the collection of evidence. In several cases, however, substantial evidence has emerged that detainees were tortured to death while under interrogation (revealed, for example, in military autopsy reports, investigation records and recent court testimony). What is even more disturbing is that standard practices as well as interrogation techniques believed to have fallen within officially sanctioned parameters, appear to have played a role in the ill-treatment […]"[82]

f) Detainee Abuse and Accountability Project

The preliminary conclusions of the Detainee Abuse and Accountability Project, a joint study by Human Rights Watch, Human Rights First, Center for Human Rights and Global Justice at NYU School of Law, were published in April 2006.[83] The project investigated allegations of abusive treatment of detainees held in US custody.

Among the report's key findings are the following:

- "Detainee abuse has been widespread." Based on data collected as of 10 April 2006, the project had documented "over 330 cases in which U.S. military and civilian personnel are credibly alleged to have abused or killed detainees. These cases involve more than 600 U.S. personnel and over 460 detainees. Allegations have come from U.S. facilities throughout Afghanistan, Iraq and at Guantánamo Bay." The authors of the report note that these numbers are conservative and likely lower than the actual number of credible allegations of abuse.

[79] Ibid. p. 1.
[80] Amnesty International, *Supplementary Briefing to the UN Committee Against Torture*, 3 May 2006, AMR 51/061/2006.
[81] Ibid.
[82] Ibid.
[83] Human Rights Watch. *By the Numbers: Findings of the Detainee Abuse and Accountability Project*, April 2006, Vol. 18, No. 2 (G), http://hrw.org/reports/2006/ct0406/.

- Only fifty-four military personnel implicated in detainee abuse cases are known to have been convicted by court-martial.

- "Available evidence indicates that U.S. military and civilian agencies do not appear to have adequately investigated numerous cases of alleged torture and other mistreatment. Of the hundreds of allegations of abuse collected by the DAA Project, only about half appear to have been properly investigated. In numerous cases, military investigators appear to have closed investigations prematurely or to have delayed their resolution. In many cases, the military has simply failed to open investigations, even in cases where credible allegations have been made."

- The project found "over 400 personnel have been implicated in cases investigated by military or civilian authorities, but only about a third of them have faced any kind of disciplinary or criminal action."[84]

> "Two years ago, revelations about the abuse of detainees in U.S. custody at Abu Ghraib prison in Iraq shocked people across the world. In response, U.S. government officials condemned the conduct as illegal and assured the world that perpetrators would be held accountable.
>
> "Two years later, it has become clear that the problem of torture and other abuse by U.S. personnel abroad was far more pervasive than the Abu Ghraib photos revealed—extending to numerous U.S. detention facilities in Afghanistan, Iraq, and at Guantánamo Bay, and including hundreds of incidents of abuse. Yet an analysis of alleged abuse cases shows that promises of transparency, investigation, and appropriate punishment for those responsible remain unfulfilled. U.S. authorities have failed to investigate many allegations, or have investigated them inadequately. And numerous personnel implicated in abuses have not been prosecuted or punished."
> By the Numbers: Findings of the Detainee Abuse and Accountability Project[85]

From the extensive evidence above, it is clear that US policies and practices are in violation of the Convention against Torture, and not only with respect to Article 3. These violations are not minor or isolated incidents, but rather constitute a pattern of non-compliance that flows from an unwillingness at the highest level of government to commit to the obligations in the Convention.

[84] Ibid. p. 2.
[85] Ibid. p. 1.

E The United States' human rights record

The general human rights situation in the United States has deteriorated since the implementation of the Safe Third Country Agreement, in particular with respect to the rights of non-citizens and specific racialized groups. In the current context of the so-called "war against terror", legal rights, protected in Canada by the Canadian Charter of Rights and Freedoms and by numerous international human rights instruments, have in the United States been gravely undermined, both in law and in practice.

Some of these rights violations have been addressed in the sections above. The following sections refer to further areas where human rights have been gravely compromised.

1. Deliberate attacks on civilians in Iraq

Since the coming into force of the Safe Third Country Agreement, there have been allegations of deliberate killings of civilians by US forces in Iraq. Such attacks constitute grave human rights abuses.

- Haditha: On 19 November 2005, 24 Iraqi civilians, including children, were killed by US marines. Witnesses said the victims were killed "at close range in retaliation for the death of a Marine lance corporal in a roadside bombing". Girls killed in one house were aged 14, 10, 5, 3 and 1, according to death certificates. The military is investigating the alleged massacre.[86]

- Ishaqi: In March 2006, US soldiers were accused of executing 11 civilians, including several children. Following an investigation, US officials exonerated the soldiers.[87] However, the BBC reported that it had video evidence that appeared to challenge the US explanation of how the 11 people were killed.[88]

- Hamdania: On 26 April 2006, US marines allegedly killed an Iraqi civilian, Hashim Ibrahim Awad, and then falsified the report of the incident. War crime charges have been laid. Two soldiers have to date pleaded guilty to charges in relation to the death: one of them explained that when he and the other soldiers were unable to find an alleged insurgent, they kidnapped Mr Awad and shot him, subsequently placing a shovel and rifle near the body to suggest that he had been planting a roadside bomb.[89]

These alleged abuses, along with others similar involving rape and killings, clearly contravene international rules protecting civilians in time of war, notably the Geneva Conventions.

[86] The Washington Post, *In Haditha, Memories of Massacre*, 27 May 2006, Ellen Klickmeyer, http://www.washingtonpost.com/wp-dyn/content/article/2006/05/26/AR2006052602069.html.
[87] Christian Science Monitor, *Marines cleared in Iraqi deaths in Ishaqi*, 2 June 2006, Tom Regan, http://www.csmonitor.com/2006/0602/dailyUpdate.html.
[88] BBC, *New 'Iraq massacre' tape emerges*, 2 June 2006, http://news.bbc.co.uk/2/hi/middle_east/5039420.stm.
[89] Washington Post, *U.S. Marine pleads guilty in Iraqi man's death*, Marty Graham, Reuters, 26 October 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/10/26/AR2006102601184.html.

The failure to respect these fundamental rules of humanitarian and human rights law seriously mars the human rights record of the United States and calls into question the designation of the US as a safe third country.

2. Detention of minors

In a report dated October 2005, *The Rest of Their Lives: Life without Parole for Child Offenders in the United States*, Amnesty International and Human Rights Watch published the results of the first national study on life without parole sentences on children in the US.[90] The report focuses on the practice of judging minors as adults and sentencing them to life sentences to be served in adult prisons, without possibility of parole. The report found 2,225 persons condemned to life without parole for offences committed while a minor. In forty-two states and under federal law, children under eighteen accused of a serious crime are treated as adults for criminal justice purposes. In some states, this rule applies to children as young as ten.[91]

The report also notes that treating children as adults for sentencing means that children are held in adult prisons, if the conviction takes place while the offender is still a minor. Based on the data available to them (420 of the 2,225 youth offenders), the authors found that 29 percent of offenders were admitted to adult penitentiaries while they were still children.[92]

Article 37 of the Convention on the Rights of the Child[93] states:

> (at paragraph a): "Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age."
>
> (at paragraph c): "every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so."

The International Covenant on Civil and Political Rights, to which the US is a party, also recognizes the need for special treatment of children in the criminal justice system.[94]

The law and practices in the United States with respect to life without bail sentences for minors and the imprisonment of minors in adult jails are thus clearly contrary go international human rights standards.

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[90] Amnesty International & Human Rights Watch. *The Rest of Their Lives: Life without Parole for Child Offenders in the United States*. 2005. http://www.hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf.
[91] Ibid. p. 1.
[92] Ibid. p. 52.
[93] The Convention on the Rights of the Child has been ratified by all countries except the United States and Somalia.
[94] *International Covenant on Civil and Political Rights*, art. 10(2)(b) "Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication", art. 10(2) "Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status" and art. 14(4) (dealing with criminal charges): "In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation."

> "Human Rights Watch and Amnesty International have discovered that there are currently at least 2,225 people incarcerated in the United States who have been sentenced to spend the rest of their lives in prison for crimes they committed as children. […A]n estimated 59 percent received the sentence for their first-ever criminal conviction. Sixteen percent were between thirteen and fifteen years old at the time they committed their crimes. While the vast majority were convicted of murder, an estimated 26 percent were convicted of felony murder in which the teen participated in a robbery or burglary during which a co-participant committed murder, without the knowledge or intent of the teen. Racial disparities are marked. Nationwide, the estimated rate at which black youth receive life without parole sentences (6.6 per 10,000) is ten times greater than the rate for white youth (0.6 per 10,000)." [95]

In January 2006, Human Rights Watch drew attention to the case of Omar Khadr, detained at Guantánamo. The United States has ignored his legal status as a minor. 15 years of age at the time of the alleged murder of a US soldier of which he is accused, Omar Khadr is being tried and held in the same conditions as adults. According to Human Rights Watch, "the Pentagon violated international juvenile justice standards by refusing to separate Khadr from adult detainees, to provide him with opportunities for education or to allow him direct contact with his family during his detention at Guantánamo. International standards require the use of detention only as a last resort, as well as a prompt determination of all cases involving children, yet Khadr was held at Guantánamo for more than three years before being charged. Khadr's attorneys claim that he was tortured at Guantánamo."[96]

3. Military Commissions Act of 2006

The *Military Commissions Act* was passed by the House of Representatives and the Senate in September 2006 and signed by the President on 17 October 2006.

> "The president can now - with the approval of Congress - indefinitely hold people without charge, take away protections against horrific abuse, put people on trial based on hearsay evidence, authorize trials that can sentence people to death based on testimony literally beaten out of witnesses, and slam shut the courthouse door for habeas petitions. Nothing could be further from the American values we all hold in our hearts than the Military Commissions Act."
> Anthony D. Romero, American Civil Liberties Union Executive Director[97]

[95] *The Rest of Their Lives*, pp. 1-2.
[96] Human Rights Watch, *Military Commission Hearing Ignores Juvenile Safeguards*, 11 January 2006, http://hrw.org/english/docs/2006/01/10/usint12397.htm.
[97] American Civil Liberties Union. *News release: President Bush Signs Un-American Military Commissions Act, ACLU Says New Law Undermines Due Process and the Rule of Law*, 17 October 2006, http://www.aclu.org/safefree/detention/27091prs20061017.html

The protections of the Geneva Conventions as well as fundamental human rights protections such as habeas corpus are seriously challenged by the following provisions in the Act:[98]

- S948a provides an expanded definition of "unlawful enemy combatant" to include a person who has "purposefully and materially supported" hostilities against the United States or its co-belligerents. This new definition means that people who cannot be described as "combatants" under any normal interpretation of the word are stripped of the protections of the Geneva Conventions, including the right to humane treatment.

- S948a also provides the government with the unilateral authority to designate a person an "unlawful enemy combatant" (through either an administrative process known as a Combatant Status Review Tribunal, or a tribunal established under Presidential or military authority).

- S. 5(a) provides that the Geneva Conventions may not be invoked in any habeas or civil action against the US or a member of the Armed Forces "as a source of rights in any court of the United States."

- S. 6(a)(3) provides that "the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions." This gives unprecedented power to the President to determine what rights are due under the Conventions.

- S. 8(a)(2) states that "no foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions" in the revised War Crimes Act. This eliminates consideration of international legal standards in the interpretation of Common Article 3 of the Geneva Conventions.

- Under s. 5(a) and s. 7, the fundamental right to habeas corpus, which is a basic protection against abusive detention and treatment, is denied. Any "alien enemy combatant" (whether lawful or unlawful) is precluded from any redress through the regular courts. By eliminating this option, the U.S. is granting itself the right to detain foreign nationals, without charging them, for an indefinite period of time – and leaving them few recourses.

- S. 6(b)(2) provides retroactive immunity for government officials for past acts of abuses, by making changes retroactive to 1997.

- S. 948r(c) and S. 948r(d) explicitly provide for the admissibility of statements that may have been obtained through coercion, if they were obtained prior to the enactment of the *Defense Treatment Act (2005)*.

Almost immediately after the Act's signing, the government moved to notify the U.S. District Court in Washington DC that it no longer had jurisdiction to consider habeas corpus petitions filed by inmates at Guantánamo Bay.[99]

[98] *Military Commissions Act of 2006*, S.3930.ENR. Available at http://thomas.loc.gov.
[99] Washington Post, *Court Told It Lacks Power in Detainee Cases*, 20 October 2006, Karen DeYoung.

> "The new law strips the right of non-citizens to seek review of their detention by a court through the filing of a writ of habeas corpus, the venerated legal instrument that for centuries has protected people from arbitrary detention, disappearance and indefinite detention without charge."
> Center for Constitutional Rights[100]

Amnesty International commented that the adoption of the new law meant that "human rights violations perpetrated by the USA throughout the "war on terror" have in effect been given the congressional stamp of approval. With the passing of the Military Commissions Act of 2006 by the US House of Representatives on 27 September and the Senate on 28 September, Congress has turned bad executive policy into bad law."[101] According to Amnesty International, the new legislation needs to be seen in the context of the recent human rights record of the US:

> "The past five years have seen the USA engage in systematic violations of international law, with a distressing impact on thousands of detainees and their families. Human rights violations have included:
>
> - Secret detention
> - Enforced disappearance
> - Torture and other cruel, inhuman or degrading treatment
> - Outrages upon personal dignity, including humiliating treatment
> - Denial and restriction of *habeas corpus*
> - Indefinite detention without charge or trial
> - Prolonged incommunicado detention
> - Arbitrary detention
> - Unfair trial procedures"[102]

[100] Center for Constitutional Rights, *Bush Signs the Military Commissions Act: CCR Calls it a Blow to Democracy and the Constitution*, undated, http://www.ccr-ny.org/v2/reports/report.asp?ObjID=b5stDu9ZOb&Content=871.
[101] Amnesty International, *Military Commissions Act of 2006 – Turning bad policy into bad law*, 29 September 2006, AMR 51/154/2006, http://web.amnesty.org/library/Index/ENGAMR511542006.
[102] Ibid.

F Conclusion

The preceding evidence shows that the US, in a significant number of ways, does not satisfy the definition or factors established in Canadian law with respect to the designation of a country as a safe third country.

US policies and practices with respect to claims under the Refugee Convention fail to provide protection from refoulement for all refugees, consistent with Article 33. In addition to prior concerns, new legislation excludes certain refugees from status, while newly available information reveals the arbitrary nature of the refugee determination system, which denies equitable treatment to all asylum seekers.

US policies and practices with respect to obligations under the Convention against Torture have become a major preoccupation, both within the US and internationally. The US government's commitment to respect the Convention has been repeatedly called into question, by the legislative changes adopted and by the various statements made by government at the highest levels. With respect to practice, there is now significant compelling evidence of the systemic use of torture by the US. In regard to the Article 3 prohibition on return to torture, there is extensive evidence that the prohibition has been systematically violated by the US, through its practices of "rendition", including of Canadian citizen Maher Arar. Since the *Immigration and Refugee Protection Act* requires that a country designated as a safe third country comply with its Article 3 obligations, it is clear that the US cannot properly continue to be designated a safe third country, based on this consideration alone.

Finally, the overall human rights record of the US has in recent years been significantly tarnished by policies and practices that are incompatible with international standards, in particular with respect to non-citizens. The recent elimination of the fundamental right of habeas corpus, in the *Military Commissions Act*, is perhaps the most dramatic sign of a series of developments in the US that show an unwillingness to respect international human rights principles.

The policies and practices of the US have drawn pointed criticism from human rights organizations, the United Nations and the Council of Europe.

The federal Cabinet has the obligation under Canadian law to review the status of the US as a safe third country. In light of the substantial changes in policy and practice in the US since the last review, the US can no longer be considered a safe third country, according to the definition and factors established in the *Immigration and Refugee Protection Act*.