

UNITED STATES AND CANADA SAFE THIRD COUNTRY AGREEMENT

HEARING BEFORE THE SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CLAIMS OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES ONE HUNDRED SEVENTH CONGRESS SECOND SESSION

OCTOBER 16, 2002

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UNITED STATES AND CANADA SAFE THIRD COUNTRY AGREEMENT

WEDNESDAY, OCTOBER 16, 2002

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON IMMIGRATION,
BORDER SECURITY, AND CLAIMS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 2 p.m., in Room 2237, Rayburn House Office Building, Hon. George W. Gekas [Chairman of the Subcommittee] presiding.

Mr. GEKAS. The hour of 2 o'clock having arrived and the Chairman being out of breath, we note the absence of a hearing quorum, but at least we have maintained our pattern of starting every Committee hearing on time. We will have to recess for two reasons, the absence of that quorum, about which I have already made a statement, and the fact that within a short time we will be voting on—three votes. I ask for the indulgence of the witnesses while we retire to the Chamber for passing voting.

All the votes we cast will be in your best interest, of course, and we will return quickly.

[Recess.]

Mr. GEKAS. The Committee will come to order. The Chair will endeavor to conduct a hearing in which the written statements of the witnesses will be submitted for the record, as will the opening statement of the Chair.

The record thus made will be submitted to all the Members of the Subcommittee for two purposes: One, to apprise it of the fact that the witnesses did appear and did submit testimony and, secondly, to accord them the opportunity to submit written interrogatories or questions to the witnesses, the witnesses agreeing thereto.

And if a follow-up hearing should be required pursuant to their requests or their inclination to submit even further questions, we will reinvoke you to come back and complete the testimony as they might see it.

So at this time we will have the Chair render an opening statement, and to keep it balanced, although I am loathe to do it, I am going to read my own statement, because I want it to appear in the record as a written open statement.

On August the 30th, the Safe Third Country Agreement final draft text was initialed by our Administration as one point of the 30 point Ridge-Manley Smart Border Action Plan between the United States and Canada. This agreement would allow both coun-

tries to manage the flow of individuals seeking to access our respective asylum systems. Under the agreement if the alien seeks to travel from the United States to Canada through a land border port of entry to apply for asylum in Canada, the alien will generally be sent back to the U.S. to apply for asylum.

If an alien travels from Canada to the United States for the same purposes, the alien must seek asylum in Canada, the first of the two countries in which the alien traveled. The intent is to prevent asylum shopping in both the U.S. and Canada, and it is possible between the two countries because both are parties to the protocol relating to the status of refugees. The theory behind the agreement is that an alien is safe in either country and should seek it in the first country in which the alien lands.

The agreement is narrowly drafted, and if finalized, it would only apply to asylum claims made at land border ports of entry between Canada and the United States. It would not apply to aliens traveling through airports or seaports, nor would it apply to aliens who cross illegally between the two countries. In addition, the agreement would not apply to aliens who have already entered both countries. The agreement is prospective, not retroactive. Several exceptions have also been written into the agreement which will likely be explained in the testimony that we are about to receive.

The agreement as initialed would cause the U.S. to take back many more aliens for asylum adjudication than Canada would have to take back, at least initially. Flight patterns are the biggest cause of this. More international flights come to the U.S. than to Canada. Proponents of this agreement argue that aliens should apply for asylum in the first safe country where they arrive rather than travel through more than one safe country and apply for asylum in their country of choice. They believe that a person truly fleeing for his life would ask for protection in the first safe country in which he arrived. Some advocate the U.S. pursuing similar agreements with other safe countries, particularly those in Europe.

Opposition to the agreement arises from very different organizations for different reasons. Some opponents focus on the uneven distribution of travelers between the U.S. and Canada, arguing that the U.S. should not agree to knowingly increase our asylum numbers when the INS currently is overwhelmed with applications. They argue that the INS will not be able to handle thousands of additional asylum applications and that enforcing the agreement at land ports of entry will encourage more illegal entries and dangerous alien smuggling across the border.

Other opponents firmly believe that asylum seekers should be able to pursue asylum in whichever country an alien chooses. With respect to the U.S. and Canada agreement, opponents favor the ability of aliens to seek asylum in Canada because of the country's, quote, kinder, end quote, asylum system, including fewer detentions than America's asylum system.

These points also fear that the U.S. will pursue similar agreements with other safe countries such as European countries; and with the hopes of preventing such future agreements, they oppose this first agreement with Canada. This hearing will examine all these issues stemming from the draft agreement between our country and Canada.

With that, we will conduct a brief introduction of the panel, and then we will launch into their testimony.

We begin with the introduction of Kelly Ryan, Deputy Assistant Secretary for the Bureau of Population Refugees and Migration at the Department of State. She is responsible for policy development and program management of humanitarian assistance for Europe, the Newly Independent States and the Americas. Prior to this role, she was Chief of the Refugee and Asylum Division in the INS Office of General Counsel. She received her Bachelor of Arts Degree at Tulane University, her law degree at Georgetown University and her Master of Laws Degree at Cambridge.

She is joined at the counsel table by Joe Langlois, the Director of the Asylum Division at the INS. He has spent over 20 years working on refugee and asylum issues. He joined the INS in 1991 as an asylum officer at the San Francisco Asylum Office before becoming a manager in various asylum offices. He is a graduate of Georgetown University.

With the first two witnesses is No. 3, Mark Krikorian, the Executive Director of the Center for Immigration Studies, a research organization which examines and critiques the impact of immigration on the United States. He is highly published and interviewed on various immigration issues. Mr. Krikorian holds a Master's Degree from the Fletcher School of Law and Diplomacy and a Bachelor's Degree from Georgetown University.

The final witness will be Bill Frelick, the Director of Amnesty International, the USA's refugee program. He coordinates the work of the Amnesty International USA members working on behalf of refugee and asylum seekers in the U.S. and throughout the world. Prior to joining Amnesty International, Mr. Frelick was the Director of the U.S. Committee for Refugees. He has traveled to refugee sites throughout the world and is widely published.

As we indicated before, the written statements will be submitted in their entirety for the record, and then we will ask each witness to try to summarize within 5 minutes, and we will proceed in the order of introduction with Ms. Ryan.

STATEMENT OF KELLY RYAN, DEPUTY ASSISTANT SECRETARY, BUREAU OF POPULATION, REFUGEES, AND MIGRATION, DEPARTMENT OF STATE

Ms. RYAN. Thank you for the opportunity to meet today to discuss a proposed safe country agreement between the United States and Canada covering asylum claims made at our land border. Negotiations on this matter were undertaken at the request of the government of Canada and included in a bilateral 30-point border action plan negotiated by Governor Ridge and Canadian Deputy Prime Minister Manley last December. That overall package is intended to improve border security and facilitate cross-border trade for both our countries. As neighbors and as friends, the United States and Canada share a common determination to combat terrorism.

This proposed agreement would alter asylum procedures for certain persons attempting to claim asylum in either Canada or the United States. The draft agreement currently under consideration by the State Department would allow Canada to return to the U.S.,

and vice versa, asylum seekers who make their applications at land border ports of entry.

My colleague Joe Langlois, the Director of the INS Asylum Division, will describe for you in more detail the operational issues associated with potential implementation.

Canada has had a long-standing interest in concluding such an agreement with the U.S. Approximately one-third of the persons who apply for asylum in Canada pass through the U.S. first. Negotiations between the two countries intensified between 1995 and 1997 but were then abandoned. Canada first raised the issue of drafting a safe country agreement again after the events of September 11th.

On December 3rd, 2001, Attorney General John Ashcroft signed an accord with senior Canadian officials agreeing to, quote, begin discussions on a safe third country exception to the right to apply for asylum, end quote.

The agreement was likewise included in the 30-point action plan under the Smart Border Declaration signed later that month by Governor Tom Ridge, Director of Homeland Security, and John Manley of Canada.

It is thus important that this agreement be viewed in the context of the overall 30-point action plan. The foundation of the plan is our countries' willingness to develop mutual approaches to our common security. The safe third agreement is one element of the plan, but there are many others. Here are but a few examples of the tangible security improvements made with Canada in the past 10 months. Beginning this month Canada for the first time is requiring advanced information on all international air passengers so that the U.S. and Canada can share information on high-risk passengers arriving in either of our countries.

We have deployed U.S. and Canadian officers to joint passenger analytical units. Our two countries have also placed integrated border enforcement teams, IBETs, across our shared border. Those teams are composed of U.S. and Canadian Federal, State, provincial and local law enforcement agents. We are deploying an electronic system to share criminal record information such as fingerprints. U.S. and Canadian customs officials are also targeting and inspecting shipping containers.

Finally, there has been much—there has been agreement to seek to harmonize our respective visa regimes. While there is much more work to do, the key to this substantial progress has been both countries' willingness to fully implement the entire 30-point plan.

In negotiating this agreement, we have also sought to learn lessons of others who have developed similar arrangements. We have watched our friends in the European Union implement a safe country agreement known as the Dublin Convention. From them we know how tremendously complex and potentially problematic it is to implement these types of arrangements for bona fide refugees. The greatest challenge all agree is determining asylum seeker's travel itinerary before making a claim and hence which country is responsible for adjudicating that claim. This has been an enormously difficult issue for the European Union, and in some cases has resulted in asylum seekers being shifted from country to coun-

try because it cannot be established with clarity what their itinerary had been.

We would not want the U.S. to be drawn into resource-intensive debates with our counterparts in the government of Canada over whether an applicant did or did not transit the United States en route to Canada. The proposal under consideration would be limited to land border ports of entry, because only there it is incontrovertible that the person was physically present in one of our two countries before applying for asylum in the other.

Claims made in the interior of either country at water crossings, airports, or by asylum seekers interdicted by crossing illegally would not be covered. This is because of the highly problematic issue of determining with certainty the last country where the asylum seeker was present, and therefore, which country was responsible for hearing a claim.

Also in contrast to the EU's approach, this proposal would not attempt to substantively harmonize the U.S. and Canadian asylum systems. The U.S. and Canadian approaches to asylum are obviously not exactly the same. Our systems are nonetheless two of the world's most generous and are both fully in keeping with international protection standards.

If that is the case, if we are both equally generous, then why do refugees transit the U.S. to apply for asylum in Canada? The vast majority of asylum seekers and migrants who make it to the territory of the U.S. Want to stay here, not head north, so why not this group?

There are several reasons. Some are undoubtedly attracted by Canadian social welfare benefits. Others may be seeking to file a second application after having an affirmative claim rejected in the U.S., although this does not appear to be a widespread phenomenon. Many of these asylum seekers, we believe, have strong family, community, kinship or linguistic ties to Canada.

Keeping humanitarian concerns in mind, the U.S. obtained in this proposed agreement a generous exemption for family members. Mr. Langlois will discuss how this would work in practice. This is undeniably a difficult issue. Of course there will still be many persons with ties to Canada and none to the U.S. who would be limited to claiming asylum here under this proposal.

As is our practice, we have been in consultation with your offices, nongovernmental organizations, interested members of the public and the United Nations High Commissioner for Refugees to discuss the safe country proposal. In July, we published a notice of a public meeting and invited comment on the draft text. I note that the UN High Commissioner for Refugees does not object in principle to safe third country agreements. For the proposal under consideration by the U.S. and Canada, issues of practical interest to UNHCR include whether an asylum seeker will have the right to a meaningful appeal of a decision to be returned to either the U.S. or Canada.

Properly crafted, safe country agreements are fully consistent with refugee protection obligations under the 1951 Refugee Convention and the 1967 Protocol. In the case of the draft agreement with Canada, the Convention's article 33 prohibition on refoulement is clearly observed. Refugees would not be returned to their country of origin or a third country until they have had their

claim adjudicated by either the U.S. or Canada. That is a firm commitment.

In addition, I would note that the U.S. has no intention to expand this bilateral agreement to include a third country.

Finally, I want to emphasize that we have considered carefully how we would implement such an arrangement on the U.S. side of the border and its implications for asylum seekers. The U.S. is serious about its commitment to protecting refugees. We are fully confident that the U.S. would have a fair process for implementing this agreement.

I am pleased to have had the opportunity to report the status of this proposal to you and would take any questions you have regarding this proposal.

Thank you, Mr. Chairman.

[The prepared statement of Ms. Ryan follows:]

PREPARED STATEMENT OF KELLY RYAN

Thank you for the opportunity to meet today to discuss a proposed "Safe Country" agreement between the United States and Canada covering asylum claims made at our land border. Negotiations on this matter were undertaken at the request of the Government of Canada and included in the bilateral 30-point border action plan negotiated by Governor Ridge and Canadian Deputy Prime Minister Manley last December. That overall package is intended to improve border security and facilitate cross-border trade for both our countries. As neighbors, and as friends, the United States and Canada share a common determination to combat terrorism.

This proposed agreement would alter asylum procedures for certain persons attempting to claim asylum in either Canada or the United States. The draft agreement, currently under consideration by the State Department, would allow Canada to return to the United States (and vice-versa) asylum seekers who make their applications at land border ports of entry. My colleague, Joseph Langlois, the Director of the INS Asylum Division, will describe for you in more detail the operational issues associated with potential implementation.

Canada has had a longstanding interest in concluding such an agreement with the United States; approximately one-third of the persons who apply for asylum in Canada pass through the United States first. Negotiations between the two countries intensified between 1995-97, but were then abandoned. Canada raised the issue of drafting a safe country agreement again after the events of September 11th.

On December 3, 2001, Attorney General John Ashcroft signed an accord with Senior Canadian officials, agreeing "to begin discussions on a safe third country exception to the right to apply for asylum." The agreement was likewise included in a 30-point Action Plan under the Smart Border Declaration signed later that month by Governor Tom Ridge, Director of Homeland Security, and Deputy Prime Minister John Manley of Canada.

It is thus important that this Agreement be viewed in the context of the overall 30-point Action Plan. The foundation of the Plan is our countries' willingness to develop mutual approaches to our common security. The safe third agreement is one of the elements of the Plan, but there are many others. Here are but a few of the examples of tangible security improvements made with Canada in the past ten months. Beginning this month, Canada for the first time is requiring advanced information on all international air passengers so that the U.S. and Canada can share information on high-risk passengers arriving in either of our two countries. We have deployed U.S. and Canadian officers to Joint Passenger Analytical Units. Our two countries have also placed Integrated Border Enforcement Teams (IBETs) across our shared border. These teams are composed of U.S. and Canadian federal, state, provincial, and local law enforcement agents. We are deploying an electronic system to share criminal records information such as fingerprints. U.S. and Canadian customs officers are also targeting and inspecting shipping containers. Finally, there has also been agreement to seek to harmonize our respective visa regimes. While there is much more work to do, the key to this substantial progress has been both countries' willingness to fully implement the entire 30-point plan.

In negotiating this agreement, we have also sought to learn the lessons of others who have developed similar arrangements. We have watched our friends in the European Union implement a safe country agreement known as the "Dublin Conven-

tion.” From them, we know how tremendously complex, and potentially problematic, it is to implement these types of arrangements for bona fide refugees. The greatest challenge, all agree, is determining an asylum seeker’s travel itinerary before making a claim, and hence, which country is responsible for adjudicating that claim. This has been an enormously difficult issue for the European Union, and in some cases has resulted in asylum seekers being shifted from country to country because it cannot be established with clarity what their itinerary has been.

We would not want the United States to be drawn into resource-intensive debates with our counterparts in the Government of Canada over whether an applicant did, or did not, transit the United States en route to Canada. The proposal under consideration would be limited to land border ports of entry because only there is it incontrovertible that the person was physically present in one of our two countries before applying for asylum in the other. Claims made in the interior of either country, at water crossings, airports, or by asylum seekers interdicted while crossing illegally, would not be covered. This is because of the highly problematic issue of determining with certainty the last country where the asylum seeker was present, and therefore, which country is responsible for hearing his or her claim.

Also in contrast to the EU’s approach, this proposal would not attempt to substantively harmonize the U.S. and Canadian asylum systems. The U.S. and Canadian approaches to asylum are obviously not exactly the same. Our systems are, nonetheless, two of the world’s most generous and are both fully in keeping with international protection standards.

If that is the case, if we are both equally generous, then why do refugees transit the U.S. to apply for asylum in Canada? The vast majority of asylum seekers and migrants who make it to the territory of the United States want to stay here, not head north. So why not this group?

There are several reasons. Some are undoubtedly attracted by Canadian social welfare benefits. Others may be seeking to file a second application after having an affirmative asylum claim rejected in the United States, although this does not appear to be a widespread phenomenon. Many of these asylum seekers, we believe, have strong family, community, kinship, or linguistic ties to Canada.

Keeping humanitarian concerns in mind, the United States obtained in the proposed agreement a generous exemption for family members; Mr. Langlois will discuss how this would work in practice. This is undeniably a difficult issue. Of course, there will still be many persons with ties to Canada—and none to the United States—who would be limited to claiming asylum here under this proposal.

As is our practice, we have been in consultation with your offices, non-governmental organizations (NGOs), interested members of the public, and the United Nations High Commissioner for Refugees (UNHCR) to discuss the safe country proposals. In July, we published a notice of a public meeting and invited comment on the draft. I note that the UN High Commissioner for Refugees does not object—in principle—to safe third country agreements. For the proposal under consideration by the United States and Canada, issues of practical interest to UNHCR include whether an asylum seeker will have the right to a meaningful appeal of a decision to be returned to either the United States or Canada.

Properly crafted, safe country agreements are fully consistent with refugee protection obligations under the 1951 Refugee Convention and the 1967 Protocol. In the case of the draft agreement with Canada, the Convention’s Article 33 prohibition on refoulement is clearly observed; refugees would not be returned to their country of origin, or a third country, until they have had their claim adjudicated by either the United States or Canada—that is a firm commitment. In addition, I would note that the United States has no intention to expand this bilateral agreement to include a third country.

Finally, I want to emphasize that we have considered carefully how we would implement such an arrangement on the U.S. side of the border and its implication for asylum seekers. The United States is serious about its commitment to protecting refugees. We are fully confident that the United States would have a fair process for implementing this agreement.

I am pleased to have the opportunity to report the status of this proposal to you and would take any questions you have regarding this proposal.

Thank you, Mr. Chairman.

Mr. GEKAS. We thank you and we turn to Mr. Langlois.

**STATEMENT OF JOE LANGLOIS, DIRECTOR, OFFICE OF
ASYLUM, IMMIGRATION AND NATURALIZATION SERVICE**

Mr. LANGLOIS. Mr. Chairman, I thank you for the opportunity to discuss the proposed "safe third country" agreement between the United States and Canada. Consistent with the statutory authority that Congress put in place a half decade ago, the proposed agreement is founded on the premise that there can appropriately be limits on the ability of an asylum seeker to choose a country of refuge, so long as that asylum seeker has a full and fair opportunity to present a claim for protection and to receive asylum if he or she is a refugee.

In outlining for you how the proposed agreement would operate, I would like to emphasize four key points about the proposed agreement. First, the United States and Canada each have asylum systems that are among the best in the world. Second, the proposed agreement has been constructed carefully to apply to individuals where it is clear that the individual is, in fact, arriving from the other country and to ensure that no asylum seeker would be returned home without first having the claim decided, either in Canada or the United States.

Mr. GEKAS. Would you please move the microphone closer to yourself, whichever one you want to use?

Mr. LANGLOIS. Third, the proposed agreement has a broad family unity exception, so that an asylum seeker with family in one of the two countries may join those family members to pursue the asylum claim.

Fourth, the Government has engaged in an open process developing the proposed agreement, consulting at various points with Congressional staff, the staff of the United Nations High Commissioner for Refugees and with representatives of nongovernment organizations.

Under the proposed agreement, the United States and Canada would return asylum seekers arriving at land border ports of entry to the "country of last presence" for the determination of a "refugee status claim," unless one of the exceptions listed in the proposed agreement applies.

The proposed agreement also addresses those who seek protection while being removed from either Canada or the United States in transiting through the other country. We decided to limit the proposed agreement to individuals arriving at our shared land border ports of entry or being removed through Canada or the United States, because these are the only places where it is incontrovertible that the person was present in the other country.

This limitation ensures that adjudications under the proposed agreement will be as simple and as speedy as possible. It avoids prolonged determination of an asylum seeker's itinerary which in some cases may be impossible to ascertain with a degree of certainty and in other cases may be as complex as the determination of the individual's protection. By limiting the proposed agreement in this way, we also avoid conflicts with the government of Canada over whether an individual did or did not transit through the United States en route to Canada or vice versa.

In addition to making the proposed agreement simple and straightforward with respect to whom it applies to, we made it

clear that each individual's protection concerns must be heard. The proposed agreement specifically requires that an asylum seeker returned to the United States or Canada under this agreement will not be removed to another country without an adjudication of the asylum claim.

The proposed agreement contains a generous exemption for family members, such that asylum seekers with spouses, sons, daughters, parents, legal guardians, siblings, grandparents, grandchildren, aunts, uncles, nieces and nephews will be allowed to reunite with family members in either the United States or Canada, as long as the relative has lawful status, other than as a visitor, or has a pending asylum claim in that country.

The range of family members who may qualify as anchor relatives is far broader than those recognized under other provisions of immigration law by including grandparents, grandchildren, aunts, uncles, nieces and nephews.

The proposed agreement also contains exceptions for unaccompanied minors and legal entrants who have a validly issued visa by the receiving party or are not required to obtain a visa.

Upon adoption of the agreement, the INS will implement its obligations under the agreement through the normal rulemaking process. The INS will begin with publication of a proposed rule, accept public comments for a period of at least 30 days, analyze those comments, and prepare a final rule for publication.

After the appropriate clearance process, the final rule will be published, with implementation commencing 30 days thereafter. Implementation in this prescribed, transparent manner will minimize uncertainty and anxiety among affected persons in the border communities.

This concludes my testimony, and I look forward to responding to any questions you may have.

[The prepared statement of Mr. Langlois follows:]

PREPARED STATEMENT OF JOSEPH E. LANGLOIS

Mr. Chairman and Members of the Committee:

I thank you for the opportunity to discuss the proposed "safe third country" agreement between the United States and Canada. This proposed agreement would allocate responsibility between the United States and Canada for processing claims of certain asylum-seekers, enhancing the two nations' ability to manage, in an orderly fashion, asylum claims brought by persons crossing our common border. The proposed agreement would cover asylum-seekers arriving at ports of entry on the land border between the United States and Canada. With certain important exceptions, these persons will be required to present any asylum claim to the country from which they came to the port of entry, rather than the country they are next seeking to enter. That is, an asylum-seeker must seek asylum in Canada, if seeking to enter the United States from Canada at a land border port of entry, or in the United States, if seeking to enter Canada from the United States, unless an exception applies. Consistent with the statutory authority that Congress put in place a half decade ago, the proposed agreement is founded on the premise that there can appropriately be limits on the ability of an asylum-seeker to choose a country of refuge, so long as that asylum-seeker has a full and fair opportunity to present a claim for protection, and to receive asylum if he or she is a refugee.

On December 3, 2001, Attorney General John Ashcroft signed an accord with then Minister of Citizenship and Immigration Canada, Elinor Caplan, and the Solicitor General of Canada, Lawrence MacAuley agreeing "to begin discussions on a safe third country exception to the right to apply for asylum. Such an arrangement would limit the access of asylum-seekers, under appropriate circumstances, to the system of only one of the two countries." The agreement became a critical element of the 30-point Action Plan under the Smart Border Declaration signed by Governor

Tom Ridge, Director of Homeland Security, and Deputy Foreign Minister John Manley of Canada on December 12, 2001. This blueprint action plan has four pillars: the secure flow of people; the secure flow of goods; secure infrastructure; and information sharing. This safe third country agreement has become a critical element of realizing our broader goals to ensure a secure flow of people and, therefore, must be viewed in the context of the mutually beneficial 30-point Action Plan and related measures taken by Canada and the United States.

In outlining for you how the proposed agreement would operate, I would like to emphasize four key points about the proposed agreement. First, the United States and Canada each have asylum systems that are among the best in the world. Second, the proposed agreement has been constructed carefully to apply to individuals where it is clear that the individual is arriving from the other country and to ensure that no asylum-seeker would be returned home without first having the claim decided in one of those two systems. Third, the proposed agreement has a broad family unity exception, so that an asylum-seeker with family in one of the two countries may join those family members to pursue the asylum claim, even if the agreement would otherwise call for return to the other country. Fourth, the government has engaged in an extraordinarily open process developing the proposed agreement, consulting at various points with congressional staff, the staff of the United Nations High Commissioner for Refugees, and with representatives of non-government organizations.

Under the proposed agreement, the U.S. and Canada would return asylum-seekers arriving at land border ports of entry to the “country of last presence” for the determination of a “refugee status claim,” unless one of the exceptions listed in the proposed agreement applies. In addition to asylum-seekers arriving at Canada-U.S. land border ports-of-entry, the proposed agreement addresses those who seek protection while being removed from either Canada or the United States and transiting through the other country. A person being removed from the United States who is transiting Canada when he or she requests protection shall be permitted onward movement to the country to which he or she is being removed, if the protection claim was rejected by the United States prior to removal. If the claim was not adjudicated by the United States, the person shall be returned to the United States to have the protection claim examined in accordance with U.S. immigration law.

We decided to limit the proposed agreement to individuals arriving at our shared land border ports of entry or being removed through Canada or the United States, because these are the only places where it is incontrovertible that the person was present in the other country. This limitation ensures that adjudications under the proposed agreement will be as simple and speedy as possible. It avoids prolonged determinations of an asylum-seeker’s itinerary, which in some cases, may be impossible to ascertain with a degree of certainty and, in other cases may be as complex as the determination of the individual’s protection need. By limiting the proposed agreement in this way, we also avoid conflicts with the government of Canada over whether an individual did or did not transit through the United States en route to Canada or vice versa.

In addition to making the proposed agreement simple and straightforward with respect to whom it applies to, we made it clear that each individual’s protection concerns must be heard. The proposed agreement specifically requires that any asylum-seeker returned to the United States or Canada under the proposed agreement will not be removed to another country without an adjudication of the asylum claim. This avoids placing refugees in a situation where they are bounced from one country to another with no country taking responsibility for assessing the refugee claim—the so called “refugee-in-orbit” problem that has arisen under the Dublin Convention in Europe.

With the principle of family unity in mind, we sought and obtained in the proposed agreement a generous exemption for family members, such that asylum-seekers with spouses, sons, daughters, parents, legal guardians, siblings, grandparents, grandchildren, aunts, uncles, nieces and nephews will be allowed to reunite with family members in either the United States or Canada, overriding the obligation of the “country of last presence” to take the asylum seeker back. This exception applies as long as the anchor relative has lawful status, other than as a visitor, or has a pending asylum claim in the country where the person is seeking asylum. The range of family members who may qualify as anchor relatives is far broader than those recognized under other provisions of immigration law by including grandparents, grandchildren, siblings, aunts, uncles, nieces, and nephews.

The proposed agreement also contains exceptions for unaccompanied minors and legal entrants who have a validly issued visa by the receiving party or are not required to obtain a visa. Importantly, the proposed agreement contains a provision

that allows the United States and Canada the discretion to exempt an asylum-seeker from the agreement based on public interest considerations.

Finally, I would like to share with you the consultations we engaged in when developing the proposed agreement and certain changes to the draft resulting from those consultations. After agreeing to an initial draft in June 2002, both the U.S. and Canada met with the United Nations High Commissioner for Refugees and their respective non-governmental organizations ("NGOs") to solicit comments on the draft. INS and Department of State officials also met with Congressional staff, providing background information on the proposed agreement. Members of the public were offered an opportunity to address the terms and implications of the proposed safe third country agreement at two meetings held at INS headquarters. The first, in January 2002, was attended by the INS Office of the General Counsel, INS Office of International Affairs-Asylum Division, and NGOs. The second, in August 2002, was open to the public and was announced by publication of a meeting notice in the Federal Register on July 12, 2002. The June 2002 version of the proposed agreement also was made available to the public on the Service's Website prior to the August meeting. At that meeting, the Department of State's Office of Population, Refugees and Migration joined INS officials in addressing the public's questions and concerns.

Many of the NGO and UNHCR comments have mirrored the principles with which the United States has negotiated the proposed agreement: (1) the agreement must guarantee that persons subject to it would have their refugee claims heard in one of the two countries; (2) the agreement should not act to separate families; and (3) it would be applied only in circumstances with limited factual issues, i.e., at land border ports of entry where it is clear that the person is arriving directly from the other country. After considering the comments received, we resumed negotiations with Canada, finding ways to address the public comments in ways that enhance our adherence to these principles.

Several NGOs urged us to include a transit exception for persons who entered one country simply for the purpose of proceeding to the other to seek asylum there. After considering this suggestion, both the U.S. and Canada agreed that such an exception should not be included. The main reason is that a transit exception would require a significantly more complex process for determining whether an individual was subject to return under the agreement, which would prolong and complicate the determination process to the extent that it could eliminate the benefit of requiring these individuals to apply in the country of last presence.

After carefully considering the public's concerns, we made changes to the proposed agreement to broaden the family unity exception. The final draft abandons a two-tier system included in the first draft that would have prevented more distant relatives (siblings, aunts, uncles, nieces and nephews) from acting as anchor relatives if they merely have a pending asylum claim. Other changes that were made to the draft text include provisions to ensure that asylum information remains confidential and to develop a role for the UNHCR to monitor the implementation of the agreement.

With these changes that followed consultations with House and Senate staffers, the UNHCR and interested NGOs, the United States and Canada negotiators initialed a proposed agreement on August 30, 2002.

Upon adoption of the agreement, the INS will implement its obligations under the agreement through the normal rulemaking process. The INS will begin with publication of a proposed rule, accept public comments for a period of at least thirty days, analyze those comments, and prepare a final rule for publication. After the appropriate clearance process, the final rule will be published, with implementation commencing thirty days thereafter. Implementation in this prescribed, transparent manner will minimize uncertainty and anxiety among affected persons and border communities.

This concludes my testimony and I look forward to responding to any questions that you may have.

Mr. GEKAS. We thank you. We turn to Mr. Krikorian.

**STATEMENT OF MARK KRIKORIAN, EXECUTIVE DIRECTOR,
CENTER FOR IMMIGRATION STUDIES**

Mr. KRIKORIAN. Thank you, Mr. Chairman. There are two questions regarding this agreement, one of principle and one of practice. As Ms. Ryan pointed out, the safe third country agreement is not inconsistent with the 1951 Geneva Convention, which says that il-

legal aliens coming directly from a country where they are threatened must be allowed to apply for asylum, but it is actually more than consistent. In my opinion, it is actually a logically and morally necessary part of any asylum system.

Asylum is analogous to giving a drowning man a berth in your lifeboat, and a genuinely desperate man grabs at the first lifeboat that comes his way. A person who seeks to pick and choose among lifeboats is by definition not seeking immediate protection, but instead seeking immigration.

Without the safe third country concept any so-called asylum system is really nothing more than an alternate avenue of immigration, and if asylum is just another immigration category, its rationale would disappear.

Asylum is different from refugee resettlement, even though both relate to the same kind of people, people being persecuted or have a well-founded fear of persecution, because in refugee resettlement our Government chooses specific individuals overseas who fear persecution and brings them to the United States. It is a policy choice governed by Congress and the President and thus is an exercise of a sovereign state's plenary power over immigration.

Asylum, on the other hand, represents a nation's sacrifice of part of its sovereignty over immigration, out of humanitarian concerns, in order to offer protection to people, usually illegal aliens who are fleeing genuine persecution. It is a kind of humanitarian pardon, or even amnesty if you will, for people who have broken the immigration law and have no other reason to be admitted into the country in question.

If people who could have applied for protection elsewhere are allowed to enter into the asylum system, the curbs on a nation's sovereignty implicit in asylum can no longer be justified.

This issue—the logical and moral necessity of including a safe third country concept in any asylum system was never an issue during the Cold War, because then very few people, the numbers of asylum claimants were small, and it was difficult for asylum claimants to transit many different countries before they came to a Western democracy where they would want to immigrate, as well as have protection.

But with the end of the Cold War, the safe third country issue came to the fore. Most notably Germany in 1993 amended its Constitution to incorporate the safe third country concept, because it was dealing with an enormous increase in the number of asylum claims.

Now, practically speaking, the draft agreement is in the interest of the United States. Now, it is indeed likely, as you have pointed out and as others have pointed out, that at least in the short run the United States will face a somewhat larger number of asylum claimants as a result of this agreement, however narrowly crafted the agreement may be. This is because the United States is easier to get to, but Canada has much more generous asylum rules. So many more people pass through our country on the way to Canada than vice versa for asylum.

But even this likely increase in asylum claims is not an argument, in my opinion, against this agreement because this agreement is best seen as a first step in reaching similar deals with

other safe countries transited by asylum seekers, most notably the states of the European Union and perhaps eventually, if institutional change occurs, in Mexico as well.

Significant numbers of asylum seekers arrive on flights from Western Europe to JFK and other airports on the East Coast, either independently or as part of a smuggling operation, and application of the safe third country concept to all asylum claimants who pass through Western Europe where they should have applied for asylum if they were genuinely seeking protection can reduce this flow significantly.

But we will have no credibility if at some future time a future Administration decides to negotiate such agreements with Western Europe if we reject this deal with Canada simply because it would lead to some modest increase in our asylum caseload. After all, in the case of a deal with European countries, it would be they on balance who would have to take back more people, since the asylum seeker flow across the Atlantic is mainly westbound. Only by first entering into this agreement would we will able to be credible in approaching the European Union to negotiate similar agreements.

And finally, the last reason, practical reason, I think this is important is that the United States has an important security interest in Canada's applying the safe third country proposal and incorporating it into its own asylum system. According to the Canadian equivalent of our asylum, more than 50 terrorist groups have established themselves in Canada, partly because of a laxity of that country's asylum system. Canada first attempted to incorporate the safe third country concept in 1988 into its 1988 immigration law, but the provision was never implemented, because the main sticking point was whether the United States would be included on the list of safe countries.

Once there is a safe third country agreement with the United States, there will be significantly less political resistance within Canada to adding European countries to a similar list should Canada's government think that advisable, and that would make it more difficult for terrorist organizations to set up shop in Canada in preparation for attacks on the United States.

That is where I will leave my comments. I will be happy to take any questions.

[The prepared statement of Mr. Krikorian follows:]

PREPARED STATEMENT OF MARK KRIKORIAN

The U.S.-Canada Safe Third Country Agreement, initialed by representatives of our two governments in August, sets an important precedent that will defend the integrity of our asylum system, improve our country's ability to control immigration, and enhance national security. It should be implemented as soon as possible.

The agreement, made pursuant to sec. 208(a)(1) of the Immigration and Nationality Act, would allow each country to return asylum claimants who passed through the other country without having to adjudicate their asylum claims. In other words, an alien would have to claim asylum protection in whichever country he reached first, and thus would not be permitted to transit through one country and then apply for asylum in the other.

This is consistent with the 1951 Geneva Convention on the Status of Refugees, the international agreement which laid the groundwork for the post-World War II refugee system. Article

31 of the convention implicitly assumes a safe third country system when it says "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or

freedom was threatened in the sense of article 1, enter or are present in their territory without authorization . . .” Note, “coming DIRECTLY from a territory where their life or freedom was threatened,” which assumes that the person seeking protection will not pass through other countries which could have offered him protection in order to make his claim in a country he likes better.

But the safe third country concept is not merely consistent with the Geneva Convention—it is a logically and morally necessary part of any asylum system. Asylum is analogous to offering a drowning man a berth in your lifeboat, and a genuinely desperate man grabs at the first lifeboat that comes his way. A person who seeks to pick and choose among lifeboats is, by definition, not seeking immediate protection. Without the safe third country concept, any so-called “asylum” system is really nothing more than an alternate avenue of immigration.

And if asylum is just another immigration category, its rationale would disappear. Asylum is different from refugee resettlement, even though both policies relate to aliens who have been persecuted or have a well-founded fear of persecution. In refugee resettlement, our government chooses specific individuals overseas who fear persecution and brings them to the United States. The policy choice is made by Congress and the president and is thus an exercise of a sovereign state’s plenary power over immigration.

Asylum, on the other hand, represents a nation’s sacrifice of part of its sovereignty over immigration for humanitarian reasons, in order to offer protection to people (usually illegal aliens) who are fleeing genuine persecution. It is a kind of humanitarian pardon, or amnesty, for people who have broken the immigration law and have no other reason to be admitted into the country. If people who could have applied for protection elsewhere are allowed to enter into the asylum system, the curbs on a nation’s sovereignty implicit in asylum can no longer be justified.

The logical and moral necessity of including the safe third country concept in asylum was not an issue during the Cold War, because asylum claimants were few in number and in the main came directly from behind the Iron Curtain. Also, the expense of air travel made it difficult for alien smugglers to move their customers through intermediate countries before arriving at a developed western democracy, where the asylum seekers would find not only protection but also extensive economic opportunities.

But with the end of the Cold War (and the declining cost of travel), the safe third country issue came to the fore. As early as 1990, Sweden returned African and Middle Eastern illegal aliens seeking asylum to Poland, which they had traversed before arriving in Sweden. And in 1992, the ministers responsible for immigration in what was then the European Community adopted a resolution establishing objective criteria for applying what they termed the “host third country” principle.

Most notable, though, was Germany’s 1993 amendment to the Basic Law (its constitution) to incorporate the safe third country concept, in response to the fact that more than 400,000 illegal aliens claimed asylum in Germany in 1992. Combined with agreements with neighboring Poland and the Czech Republic to take back illegal aliens who passed through those countries on their way to Germany, this institutionalized the safe third country concept for the first time. It has since been adopted in some form by members of the European Union individually and through the Dublin and Schengen agreements.

And this is not an entirely new idea for the United States. Such an arrangement was foreseen in the INS asylum reform regulations that took effect in January 1995 (the provision permitting safe third country determinations was later codified in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996). And in October 1995, a “Memorandum of Agreement” was released outlining a safe third country arrangement between our country and Canada, though negotiations were suspended during the debate over immigration legislation in the 104th Congress, and were not resumed.

In the case at hand, the question is whether this draft agreement with Canada is in the interests of the United States. It is indeed likely, as some have observed, that in the short run, the United States will face a somewhat larger number of asylum claimants as a result of this agreement. This is because the United States is easier to get to (more international flights arrive here than in Canada and we have long land border with Mexico), while Canada has much more permissive asylum rules. The result is that more people pass through our country on the way to apply for asylum protection in Canada than vice versa.

While we can stipulate that the agreement will result in some increase in asylum requests in the United States, the magnitude of such an increase is open to debate. Once the option of transiting the United States in order to apply for asylum in Canada is eliminated, some significant number of those whose objective was Canada will choose not to come to the U.S. in the first place, opting instead to apply for

asylum in an EU country. We cannot know, ahead of time, how many additional asylum claims for the U.S. will be generated by this agreement.

But even the likely increase in asylum claims is not an argument against this agreement. That is because this agreement is best seen as a first step in reaching similar deals with other safe countries transited by asylum seekers, notably the member states of the European Union. Significant numbers of asylum seekers arrive on flights from western Europe to JFK and other East Coast airports, either independently or as part of organized smuggling operations. Application of the safe third country concept to all asylum claimants who passed through western Europe—where they should have applied for asylum if they were genuinely seeking protection—would reduce this flow significantly, increase the proportion who had legitimate claims to asylum, and allow generally for a more efficient and expeditious asylum process for those remaining.

But we will have no credibility in insisting on such agreements with EU nations if we reject this deal with Canada simply because it will lead to a modest increase in our asylum caseload. After all, in the case of a deal with EU countries, it would be *they*, on balance, who would have to take back more people, since the asylum-seeker flow across the Atlantic is mainly westbound. Only by first entering into an agreement that would result in an increase, however small, in our own caseload can we credibly approach the Europeans with a proposal that would shift back to them some of the asylum flow that they have been sending on to us.

A better-managed asylum system resulting from the incorporation of the safe third country principle would also yield security improvements. Six of the 48 foreign-born al Qaeda operatives who committed crimes in the United States over the past decade were applicants for asylum at some point, three of them at the time they took part in terrorism. One example is Abdel Hakim Tizegha, who took part in the 1999 Millennium Plot to blow up Los Angeles International Airport and/or Seattle's landmark Space Needle (See *The Open Door: How Militant Islamic Terrorists Entered and Remained in the United States, 1993–2001*, by Steven A. Camarota, Center for Immigration Studies Paper no. 21, <http://www.cis.org/articles/2002/Paper21/terrorism.html>.) Tizegha's asylum application was rejected in 1997 and the appeal was rejected in 1999, after which he moved to Canada and sought asylum there. He snuck back across the border in Washington State in 1999. Other terrorists who have exploited our asylum system were Sheikh Omar Abdel Rahman, spiritual inspiration for the 1993 plot to bomb New York landmarks; Ramzi Yousef, mastermind of the first World Trade Center attack; and Mir Aimal Kansi, who murdered two CIA employees in 1993.

In addition to the direct security benefits of a more tightly run asylum system applying the safe third country principle, the United States has an important security interest in Canada's applying the safe third country concept more broadly, especially to Europe. According to the Canada Security Intelligence Service, more than 50 terrorist groups have established themselves in Canada, due partly to the laxity of that country's asylum system. The Sikh or Tamil terrorists in Canada may be of little concern to us, but as James Bissett, former director of Canada's immigration service has pointed out, al Qaeda has also set up shop there and used the country as a jumping off point for attacks against the United States. (See "Canada's Asylum System: A Threat to American Security?," Center for Immigration Studies *Background*, May 2002, <http://www.cis.org/articles/2002/back402.html>.)

For instance, Ahmed Ressay, an asylum seeker from Algeria who had not shown up for his Canadian asylum hearing, was apprehended in December 1999 while attempting to enter the United States with a trunk load of explosives in his car as part of the Millennium Plot. Ressay was a member of a Montreal cell of the Algerian Armed Islamic Group that has strong ties to Osama bin Laden's al Qaeda network. Attorney General John Ashcroft has also identified two former Montreal residents on the list of "most wanted" al Qaeda militants.

Canada first embraced the safe third country concept in its 1988 immigration law, but the provision was never implemented. The main sticking point was whether to include the United States in the list of safe countries. Many activist groups at the time argued that the United States could not be considered a safe country for Central American illegal aliens seeking asylum, but for diplomatic reasons, it would have been impossible to present a list of safe countries that did not include the United States. The solution was to ignore the provision altogether; in the words of the immigration minister at the time, "I am prepared to proceed with no country on the safe third country list."

Canada's new immigration law, which went into effect in June of this year, also includes a safe third country provision: "A claim is ineligible to be referred to the Refugee Protection Division if . . . (e) the claimant came directly or indirectly to Canada from a country designated by the regulations, other than a country of their

nationality or their former habitual residence." If the past is any guide, once there is a safe third country agreement with the United States, there will be less political resistance within Canada to adding European nations to the list, should Canada's government think that advisable. This would make it more difficult for Islamist terrorist organizations to set up shop in Canada in preparation for attacks on the United States.

There are compelling reasons for rapid implementation of the U.S.-Canada Safe Third Country Agreement. It would, as the draft agreement itself points out, "strengthen the integrity" of the institution of asylum "and the public support on which it depends." It would serve as a vital first step toward improving management of our asylum system and making it more difficult for terrorists to exploit. And its implementation would contribute to Canada's own efforts to improve North American security.

Mr. GEKAS. We thank you, and finally Mr. Frelick.

**STATEMENT OF BILL FRELICK, DIRECTOR, REFUGEE
PROGRAM, AMNESTY INTERNATIONAL USA**

Mr. FRELICK. Thank you, Mr. Chairman. I appreciate the opportunity to testify today. I think that the first question that needs to be asked is what problem is this agreement addressing? Why are we signing this agreement in the first place? Is there a flood of asylum seekers coming in from Canada that it seeks to deter in some way? No. Clearly, the numbers don't add up. As the INS has given its own estimates, we are talking about maybe 200 people a year coming from Canada to the United States to seek asylum, and in the other direction last year it was about 15,000 people that went from the United States to Canada. And essentially what we are doing is telling these 15,000 people who want to apply for asylum in Canada that they can't do that, that they have to apply for asylum here. And we are saying that at a time when we have 60,000 asylum applicants per year. We have a backlog of over 250,000 asylum cases. We have a backlog of asylee adjustment of about 69,000 that will have to go into the year 2011 before those adjustments can take place, and we are talking about adding these numbers into an INS that is in transition.

The House has already passed a bill that would split the INS between the Department of Homeland Security and the Justice Department. If you think you have backlogs now, if you think you have bureaucratic disarray, if you think that the INS is broken, certainly this is not the time to be adding to its workload and to its backlogs.

So what is the problem? You mentioned in your opening statement the problem of asylum shopping, but we already heard Ms. Ryan from the State Department saying that that is not a widespread problem, and how widespread could it be, after all, among 200 people that are coming into this country per year? Coming in the other direction, if we are concerned about asylum shopping going from the United States to Canada, basically in the few cases, relatively few cases where this occurs, it is people who all along wanted to go to Canada, they were apprehended upon arrival at JFK or wherever in the United States and simply lodged an asylum claim as a way of avoiding deportation and being paroled from detention, and in that case they proceed in most cases directly up to Canada, which is where they wanted to apply for asylum in the first place.

Is this a security agreement? In fact, there is nothing in the preamble, there is nothing in the agreement itself that mentions anything about security, and in the agreement, per se, there is nothing that any of the Government witnesses have said to indicate that there is a security component to this agreement.

On the other hand, it appears that this agreement would make our border more insecure because it does only apply at ports of entry, at land ports of entry, and asylum seekers aren't stupid. Basically if you say it only applies at this one place, you are going to be turned back if you go here. They will try to evade those ports of entry.

Under the current system as it now exists we have nongovernmental service providers that help people, assist people. They take them for inspection. People are working in an orderly and in a legal fashion to apply for asylum in Canada. Under this agreement, you could say good-bye to the nonprofit service providers and say hello to smugglers and traffickers who will prey upon people and tell them I can get you past there, I can help you evade this border and I can get you into the Canadian interior.

So it is likely to cause in fact a more insecure border with greater criminality, in addition to creating a new bureaucracy, increased costs, new disputes between Canada and the United States that simply don't exist under the current system.

There are some exceptions to the agreement, but how are we going to adjudicate such exceptions? They are family exceptions. How do you determine if this person really is the family member that you claim it to be? Are we going to be doing blood tests? What kind of documentation do we require from the asylum seekers? For unaccompanied minors, how do we determine how old the child claims to be? Are we going to have people waiting in detention as the Government officials try to determine which country is responsible for examining the claim?

In fact, it appears that what we have going here, we have had several references by the Government officials here to the 30-point plan between the United States and Canada. This is but one of those 30 points. It appears that what is at work is that refugees are being made a bargaining chip. There is really nothing in this plan that is in the interest of the United States. There is nothing in this plan that is in the interest of refugees, per se. It is basically a bargaining chip for some other agreements, and when you look at the other 29 points, they seem to be areas of mutual agreement between the United States and Canada. So we are not even sure what we are getting in a trade.

There is a side agreement apparently that has to do with resettlement of a certain number of refugees from Guantanamo, but again we are in a horse trading mode here, and I think it is really an unseemly engagement of our Government to try to use refugees in this way.

I would like to respond very briefly, and I realize my time is up, and I refer you to my written testimony, on the questions of how this comports with international law. In fact, the executive committee conclusions of the UN High Commissioner for Refugees that interpret the Refugee Convention make it very clear that asylum should not be denied solely because the person could have applied

for asylum in another place. And the only exception that is mentioned to this where you may request a person to seek asylum in another country is where there is a particular connection or close link to that country.

Now, this agreement instead uses the term “country of last presence,” which can be very fleeting, momentary, simply the time it takes you to get to the airport up to the Canadian border, that is hardly a close connection. That is hardly a close link between the two countries. And so I think that we need to look very closely at the premise, at the foundation of this agreement, because it is a fundamentally flawed premise.

In a closed system between two countries, you could have a very simple, straightforward agreement where the asylum seeker would have the choice of which of the two countries he or she wanted to apply for asylum. You would give that person a full and fair refugee status determination in the country of their choice. If granted, the person would be ineligible to seek asylum in the other country, and under the Refugee Convention cessation clause they would have no need to. They would have been protected. And if they were denied, they would then have a presumption that they were ineligible to be granted asylum in the other country, and they would have a very high standard to overcome that presumption. Shall I change country conditions since the first adjudication showing that there was an unfair adjudication in the first place or some other exceptional or extenuating circumstances?

So I think it could be done much more simply. You wouldn’t have to get into trying to decide whether or not the exceptions that are set up by the Government are met or not, and I think that it is very important for Members of Congress to look at this agreement and to see whose interests are served here. It certainly doesn’t serve the interest of these 15,000 asylum seekers who are looking usually to connect with family, friends, people that speak the same language, places where they feel that they would have work authorization while their claims are pending, who would have the right to a court-appointed attorney, which they don’t have in this country, and to see what benefit there could possibly be to the United States of forcing these people who want to apply for asylum in Canada to apply for asylum here.

Thank you very much.

[The prepared statement of Mr. Frelick follows:]

PREPARED STATEMENT OF BILL FRELICK

Mr. Chairman and members of the Subcommittee, I am pleased and grateful to you for inviting my comments on the proposed Agreement for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries (better known as the “Safe Third Country Agreement”) between the United States and Canada. This agreement, if signed, will create hardships for asylum-seekers in North America, have serious implications for refugee protection worldwide, and likely cause a host of unnecessary problems here in the United States.

Despite promising language in the preamble of the Agreement declaring the U.S. and Canadian governments’ commitment to “uphold asylum as an indispensable instrument of the international protection of refugees,” the Agreement not only fails to achieve that goal, but actually thwarts the exercise of asylum. This failure is due to a fundamental flaw in its foundation: the notion of the “country of last presence” as the normal basis for assessing the responsible party for examining refugee claims. The Agreement has other flaws, as well, most of which result from an artificial and complicated system for assigning responsibility that will invariably result

in new bureaucracies, inefficiencies, unnecessary costs, and disputes between the U.S. and Canada regarding issues that have not previously been problematic.

IS THERE A PROBLEM?

The first question that ought to be asked is: Is there a problem?

Is there a flood of asylum-seekers pouring across the Canadian border? The Immigration and Naturalization Service (INS) itself estimates that no more than 200 persons per year apply for asylum in the United States via Canada.

The only problem that has even implicitly been identified is the notion sometimes referred to as “forum shopping”—the idea that a person seeking asylum ought not to be allowed to seek asylum in one country after having already been granted or denied asylum by another. This could be interpreted from the “safe third country” component of the Smart Border agreement signed by the Canadian Solicitor General and Minister of Citizenship and Immigration and the U.S. Attorney General on December 3, 2001, which says that the agreement is intended to “limit the access of asylum seekers, under appropriate circumstances, to the system of only one of the two countries.”

But, are refugee claimants “forum shopping”—applying for asylum in both the U.S. and Canada to manipulate the system? In the relatively few cases where applications are lodged in both countries, service providers are agreed that such asylum-seekers are not usually trying to get “two bites at the apple.” Often, the only recourse for an asylum seeker apprehended in the United States to avoid deportation is to file an asylum claim. After establishing a credible fear of persecution, the asylum-seeker may be eligible to be released on bond. After being released from detention, he or she proceeds to Canada, and is reflected as a “no show” or “absconder” in INS statistics. But such persons are not absconders in the sense that they are in hiding somewhere in the United States. By “absconding,” they are actually indicating that they are not interested in applying for asylum in both the United States and Canada, but want to apply for asylum only in Canada.

Aside from lack of direct flights from regions of origin (for example, there are almost no direct flights from Latin America to Canada that don’t first pass through the United States), there are many reasons why an asylum-seeker might want to apply for asylum in Canada rather than the United States (for reasons beyond the exceptions, such as family ties, enumerated in the Agreement). Often refugees seek existing communities of support that will help them integrate into a new society. French speaking refugees from Haiti or Rwanda, for example, might seek out such communities in Quebec. Also, claimants may find that one country’s asylum system is more receptive to them than the other. The U.S. falls short on a number of minimum standards: prohibiting asylum applicants from working for six months after applying for asylum (unlike Canada); not providing them legal assistance (which is usually available in Canada); barring asylum-seekers from filing asylum claims if they do not file within one year (not required in Canada); and detaining asylum-seekers in jails more readily than Canada. The U.S. also generally has a narrower interpretation of refugee law than Canada, for example, on gender-based persecution claims, raising the prospect that it might return a claimant to persecution that Canada would have protected.

Does “forum-shopping” occur in the other direction? No evidence has been presented to suggest that there is a problem of any significance involving forum shopping of asylum-seekers denied in Canada and then applying for asylum in the United States. More typical of the estimated 200 asylum seekers who enter the United States via Canada each year would be the recent case of the young Cubans who broke away from a group attending World Youth Day in Toronto and sought asylum in Buffalo, New York. All along they wanted to seek asylum in the United States, where they have ties to the Cuban-American community, but the only way they could escape Cuba was by getting Cuban government permission to visit Canada. Within the context of more than 60,000 asylum claims in the United States last year, the number coming from Canada is negligible, and the number of that minute fraction who might have previously applied for asylum in Canada is miniscule.

Does this Agreement address a problem of border security? Despite heightened security concerns generally at our borders, there is no reference whatsoever either within the preamble or text of the Agreement or in government spokespersons’ explanations of it, that this Agreement is intended in any way to address security concerns.

Is there a problem of smuggling asylum-seekers across the U.S.-Canadian border that this Agreement would prevent? No. Our northern border is remarkably orderly and relatively crime-free, in sharp contrast to the U.S.-Mexico border. Local non-

governmental service providers work in close cooperation with local immigration officials on both sides of the border to encourage and facilitate asylum seekers to present themselves at ports of entry for inspection. If anything, because this Agreement only applies at land ports of entry (Article 4.1), it would create incentives for evading ports of entry and could foment illegal smuggling and encourage traffickers who prey upon desperate refugees.

Put simply, from the U.S. perspective, there is no problem that this Agreement would remedy (and quite a few problems that it would likely cause).

The Canadian government has a more obvious reason for wanting to conclude this agreement. In contrast to the estimated 200 persons per year who apply for asylum in the United States after passing through Canada, an estimated 15,000 refugee claimants per year—about one-third of Canada’s annual asylum caseload—arrive via the United States.

U.S. policy makers should consider the question: What purpose is served by increasing the U.S. asylum caseload by as many as 15,000 applicants who do not wish to apply for asylum in the United States?

A SIMPLE (AND FAIR) SOLUTION

It would make more sense to allow third country nationals passing through the United States who wish to seek asylum in Canada to proceed and not to force them to apply for asylum in the country that is not their preferred destination. Here is the simple solution:

- (1) Let the asylum seeker who enters the United States or Canada choose where he or she prefers to lodge his or her refugee claim.
- (2) Give the applicant “a full and fair refugee status determination” (language from the preamble to the Agreement) in one of the two countries.
- (3) If the applicant’s claim were rejected in the country of first refugee status adjudication, the applicant would be presumptively ineligible to be granted asylum in the other country (though not ineligible to apply).
- (4) In order to overcome the presumption of ineligibility, the rejected applicant would have to present evidence to a refugee status adjudicator showing changed country conditions since the time of the first application or challenge the fairness of the adjudication in the first country, or show other extenuating circumstances that warrant consideration of the merits of the claim by the other country.
- (5) Persons granted asylum in one country would be ineligible to file asylum claims in the other (as under existing law in both the United States and Canada and consistent with Article 1.C.3 of the Refugee Convention) except in the highly unlikely event of fearing persecution in the United States or Canada.

Following this approach would render superfluous the list of exceptions to the “country of last presence” principle rendered in Article 4.2 of the Agreement. There would be no need to establish family relationships (and determining the legal status of anchor relatives), to determine ages of unaccompanied minors, or to compare visa policies in deciding the country responsible for examining the asylum claim.

The claimant himself or herself would determine where he or she had the more relevant family ties, community support, or other factors that would make one country the preferred destination. This is consistent with UNHCR Executive Committee Conclusion No. 15 (XXX), which says that “the intentions of the asylum seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account.”

A FUNDAMENTALLY FLAWED AGREEMENT

The concept of establishing responsibility for examining an asylum claim based on the “country of last presence” is not an established principle in international law. Excom Conclusion No. 15, which delineates how “to resolve the problem of identifying the country responsible for examining an asylum request” says that “asylum should not be refused solely on the ground that it could be sought in another State.” The only exception Excom 15 draws to this principle is where it appears that a person, before seeking asylum, “has a connexion or close link” with another state, “he may if it appears fair and reasonable be called upon first to request asylum from that state.” (Emphasis added.)

Nothing in the notion of “country of last presence” suggests a “close link.” In fact, the Agreement’s definition of the term “country of last presence” as the country “in which the refugee claimant was *physically present immediately prior* to making a

refugee status claim at a land border port of entry” suggests that the “link” need not be close at all, but can be quite superficial and thin, such as that involving an asylum seeker’s direct and immediate travel from an airport to the border.

In contrast to the Agreement, U.S. law abides by the concept that only persons “firmly resettled in another country prior to arriving in the United States” should be barred from consideration for asylum (INA § 208(b)(2)(A)(6)). Reliance on the “country of last presence” is inconsistent and incompatible with this principle in U.S. law. U.S. law, in fact, not only requires the “close link” called for in the international legal standard to refer the claimant to another state but goes further by setting the standard as high as “firmly resettled.”

While the meaning of “firmly resettled” is still developing in jurisprudence, it is clear that it requires substantially closer links than the mere “last presence” in this Agreement, and minimally requires not only tolerance, but a legal claim leading to permanent residence or undisturbed long-term residence suggesting *de facto* permanence.

In *Matter of Pula*, 19 I&N Dec. 467 (BIA), the Board of Immigration Appeals determined that asylum should be granted to an otherwise eligible national of Yugoslavia despite his having transited through the Netherlands and having spent six weeks in Belgium. He was not barred from consideration because “it does not appear that he was entitled to remain permanently in either country.”

In *Cheo v. INS*, 162 F. 3d 1227 (9th Cir. 1998), a case involving ethnic Chinese from Cambodia who had spent three years in Malaysia without incident, the U.S. Court of Appeals for the Ninth Circuit ruled that while the fact of their living in Malaysia for three years without problems did shift the burden of proof onto the claimants, “This does not mean that as soon as a person has come to rest at a country other than the country of danger, he cannot get asylum in the United States. Another country may have allowed only a temporary and not a permanent refuge.”

In *Andriasian v. INS*, 180 F. 3d (9th Cir. 1999), the Ninth Circuit considered the case of an ethnic Armenian from Azerbaijan who had spent three years in Armenia prior to seeking asylum in the United States. In remanding the case to the BIA for a grant of asylum, the Ninth Circuit made quite clear that “firmly resettled” requires considerably more than that he had “spent a considerable amount of time” in Armenia. The court pointed out that “at the time his family lived in Armenia, there were no procedures in place for refugees to apply for asylum or citizenship.”

In *Matter of Soleimani*, Dec. 3118 (BIA 1989), the Board went further, and granted asylum to an Iranian Jew who had spent 10 months in Israel where the applicant had the right under Israel’s Law of Return to Israeli citizenship. The BIA held that “a finding that an alien was firmly resettled in another country does not render him ineligible for asylum . . . [if] the alien can demonstrate countervailing equities that are compelling in nature.” The BIA listed factors to consider, including “family ties, *intent*, business or property connections, and other matters.” (Emphasis added.)

The U.S.-Canada Safe Third Country Agreement would contradict the considerable body of U.S. case law that has established the principle that mere physical presence in another country ought not to preclude the right to seek asylum in the United States. Unless an agreement with Canada was limited to barring asylum to persons who had been firmly resettled in the other country (i.e., granted asylum in Canada, leading to permanent residence), it would be inconsistent with the principles underlying U.S. asylum generally.

PARTICULAR PROBLEMS WITH THE AGREEMENT

Beyond the fundamentally flawed “country of last presence” foundation for the Agreement, I would also like to raise concerns regarding specific points in the Agreement.

- 1) If the parties choose to retain the “country of last presence” framework (which would make it unacceptable to Amnesty International), the agreement should include a provision excepting migrants who can demonstrate that they moved expeditiously to the second country after entering the first. (Such a provision was included in the aborted 1996 draft safe third country agreement between Canada and the United States.)
- 2) Given disparities in eligibility for refugee status in the two countries (by, for example, the one-year filing deadline in the United States), the agreement should include a provision saying that claimants who are eligible to apply for asylum in one country but not the other should have access to the country in which they are eligible to apply regardless of the country of last presence.

- 3) In its definition of “refugee status determination system,” the agreement should specify that for purposes of this agreement, a refugee status claimant returned from one country will have “access to a full and fair refugee status determination procedure” in the other country (language from the preamble). This would prevent a person being returned from Canada to the United States from being subjected to expedited removal procedures through which he or she might not have a status determination on the merits of the refugee claim.
- 4) The exceptions in Article 4.2, while welcome, are likely to be very difficult to determine. Are the family members the actual blood relations they are claimed to be? Are the anchor relatives in the proper legal status to qualify for the exception? Are unaccompanied children the ages they claim to be? Are they truly unaccompanied? The result will be refugees left in limbo and perhaps kept indefinitely in detention. We will see a burgeoning bureaucracy, added costs, and disputes between Canada and the U.S. that currently don’t exist.
- 5) Article 5 is strangely asymmetrical. It is not at all clear why different procedures should be in place depending on which of the two countries an asylum-seeker is transiting through after being removed from the other country. Since it is likely that persons being removed from one country and transiting through the second would have exhausted their claims for relief from removal in the first country, it makes sense to have the refugee claim examined in the transit country. Otherwise, if the procedure outlined in Article 5.a prevails, the applicant could conceivably remain in orbit indefinitely: the asylum-seeker rejected by Canada could claim asylum while in transit through the United States, then, pursuant to Article 5.a, be returned to Canada, where he would be denied again, and removed via the United States where he could again claim asylum, and repeat the process ad infinitum. On the other hand, it does not seem consistent with international obligations for *nonrefoulement* for the transit country simply to permit the onward travel of a person in transit without itself examining the claim (which would be the procedure under Article 5.c). For example, a person could have been denied asylum years prior to his or her removal from the United States (in many cases, the United States is not able to execute a removal order), during which time conditions could have changed in the home country. To deny such a person transiting through Canada the opportunity to apply for asylum there because a prior claim “has been rejected by the United States” could place Canada in violation of its obligations under the Refugee Convention. Here, again, the simpler solution would be both more fair and less likely to create additional problems: the transit country should hear the asylum claims of persons in transit; it should not push them back and forth or send them home without hearing their refugee claims.
- 6) A time limit should be placed on the determination of the country responsible for examining the asylum claim to prevent persons being stranded between the two countries.
- 7) The agreement should specify that the transfer of an asylum seeker from one party to the other should take due regard to the safety and dignity of the person. A time limit should be placed on the transfer so that the alien does not remain in limbo between the two countries even after a determination of the responsible country has been made.
- 8) The agreement should also include specific provisions referring to the international principle, per UNHCR Executive Committee Conclusion No. 44 (XXXVII) and Article 9 of the International Covenant on Civil and Political Rights, that asylum seekers should not normally be detained. It should require that asylum seekers returned to the country of last presence not be detained, unless the claimant is found to represent a danger. In cases where an applicant would be detained in the country of last presence if returned, but would not be detained in the other country, the applicant should not be returned to the country of last presence.
- 9) Article 7 should more strictly protect the confidentiality of asylum seeker information. It should delineate the specific information required and state that the information should be used exclusively for the purposes of this agreement and the information should be kept only for the time necessary for the purposes for which it was exchanged. Information should only be exchanged between authorities whose designation has been communicated to

and accepted by each party. The agreement should explicitly prohibit divulging information regarding the claimant or the claim to the claimant's country of origin or to any other entity that might disclose the information to a possible persecutor.

- 10) Article 7 should also require that the applicant should receive any information exchanged between the two parties concerning him or her and have the opportunity to have inaccurate information corrected or deleted before it is sent to the second party.
- 11) Article 8 on standard operating procedures should include in the notification to the country of last presence that the return is for the purposes set out in Article 4 and should require confirmation of receipt of notification prior to transfer.
- 12) Article 8.3 on review of the agreement is inadequate. A new article should be added on monitoring of the agreement. Representatives of UNHCR, Congressional or Parliamentary bodies, and NGOs should be guaranteed access to monitor on an ongoing basis all phases of the implementation of the agreement, including access to refugee status claimants undergoing the procedure (with their consent).
- 13) Article 9 should be deleted. It is not germane to the agreement, and suggests "side deals" that detract from the purposes set forth in the preamble. Certainly, both countries should be encouraged to assist each other in resettlement, but the expression of such a sentiment does not belong in this agreement.

The old adage says, "If it ain't broke, don't fix it." While much about the Immigration and Naturalization Service is broken, this particular "fix" is likely to put the INS in a deeper hole. It will create new burdens on an overburdened system that may soon be undergoing the additional disruption of moving in whole or in part from the U.S. Department of Justice to a new Department of Homeland Security. It also is more likely to create a less secure border. It is likely to produce a new human trafficking industry on our northern border that does not now exist.

Canadian and US officials should look long and hard at the European experience with so-called "safe third country" agreements. Arguably, they have resulted in more people in orbit, chain deportations, and "burden shifting" rather than burden sharing. These agreements have not been the panacea for controlling irregular migration; in fact, they have essentially invited migrants to destroy their documents so to prevent tracking transit countries. When they have succeeded in returning asylum seekers to so-called safe third countries, the burden has often eventually shifted to countries in the regions of conflict that often lack the resources and legal mechanisms to provide adequate refugee protection. This, of course, is the antithesis of international burden sharing.

Because this Agreement so clearly has no benefit for the United States, it raises the question, why? A cynical interpretation would hold that it is the first step. Create a precedent with Canada, a country known for its generosity and legal traditions. Once the precedent is set, enter into agreements with other countries, closer to zones of conflict, with fewer resources to accommodate refugees, and less developed traditions of legal due process. The pay-off would be the creation of buffer states, such as Mexico, to which asylum-seekers would be returned. The idea is not so far-fetched. The United States has made its intentions known by diverting Chinese boat people seeking asylum in the United States to Mexico, which, in turn, has summarily returned them to China. Signing this agreement, however, would set the stage for formalizing and extending such practices beyond pushing boats away from our shores; it takes the United States a step closer toward blocking all asylum-seekers who do not arrive directly from the country of persecution from access to our asylum system. Look at a map. With interdiction of boat arrivals—including Cubans and Haitians—in place, and our land borders covered by "safe third country" agreements, the United States would essentially be sealed off from most asylum-seekers, precious few of whom would be able to flee directly from their homelands to the United States. We would then have a pristine asylum procedure on paper, but wash our hands of the need to examine real claimants on the merits. The dirty work of returning refugees to persecution would be left to others. But that would be cynical.

Mr. GEKAS. We thank the gentleman. Let the record indicate that the lady from Texas, Representative Sheila Jackson Lee, is present. We will accord her the right of rendering an opening statement if she wishes to do so or to submit it to the record. And following that, I will engage in the Chair's 5-minute questions.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman. Let me—first of all I am going to—I am not sure of the procedures here. I want to state on the record an objection that I was intending to cast, but what I am going to do is to indicate my concern that no Members are here, that you might be aware that Members respectively are in conference meetings dealing with important end of the session matters, and therefore no Members are here.

This hearing is an important hearing for the witnesses, and I have some disagreement with the proposed actions of the Administration. And I believe the hearing is so important that it would be worthy of us holding another hearing and it would be worthy of us having sufficient input to balance the protection of our borders and the hiding of terrorism with the excellent analysis that Mr. Frelick has given us on the backlog. I will simply say that I have concern that people who are constantly getting less than second class status, third, fourth and fifth, who are fleeing because of persecution, the backlog of any asylees would impact negatively on their efforts, which are always seemingly rejected by this Nation.

So what I would ask to do is to have my concerns expressed on the record that there are no Members here. This is a vitally important issue, and I will submit my statement into the record and as well will pose my questions subsequently individually to these particular witnesses.

Mr. Chairman, thank you. I yield back.

Mr. GEKAS. We thank the lady, and we note again that there is present a quorum for the purposes of establishing this hearing.

The first round questioning will be from the Chair.

Mr. Frelick, are you saying that when someone reaches the United States, that right then and there in New York or in Newark or someplace, that that individual can declare that he or she wants to go to Canada to establish asylum?

Mr. FRELICK. No. What happens currently is a person would be apprehended at JFK Airport, for example. They would then apply for asylum in the United States. All right? If they establish a credible fear, they then become eligible for parole. It doesn't happen in all cases, but if the person is paroled from detention—and oftentimes, again—the intention of the person is they had wanted to apply for asylum in Canada in the first place. They may be a Haitian, for example, who speaks French and wants to go to Quebec. It may be a Tamil from Sri Lanka, and there is a large Tamil community in Toronto, but they may not have been able to get directly to Canada. For example, from Latin America there are virtually no flights that go directly from any Latin American country to Canada. They all pass through the United States.

So this will be a person who would have been apprehended here, and in order to avoid deportation to their home country, they are essentially forced to apply for asylum here, even though that is not the place where they wanted to apply for asylum. Then if they are paroled from detention, they then proceed on to Canada and they have been allowed—heretofore they have been allowed to apply for asylum in Canada.

Ironically, they appear as absconders, they appear as no-shows in INS statistics, but really what that shows is they are really not absconding, hiding out here in the United States. They actually in-

tended all along to go to Canada, and they didn't want to get two bites at the apple. They really only wanted to apply in Canada. And again, I think this relates to a relatively few number of people. It is not a major problem to begin with.

Mr. GEKAS. But the exceptions that all of you agreed have been inserted in this agreement, wouldn't they accommodate the very situation you just mentioned, someone from Haiti who has a lingual connection—

Mr. FRELICK. No. There is no exception for community ties. There is no exception whatsoever for that. The only exception may be a family tie, but think of this and think of it in terms of the overseas resettlement program now, the difficulty of establishing that that in fact is the relative that you claim it to be. We have got nieces and nephews as part of this agreement, which I think is great, but how are you going to prove that that is your niece, your nephew, your aunt, your uncle?

Mr. GEKAS. Then the purpose of this agreement is fulfilled under that—

Mr. FRELICK. What I think will happen—

Mr. GEKAS. Because he goes to Canada, there is no connection, so the individual comes back to the U.S.?

Mr. FRELICK. In implementation, people are going to be left in limbo, perhaps in detention for long periods of time as the two governments argue about which country ought to be examining this claim. There is no time limit for that determination. It could be a very, very long time indeed, and it would simply—what I am suggesting—be far easier to allow the person to apply for asylum, have a full and fair hearing in one of the two countries. You either grant or deny it on the merits and then don't allow the person to apply in the other country. That simple.

That is simple. You don't have to get involved in all of these really arcane and convoluted exceptions, and the determination of whether or not a person qualifies for an exception.

Mr. GEKAS. Let me ask a generic question that any one of you can answer, or you can leave the room if you don't want to answer it. That is, what does the High Commissioner have to do with this agreement between the United States and Canada?

Why does the High Commissioner ever enter into the picture at this stage, or does he or she?

Ms. RYAN. I would like to take that question, please. The primary reason that we consulted with UNHCR, and we did that after we consulted with your offices and members of our public, was that UNHCR has a unique role under the Refugee Convention and the Protocol, in that that they advise the U.S. Government and any party to the Refugee Convention, in a supervisory capacity, about our obligations under it.

So they give us advice about whether we are or are not meeting our international law obligations under the treaty.

Mr. GEKAS. Does he offer that? We see a problem, do we then ask him to sort of give us advice?

Ms. RYAN. We continually talk and invite UNHCR in that capacity here in Washington, and in Geneva. But, because we thought this safe third-country agreement was so important, we actually

flew a number of Government officials to Geneva to bring it up with the head of protection in Geneva in July.

Mr. GEKAS. Well, succinctly does the High Commissioner have any veto power or ability to criticize this agreement?

Ms. RYAN. They don't have any veto power other than United States law and practice.

Mr. GEKAS. Thank you for saying that.

Ms. RYAN. But they do give us their best advice, and we took it. And their advice was that these type of agreements, they do not have any opposition to these agreements in principle. They had a lot of questions about how it would operate. We invited them, if they chose to, to cooperate with us and come to the border and watch how it would go.

But, you know, if we changed our law in such a way that they disagreed, we certainly have that right to do so.

Mr. GEKAS. Mr. Langlois, several times, at least twice, you said on the proposed agreement. I have used that conditional language as well, because it is just initialed. But do you think it is a fait accompli from what you have learned or know, or have memorandums to demonstrate it?

Mr. LANGLOIS. I don't know if it is a fait accompli. My understanding is that it still has to be signed by the Secretary of State, and then we will go through the normal rulemaking process, in that we will have a proposed regulation, we will have a comment period associated with that regulation, a minimum of 30 days.

We will analyze the comments. We will make adjustments based on those comments, and then we will have an implementation.

Mr. GEKAS. When we talk about the fact that this is a land-to-land transaction, it doesn't cover all of the others, what about the Lake Erie and Lake Michigan and Lake Huron—I can I name all five, I think.

Is that an exception within the exception? How do we treat them? Is that seaport land, or what is it?

Mr. LANGLOIS. Those would not be considered land ports and would not be covered by this agreement.

Mr. GEKAS. The staff has prepared one excellent question, I think. Explain how this safe third country agreement would prevent terrorists from coming to the U.S. From Canada? We will take an hour for your explanation. What is the theory?

Ms. RYAN. We don't, and we have never tied this particular agreement to the counterterrorism measures included in the 30-point action plan. This agreement is designed to make a regular process of asylum seekers.

Right now at the land borders, and at the sea borders and at the airports, we have agreement and work cooperatively with the Canadian government if they identify a terrorist and they are sending them back to us.

So we have a procedure that would operate to—if they have identified someone as a terrorist and they are sending him back, it works right now. We view this not as a counterterrorism measure, but as a separate part of the 30-point action plan, and not tied directly to counterterrorism.

Mr. GEKAS. But, you say not directly. But most of you agree that real action toward this agreement was taken after September the

11th, meaning by implication, that this could be another step taken to prevent unsafe border crossing.

Ms. RYAN. Negotiation of this proposal was undertaken after September 11th, and at the request of the Government of Canada as part of the 30-point action plan. We think it should be viewed in that context.

But it does not directly affect U.S. security. It is important to the Government of Canada, and it is important for us getting the other objectives of the border plan, and that is how Tom Ridge and Attorney General Ashcroft envisioned it working.

So we view this as an important agreement in the context of the overall 30 points that Canada wants and that we are willing to agree to as a trade-off for the other important counterterrorism measures.

Mr. KRIKORIAN. I see this as having a small direct impact on counterterrorism and a larger indirect impact. The small direct impact would be that bad guys trying to get into Canada in order to take advantage of its more lenient asylum rules and its much other extensive social benefits for asylum applicants, in order to operate there and use it as sort of a launching pad for attacks in United States, as we have seen in the past, they wouldn't be able to do it.

In other words, we would get them before they were able to get to Canada as a kind of haven, if you will. That is, in my opinion, a relatively modest, but possibly significant benefit. The longer term indirect benefit is that it is a building block for applying the safe third-country provision, both by the United States applying it and Canada applying it, to Western Europe. And a significant number of Islamic terrorists have come from Western Europe, are very active in Western Europe, and come to the United States and used asylum as a tactic to avoid deportation back to either their home countries or presumably to the safe country they passed through before they got here.

In other words, its value is longer term as a precedent.

Mr. GEKAS. Using your example, you are saying that it is safer for us to harbor a terrorist in the first instance than to permit them to go to Canada?

Mr. KRIKORIAN. If we lock them up in detention, yes. It certainly would be, because we would know who they were, where they were, and ideally, and this is not exactly in the purview of this, but ideally we would detain every single asylum applicant. But we don't have the capacity to do that.

But ideally, all applicants for asylum should be detained until their cases are decided. So, sure, I would rather have a potential terrorist looked up in New Jersey than working in Manitoba.

Mr. GEKAS. Yet it seems to me to me, subliminally, if not overtly, there is an antiterrorism flavor to this, which can be implied from the fact that there is no other such agreement pending with any other country.

Doesn't that indicate or—

Mr. KRIKORIAN. You would have to ask the Government witnesses about that. I don't know.

Mr. GEKAS. Can someone give an opinion of that? Why isn't this a prospect for some other country?

Ms. RYAN. The United States or the Executive Branch has no intention now of entering into any arrangement with another country other than Canada. We are doing this agreement, if we go through with it, at the request of Canada, because they believe it is important for reducing their asylum backlog. We don't view this as a counterterrorism measure.

But, in order to get the important counterterrorism pieces of the 30-point action plan, this was a trade-off in order to get that. So we do not view this as a counterterrorism measure in and of itself.

Mr. GEKAS. No more staff questions.

I made a note during Mr. Krikorian's testimony, and I have a question mark after it, but I don't remember why I made the question, in which I questioned modest increase that Mr. Krikorian used.

Mr. KRIKORIAN. Well, it is true that 15,000, or last year 15,000 people applied for asylum passing through the United States at Canadian land ports, but it is open to debate whether that would mean automatically next year 15,000 more people would apply for asylum in the United States.

It is at least conceivable this would have a deterrent effect for those who would understand that they don't have an asylum claim that would get anywhere in the United States, or don't want to be locked up in detention, and would apply for asylum elsewhere, in Western Europe or elsewhere, rather than attempt to use the United States, transit the U.S. to get to Canada.

In other words, my point is not that there won't be an increase, there probably will be an increase in our asylum caseload. But, it is not obvious that it is going to be a one-to-one increase. In other words, it is the same size as the number of people applying at land borders now.

Mr. GEKAS. Well, I thank the witnesses. I do believe we have more inquiry to conduct in this issue. I personally will direct the staff to put me in touch with Secretary Powell just to discuss the matter a little more deeply.

In the meantime, we express our gratitude for your testimony and for your responding to your requests, and we bid you adieu with gratitude. This hearing is adjourned.

[Whereupon, at 3:55 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF TEXAS

Mr. Chairman, thank you for calling this hearing on an issue that we as Americans should hold dear to our ideals—asylum. Today I look forward to hearing from the witnesses on the U.S.-Canada Safe Third Country agreement, which is currently under consideration. I know that there are concerns from advocates on both sides of the issue, yet I hope that we can strike a balance that recognizes the legitimate needs of those persecuted in their home countries and the prevention of Asylum shopping for the best country to flee toward.

As currently written, I am concerned about some of the agreements provisions. As written, the agreement would prevent third country nationals from crossing through either the United States or Canada in order to apply for asylum in the other country. I have heard from the advocacy community that this will impact about 15,000 third-country nationals per year that pass through the United States before seeking asylum in Canada. It is my understanding that only about 200 asylum seekers arrive here from Canada. As many of you know, I have been a strong advocate for Haitian Asylum seekers. In light of our past record with Haitian Asylees, I would be particularly interested in hearing from the witnesses how this agreement may complicate of Haitian Asylum seekers who already face a difficult path at American ports of entry.

The opponents of this agreement point out that at a minimum, this agreement will increase dramatically the U.S. asylum caseload. Last year, the U.S. received more than 60,000 new applications, and the backload is estimated at upwards of 250,000. Currently, 96,600 Asylees adjustment applications are pending; a person granted asylum today is not likely to be processed for adjustment of status until the year 2011 at the earliest.

It is my understanding that now, third country nationals in the United States who want to apply for asylum in Canada are encouraged to appear at our ports of entry. I am concerned that the new agreement fails to take note of the fact that the current system allows asylum-seekers themselves to decide where they have the closest community ties, and in which country they feel most supported while their asylum claims are pending. This is very important. I understand that the agreement makes exceptions and I would love to hear a strong explanation of how this agreement addresses those issues.

I am also concerned that because the agreement applies exclusively at land ports of entry, that the agreement, while well intentioned, may encourage asylum-seekers to evade ports of entry and cross our borders illegally. Opponents of this measure share this concern and point out that the change in policy may produce a human smuggling industry on our northern border, and new social service and security burdens for northern states, especially New York and Michigan.

I understand that we must take account of our national interest in light of the new security threats facing our nation. However, we must not close our borders or bounce asylum seekers from one country to the other. Taken to the extreme, Third Country agreements between ours and other countries can pin asylum seekers to certain “asylum ghetto nations” or, worse—the very nations that they are fleeing.

We must not forget, that we are a nation of refugees and asylum seekers. The pilgrims who landed this country fled religious and political persecution. Therefore, it is part of our national identity to be a haven for those fleeing persecution. We tend to forget that the Pilgrims did not come to this country under strict registration guidelines. The Pilgrims simply came to this country. As such, we should make every effort to reasonably facilitate the settling of the world’s asylum seekers.

While I have concerns about this agreement I am willing to work with parties on both sides to maintain and develop a strong asylum record in the United States. Thank You Mr. Chairman.

SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, & CLAIMS
Hearing on "The U.S. and Canada Safe Third Country Agreement"

Wednesday, October 16, 2002

Questions Submitted for Written Response from Witnesses
by Congresswoman Zoe Lofgren

Questions for Kelly Ryan, Deputy Assistant Secretary, Bureau of Population, Refugees, and Migration, Department of State:

- From a U.S. perspective, is there a problem with the current asylum system at the U.S.-Canadian border? What is the problem? How will this agreement solve that problem?
- What positive benefit will be realized for the United States through this agreement, especially in light of the large increase of asylum cases the U.S. will receive under the Agreement (see written testimony of Bill Frelick stating that the U.S. will receive an additional 15,000 asylum cases)?
- Does this agreement use refugees as bargaining chips for other deals with Canada, such as the other 29 points of the 30-point Ridge/Manley Smart Border Action Plan that includes the Safe Third Country Agreement?
- Why does this agreement use "the country of last presence" as the general basis for deciding responsibility of an asylum claim? Does the "country of last presence" have a basis in international law as a ground for denying asylum? How does that compare with current U.S. law, which only uses the term "firmly resettled" in another country as a basis for denying an asylum claim? Would it make more sense to establish "the country of first adjudication" as a basis for such an agreement? This would ensure that an asylum seeker would not "forum shop," but would allow the applicant to determine which country was better suited to hear his or her asylum claim and therefore avoid the cumbersome and expensive process of determining whether or not the claimants qualify for exceptions under the agreement.

Questions for Joe Langlois, Office of Asylum, Immigration & Naturalization Service:

- At a public meeting on August 1st, you said that thousands of asylum-seekers would evade inspection at land ports of entry, where the agreement exclusively applies, and apply instead at the Canadian interior. Wouldn't that likely result in the proliferation of smugglers and criminality on our northern border and have a negative impact on border security?

- Since the U.S., but not Canada, bars individuals from applying for asylum if they failed to apply for asylum within the first year of arrival, shouldn't there be an exception that would allow persons who would be barred from applying for asylum in one country, but eligible in the other, to apply in the country where they would be eligible?
- Will this agreement result in more detention of asylum-seekers in the United States? How will asylum-seekers be housed while the two governments decide whether they qualify for exceptions, such as family ties? Is there a time limit on this process?
- Bill Frelick of Amnesty International stated in written testimony that 15,000 individuals travel through the U.S. to make their claim in Canada and only 200 travel from Canada to apply in the U.S. Is this true? If so, how does the INS plan on handling additional asylum applications considering current backlogs and enhanced security check requirements?
- What appeal process is available under the agreement for eligibility determinations?

Questions for Bill Frelick, Director, Refugee Program, Amnesty International USA:

- What impact will this agreement have on the U.S.-Canadian border? What impact might it have on northern border states and their northern communities?
- Why do you say that it would make more sense to base an agreement on the principle of the country of first adjudication rather than the country of last presence?
- What international principles or standards would be compromised through implementation of this agreement?

Questions for Mark Krikorian, Executive Director, Center for Immigration Studies:

- What do you think of the final paragraph of Bill Frelick's written testimony where he suggests that this agreement might be a first step towards setting a precedent that would enable the U.S. to forge additional agreements with other countries, such as Mexico?
- Can you assess the success or failure of the Dublin Convention in Europe? Has it been successful in creating a multi-lateral system for determining the country responsible for examining asylum claims? Why or why not? What lessons can be drawn in North America from the European experience under the Dublin Convention system?

PREPARED STATEMENT OF LAWYERS COMMITTEE FOR HUMAN RIGHTS

INTRODUCTION

The Lawyers Committee is a non-profit, non-governmental organization. Since 1978, the Lawyers Committee has worked to protect and promote fundamental human rights, holding all governments—including the United States—accountable to upholding the standards set forth in the Universal Declaration on Human Rights and other international human rights instruments.

For more than twenty years, the Lawyers Committee for Human Rights has worked to ensure protection of the rights of refugees, including the right to seek and enjoy asylum. The Lawyers Committee grounds its work on refugee protection on the international standards of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol and other international human rights instruments, and we advocate adherence to these standards in U.S. law and policy.

The Lawyers Committee operates one of the largest and most successful *pro bono* asylum representation programs in the country. With the assistance of over 900 volunteer attorneys, the Lawyers Committee provides legal representation, without charge, to hundreds of refugees each year. Our *pro bono* lawyers represent asylum seekers before the INS Asylum Office, before the immigration courts, before the Board of Immigration Appeals and before the federal courts. Our extensive experience dealing directly with refugees seeking protection in the United States is the foundation of our advocacy work and informs this testimony.

OVERVIEW OF OBJECTIONS TO THE PROPOSED AGREEMENT

The Lawyers Committee for Human Rights opposes the proposed Safe Third Country Agreement between the United States and Canada (the “Proposed Agreement”). The Proposed Agreement is unnecessary, inefficient, and inhumane. The Proposed Agreement would bar asylum seekers from seeking refuge in the United States if they had transited through Canada, and it would bar asylum seekers from seeking refuge in Canada if they had transited through the United States. Thousands of asylum seekers would, in effect, be forced to apply for asylum in the United States rather than in Canada. The Proposed Agreement provides for some exceptions to these bars, but these are unduly limited.

The Proposed Agreement fails to take into account the intentions of refugees who are fleeing from persecution, forcing them to seek asylum in the country they happen to have transited through rather than the country in which they may have family, friends, or other significant contacts who can house and support them while they struggle to put their lives back together again. The Canadian Council for Refugees (CCR) reported that approximately 35% of asylum claims made in Canada last year (14,807 claims) were made by claimants who arrived in Canada after having transited through the United States.

We urge that the effort to enter into a “Safe Third Country” agreement with Canada be abandoned. The Proposed Agreement will result in needless hardship for refugees and their families, and serves no United States security or other purpose. The effort will lead to increased inefficiency and bureaucracy. And, as the Canadian Council for Refugees has pointed out, the Proposed Agreement may in fact make the U.S.-Canada border less secure. Yet the interests of refugees are being sacrificed—apparently as some kind of bargaining chip in the larger U.S.-Canada border discussions. As a result, Canada will be able to shift a significant proportion of its asylum case load to the United States, and refugees will be forced to seek asylum in the United States, even when the only friends or family they can turn to may live in Canada.

The United States has failed to offer any convincing explanation of why the Proposed Agreement is in the best interest of the United States. Concerns that some refugees may seek to maximize their chances of receiving protection by applying in both countries could be addressed by a narrower agreement that simply prohibits individuals from pursuing asylum in both countries.¹ In addition, while the U.S. has not argued that security concerns necessitate that the U.S. enter into an agreement that requires a significant number of individuals to seek asylum in the U.S. rather

¹United States government officials have indicated that one reason they are pursuing this agreement is a concern about duplicate asylum claims. But there appears to be no data demonstrating that there is a significant basis for this concern. The government's failure to provide statistical information demonstrating the need for this agreement was also raised in 1996, during discussions relating to a prior safe third country proposal. See Bill Frelick, “Who’s on First? The Canada-U.S. Memorandum of Agreement on Asylum,” 73 Interpreter Releases at 219 (Feb. 26, 1996). [hereinafter Frelick]

than Canada, concerns regarding security can be met by provisions allowing for the sharing of information (with appropriate safeguards) between the two countries.

At a more fundamental level, the Proposed Agreement is yet another signal reflecting the U.S. government's abandonment of its position as a leader in the protection of refugees. The drastic decline in refugee admissions, the Department of Justice's changes to the Board of Immigration Appeals which are depriving asylum seekers of meaningful appellate review,² and this Proposed Agreement are all part of the same disturbing shift. Once again, it is refugees and their families who will feel the impact of this most recent proposed change.

THE PROPOSED AGREEMENT WILL CREATE NEW INEFFICIENCIES AND WILL RESULT IN DEPRIVATION OF PROTECTION FOR DESERVING REFUGEES

The implementation and maintenance of the Proposed Agreement would place a substantial additional burden on the U.S. asylum adjudication system and would create significant inefficiencies and waste in both the U.S. and Canadian systems. Not only would the Proposed Agreement significantly increase the U.S. asylum adjudication caseload (according to Canada's figures, more than 14,000 asylum seekers transited through the United States before seeking asylum in Canada in 2001), but the Proposed Agreement also would require the creation of a special process and procedures to assess applicability of the agreement and its exceptions in individual cases.

The "safe third country" arrangements that proliferate in European asylum systems are notorious for their failure to protect refugees by bouncing them back through their trek in search of protection, a phenomenon known as "refugees-in-orbit" or "refugee soccer." In some cases, asylum seekers have been rejected by one state on "safe third country" grounds, only to find themselves rejected again by the state they are sent back to. These procedures waste scarce adjudication resources, and safe third country arrangements in the European Union have left more asylum seekers without procedures for longer periods of time and have led to considerable delays in processing.³

The costs of designing new procedures, regulations and systems to create "safe-third country" arrangements in both the United States and Canadian asylum systems, and the additional cost of implementing these procedures in individual cases, will not be insignificant. In addition, as detailed below, a system which undermines family reunification will also create additional burdens as family unity enhances refugee self-sufficiency and lowers social and economic costs to states.⁴

The Proposed Agreement is unnecessary in order to ensure that asylum seekers do not pursue asylum claims in both countries. A much narrower agreement could prevent duplication. Moreover, U.S. law and regulations already prohibit asylum seekers who pass through Canada and receive a "permanent offer of resettlement" in Canada from receiving asylum in the U.S. (See INA 208(b)(2)(vi) & 8 C.F.R. 208.15). Similarly, under Canadian law, a claim is ineligible if "the claimant has been recognized as a Convention refugee by a country other than Canada and can be sent or returned to that country." (See the *Immigration and Refugee Protection Act*, s. 101(1)(d)). To the extent that U.S. and Canadian officials are concerned about their ability to enforce such provisions, an enhanced ability to share information, could, with appropriate confidentiality safeguards, allow each government to verify if an individual had in fact received such status in the other country.

Not only will the agreement lead to increased inefficiencies, burdens, and delays, but it may also undermine orderly and secure procedures at the border. As the Canadian Council for Refugees has recently pointed out:

The agreement is likely to make the border "less" not more secure. The proposed agreement will destroy the current orderly process at the border and likely create disorder. Similar agreements in Europe have led to new problems of smuggling. Currently, those wishing to claim refugee status present themselves in an orderly fashion at the border for examination by Canadian officials. When

² 67 Fed. Reg. 7309-18, AG Order No. 2559-2002, Board of Immigration Appeals: Procedural Reforms to Improve Case Management, February 19, 2002; Comments of the Lawyers Committee for Human Rights on the Proposed Rule relating to the Board of Immigration Appeals, March 20, 2002; Emily Heller, "Clash Over Plan for Immigrant Appeals," *The National Law Journal*, July 15, 2002.

³ Joanne van Selm, Access to Procedures: "Safe Third Countries," "Safe Countries of Origin" and "Time Limit," 2001, commissioned by UNHCR and the Carnegie Endowment for International Peace in connection with the UNHCR Global Consultations on International Protection.

⁴ Kate Jastram & Kathleen Newland, "Family Unity and Refugee Protection," commissioned by UNHCR in connection with the UNHCR Global Consultations (2001)(available at www.UNHCR.ch).

that door is closed, desperate refugees will try to get across illegally. Smugglers will exploit the situation. The problems of exploitation, accidental deaths and border enforcement already seen along the US-Mexico border will find their parallel to the north.⁵

ASYLUM SHOULD NOT BE REFUSED SOLELY ON THE GROUND THAT IT COULD BE SOUGHT FROM ANOTHER STATE

On December 3, 2001, the United States and Canada issued a "Joint Statement on Cooperation on Border Security and Regional Migration Issues." In this statement, the two countries agreed "to begin discussions on a safe third-country exception to the right to apply for asylum." According to the December 2001 agreement, the safe third country arrangement "would limit the access of asylum seekers, under appropriate circumstances, to the system of only one of the two countries."

After this announcement, representatives of U.S. refugee advocacy and assistance organizations met with representatives of the Immigration and Naturalization Service and the Department of State and urged that any such agreement be based on the refugee's choice rather than the arbitrary concept of country of "first arrival"—or as phrased in the Proposed Agreement, "country of last presence." The Lawyers Committee believes that any limitations on the right to seek asylum in a particular country place great emphasis on the choice of the refugee. Not only is this more humane, but it is consistent with internationally agreed upon principles of refugee protection, and in particular the conclusions of the Executive Committee of the United Nations High Commissioner of Refugees. Conclusion 15 specifically states that "asylum should not be refused solely on the ground that it could be sought from another state." Indeed, there is no provision of international law that requires a refugee to apply for asylum in her first country of arrival. Conclusion 15 also confirms that "the intentions of the asylum seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account."⁶

An agreement that takes into account the intentions of the refugee is also the most sensible choice. Arrangements based merely on the fact that a refugee happened to transit through one country would, as noted above, leave refugees vulnerable to the exploitation of smugglers and could lead to the very insecurity both the United States and Canada have declared they wish to avoid.

THE PROPOSED AGREEMENT WILL HAVE A NEGATIVE IMPACT ON REFUGEE FAMILIES

When refugees flee their home countries, there are often few people to whom they can turn. Their immediate families may be missing or killed. Concerned about the ability of children to travel, they may leave their children behind with someone they trust or in a refugee camp (which may not be safe) while they struggle to find a secure safe haven. Refugees often turn to the few contacts that they may have, seeking refuge in those countries where they may have relatives or family friends who can help provide urgently needed support while they struggle to reclaim their lives and their safety and that of their children.

Often it is not physically possible to reach these destination countries without transiting through other countries. To bar an asylum seeker from seeking asylum in the country where they have family or other support or ties, would be unfair both to refugees and to their families. If asylum seekers are forced to seek asylum in a country where they have no ties, many will have no place to live and insufficient resources to support themselves, prolonging the time it will take for them to re-establish themselves and their surviving family.

We urge that any safe third country arrangement include an exception for asylum seekers who have simply transited through one country on their way to the other. While the draft safe third country arrangement that was under discussion in the mid-1990s included a rigid definition of transit, a less rigid approach to "transit" is more realistic. As Bill Frelick explained in his 1996 article on the prior safe third country proposal:

Setting fixed time limits neglects the many obstacles to travel that refugees encounter particularly when they are poor, female, and/or traveling with children. Journeys are slowed by a variety of circumstances, including immigration detention, health problems and lack of funds.⁷

⁵ Canadian Council for Refugees, "Talking points: Announcement re. U.S.-Canada "Safe Third Country" Agreement, June 28, 2002.

⁶ UNHCR ExCom Conclusion No. 15 (XXX/1979), available at www.unhcr.ch. For a comprehensive discussion of relevant international standards see Frelick *supra* note 1 at 217.

⁷ Frelick *supra* note 1 at 223.

In our work with refugees, the Lawyers Committee has frequently encountered asylum seekers who were planning to seek refuge in Canada where they have family or friends, but were left with no other choice than to apply for asylum in the United States after they were detained while attempting to transit to a flight bound for Canada. For these asylum seekers, their period of transit in the United States was effectively extended by the government's decision to detain them, another reason why a brief and rigid transit exception is not appropriate. For many asylum seekers, often it is not a brother or sister that they have in Canada. Refugee families are typically fragmented and torn-apart. More often, it is a less immediate relative, such as a cousin, or a long-time family friend or colleagues from the refugee's political party or religious group. This kind of support system is tremendously important for refugees we have worked with—not only for their physical survival (food and shelter) but also for their ability to re-establish themselves and to ultimately reunite their surviving families.

The importance of reuniting refugee families, and the right of refugees to family unity, were the subject of careful examination last year during the course of the UNHCR Global Consultations. In the context of those discussions, refugee law experts detailed the many ways in which family unity enhances refugee self-sufficiency and lowers social and economic costs for states.⁸

While noting that the concept of family includes nuclear family at a minimum, a groups of experts convened by UNHCR also confirmed that “[t]he question of the existence or non-existence of a family is essentially a question of fact, which must be determined on a case-by-case basis, requiring a flexible approach which takes account of cultural variations, and economic and emotional dependency factors.”⁹ UNHCR, in a background note on the issue of family reunification, explained why a broad approach to family is critical in the refugee context:

Given the disruptive and traumatic factors of the refugee experience, the impact of persecution and the stress factors associated with flight to safety, refugee families are often reconstructed out of the remnants of various households, who depend on each other for mutual support and survival. These families may not fit neatly into preconceived notions of a nuclear family (husband, wife and minor children). In some cases the difference in the composition and definition of the family is determined by cultural factors, in others it is a result of the refugee experience. A broad definition of a family unit—what may be termed an extended family—is necessary to accommodate the peculiarities in any given refugee situation, and helps minimize further disruption and potential separation of individual members during the resettlement process.

The principle of dependency requires that economic and emotional relationships between refugee family members be given equal weight and importance in the criteria for reunification as relationships based on blood lineage or legally sanctioned unions.¹⁰

The Proposed Agreement contains a definition of “Family Member” that is unduly restrictive and ignores the reality of the refugee experience. The definition should be revised to comport with the reality of the refugee experience, and should be expanded to include “cousins or other relatives” as well as others. The agreement should allow for a case-by-case examination of the individual refugee's situation, and should make clear that this definition is not to be interpreted restrictively. The agreement should also provide for an additional exception for “community support contact” which could include family friends or other colleagues who are willing to submit statements attesting to their willingness to house and support the asylum seeker during the asylum process.

DIFFERENCES BETWEEN U.S. AND CANADIAN LAW AND PROCEDURE WILL RESULT IN ARBITRARY RESULTS FOR SIMILARLY-SITUATED REFUGEES

There are an array of areas in which U.S. and Canadian asylum law and procedures differ—and differ significantly. These include expedited removal, detention, adjudication of gender based claims, interpretation of the “nexus” requirement, and the one-year filing deadline—to name just a few areas. In many cases, refugees who

⁸ Summary Conclusions on Family Unity, Geneva Expert Roundtable, UNHCR Global Consultations on International Protection, November 8–9, 2001, at ¶6; Kate Jastram & Kathleen Newland, “Family Unity and Refugee Protection,” commissioned by UNHCR in connection with the UNHCR Global Consultations (2001)(available at www.UNHCR.ch).

⁹ Summary Conclusions on Family Unity, *supra* n.7 at ¶8.

¹⁰ UNHCR, “Background Note: Family Reunification in the Context of Resettlement and Integration, Annual Tripartite Consultations on Resettlement,” June 20–21, 2001, available at www.unhcr.ch.

would qualify for asylum in Canada could find themselves barred from asylum in the U.S. based on these provisions, yet would be unable to pursue refuge in Canada under the Proposed Agreement even though they would qualify for asylum in Canada.

The Center for Gender and Refugee Studies of the University of California, Hastings College of Law, has conducted a comprehensive analysis of the differences in U.S. and Canadian law with respect to gender-based asylum claims and the impact that a safe third country agreement could have on women who seek protection from gender-based persecution. This analysis also detailed the impact of the restrictive interpretation of the “nexus” requirement by many U.S. courts. The Center for Gender and Refugee Studies concluded that “any agreement requiring Canadian-bound asylum seekers to make their claims in the United States has the potential to lead to denials of protection and to the return of women asylum seekers to their persecutors, in violation of international law.”¹¹

Similarly, there may be refugees who cannot be granted asylum because of the one-year asylum filing deadline in U.S. law, but would be barred from asylum in Canada under the Proposed Agreement—even though they would be eligible for asylum in Canada. The filing deadline and its narrow exceptions have resulted in thousands of people being denied the opportunity even to request asylum, and consequently has been the subject of criticism by refugee advocates. Since the filing deadline has gone into effect in the U.S., well over 13,000 asylum seekers have had their asylum claims rejected as untimely. From our own work with asylum seekers, we know that individuals who meet the Convention definition of a “refugee” are sometimes unfairly denied asylum as a result of the U.S. asylum filing deadline.

To the extent any safe third country agreement is pursued, it should include an exception for those who would be ineligible for asylum in their country of last presence, for reasons unrelated to the merits of the asylum claim, but would be eligible to receive asylum in their country of planned destination.

CONCLUSION

There is no compelling reason for entering into this agreement with Canada. The Proposed Agreement will create additional inefficiencies in the asylum system and will result in unfairness to refugees and their families—in the best case—and denial of protection to deserving refugees at worst. For the reasons detailed above, the Lawyers Committee for Human Rights urges that the effort to enter into a “Safe Third Country” agreement with Canada be abandoned.

To the extent such an agreement is pursued, we urge that it focus only on eliminating duplicative claims, where this is appropriate. In this case, the exceptions should be expanded to include asylum seekers who (i) have merely transited through one country, (ii) have family, including cousins or other relatives, or other community ties in one country, and/or (iii) would be ineligible for asylum in one country but would be eligible in the other.

¹¹Letter from Center for Gender and Refugee Studies, University of California, Hastings College of Law, to Minister of Citizenship and Immigration, Ottawa, Canada, dated April 2, 2002, copied to INS General Counsel Owen B. Cooper.



Federation for American
Immigration Reform

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FAIR is a nonprofit public interest
organization working to end illegal
immigration and to set levels of legal
immigration that are consistent with
the national interest.

October 16, 2002

The Honorable George Gekas, Chairman
House Judiciary Subcommittee on Immigration and Claims
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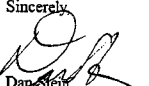
Dear Chairman Gekas:

In connection with the hearing that you are conducting on the draft U.S.-Canadian asylum agreement, I would appreciate your inclusion of the following analysis of the agreement by FAIR as part of the record of the hearing. As you will note from the analysis, and as you will know from our earlier communications on this issue, we think that this draft agreement is not in the national interest and should not be accepted by the United States.

We are concerned that the draft agreement would increase the threat to homeland security by permanently adding thousands of persons who have not been fully screened for crimes or terrorist associations to our population. In addition, it would further undermine the effectiveness of the effort to regain control over the nation's borders and further weaken an already overburdened and crippled immigration agency that soon will be in the process of restructuring within a new department of homeland security. Even if the draft agreement were in the national interest, which we do not accept, it would not be appropriate to embark on such a program under current circumstances.

Thank you in advance for sharing these views and the detailed analysis attached with your colleagues on the Subcommittee. I trust that you and the other subcommittee members will reach the conclusion that the Secretary of State should be requested to desist from formalizing the draft agreement.

Sincerely,


Daniel A. Stein
Executive Director

Attachment: FAIR's analysis of the U.S.-Canadian draft asylum agreement

Analysis by the
Federation for American Immigration Reform

Submitted to
THE HOUSE IMMIGRATION, BORDER SECURITY
AND CLAIMS SUBCOMMITTEE
October 16, 2002

COMMENTS ON THE DRAFT U.S.-CANADIAN AGREEMENT ON REFUGEE CLAIMS

FAIR's Position

The Federation for American Immigration Reform (FAIR) strongly believes the draft agreement on refugee status claims from third-country nationals is not in the U.S. national interest and should not be concluded.

Background

In 1980, when the Refugee Act was enacted it was projected that asylum claims would not exceed an annual level of 5,000 per year. Therefore, that was the ceiling that was established in the law on the number of successful asylum claimants who could be adjusted to legal permanent residents (LPR) in any year. By 1990, the availability of asylum status had attracted so many claimants that a backlog of adjustments had developed and Congress was forced to double the adjustment ceiling to 10,000 per year. The number of asylum applicants has continued to mushroom, in large part because of the advent of the legal advocacy of immigration lawyers and new categories of asylum claims have been opened for persons seeking residency in the United States.

Since fiscal year 1996, not only are successful asylum claimants exceeding the annual ceiling on adjustment to LPR status, but a long waiting list has developed. Any action that would have the effect of significantly increasing the number of asylum applicants in the United States, as would the draft agreement -- by as many as 8-15,000 applicants per year, would further add to the imbalance between the number of asylum applicants and the number that can be accommodated under the law.

The Asylum Process is a National Security Issue

Asylum applicants, unlike refugees, have already entered the United States, most often under false pretenses or surreptitiously before they present themselves to the U.S. Government and request permanent residence. Unlike refugees, they are not screened abroad for permanent residence in the United States, and those who enter surreptitiously undergo no pre-screening of any kind. Asylum claimants often lack any verifiable identity documents and could be anyone passing themselves off as a victim of persecution and are held to a much lower standard of proof than other immigrants. That was most notably documented in the case of Regina Danson, a Ghanaian hotel worker who gained asylum in 1999 posing as Adelaide Abankwah, claiming to be a tribal "queen mother" who would be subjected to genital mutilation if sent back to Ghana. The story was exposed a year later as a complete fabrication and involved a stolen identity.

It is not possible to complete as rigorous a background investigation of asylum applicants as it is for persons outside of the United States applying for permanent residence. In addition, applicants abroad, if they are found ineligible for permanent residence, may be excluded from entering the country. Persons already in the country who are found ineligible most often end up continuing to stay in the country illegally, and the INS does not have the resources to locate and remove them, as is amply demonstrated by the number of absconders with orders of deportation that the agency is currently seeking.

The case of Sheik Omar Abdel Rahman, the spiritual leader of the terrorists who conducted the 1993 World Trade center bombing, demonstrates that asylum protection can and will be used by our country's enemies to avoid removal from the United States while they plot against our safety from within. The case of Ghazi Ibrahim Abu Mezer, who in 1997 attempted a terrorist bomb attack in New York City's subway system was another asylum claimant, albeit in Canada. Ahmed Ressay, who was apprehended upon entry from Canada on his way to carry out a millennial terrorist act in Los Angeles was another asylum applicant in Canada.

Because it is not possible to screen asylum applicants as carefully for terrorist or criminal connections as refugees or others who apply for permanent residence from outside the United States, any action to increase the number of asylum applicants in this country also increases the threat from terrorists taking advantage of this humanitarian program. The INS is already so overburdened with adjudications and processing applications for immigration benefits that it has become a target for major institutional reorganization. During a process of change, the agency will be further disrupted and even less able to meet public expectations and national security responsibilities. To unnecessarily add to the burden of the agency during such a critical period, especially when the increased workload would include elements of national security protection, would not only be unwise, it would be negligent.

One predictable outcome of the agreement, if it were concluded, would be to increase the role of traffickers in illegal aliens between the United States and Canada. If it becomes likely that intending asylum applicants to Canada will be refused entry if they enter from the United States, some of those intending applicants are likely to seek alternative means to enter Canada. Unfortunately, the U.S.-Canadian border is porous, and people smugglers, who now largely bring aliens from Canada into the United States will take advantage of aliens seeking to gain physical presence in Canada by illegal entry. The draft agreement would, therefore, have the dangerous repercussion of enhancing the business of the traffickers, which, at the same time, will weaken U.S. security from terrorists who may seek to enter from Canada by this route.

The Draft Agreement has No Justification

The imbalance between the up to 15,000 asylum applicants who would be denied entry by Canada under this agreement and left to fend in the United States, and the up to 200 claimants who would be denied entry by the United States and left to fend in Canada is due to two factors. The first is the result of international transportation routes that make it much easier to travel to the more populous United States than to Canada. This causes many more persons who intend to claim asylum in Canada to arrive first in the United States than vice versa. Secondly, many asylum applicants in Canada are attracted by the very generous provisions adopted by the Canadian government. The United States had a much more serious problem of asylum abuse

than it does today up until 1995 when it adopted measures to detain asylum applicants and to deny work permits until asylum status was adjudicated. Canada apparently is unwilling to similarly treat asylum applicants until they establish their bona fides with less welcoming policies.

Rather than act to harmonize its asylum screening procedures with those of the United States in order to remove an incentive that attracts fraudulent asylum applicants, Canada has sought this agreement that would require the United States to accommodate the return of thousands of persons attracted to Canada by its policies. This would be at best a band-aid approach for Canada, treating the symptom rather than the underlying cause, and it would be a self-inflicted wound on the United States, further overburdening the already shaky asylum system in this country and adding further to the national security risk.

The suggestion that this draft agreement is important to the United States because it is part of a 30-point package of measures which contain other cooperative measures that will contribute to U.S. security is unworthy of consideration. That implies that Canada would attempt to coerce the United States to accept a measure that is not in the United States' national interest in order to obtain other measures that would further our security interests. Close allies and partners in defense and trade agreements should not be expected to seek domestic benefits at the expense of each other's security interests.

The Draft Agreement is Unfair to the Asylum Applicants

Both the asylum applicants seeking asylum in Canada, who would be turned away and returned to the United States under this agreement, and the asylum applicants in the United States whose opportunities would be diluted by this agreement would bear the unfair burden of the agreement. Why should the aspirations of a French-speaking asylum seeker to find refuge in a French-speaking community in Canada be denied, if that applicant does not meet one of the exceptions contemplated in the draft agreement? If a legitimate asylum applicant is attracted to Canada by the existence of an already established refugee community, why should that person be denied entry to Canada if otherwise eligible?

Conclusion

The draft agreement on refugee status claims is not in the U.S. national interest. It would increase the threat that an intending terrorist would gain permanent residence in this country. It would further overburden the already troubled INS, especially during a period of institutional vulnerability. Finally it would have adverse effects on asylum applicants, both those who would be turned back from Canada and those who seek protections in the United States. For these reasons, the agreement should not be concluded.

**UNHCR Comments on the
Draft Agreement between Canada and the United States of America for
"Cooperation in the Examination of Refugee Status Claims
from Nationals of Third Countries"**

I. Introduction

The Office of the United Nations High Commissioner for Refugees (UNHCR) is very appreciative of the willingness of the Parties to consult with UNHCR on the draft Agreement between Canada and the United States of America "for cooperation in the examination of refugee status claims from nationals of third countries" (hereinafter "the Agreement").

Overall, UNHCR recognizes as positive the ultimate objective of this Agreement, which is to ensure an appropriate allocation of State responsibility for determining refugee status. UNHCR shares the concern of States to avoid situations where responsibilities in this regard are unclear and hence not assumed, often leading to "orbit" situations for the concerned individuals. UNHCR also appreciates States' concerns to limit unwarranted "forum shopping". At the same time, UNHCR Executive Committee Conclusion 15 (XXX) provides that the intentions of the asylum seeker should "as far as possible be taken into account". In this connection the Agreement's provisions for family reunification and for the exercise of discretion by the Parties are particularly important.

UNHCR's main interest is to ensure that persons seeking protection from persecution will have access to a full and fair procedure to assess their claims, either in Canada or the US, and that protection will be accorded to those in need of it. There are several scenarios which could arise under this Agreement which might put access to protection into question in the individual case. Our observations and recommendations in this respect are set out below.

Also by way of general observation, UNHCR notes with concern that this Agreement may have the unintended effect of encouraging clandestine border crossings, which runs counter to the interests of all parties, including individuals in need of protection. Because the Agreement applies only to persons making claims at land ports of entry, those who manage to cross the border (likely in an irregular manner) and make a claim inland will not be affected. An increase in the number of illegal entrants/stayers is often accompanied by exploitation of vulnerable individuals and can have a detrimental effect on public attitudes toward refugees and asylum-seekers, at a time when both UNHCR and States are endeavouring to ensure that public opinion remains favorable to refugees, and that public confidence and trust in the asylum system is maintained.

UNHCR does recognize that the impact of this Agreement will depend largely on the implementing regulations and policy guidance issued by the Parties. UNHCR is grateful for the Parties' willingness to provide texts of both to the Office for its review and comment, before they are finalized.

II. Application of US Expedited Removal Procedures

Under current US law, "arriving aliens" with improper travel documents are placed in expedited removal proceedings. UNHCR has expressed concerns about how this expedited removal process functions, given the Office's view of the need for greater procedural guarantees to ensure that *bona fide* refugees are not inadvertently removed to a country of feared persecution (*refoulement*), that they have all "necessary facilities" to present their asylum claim, and that they are treated in a humane manner while their applications are pending. It is unclear from the draft text of the Agreement to what extent persons subject to its provisions would be placed in expedited removal proceedings in the US.

Recommendation: Given stated concerns about the expedited removal process, UNHCR recommends that such proceedings not apply to persons subject to this Agreement.

III. Statutory Bars to Refugee Protection

UNHCR has also raised questions about the consistency with international standards of certain statutory bars to the asylum procedure. Those at issue include the US bar for failure to meet a filing deadline and criminal and affiliation bars in both countries that are broad and automatic in nature. Refugee claimants subject to a US statutory bar that has no equivalent under Canadian law, and *vice versa*, may be required under the Agreement to make a claim in a jurisdiction where they would be ineligible for refugee protection. Under these circumstances, they may well be denied rights under the Convention and Protocol, which, except for the operation of this Agreement, would be available to them. To give one example, under US and Canadian law, persons who are ineligible for asylum/protected person status may still be eligible for protection from *refoulement* (withholding/stay of removal), but only if they satisfy a heightened legal standard. As a result, claimants who satisfy the refugee definition under the Convention and Protocol, but fail to meet this heightened legal standard, may be subject to *refoulement*.

Recommendation: UNHCR recommends that where one country would bar an individual access to the asylum procedure or protection from refoulement and the other country would not, this should be an important factor in determining when the Parties will exercise their discretion under Article 6 to review the claim and examine it on the merits.

IV. Meaning of "to Adjudicate" a Refugee Claim

UNHCR understands that the purpose of the agreement is to guarantee that one of the two Parties will properly examine a refugee status claim on its merits. Article 3 of the Agreement stipulates that one of the two countries must "adjudicate" the claim before removing the applicant to a third country. However, it does not define the term "adjudicate." This could result in two problematic scenarios:

- (1) *No clear responsibility to consider an applicant's claim:* Neither the US nor Canada at present has any other safe third country agreement in effect. However, if "adjudicate" means "determine eligibility to apply for asylum", then a future "safe third

country" agreement concluded by Canada or the US with another country could possibly result in chain removals, without a consideration of the claim on the merits. The worst case result would be "refugees in orbit" and possible *refoulement*.

(2) *A claim on its merits is not considered:* While the US or Canada might accept responsibility to "adjudicate" the claim of an applicant, a bar to asylum or *non-refoulement* protection might apply such that a full consideration of the claim, on the merits under an appropriate international legal standard, never occurs.

Recommendation: UNHCR recommends that the Parties include a definition of adjudication which ensures that the claim is considered properly on its merits by one of the two Parties. This would clarify that the Agreement creates a "closed system."

V. Detention

Detention of asylum-seekers world-wide remains a serious concern. In the US, detention of asylum-seekers, including children, is an issue on which UNHCR has frequently pronounced itself. During the recent surge of asylum-seekers at the US-Canada border in June 2002, the US indicated that it would retain the right to detain any person in unlawful status who was "directed-back" from Canada to the US. Presumably, the position will be the same for claimants returned to the US from Canada under this Agreement.

Recommendation: As a general principle, asylum-seekers should not be detained. Detention should be resorted to only in exceptional cases. The fact that asylum-seekers have often had traumatic experiences should be taken into account in determining any restrictions on freedom of movement based on illegal entry or presence. UNHCR encourages both Parties to limit the detention of asylum-seekers subject to this Agreement to the greatest extent possible, and to avoid the use of local, state or county jails.

VI. Family Unity

UNHCR welcomes the Parties' willingness to establish exceptions for asylum-seekers who have family connections already established in one of the two countries.

A. Family Members

UNHCR appreciates the broad definition of "*family member*", as it includes spouse, son, daughter, parent, legal guardian, sibling, grandparent, grandchild, aunt, uncle, niece and nephew. Common law spouse, however, is not included in this definition, but rather is subject to national interpretation under Article 1(2).

For the exception in Article 4(2)(a) to be invoked, the person seeking entry must have at least one family member who has "lawful permission to remain indefinitely" in the receiving country, or who was granted refugee status there. The term "lawful permission to remain indefinitely" is not defined.

The exception under Article 4(2)(b) takes a more narrow approach to family membership, and as a result would bar parents and grandparents from entering to join children under 18 who are asylum-seekers. It would also bar claimants from joining extended and "de facto" family members who serve or have served as their primary support mechanism.

Recommendations: UNHCR recommends that the Parties include common law spouses in the definition of "family member". It is also recommended that consideration be given to how extended and "de facto" family members can also be included, regardless of relationship to the refugee claimant, if they serve or have served as the claimant's primary source of emotional and/or material support.

UNHCR further recommends that the Parties define in the Agreement the phrase "lawful permission to remain indefinitely" to include those allowed to remain in the US or Canada under withholding of removal or relief under the UN Convention Against Torture (in the US) or a stay of removal after a Pre-Removal Risk Assessment (in Canada).

UNHCR also encourages the Parties to extend the scope of Article 4(2)(a) to include persons with lawful permission to remain for "humanitarian reasons." This would include, for example, beneficiaries of Temporary Protected Status (TPS) (in the US) and those from moratoria countries (in Canada) who may remain in either country for an extended period of time due to continued instability in their countries of origin. These individuals can generally work and provide asylum-seeking relatives with necessary support.

Consistent with the spirit of Articles 9 and 10 of the Convention on the Rights of the Child, UNHCR recommends that the 18-year age limit for qualifying relatives be dropped from Article 4(2)(b). Moreover, UNHCR recommends that extended and "de facto" family members also be included under this exception, if they serve or have served as the claimant's primary support mechanism.

B. Unaccompanied Minors

UNHCR welcomes the generous exception to the Agreement for "unaccompanied minors."

UNHCR is concerned that a child wishing to apply for asylum in the receiving country may be intercepted during outbound inspections in the country of last presence, and taken into custody. Unless the country of last presence permits the child to proceed to the receiving country to lodge his/her refugee claim, the child would not benefit from this exception.

Under the Agreement's definition of "unaccompanied minor", a child would not be considered "unaccompanied" if s/he had a parent in either Canada or the U.S. In that case, and if the exceptions under Articles 4(2)(a) or 4(2)(b) did not apply, the child would not be able to join his or her parent.

Finally, the Agreement does not ensure that unaccompanied minors will not be detained in the receiving country, absent exceptional circumstances.

Recommendations: UNHCR recommends that the cases of unaccompanied minors be processed in a priority manner. Because age assessment is not an exact science, UNHCR hopes that separated children will receive the benefit of the doubt when age determinations are made.

UNHCR recommends that the Parties ensure that unaccompanied minors are permitted to apply for asylum in the receiving country if apprehended during an outbound inspection.

UNHCR urges that children be permitted to apply for asylum in the receiving country if a parent or legal guardian resides there.

UNHCR urges that separated children not be detained and proper care arrangements also be made pending determination of a claimant's age, if age assessment is deemed necessary.

VII. Validly Issued Visas

For exception 4(2)(d) to operate, the individual must have a "validly issued visa" or other "valid admission document, other than for transit", issued by the receiving country, or be from a country for which only the receiving country does not impose visa requirements. However, the term "validly issued visa" is not defined.

UNHCR's understanding of current US law is that an "arriving alien" will be considered inadmissible and placed in expedited removal proceedings if s/he arrives at a port of entry with purportedly false documents or no documents. In this context, "false" documents would include tourist or business visas if the person's true intention was to apply for asylum. It is not clear in the draft Agreement if such a standard would also apply to "validly issued" documents under Article 4(2)(d).

This provision is silent with regard to refugee claimants from countries for which neither Party maintains a visa requirement, as well as claimants who obtained visas for travel to both the US and Canada.

Recommendations: UNHCR recommends that the Agreement or its regulations/rules, define "validly issued visa" in a manner which does not link validity of issue to the presumed subjective intentions of the asylum seeker.

UNHCR further recommends that claimants with visas for both countries, as well as

claimants who do not need visas for either country, be allowed to choose where to lodge their claim.

VIII. Status of Applicants Seeking Entry

Article 4(3) stipulates that the country of last presence is not required to take back a claimant until a final determination is made by the receiving country on whether one of the Agreement's exceptions apply. Determination of family links may be difficult to establish at the port of entry. Interviews may be lengthy and claimants may require many days to obtain proof of relationship. It is not clear from the Agreement how claimants will be treated during this period -- will they be admitted, required to wait at ports of entry, asked to wait in the other country, or detained pending determination of family links? In Canada, it is unclear whether the determination of relationship will be part of the eligibility decision, which, under the Immigration and Refugee Protection Act must be taken within 72 hours.

Recommendations: UNHCR urges the receiving country to admit an applicant into its territory while it determines whether s/he falls under one of the Agreement's exceptions. UNHCR further urges the Parties not to detain asylum-seekers during this period.

IX. Effective Review Procedures

In UNHCR's view, determinations under "safe third country" agreements must be reviewable, with such reviews having suspensive effect.

It is unclear if a review procedure will exist for decisions made under the Agreement (e.g., whether one of the exceptions applies to the applicant).

Recommendation: UNHCR encourages the Parties to include in the Agreement a provision for an effective review procedure.

X. Discretion

UNHCR welcomes the language of Article 6, which allows each Party the discretion to examine a refugee claim when it is in its public interest to do so. However, issues regarding how claims will be made, how they will be adjudicated, and by whom, are not addressed.

Recommendation: UNHCR recommends that the exercise of discretion under Article 6 be approached broadly in cases of humanitarian concern, and that the process be delineated in regulations. Gender-based claims, which are currently assessed quite differently by the Parties, should be given particular consideration.

XI. Exchange of Information

The intended scope of Article 7(a) is unclear. UNHCR is concerned that information about individual asylum-seekers should not be disclosed to third parties, especially to the individual's country of origin.

Recommendation: UNHCR recommends that the Parties make clear that this article refers only to exchange of information between the Parties.

XII. Implementation

In June 2002, there was a large surge in the number of asylum-seekers approaching the Canadian border from the US, resulting in significant accommodation and public health concerns. Some were seeking to enter Canada before the new immigration law (IRPA) went into effect on 28 June, but others were seeking entry due to unfounded rumors that the Agreement was due to go into effect that same day. UNHCR anticipates that there may be a similar "rush to the border" after the final text of the Agreement is signed, but before it is implemented.

Recommendation: In anticipation of a possible surge of asylum applicants at the border once the final text is announced, UNHCR hopes adequate resources will be made available to process asylum claims in a timely and humane manner.

XIII. Monitoring and Periodic Review

UNHCR welcomes the opportunity given in Article 8(3) to participate in reviews of the Agreement and its implementation, the first of which is to occur within 12 months of the Agreement's date of entry into force. UNHCR notes that ongoing monitoring of the Agreement's implementation will be vital to make these periodic reviews meaningful. UNHCR is prepared to play a role in this monitoring, as part of its advisory responsibilities. NGOs could also have an important role to play in this regard. Involvement of NGOs would provide greater breadth of geographic coverage. NGOs also have the most direct contact with the affected asylum-seekers.

Recommendation: UNHCR recommends that the Parties include in the Agreement a provision for the monitoring of its implementation, which could involve both UNHCR and NGOs in the two countries.

XIV. Resettlement

In Article 9, the Parties agree to "endeavor to assist" each other in the resettlement of persons determined "to require protection in appropriate circumstances." It is unclear how this relates to the subject of the Agreement, *i.e.*, cross-border asylum applications.

Recommendation: UNHCR recommends that this article be omitted from the Agreement, given that it does not deal with cross-border applications for asylum. In any case, in view of UNHCR's overall statutory responsibility for helping governments to provide refugees with durable solutions, UNHCR hopes to be kept informed of the actions of the two governments under this provision.

UNHCR
26 July 2002

Testimony on
The U.S.-Canada "Safe Third Country" Agreement
by Bethany Olson
Church World Service Immigration and Refugee Program
For the U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Immigration, Border Security and Claims
October 17th, 2002

Mr. Chairman and members of the Subcommittee, Church World Service Immigration and Refugee Program is pleased to submit this written testimony in regards to The "Safe Third Country Agreement" in question between the United States and Canada.

The Church World Service Immigration and Refugee program is opposed to the safe third country agreement that these two nations have recently been negotiating. We fear this agreement will gratuitously change a system that has worked effectively for many years.

The fact that an agreement has been proposed and is being considered presupposes a problem. Is there a threat to the security of the U.S.'s northern border that the refugee or asylum-seeking population has a direct effect on? The immediate answer would appear to be an emphatic "no." The U.S.-Canadian border is noticeably orderly and crime-free. Our unique relationship with Canada has facilitated open relationships between non-government agencies and immigration officials on both sides of the border that are able to effectively assist asylum-seekers in presenting themselves at ports of entry for inspection. This is a far cry from the dangerous, and quite often, deadly practice of human smuggling regularly practiced along our southern borders. This new agreement will encourage those in desperate need of asylum to seek entry by way of the northern border without regard to the legal ports of entry. Those that would support the safe third country agreement, must realize that if this program creates a rise in human trafficking, the goal of the agreement will have ultimately been lost, and a host of new problems will arise. The Immigration and Naturalization Service already deals with a lack of staff and an incredible workload. The addition of this issue in light of the possibility of reorganization may be more than the INS can bear effectively and responsibly.

In terms of numbers, the INS reports that as few as 200 persons per year apply for asylum in the United States via Canada. This number is an inconsequential percentage of the more than 60,000 asylum claims presented in the United States last year alone. There does not seem to be nearly as much of a benefit for the U.S. numerically speaking, while Canada could

benefit significantly. A third of Canada's 45,000 asylum-seekers arrive via the U.S. each year. In light of this statistic, it is peculiar that the U.S. would support an agreement making our asylum caseload heavier by nearly 15,000 people. These numbers are still insignificant, however, in comparison to the asylum-seeker statistics in many European nations. Germany received 400,000 asylum requests in a year when Canada dealt merely with its 45,000 and the U.S. with its 60,000. It is important to remember that that nation has not since crumbled beneath the weight of its generosity to asylum-seekers.

There are those that have pointed out the obvious advantage to the U.S. government adopting this treaty: it takes us a step closer to refusing admittance to any asylum-seeker who is not arriving directly from the country of persecution. If we do not admit these asylum-seekers, we do not then have to grant them asylum based on the safe third country agreement. This could quite possibly open the door for a "buffer state" policy regarding refugees, such as Mexico, where asylum seekers would then be automatically returned. This procedure has been made public by the return of Chinese boat people to Mexico, and their subsequent return of these asylum-seekers to China. If we guard our borders with safe-third country agreements, and deny boats full of refugees based on the concepts of "international waters," we may be free forever from the entanglements of generosity to those seeking a safe haven. Some have said that: "we would then have a pristine asylum procedure on paper, but wash our hands of the need to examine real claimants on the merits." Although this is an admittedly pessimistic argument, it begs consideration nonetheless.

Among the treaty's other failures, it neglects to recognize the intentions of refugees, disregarding UNHCR Executive Committee Conclusion 15 which provides that: "the intentions of the asylum seekers as regards the country in which he wishes to request asylum should as far as possible be taken into account." The Canadian government itself espouses a commitment to "uphold asylum as an indispensable instrument of the international protection of refugees." Historically, although the United States has accepted only a fraction of the refugee population worldwide, we have still been the leading country in offering refugee and safety to those in greatest need. Along with that, the U.S. has a tradition of jurisprudence rejecting the idea of physical presence in another country precluding the right to seek asylum in our country. The Board of Immigration Appeals even stated that, "a finding that an alien was firmly resettled in another country does not render him ineligible for asylum."

If this agreement is ratified and put into effect a clear message is being sent to nations of the world, and it is a very negative one about the United States' response to refugees. We fear our unwillingness to protect refugees will be followed by other nations; our leadership as a nation sets an international standard. This responsibility must not be ignored or taken lightly. If the U.S. retreats so significantly from its protection of refugees, then no doubt other nations will follow. Given that, CWSIRP requests that this safe third country agreement be abandoned -- not merely because it would be in the United States' best interest, but conversely because it puts hundreds, and possibly thousands of lives in the balance.

PREPARED STATEMENT OF THE LUTHERAN IMMIGRATION AND REFUGEE SERVICE

Lutheran Immigration and Refugee Service (LIRS) believes that the Agreement Between the Governments of Canada and the United States for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, also known as the "Safe Third Country" Agreement, is not in the best interest of the United States and will undermine the international protection of refugees.

BACKGROUND ON LIRS

The mission of LIRS is to provide "New Hope and New Life" to uprooted immigrants and refugees in our midst. LIRS has a long history of service to refugees, asylum seekers, and other vulnerable immigrants. Since 1939, more than 250,000 refugees have been resettled into the United States under Lutheran auspices. Over the years, the work expanded to help asylum seekers, long-term legal permanent residents, and people in INS detention. In 1999 alone, LIRS resettled 13,000 refugees, many from the former Yugoslavia where ethnic cleansing through murder and torture were endemic. In 2000, LIRS served detainees from 136 countries. Throughout the years, the agency has maintained an excellent reputation among its peers and an excellent working relationship with the U.S. government agencies assigned to deal with refugee and immigration concerns.

THE "SAFE THIRD COUNTRY" AGREEMENT IS NOT IN THE BEST INTERESTS OF THE UNITED STATES

A. A violation of the principle of burden-sharing.

The agreement will place a significant burden on the U.S. asylum adjudication system, and will add to the already overwhelming backlog of cases facing the Immigration & Naturalization Service (INS). Canada states that in 2001, over 14,000 asylum seekers transited through the US before seeking asylum in Canada. By contrast, past figures show that only about 200 come from Canada to apply in the U.S. These numbers may not predict exactly but they give us a very good indication of what we can expect in the future. All of this would happen during a time when the INS is already going through tremendous upheaval and internal restructuring, and has proven that it cannot handle even current caseloads.

B. Creation of serious problems with Canada where none exist

The agreement has the very grave potential to create immense problems on our northern border and hurt relations with Canada. There are many real and important reasons why a person fleeing persecution and true threats to life and liberty would choose Canada over the United States when seeking protection through the asylum process. Among these are communal, linguistic and familial ties that would help the refugee survive in strange land. A process that disregards the refugee's right to choose will exacerbate the problem of human trafficking and smuggling. As the possibility of legal entry into the country is eliminated, refugees will become more vulnerable to persons ready to exploit them. A situation could develop on the Canadian border similar to the one that exists on the US-Mexico border, where an escalation of death, exploitation and border enforcement is the rule. Many will be forced to go "underground" completely. In addition, disputes over process or border policy between Canada and the U.S. could easily arise. The U.S. would face the two-fold problem of increased criminality by those who see an opportunity in the smuggling of asylum-seekers, and creation of hostilities between two nations that have traditionally enjoyed harmony and cooperation.

C. The agreement could hurt the security of the United States.

If the agreement is intended to address security concerns, as some argue, this is not the answer. We have a system that works. No terrorists would submit themselves to the scrutiny of the current asylum process. Presently, persons in the US who wish to make a claim in Canada present themselves at a border point and are examined by an immigration officer. An orderly process exists. The agreement will disrupt that process and create a dangerous and disorderly one.

THE AGREEMENT ERODES OUR NATION'S COMMITMENT TO THE PROTECTION OF HUMAN RIGHTS

A. The Right of a Refugee to Choose

The agreement takes away the refugee's right to choose the country in which to make a claim. This is contrary to internationally agreed upon principles of protection for refugees, specifically the UNHCR Executive Committee Conclusion #15 which states "asylum should not be refused solely on the ground that it could be

sought from another state”, and that “the intentions of the asylum seeker as regards the country in which he wishes to request asylum should be as far as possible be taken into account”. Furthermore, the assumption that the country of “last presence” is the most appropriate place for the claim to be made results in a Safe Third Country agreement that is fundamentally flawed. Persons who have been forced to flee in order to survive have experienced tremendous loss and upheaval. They have lost their homeland, family members, friends, communal support systems, home, property, and more. They have to a great degree lost the power to make decisions about their own lives. Factors in a particular country such as the presence of extended family members and/or friends, familiarity with the language, cultural connections and other forms of communal support are all important to the refugee’s ability to adjust to a new country. Therefore, a person seeking protection should be allowed to choose where they make their claim.

B. Differences between the U.S. and Canadian systems

The agreement presupposes equal and comparable procedures and standards used in refugee determination in both countries. In fact, there are important differences in immigration enforcement, asylum procedure and asylum law that result in a denial of refugee claims in one country that would be accepted in the other. For example,

- (1) The U.S. has expedited removal, which drastically limits access to hearing of asylum claims. Canada has no such practice.
- (2) The U.S. government provides no legal counsel for asylum seekers. In Canada, asylum seekers are provided with legal counsel.
- (3) The U.S. enforces a one-year deadline to present a claim. Canada has no one-year deadline.
- (4) Regarding substantive law, Canadian officials have pioneered the conceptual protection framework for women persecuted on account of gender. In the U.S. there is minimal protection for women making gender-based claims.

A Georgetown University study shows that without counsel, an asylum seeker would be six times as likely to fail in his claim as someone who is represented (Georgetown University, Institute for the Study of International Migration, “The State of Asylum Representation” May 2000). Further, The Center for Gender and Refugee Studies concludes that “any agreement requiring Canadian-bound seekers to make their claims in the United States has the potential to lead to denials of protection and to the return of women asylum seekers to their persecutors, in violation of international law.”

Another major difference is that in the U.S. asylum seekers are detained by immigration enforcement officials, often for extended periods of time. In Canada, asylum seekers are generally not detained. Detention is not a benign solution. Asylum seekers suffer greatly in detention, especially those who are children or survivors of torture. Lengthy detentions and the impact of imprisonment often result in asylum-seekers abandoning their claims, not because of a lack of merit or fear of persecution, but because they detention becomes unbearable.

C. Implementation Problems

The agreement itself will be extremely difficult, if not impossible to implement. Not only will it create a bureaucratic nightmare, it does not explain what the process will be at the border, does not account for what will happen to the refugee during the process, does not explain how eligibility for the exceptions will be quickly and fairly determined, among other concerns. LIRS has previously submitted lengthy comments outlining some of the many implementation and processing problems this agreement will create. Just a few examples follow:

Allowances have been made for persons who have family members in the other country, but even these do not take into account the problems related to verification of relationship and the resulting hardship on applicants who may have to wait undetermined amounts of time as they wait for a determination. What kind of documentation or testing will be required? Will applicants be held in detention while determination is awaited? Other problems exist. The agreement states that the relative of the applicant must be at least 18 years of age in order to facilitate family reunification; this hurts families where the applicant is a parent seeking to join a child or children under the age of 18 in the territory of the other party. The agreement states that family members are required to have a particular status in order for the exception to apply; student and temporary worker status should be included in the category of family member immigration status but are not.

Persons in transit through a U.S. airport could be determined to be in the U.S. and forced to make their claim here regardless of their reasons for wanting to reach Canada.

The agreement has no provisions dealing with the needs, circumstances and procedural issues that ensure the fair and humane treatment of unaccompanied or separated minors throughout the entire process.

Adjudication is not clearly defined, and as the agreement is written it could very likely hurt an applicant's chance to access a fair hearing and all appeals. As it is written, adjudication could simply mean a decision concerning eligibility, which could result in chain deportations after one of the countries find a claimant ineligible. Adjudication should not include expedited removal, which offers fewer procedural protections than regular asylum hearing, but this is not addressed.

Difference in eligibility between the two countries need to be addressed in order to prevent the denial of access to a fair hearing. For example, the U.S. requires that a claim be made within a year of arrival in the U.S. This fails to take into account the difficulties involved in making a claim, including fear and trauma, health problems, incompetence due to age or mental illness, lack of legal assistance or timely information concerning law and procedures involved in making a claim, and other factors.

There are so many problems with the language of the agreement that they appear to be insurmountable and ultimately, the ones who will suffer the most will be the asylum seekers the system is intended to protect.

THE AGREEMENT IS UNNECESSARY AND THERE IS AN EASIER WAY

The agreement is unnecessary, and in fact will create more problems than it will solve. If the reason the US wants this agreement is to avoid duplicate claims of asylum, the problem is more easily solved through a more focused and simpler agreement that prohibits individuals from pursuing asylum in both countries and that provides for the confidential information-sharing that identifies rejected applicants. Even so, no proof has ever been offered that duplicate claims are even a problem.

CONCLUSION

The preamble to the agreement emphasizes the desire of both countries to honor the commitments made to the protection of refugees. LIRS urges that any Safe Third Country agreement be explicit and thorough in assuring that this is in fact done. This agreement does not meet that standard and creates more problems than it purports to solve. Thank you for consideration of our concerns.

