THE U.S.-CANADA SAFE THIRD COUNTRY AGREEMENT: SLAMMING THE DOOR ON REFUGEES

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I. INTRODUCTION

The United States and Canada are nations comprised predominately of immigrants and their recent descendants. Many fled persecution in their homelands and arrived in the United States and Canada with the hope of seeking refuge. Unfortunately, in times of crisis, people in both countries have been quick to forget that they or their recent ancestors were immigrants that were fortunate enough to get inside one of the two countries' borders. Both nations have repeatedly forbidden people attempting to seek protection within to enter. For example, during World War Two, Canada and the United States largely refused to admit Jewish refugees seeking protection within their borders. Specifically, in Canada, the slogan regarding its Jewish refugee policy during the period was, "None is Too Many." This was the answer given by a Canadian official when asked how many Jewish refugees Canada would take. Similarly, when the S.S. St. Louis carrying Jewish emigrants fleeing Germany was not allowed to land in Cuba, the U.S. government also refused to allow the vessel to dock in the United States. The S.S. St. Louis was forced to return to Europe. There, Holland, France, Great Britain and Belgium accepted many of the German-Jewish emigrants as refugees; unfortunately, many of the refugees' safe havens soon became occupied by the Nazi regime.

On August 30, 2002, the United States and Canada completed and initialed a final draft of the U.S.-Canada Safe Third Country Agreement, a bilateral agreement generally requiring asylum seekers to lodge their claims in their "state of first arrival," and not allowing them to apply subsequently or simultaneously in the second of the two states. The two countries signed the Agreement on December 5, 2002. The Agreement was drafted to promote national security in the two countries, to defend the integrity of their asylum systems, and to improve their ability to control immigration.
Unfortunately, as with the policies of the United States and Canada towards Jewish refugees during the Second World War, if legislation implementing the U.S.-Canada Safe Third Country Agreement is approved by the Parliament of Canada and the U.S. Congress, refugees will be put at an increased risk. Refugees deserving of a grant of asylum under the laws of one of the two countries but who first apply in the second country will be forced to return to the persecuting country. This will happen most often if a refugee first arrived in the United States, was required to apply for asylum in the United States only, and then was forced to return to the persecuting country. This is so because Canada's asylum laws are more asylee-friendly than those of the United States.

This essay argues that the passage of implementation legislation fully enacting the U.S.-Canada Safe Third Country Agreement would result in the violation of international legal obligations by the United States and Canada, the violation of the two countries' moral obligations to refugees, and the ironic effect of potentially harming national security in the United States and Canada. Part II will provide an overview of the Agreement, including background on the Agreement, its objectives, and its application. Part III suggests that the United States and Canadian governments have international legal requirements, moral obligations towards protecting people deserving asylum in their countries, and obligations to their own people to protect national security that will not be undermined by the implementation of the Agreement. This note will conclude by arguing that ideally legislation implementing the Safe Third Country Agreement should not be implemented at all, or in the more feasible alternative, implementation legislation should include greater protections for refugees' safety, and should also include a well-defined plan for bureaucratically administering the transition, in order to comply with international legal and moral obligations, and to adequately meet the Agreement's own objective of promoting national security.

(statement of Mark Krikorian, Executive Director, Center for Immigration Studies) [hereinafter Krikorian Testimony].


II. THE U.S.-CANADA SAFE THIRD COUNTRY AGREEMENT: A BILATERAL MEANS OF SOLVING COMMON PROBLEMS?

On August 30, 2002, the final draft of the U.S.-Canada Safe Third Country Agreement, was initialed by the United States and Canada. The Agreement was solidified on December 5, 2002, when both countries formally signed the final draft. The main objectives of the Agreement are the improvement of national security, the improvement of immigration control, and the preservation of the integrity of the asylum systems of the United States and Canada. The Agreement seeks to do this by establishing a "safe third country" relationship between the United States and Canada for the adjudication of asylum claims. A safe third country relationship provides that a refugee may only have a claim for asylum adjudicated in the first country in which the person arrives, and cannot have the claim adjudicated in the country of last presence. In other words, if an asylum applicant were to pass through the United States and then claim asylum in Canada, the responsibility for determining the refugee status claim would lie with the United States and not Canada.

A. Background on the Agreement

The notion of a safe third country agreement is not new. A series of western European nations signed the Schengen Convention, the first safe third country agreement in 1985, and implemented it in 1990. Since then, the number of nations party to safe third country agreements has increased. The possibility of a safe third country agreement between the United States and Canada had been discussed as early as 1995. The United States responded to such discussions by implementing section 604(a) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996, which, in general, legalized the use of safe third country agreements in American law. At that time, Canada was reluctant to legalize the use of safe third country agreements, due to concerns that American and Canadian asylum law are incongruent, brought to light in part by "vigorous objections" of scholars and bad publicity from international human rights groups. In 1998, these talks ceased. In June

12. See Immigration Bills Pass House and Senate–Refugee Cap Dropped; Summary Exclusion in, Then Out; Limits on Legal Family Immigration Dropped; Asylum Provisions Relaxed, Vol. XVII, No. 3
2002, however, as part of the Immigration and Refugee Protection Act, Canada implemented a statutory provision allowing for safe third country agreements.\textsuperscript{13} The talks between the United States and Canada which resulted in the signing of the Agreement on December 2, 2002 resumed largely in response to the terrorist attacks of September 11, 2001. The terrorist attacks mobilized a movement within both countries for bilateral cooperation in improving immigration control, in improving national security, and in preserving the integrity of the asylum systems of the United States and Canada.\textsuperscript{14} The Agreement was signed as a result of the belief that such a document would direct politician’s efforts to satisfy the objectives of the recent bilateral cooperation between the United States and Canada.

B. Purposes of the Agreement

1. For the Preservation of the Integrity of the Asylum Systems of the U. S. and Canada

Proponents of the Agreement argue that its implementation is necessary for preservation of the integrity of the asylum systems of the United States and Canada. This argument is based on the idea that people who apply for asylum in both countries are “usually illegal aliens [that] have broken the immigration law and have no other reason [besides their eligibility for asylum] to be admitted into the country.”\textsuperscript{15} In other words, given the fact that many asylum-seekers would not be allowed to remain in the United States but for a grant of asylum, it is argued that grants of asylum to such people “represents a nation’s sacrifice of part of its sovereignty over immigration for humanitarian reasons.”\textsuperscript{16} It is further argued that, “if people who could have applied for protection elsewhere are allowed to enter into the asylum system, the curbs on the nation’s sovereignty implicit in asylum can no longer be justified.”\textsuperscript{17} Based on these beliefs about the rationale behind the asylum systems in the United States and Canada and limitations on these systems, it is believed that implementation of the U.S.-Canada Safe Third Country Agreement would allow the preservation

\textsuperscript{13} Krikorian Testimony, supra note 6.

\textsuperscript{14} Id.

\textsuperscript{15} Id.

\textsuperscript{16} Id.

\textsuperscript{17} Id.
of the integrity of the asylum systems of the two countries by reducing the abuse of their respective asylum systems.  

2. For National Security

Proponents of the Agreement argue that its implementation is necessary for national security, in part because it will improve management of the vast U.S.-Canada border. It is argued that, "[a] better-managed asylum system resulting from the incorporation of the safe third country principle would also yield security improvements." As an example, it has been noted that, "[s]ix of the 48 foreign-born al Qaeda operatives who committed crimes in the United States over the past decades were applicants for asylum at some point, three of them at the time they took part in terrorism." 

3. For Immigration Control

In addition to the goals of preserving the integrity of the asylum system and improving national security, proponents of the Agreement further argue that the U.S.-Canada Safe Third Country Agreement would increase the control of the American and Canadian governments over immigration. It is believed that, "[o]nce the option of transiting the U.S. 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." Speculation exists that there is a good chance that in the short run there will be an increase in the number of asylum claims made in the United States but that the Agreement will still help to control immigration in the long run as the Agreement can be "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."

19. Id.
20. Id.
21. Id.
22. Id.
C. Application of the Agreement

1. The Provisions of the Agreement

The Agreement states that, "[t]he Party of the country of last presence shall examine, in accordance with its refugee status determination system, the refugee status claim of any person who arrives at a land border port of entry on or after the effective date of this Agreement and makes a refugee status claim."24 There are, however, exceptions to this rule. In five enumerated instances, the responsibility for determining the "refugee status claim...shall rest with the Party of the receiving country, and not the Party of the country of last presence."25 These instances are:

1) When the claimant "[h]as in the territory of the receiving Party at least one family member who has had a refugee status claim granted or has been granted lawful status, other than as a visitor, in the receiving Party's territory";26
2) "Has in the territory of the receiving Party at least one family member who is at least 18 years of age and is not ineligible to pursue a refugee status claim in the receiving Party’s refugee status determination system and has such a claim pending";27
3) "Is an unaccompanied minor";28
4) "Arrived in the territory of the receiving Party: [w]ith a validly issued visa or other valid admission document, other than for transit, issued by the receiving Party";29
6) Or "[a]rrived in the territory of the receiving Party [and was not] required to obtain a visa by only the receiving Party."30

2. Scenarios In Which the Agreement Applies

From this, it is clear that the Agreement will "generally require asylum-seekers to make their refugee claims in the first of the two countries entered,

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25. Id. art. 4, § 2.
26. Id.
27. Id.
28. Id.
30. Id.
regardless of their desired destination." It is also clear that there are six enumerated exceptions to this general rule. But, in what scenarios will the Agreement, if implemented, actually have an effect?

First, the Agreement will result in people attempting to make claims at American or Canadian land borders that do not fall into one of the five enumerated instances of exception being refused entry. Second, the Agreement only relates to people making claims at land borders, meaning the physical geographical border of a country. Therefore, asylum-seekers that “manage to cross the border (likely in an irregular manner) and make a claim inland will not be affected.” Asylum-seekers lodging claims inland are exempt from the Agreement, as it only applies to land borders, and therefore can theoretically apply in both countries.

Third, the Agreement will impact the large number of people who fly into one country and then apply for asylum at the second country’s land border, having never attempted to apply for asylum in the first country. This is particularly common when asylum-seekers come from countries that do not offer direct flights to Canada. These asylum-seekers fly to the United States, and then travel to Canada by land and apply for asylum. Such people will now be forced to apply for asylum only in their “country of first presence,” which is typically the United States. Lastly, the Agreement will not impact people applying at airport ports of entry. Therefore, if traveling on a connecting flight from one of the two countries to the other, the traveler will be able to apply for asylum in the second country.

III. CONSEQUENCES OF IMPLEMENTATION: CAUSING MORE HARM THAN GOOD?

While the goals of the United States and Canada may include improving national security and immigration control, and preserving the integrity of the

asylum systems of the two countries, the U.S.-Canada Safe Third Country Agreement has serious flaws. These flaws are so great that implementation of the Agreement as it stands would result in violations of international law and moral obligations, and would endanger the national security of both the United States and Canada.

A. Violating Requirements of International Law

1. Asylum in International Law

   In 1950, the United Nations General Assembly adopted the Statute of the United Nations High Commissioner on Refugees, which created the Office of the United Nations Commissioner for Refugees (UNHCR). The statute states that the UNHCR has two primary functions; "the functions of UNHCR encompass 'providing international protection' and 'seeking permanent solutions' to the problems of refugees by way of voluntary repatriation or assimilation in new national communities." In 1951, the United Nations adopted the Convention Relating to the Status of Refugees. The Convention deals with protection of the rights of refugees within member countries, the Convention does not, however, require any nation to admit overseas refugees.

   The Protocol Relating to the Status of Refugees was adopted by the United Nations in 1967, mainly to remove a stipulation found in the 1951 Convention, which "limited the definition of 'refugee' to those who had fled as a result of events occurring before January 1, 1951." The United States acceded to the 1967 Protocol, and as a part of that decision, accepted the 1951 Convention. The Protocol mandates: "no Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of [one of the five enumerated grounds], race, religion, nationality, membership of a particular social group or political opinion." In other words, it requires that member countries do not

38. LEGOMSKY, supra note 10, at 858 (citing GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 129-31 (1983)).
40. LEGOMSKY, supra note 10, at 874.
41. Id. at 861.
43. See Protocol Relating to the Status of Refugees, supra note 42, art. 33.
expel or return a refugee to a place in which he or she will be persecuted. While refoulment of a refugee claimant to a nation where his life or freedom will be threatened based on one of the 1967 Protocol's five enumerated grounds violates the Protocol, it remains unclear whether a country may remove an applicant to a third country.

2. Can Safe Third Country Agreements Comply With International Law?

The Refugee Convention and 1967 Protocol do not explicitly prohibit the use of safe third country agreements. The only requirement under Article 33 of the Refugee Convention and the Protocol Relating to the Status of Refugees is that a country not refouler, or return, a refugee to another country in which he or she would be persecuted under one of the five grounds enumerated in the 1967 Protocol. Indeed, none of the numerous cases of the European Court of Human Rights that discuss the use of safe third country agreements in Europe or international obligations related to asylum, directly question the legality of safe third country agreements. This allows room for expelling an asylum-seeker to any country other than one in which he would be persecuted on account of one of the five enumerated grounds. Under such an argument, a person could be expelled to any country in which the person would be "safe." The problem with such an argument is determining when an asylum-seeker would be safe. Can a country party to the 1967 Protocol assume that because another country is also party to the 1967 Protocol, and has signed a safe third country with the first country, that the second country is safe? Does this mean that a country sharing a safe third country agreement with another country is presumed to be a safe country for any asylum-seeker from any group, regardless of differences in interpretation of the obligations arising from the 1951 Convention and 1967 Protocol between countries? Does this mean that no form of adjudication in the country in which the asylum-seeker requests asylum is required, so long as the asylum-seeker is returned to another country party to a safe third country agreement?

The danger that arises from the use of safe third country agreements is that by removing a refugee to a state party to a safe third country agreement, the refugee may be ejected after returning to the safe country. This type of action

44. Chahal v. United Kingdom comes closest to questioning the legality of safe third country agreements, by stating that "states are...bound...not to send a person to a country where he faces persecution or to one from which he risks being sent to such a country." 23 Eur. Ct. H.R. 413, 489 (1997). Still, Chahal, does not address the question of whether safe third country agreements are international legal violations per se. Id. On the contrary, the Chahal decision, goes on to explain that as a result of international legal obligations, "European nations...adopt the practice of returning asylum seekers either to a country through which they have transited in order to travel to the country where they are seeking asylum or else to a 'safe third country.'" Id.
is clearly prohibited by Article 33 of the Refugee Convention. A country is not necessarily in compliance with the non-refoulement requirement of Article 33 merely because it abstains from returning an asylum-seeker to the country from which he fled, and then allows that country to make the final decision regarding the refugee’s return to the country of alleged persecution. This process is also known as indirect return.

The UNHCR has the “duty of supervising the application of” the Refugee Convention and the Protocol Relating to the Status of Refugees. The UNHCR has criticized the use of safe third country agreements by Refugee Convention and Protocol member states that violate the non-refoulement obligation of the Convention. In its 1999 General Conclusion, the UNHCR Executive Committee stated that, “policies such as those initiated by the EU, based on notions of ‘safe country of origin’ and ‘safe third country’ lack, in practice, the necessary safeguards to ensure that individuals are not refouled.”

In other words, indirect refoulement is prohibited by Article 33. As defined previously, indirect refoulement occurs when a state returns a refugee to a third state, which is not the state of origin, where the refugee would be at risk of further persecution, or even at risk of being sent from that state to the country of origin.

Non-refoulement is “the cornerstone of asylum and international refugee law.” To ignore refoulement and the effects it may have on refugees is to defy the core objectives of the Refugee Convention and Protocol. Nonrefoulement “reflects: ‘[t]he concern and commitment of those in need of protection the enjoyment of fundamental human rights including the rights to life, to freedom from torture or cruel, inhuman or degrading treatment or punishment, and to liberty and security of the person.’”

The chance of non-refoulement becomes more likely where there is a safe third country agreement. Under a safe third country agreement, an applicant can be removed to a member state, typically “the country of last presence.” Then, the procedures of that country are followed in making a determination regarding eligibility for asylum. Safe third country practices rely on the presumption that the country to which the asylum-seeker is being returned is safe. The practices

45. Protocol Relating to the Status of Refugees, supra note 42, art. 2 § 1; Refugee Convention, supra note 39, art. 35 §1.
46. See Jean Allain, The Jus Cogens Nature of Non-Refoulement, 13 INTL. J. OF REFUGEE L., 533 n. 4 (2001); See also General Conclusion on International Protection, UNHCR Executive Committee Conclusion No. 87 (1999).
47. Id. at 478. In addition to being a treaty obligation, non-refoulement is also recognized as a norm of customary international law and jus cogens. See id. at 480; see also Allain, supra note 46, at 548-59.
also assume that the asylum-seeker has the ability to apply for asylum in the third country. Unfortunately, returning an asylum-seeker to another state participating in a safe third country agreement can result in indirect refoulement when the receiving member returns an asylum-seeker to the country from which he had fled persecution.

3. The Agreement as Written Violates International Law

Although the U.S.-Canada Safe Third Country Agreement was signed after the United States and Canada became party to the Protocol, the Agreement does not lessen the American and Canadian obligations under the Convention and Protocol. This is because the Agreement states that it reaffirms the two countries' obligations under the Convention and Protocol to provide protection for refugees. The Vienna Convention on the Law of Treaties states that, "when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail." Given the fact that the United States and Canada are still subject to international legal obligations, the UNHCR has raised concerns about the general difficulties of successfully abiding by international legal obligations while also participating in a safe third country agreement, due to the potential for refoulement. Moreover, the agreement at issue is particularly problematic because the United States and Canada interpret their obligations under the Refugee Convention and Protocol differently. As written, the Agreement provides no explicit exception to its application for situations in which an asylum-seeker would be ineligible for asylum in one country but would be protected from refoulement in the other country.

UNHCR addresses concerns about the fact that under the U.S.-Canada Safe Third Country Agreement an asylum-seeker may be ineligible in one of the two countries but eligible in the other, apply in the country of ineligibility and therefore be sent back to the country of alleged persecution. "As a result [such asylum-seekers] may be subject to refoulement."

UNHCR notes that one circumstance in which this issue may arise is in relation to statutory bars on eligibility for asylum. The UNHCR has expressed concern that such bars are contrary to international law. "Those at issue include the U.S. bar for failure to meet a filing deadline and criminal and affiliation bars

51. Id. art. 31, § 2.
52. Article 6 of the agreement allows some wiggle room, through its allowance of the use of discretion. Id. art. 6.
53. UNHCR Comments, supra note 8.
54. Id.
in both countries that are broad and automatic in nature.”

UNHCR explains that, “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.” As a result of these statutory bars, cases will arise under the Agreement “where one country would bar an individual access to the asylum procedure or protection from refoulement and the other country would not.”

UNHCR specifically criticizes elements of U.S. law that could result in refoulement of asylum-seekers who may not be subject to refoulement in Canada. UNHCR has raised concerns that such elements of U.S. law may be contrary to international law. If the U.S.-Canada Safe Third Country Agreement is implemented, Canada’s adherence to its international legal obligations will effectively be gutted by default, due to cases in which the United States is the “country of last presence” and decides cases in its jurisdiction under U.S. laws that are contrary to international legal obligations. For example, UNHCR explains that U.S. law may violate international law through its use of expedited removal procedures. Under current U.S. 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).

B. Ignoring Moral Obligations

In addition to violating international law, the Agreement is contrary to the moral obligations of Canada and the United States. In response to the mass genocide of Jewish people who were denied refuge during World War Two, “there has been a broad effort . . . to comply with the United Nations Convention within their own domestic refugee law” by states party to the Refugee Convention and Protocol. Specifically, in the United States since 1947, “the basic policy has remained the same with U.S. immigration law -- to provide a safe haven for homeless refugees.” This is particularly significant as the policy

55. Id.
56. Id.
57. Id.
58. UNHCR Comments, supra note 8.
60. Id. (citing Stevic, 467 U.S. at 415).
was implemented prior to the United States becoming party to any international agreements regarding refugees. Rather, it arose out of moral obligation.

In Canada, in 1971, a "policy of multi-cultureness" was implemented. Additionally, through The Immigration Act of 1976, a priority system for processing immigrant visas was implemented. The Immigration Act of 1976, "explicitly affirmed the fundamental objectives of Canadian immigration laws, including family reunification, non-discrimination, concern for refugees and the promotion of Canada's demographic, economic and cultural goals." Under the priority system, along with applicants holding family-based visas, "Convention Refugees and the displaced and persecuted (humanitarian category)" are in the first priority group.

C. Harming National Security

Although one of the primary goals of the U.S.-Canada Safe Third Country Agreement is to improve national security, it may, in fact, harm national security. Relatedly, the Agreement could result in increased disorder at the border and increased bureaucratic hassle. Implementation by the United States and Canada would result in a transition period, creating the potential for the additional problem of having disorder during the transition. This could have the ironic effect of harming national security in both nations. Amnesty International has addressed this potential problem by stating that a likely ironic result of implementation of the Agreement would be the undermining of, "orderly and secure procedures at the border. When that door is closed, desperate refugees will try to get across irregularly, putting themselves in the hands of traffickers and becoming victimized yet again."

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62. Id. (citing Immigration Act 1976, R.S.C., Ch. 1-2, § 3 (1985) (Can.)).

63. Id. at 61.


65. Press Release, Amnesty International, Amnesty International Warns that new draft Asylum-Seeker Agreement Will Be Bad for Refugees, Bad for United States (Aug. 16, 2002), available at http://www.amnestyusa.org/news/2002/usa08162002.html. (last visited Aug. 7, 2004). Interestingly, The Federation for American Immigration Reform, a conservative, anti-immigration group, also opposes the implementation of the U.S.-Canada Safe Third Country Agreement. Dan Stein, the organization's executive director has predicted that, "People would still be encouraged to try their luck in applying under Canada's lax asylum laws, knowing that even if they were turned away, they would end up in the U.S., rather than home. At that point, they could begin pressing claims to remain here. As in the past, terrorists would be certain to take advantage of a system that is unable to cope with a growing caseload."; Press Release, The
Support for Amnesty International's prediction that the U.S.-Canada Safe Third Country Agreement would undermine national security at the U.S.-Canada border can be found by turning to the recent exodus to Canada by hundreds of Pakistanis due to a change in U.S. law. This law mandated that Pakistanis over fifteen years of age who are in the United States on visitor, student, or business visas must register with the Immigration and Naturalization Service by March 21, 2003.\textsuperscript{66} Resulting from the implementation of this law, the movement of hundreds of Pakistanis towards Canada led to what \textit{The New York Times} has categorized as a "chaotic exodus."\textsuperscript{67} This law, which only impacts a small segment of immigrants, has resulted in "jammed land crossings...overwhelming immigration officials and refugee aid groups on both sides of the border."\textsuperscript{68} Implementation of the U.S.-Canada Safe Third Country Agreement would clearly result in extreme disorder. This disorder would not only bombard American and Canadian officials, but would also have a negative impact on other aspects of American and Canadian society.

Rumors of the U.S.-Canada Safe Third Country Agreement began to increase border traffic before the Agreement was even finalized, when many immigrants thought the border would be closed.\textsuperscript{69} The result was a wave of over 1000 asylum seekers to the one Canadian border crossing alone, from a variety of countries, over the course of just a few weeks.\textsuperscript{70} In 2001, the same border crossing saw 5000 people file asylum applications; in June 2002 alone, approximately 1200 claims were made there.\textsuperscript{71} The Canadian border point of entry could not handle the June 2002 influx smoothly. This large increase in numbers forced immigration officials to work overtime and also forced refugees to camp out at the border crossing.\textsuperscript{72}

\textsuperscript{66} "In December [2002], the US government added Pakistan to a list of 25 mostly Muslim countries whose men are required to register with the Immigration and Naturalization Service." \textit{Nat'l Public Radio: All Things Considered} (NPR Radio Broadcast Jan. 28, 2003) (transcript on file with ILSA J. INT'L & COMP. L). The use of the Special Registration Program recently came to a close.


\textsuperscript{68} \textit{Id}.

\textsuperscript{69} Ingrid Peritz & Campbell Clark, \textit{Refugees Jam Border Fearing New Policy: Legislation Taking Effect Today Generates Concern That Canada Plans to Shut Its Doors}, GLOBE & MAIL, June 28, 2002, at A8. Additionally, refugees also fled the United States for Canada in the weeks before June 28, 2002, the date on which Canada's new Immigration and Refugee Protection Act went into effect. \textit{Id}.

\textsuperscript{70} Sachs, \textit{supra} note 67.

\textsuperscript{71} \textit{Id}.

\textsuperscript{72} \textit{Id}.
Full implementation of the U.S.-Canada Safe Third Country Agreement would lead to great disorder at the U.S.-Canada border. It would require a “whole new bureaucracy,” and during the transition to create such a bureaucracy, increased disorder would result. Perhaps, some of the negative ramifications for national security would lessen with time and increased organization within the system, but the use of smugglers and traffickers would continue even if an efficient bureaucracy were in existence.

IV. OFFERING A SOLUTION

A. Implementing Legislation Should Not be Passed

Legislation implementing the U.S.-Canada Safe Third Country Agreement should not be passed. Both the United States and Canada are obligated to prevent refoulement under international law, specifically under the Refugee Convention and Protocol. Safe third country agreements do not guarantee that this binding obligation will be upheld, as refoulement may still result, due to differences in the interpretations of the Refugee Convention and Protocol by each member state. Canada and the United States also should not pass implementation legislation as the two countries have moral obligations to refugees that would be compromised by increasing chances of refoulement for asylum-seekers. Additionally, if this implementing legislation is passed, it would lead to increased threats to the national security of the United States and Canada. This legislation, if passed, will lead to increased danger for asylum-seekers, increased disorder at the border, and increased bureaucratic hassle.

Canada’s Parliament should be particularly reluctant to approve implementation legislation. Canada provides immigrants with greater protections than the United States, and has affirmatively and consistently focused on complying with international law and self-imposed moral obligations to refugees. For example, Canada has taken a lead among nations by declaring that people in danger of gender-based persecution constitute a social group, and thus are eligible for protection under the Refugee Convention. According to Canadian law, a “social group” is afforded protection under the Refugee Convention. Legislation implementing the U.S.-Canada Safe Third Country Agree-


74. The Lawyers Committee For Human Rights, for example, notes that the Agreement will “create new inefficiencies, waste and bureaucracy as the U.S. and Canada each create, staff and maintain new procedures to determine who is and is not barred by the agreement.” Lawyers Committee For Human Rights, supra note 64.

75. Id.
ment would result in people with legitimate asylum claims being more likely to be sent back to persecution, nullifying Canada's efforts. In addition, Canada should be reluctant to implement the Agreement because such implementation could begin a transgression up a slippery slope. If the U.S.-Canada Safe Third Country Agreement is passed, the United States will likely attempt to make a third safe country agreement with the European Union member-nations. This would mean that after signing the agreement, Canada would be pressured to join more third party agreements.

Canada also should be reluctant to pass implementing legislation, as it will result in Canada frequently having its own asylum laws gutted, and U.S. laws control asylum by default, as U.S. asylum laws are narrower, when claims are to be adjudicated in the United States under the Agreement. Implementing

76. The gross impact that implementation of the Agreement would have on Canada's stance on gender-based asylum and its policy of multi-cultureless is indisputable. Even the Canadian government has openly admitted that the negative treatment of certain groups of asylees would be an inevitable result if the Agreement were to be implemented. The Canadian government has admitted this, despite the fact that such a result is unpopular internationally and among many Canadians. "Even the Canadian Government itself publicly acknowledged the unequal treatment given to refugee claimants in the U.S. In its 'Regulatory Impact Analysis Statement' contained in the Regulations to the Border Agreement, the government recognizes that the Agreement will have discriminatory impact on certain categories of refugee claimants. The Statement admits: 'the proposed regulations will likely have differential impacts by gender and with respect to diversity considerations.'" Canada-U.S. "Safe Third Country" Agreement is Signed but Not Yet Implemented, KAIROS REFUGEE AND MIGRATION PROGRAMME (Mar. 6, 2003), available at http://www.kairocanada.org/e/refugees/safeCountry/index.asp. (last visited Oct. 10, 2004).

77. Krikorian Testimony, supra note 6.

78. In France and Germany, only persecution inflicted on the asylum-seeker by the government itself entitles the applicant to asylum. Catherine Phuong, Persecution by Third Parties and European Harmonization of Asylum Policies, 16 GEO. IMMIGR. L.J. 81, 83 (2001). This means, "those fleeing persecution by one of several rival groups, none of which controls the country, are not entitled to asylum under German [and French] law...[Additionally, no] matter how credible the reports of persecution, if there are multiple sources of persecution and the situation is too anarchic, German courts will conclude that state authority has disintegrated and that, as a consequence, the asylum-seekers are ineligible for asylum." Maryellen Fullerton, Failing the Test: Germany Leads Europe in Dismantling Refugee Protection, 36 TEX. INT'L. L.J. 231, 265 (2001). This interpretation has been criticized by the UNHCR, among others. Germany interprets the Convention to an opposite extreme from Canada's interpretation; yet, if the two were a party to a mutual safe third country agreement, Canada would send asylum-seekers who had first been in Germany back there, due to its being deemed a "safe" country. Id.

79. Press Release, Amnesty International, USA/Canada: Open Letter to U.S. and Canadian Government Officials (last visited Aug. 15, 2002), http://www.amnestyusa.org/news/2002/usa08152002.html. Chris McGann, New Agreement May Reduce Number of Asylum Seekers, SEATTLE POST-INTELLIGENCER, May 24, 2003, http://seattlepi.nwsource.com/local/123472_canada24.html (last visited Oct. 5, 2004) [hereinafter New Agreement]. For example, the U.S. requires asylees to demonstrate that they are applying for asylum within one year of entry to the U.S., while Canada does not. In the past, this has meant that those with bona fide asylum claims who have been in the U.S. for less than one year, but are without documents proving that they have been in the U.S. for less than one year, have been unable to earn grants of asylum in the U.S.; they have, however, then been able to go to Canada and successfully assert asylum claims there. If the Agreement
legislation is currently being addressed by the Canadian Parliament. It is particularly important during this period for the UNHCR and NGOs to focus efforts on encouraging Canada’s Parliament not to pass such legislation. It is also critical for the Canadian Parliament to consider the potential consequences of such legislation on Canada’s international and moral obligations, and national security.

B. If Implementation Legislation Is Passed, It Should Be Passed With Reservations

Despite all this, implementation legislation will likely be passed. Currently, the issue of passing legislation implementing the goals of the Agreement is being discussed in Canada’s Parliament and the U.S. Congress. In regards to the European Union’s Conventions, “A representative of the United Nations High Commissioner for Refugees has stated that ‘the safe third country rules are here to stay, in one form or another.’” Additionally, the Office of the United Nations High Commissioner for Refugees states that it, “focuses its energies not on eliminating the practice, but on providing guidelines for its improved implementation.” Such agreements are already prevalent in Europe. Less as written is implemented, asylum applicants who lack documents proving that they entered the U.S. within one year will, in most cases, no longer be able to receive a grant of asylum in the U.S. or Canada. Id.

80. It should be noted that while the U.S.-Canada Safe Third Country Agreement has not yet been implemented, the use of an informal system with a similar initial result has commenced. Due to the large number of asylum applicants departing from the U.S. and presenting themselves at the Canadian border, in February 2003 Canada began to require appointments with border officials in Canada prior to allowing asylees to enter Canada. When they are told to go back to the U.S. and to come back at a later date, often the following day, Homeland Security officials in the U.S. arrest them upon their return. Francis X. Donnelly, Refugees Seek Safe Harbor in Canada, DETROIT NEWS, Mar. 4, 2003. These asylum applicants are then allowed to apply for asylum in the U.S., but are often detained until their asylum hearings before immigration judges unless they come up with adequate bond money. While, unlike under the U.S.-Canada Safe Third Country Agreement in theory these applicants may apply in asylum in Canada if they are denied asylum in the U.S., as under the Agreement, they are not given the option to chose which country to apply in first and thus if granted asylum in the first country must immigrate to that country. Also, if they are denied asylum and are ordered removed from the U.S. not on their own recognizance (e.g., if they are denied voluntary departure), the result is the same, and they will be returned to their country of citizenship. Id.

82. UNHCR Comments, supra note 8.
83. Id.
broad-reaching but similar agreements in other regions are also starting to emerge that involve other regions.\textsuperscript{85}

Still, legislation implementing the Agreement as written should not be passed. Implementation would mean that persons seeking refugee status in the United States prior to seeking it in Canada would be subject to the laws of the United States, and those that first arrived in Canada would be subject to the laws of the United States. For Canada, whose asylum laws are less stringent than those of the United States, implementation of the Agreement would mean modifying Canada's own laws to parallel those of the United States. In order to preserve its own laws, Canada should impose exceptions to the instances in which the Agreement would be implemented.

Canada should include an exception to the Agreement as it stands for applicants who make gender-based persecution claims as members of a particular social group before passing implementation legislation. Canada has made it a social obligation to recognize gender-based persecution under the enumerated category of particular social group.\textsuperscript{86} If Canada the United States on this issue it will likely be met with success, or even with the slight loosening of U.S. asylum laws, as U.S. Attorney General John Ashcroft is currently "considering new gender-persecution regulations for asylum seekers," for use in the United States.\textsuperscript{87} Second, Canada should demand an exception for cases in which the United States would detain an asylum-seeker just as it would detain

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\textsuperscript{85} For example, in January 2003, Switzerland and Senegal signed an agreement allowing "Switzerland to deport to Senegal any West African whose asylum application has been rejected and whose country of origin is not clear...The Swiss say the agreement is a first step in combating human traffickers operating in West Africa." \textit{Swiss Sign Pact to Curb the Rise of Political Asylum Requests}, N.Y. TIMES, Jan. 19, 2003.

\textsuperscript{86} There are five enumerated categories under which an applicant is entitled to asylum under the Protocol: race, religion, nationality, political opinion, and membership in a particular social group. Refugee Convention, \textit{supra} note 39.

\textsuperscript{87} George Lardner, Jr., Ashcroft Reconsiders Asylum Granted to Abused Guatemalan: New Regulations Could Affect Gender-Based Persecution, WASH. POST, Mar. 2, 2003, at A02. Attorney General Ashcroft is not only considering new gender-persecution regulations, but also reconsidering a Board of Immigration Appeals case from 1999, \textit{In re R-A-}, 22 I & N Dec. 906 (1999) (vacated Jan. 19, 2001), in which the Board found that the respondent, Rodi Alvarado, was credible but that the rape, beating, and vows to kill Ms. Alvarado inflicted upon her by her husband did not "qualify" her for asylum. Id. While Attorney General Ashcroft did vacate the decision in \textit{R-A-}, he has not yet approved any gender-based guidelines. The fact that this issue is under consideration in the United States makes it an issue that Canada could pressure the United States about prior to implementing the Agreement.
a convicted criminal. Canada should also exert pressure onto the United States, urging it to provide an exception to the Agreement for asylum-seekers who would be detained and would not be guaranteed counsel, as it is frequently hard for detained asylum-seekers to find counsel in the United States. \(^8\) Lastly, "the applicant should be able to challenge—in an individual procedure—the presumption that he or she could find safety in the third country." \(^8\) Such a safeguard should be an explicit part of any implementation legislation passed by either country.

The United Kingdom's Asylum and Immigration Act of 1996 contained a provision allowing for the use of safe third country agreements. This provision allowed:

> a person who ha[d] made a claim for asylum [to be] removed from the United Kingdom if, inter alia, the Secretary of States certifie[d] that in his opinion 'the government of that country or territory would not send him to another country or territory otherwise than in accordance with the Convention.' \(^9\)

Clearly, the British Act lacked an explicit statutory provision addressing whether an applicant could challenge the presumption that he or she could find safety in a third country. In other words, the statute did not explicitly state whether the third country's interpretation of the Refugee Convention or the British interpretation of the Refugee Convention dominated such conflicts, when the two countries interpreted their obligations under international law differently. Thus, in the United Kingdom, a court case arose dealing with the issue, *Regina v. Secretary of State for the Home Department, Ex Parte Adan*, which was appealed up to the House of Lords. \(^9\) The House of Lords found that in order to prevent the usurpation of British asylum law, it was necessary to allow asylum-seekers to challenge whether an asylum-seeker would be safe in the third country. \(^9\) The House of Lords eventually came to a decision on this

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88. \*10 Reasons Why*, supra note 1; see also UNHCR Comments, supra note 8.
89. Borchelt, supra note 86, at 515.
91. *Id.*
92. In *Adan*, Lord Slynn stated that, "the sole or core question is therefore whether as a matter of law it is open to the Secretary of State to certify that in his opinion that condition has been fulfilled...[or in the case at hand, can] he as a matter of law say that the government of Germany and France would not send Adan or Aitseguer back respectively to Somalia and Algeria 'otherwise than in accordance with the Convention.'" *Id.* at 728. Lord Slynn then found that, "the question is not whether the Secretary of State thinks that the alternative view is reasonable or permissible or legitimate or arguable but whether the Secretary of State is satisfied that the application of the other state's interpretation of the Convention would mean that
issue, but it did not impact the parties at issue. The asylum-applicants were sent back to "safe" countries which would later return them to the potentially persecuting countries before the case was heard by the House of Lords. In order to avoid such errors, if legislation implementing the U.S.-Canada Safe Third Country Agreement is implemented, Canada and the United States should each include explicit statutory provisions allowing for an asylum-seeker to challenge the presumption that he or she could find safety in the third country in their respective implementation legislation. Currently, Article 6 of the Agreement allows room for discretion, but what constitutes discretion is undefined.  

V. CONCLUSION

Now the United States and Canada have signed the U.S.-Canada Safe Third Country Agreement, enacting a bilateral possibility that has been talked about in North America since the mid-nineties. The Agreement, which has sparked much debate among scholars, immigrants' rights activists and politicians, is coming closer to being a reality. To comply with their international legal and moral obligations, and for the sake of the preservation of national security, the United States and Canada must not implement the Agreement.

While in the context of today's terrorism-fearing climate a safe third country agreement appears rational on its face, the resulting negative ramifications outweigh the justifications for the Agreement. In Europe, there has been an increase in the number of countries party to safe third country agreements. Under these agreements, if a person from within a European member country applies for asylum in another member country, the application will automatically be denied as it will be assumed that all member countries adequately promote human rights and their individual asylum systems. Additionally, if a person from a non-member country, most commonly Eastern Europe, Asia or Africa, enters from the east, the person must apply for asylum in one country only, the first country the person enters. As more and more countries become members of the agreements, less and less asylum-seekers will be able to have their claims for asylum fully adjudicated in a manner consistent with the legal obligations found in the Refugee Convention and Protocol.

the individual will still not be sent back otherwise than in accordance with the Convention." Id. Lord Slynn also addressed the concern that such an interpretation of England's role within its safe third country agreements, which included its relationship with Germany which was at issue, could negatively impact relations between the two countries or any pair of countries. He stated, "If some other states interpret the Convention differently in a way which he considers not to be in compliance with the Convention he must carry out his obligations in the way in which he is advised or is told by the courts is right. To do so is not in any way contrary to the comity of nations or offensive to other states who interpret it differently and it does not begin to suggest malafides on their part." Id. at 729.

This dangerous trend is reminiscent of the trends that led to the failed attempts by European Jews to enter other countries during World War Two, in order to avoid persecution. Most countries, including the United States and Canada, largely turned a blind eye to these people. As more and more countries sign safe third country agreements, even if a country wishes to help asylum-seekers, it will likely feel no obligation to.

The Canadian Council For Refugees has noted the similarity between the denial of protection of Jews fleeing Nazi persecution and the U.S.-Canada agreement by stating, “during the Second World War, Canada denied protection to Jewish refugees fleeing Nazi persecution. The slogan from that period was, ‘None is Too Many!’ the answer given by a Canadian official when asked how many Jewish refugees Canada would take.” The Canadian Council for Refugees calls the U.S.-Canada agreement a “[n]one is too many Agreement” because it is about keeping refugees out, “just as we closed the door on Jewish refugees in the 30s and 40s.”

If safe third country legislation is implemented by the United States and Canada, the rights of asylum-seekers will be severely restrained. Though Canadians have chosen to implement relatively liberal immigration and asylum laws and practices, these laws and practices will become lost to asylum-seekers who first enter the United States, and therefore become subject to the immigration and asylum laws and practices of the United States, particularly in the context of specific claims, such as those of gender-based persecution. The member countries of the European agreements have expanded, and it is likely that with time these agreements in North America and Europe will continue to expand. It is dangerous precedent to set up a system in which it is possible that an asylee would have no safe country to turn to in a flight from persecution.

It is not surprising that in a time like this, when many Americans and Canadians feel vulnerable to terrorism, that there is a desire to increase security at our borders and to limit asylum. However, at what cost should these protections come? The United States and Canada are countries of immigrants, who largely came to their respective countries to flee persecution and obtain freedom. It is no less important during these times than during other times that the United States and Canada not inhibit legitimate asylum-seekers from seeking refuge within their borders.

94. See 10 Reasons Why, supra note 1.