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Audrey Macklin is Associate Professor at the Faculty of Law, University of Toronto. Her areas of expertise include immigration, refugee and citizenship law. (audrey.macklin@utoronto.ca). She was formerly a member of Canada's Immigration and Refugee Board (1994-96).

The Caledon Institute of Social Policy occasionally publishes reports and commentaries written by outside experts. The views expressed in this paper are those of the author.

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ISBN 1-55382-070-3

Published by:

The Caledon Institute of Social Policy
1600 Scott Street, Suite 620
Ottawa, Ontario, Canada
K1Y 4N7
Phone: (613) 729-3340
Fax: (613) 729-3896
E-mail: caledon@caledoninst.org
Website: www.caledoninst.org

Caledon publications are available on the Caledon website at www.caledoninst.org

Introduction

What is a border? We all think we know the answer, at least in formal terms: A border demarcates the territory of one state from the territory of another. But that actually tells us less than we think, because the significance of a border lies not in what it is, but in what it does – or, more precisely, in what is done in its name. Among the many lessons we are learning in the wake of 9/11, one important insight is that borders have different impacts not only on citizens versus non-citizens, but also on differently situated citizens. So for all intents and purposes, the Canada-US border does not operate the same way for an Aboriginal person born in Akwesasne as it does for a non-Aboriginal Canadian born in Halifax, or for a Canadian born in Islamabad.

Another way of understanding this variation is to imagine the Canada-US border less as a line in the dirt than as a transparent medium through which all can see, but through which some pass more easily than others. The Canada-US Free Trade Agreement, superseded by the North American Free Trade Agreement, fundamentally altered the significance of the borders dividing Canada, US and Mexico concerning movement of goods, while leaving them virtually intact for the legal movement of people. NAFTA does facilitate the cross-border movement of certain categories of highly-skilled individuals, such as investors and managers, but does not affect the overwhelming majority of people who might otherwise wish to move across borders into Canada, the US and Mexico.

The recent Safe Third Country Agreement between Canada and the United States¹ offers an opportunity to examine how the border is being reconfigured for one class of non-citizens, namely asylum seekers. The Agreement provides that asylum seekers (also known as refugee claimants)² who arrive at a port of entry along

the Canada-US land border will be obliged to seek protection in the first country of arrival. In other words, asylum seekers on the US side of the border attempting entry into Canada will be deflected back to the US and vice versa.

In the language of the Safe Third Country Agreement (hereafter “Agreement”), ‘third country’ refers to a state through which an asylum seeker passes en route from her country of nationality to the destination state. Designating a third country as ‘safe’ signifies a judgment that the country will provide refugee protection in accordance with the 1951 UN *Convention Relating to the Status of Refugees* and the 1967 *Protocol*, and will adjudicate refugee applications in a fair manner.

According to the 1951 *Convention*, as amended by the 1967 *Protocol*, a refugee is a person who:

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country.³

Both Canada and the US are parties to the 1951 Convention and the 1967 Protocol, and have incorporated the refugee definition into their domestic law. The singular right to which a refugee is entitled is protection from *refoulement* (i.e., return or expulsion). Article 33(1) of the 1951 Convention states that no State party to the Convention shall expel or return a refugee “in any manner whatsoever” to the frontiers of a country where the refugee’s life or freedom would be threatened.

The purpose of this paper is to describe and evaluate the Safe Third Country Agreement (hereafter “the Agreement”) as an instrument that alters the practical meaning of the Canada-US

border for asylum seekers. Since Canada alone instigated and actively pursued this Agreement, I focus on the congruence between the Agreement and some of the core legal, social and political values Canada claims as constitutive of its national identity.

The Agreement

The Agreement begins with a preamble affirming both parties' international legal obligations to protect refugees on their territory. It expresses the parties' desire to "promote and protect human rights and fundamental freedoms," including those stipulated under the *Convention Against Torture*. The preamble also acknowledges the specific duty of *non-refoulement* (i.e., not returning or expelling), and re-affirms that the Agreement should neither undermine the identification of persons in need of protection, nor lead to indirect breaches of the principle of *non-refoulement*. While recognizing the parties' respective undertakings regarding asylum, the preamble also nods obliquely to domestic interests by citing the desirability of enhancing "the integrity of that institution [of asylum] and the public support on which it depends." Finally, the preamble expresses the conviction that the Agreement "may enhance the international protection of refugees by promoting the orderly handling of asylum applications by the responsible party and the principle of burden-sharing." I will return to a more detailed consideration of the Preamble below.

The crux of the Agreement is Article 4(1), which 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 ... and makes a refugee status claim.

The rule that an asylum seeker must make her claim in the "country of last presence" (US or Canada, wherever she first arrived) is subject to four exceptions. According to Article 4(2), a claimant will be admitted into the territory of the "receiving Party" for purposes of making a refugee claim if she:

- a) Has at least one family member in the territory of the receiving Party who has been accepted as a refugee or has lawful status, other than as a visitor
- b) Has at least one family member in the territory of the receiving Party who is over 18, and has an eligible refugee claim pending
- c) Is an unaccompanied minor, meaning that she is unmarried, under 18, and has no parent or legal guardian in either Canada or the US
- d) Arrived in territory of the receiving Party with a validly issued visa (other than a transit visa), or without a visa because none is required to enter only the receiving Party.

In addition, Article 6 of the Agreement grants either party the discretion to consider a refugee claim "where it determines that it is in its public interest to do so." Furthermore, the Agreement only applies with respect to refugee claims made at a land port of entry.⁴ It also does not apply to asylum seekers who make inland refugee claims from within Canada or the US.⁵ Between 1995 and 1997, Canada tried to persuade the US to enter into a safe-third country agreement, and ultimately failed. This agreement would have covered inland claims. One reason the present Agreement does not apply inland is the impossibility of determining whether inland

claimants arrived via the US. Refugee claimants who wish to pursue their claim in Canada have no incentive to disclose that they passed through the US, and every reason to conceal it. The task of establishing a person's route into Canada or the US is obviated when the person concerned is literally standing at the Canada-US border.

In broad terms, there are two elements to this Agreement. The first is a readmission component, which requires the country of last presence to accept the return of an asylum seeker from the receiving Party. Canada is obliged to 'take back' an asylum seeker who attempts to enter the US via Canada, and vice versa. The second element is the refugee determination component, which requires the party that ultimately admits the asylum seeker to also adjudicate the refugee claim.

No refugee claimant who is subject to this Agreement may be removed to a country outside Canada or the US until the refugee claim has been determined by one of the parties (Article 3). This provision is intended to preclude two related phenomena. One is known as "chain *refoulement*," whereby asylum seekers are deflected from one country to another, either informally or pursuant to successive 'readmission agreements,' until they are eventually returned to their country of origin without ever accessing a refugee determination process.

The other consequence the Agreement seeks to avoid is the 'refugee in orbit' problem. This arises when country A designates country B as a safe third country, thereby entitling country A to refuse to adjudicate the claim of an asylum seeker who arrived in country A via country B. However, in absence of a readmission agreement, country B may refuse to re-admit the asylum seeker, and send the person to Country C, and

so on. The following episode illustrates how a 'refugee in orbit' may ultimately be *refouled* (i.e., returned) without any country ever adjudicating his or her claim.

In August 2002, a group of nineteen Guatemalans who feared persecution on grounds of political opinion (and, in some cases, race) arrived by plane at London's Heathrow Airport, apparently after stop-overs in the United States and Spain. The British authorities returned them to Spain, which in turn sent them off to Miami International Airport. From there, United States immigration officials immediately *refouled* them to Guatemala. At no point in the process did any country assess their refugee claims, despite urgent pleas from Amnesty International to all three governments.⁶

According to Article 8(3), the Parties agree to review the Agreement no later than one year after the date of entry into force. They also agree to cooperate with the United Nations High Commissioner for Refugees (UNHCR) in monitoring the implementation and will also seek input from non-governmental organizations.

Article 9 states that both Parties "shall, upon request, endeavour to assist the other in the resettlement of persons determined to require protection in appropriate circumstances." The purpose and relevance of this provision in the context of the Agreement as a whole seems obscure, given that government selection of refugees abroad for resettlement in Canada or the US is a separate and distinct process. The reason for its presence in the Agreement only surfaced months after the first draft of the Agreement was issued. In August 2002, the Canadian Council for Refugees obtained a document entitled "Draft Note to Accompany a Canada-United States Agreement for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries," which had been drafted sometime around June 2002, but not publicly disclosed.⁷

The Draft Note requires Canada to resettle up to 200 persons per year referred by the Government of the United States who are “outside the United States and Canada...and have been determined by the Government of the United States of America and the Government of Canada to be in need of international protection.” Canada also undertakes to engage in coordinated action with the United States in the field of “migration control and refugee protection responses” in the event of “mass migration affecting either Canada or the United States.”

According to the US State Department, the objective of the Draft Note is to refer to Canada persons interdicted at sea by US authorities.⁸ Each year, the US Coast Guard intercepts decrepit vessels ferrying Cubans and Haitians fleeing their respective countries. The objective of this interdiction program is to prevent the people aboard from setting foot in the US, where they might claim asylum. Haitians are summarily returned to Haiti with no or minimal inquiry into whether any of the migrants fear persecution. The situation with Cubans is slightly more complicated, since the US refuses to resettle Cuban refugees, nor will it forcibly return them to Cuba. Many end up being detained indefinitely in Guantanamo Bay. One surmises that these Cuban detainees will be at the top of the list of those referred by the US to Canada for resettlement. According to Bill Frelick, Director of Refugee Programs for Amnesty International in the United States, “They’re doing a little horse trading. ... It’s basically come down to trading in people and it’s unseemly.”⁹

Canada’s Governor-in-Council (Cabinet) issued draft regulations in October, 2002 which would provide formally designate the US as a Safe Third Country under s. 101(1)(e) of the *Immigration and Refugee Protection Act*, and would furnish the requisite elaboration of the terms of the Agreement. The draft regulations

have been subject to review and recommendations by the Standing Committee on Citizenship and Immigration and have been revised but not finalized.¹⁰ The United States has not yet embarked on a parallel process of regulation.

Can the Agreement Live Up to its Preamble?

If one wishes to measure a law according to the values of a society, the preamble to the law is a good place to start. Preambles often articulate the goals of a law in terms of the norms, aspirations and self-understanding of the nation. In so doing, the preamble furnishes a set of standards against which one can situate and measure the law. One can ask whether the norms expressed or implied in a preamble fairly represent (in whole or part) a given society’s values. One can also ask whether the text of the law, in letter and spirit, aligns with the values expressed in the preamble. I will take the former as given, and turn my attention to the latter question. I will isolate various elements of the preamble and assess whether the Agreement is likely to promote, enhance or derogate from the values expressed in the preamble.

1. Canada and the US reaffirm their obligation to “provide protection for refugees on their territory in accordance with [the 1951 *Convention Relating to the Status of Refugees* and the 1967 *Protocol*].”

I believe that most Canadians accept the importance of honouring our legal commitments, both as individuals and as a state. Abiding by our international legal obligations, including those relating to refugees, is simply a specific application of the general rule that we ought to keep our promises.

The Safe Third Country Agreement denies access to Canadian territory by asylum seekers at the Canada-US border. One might contend that since these individuals are not yet on our territory (they are only at the port of entry), Canada has no obligation to protect them and may repulse them without violating international law. Therefore, there is no conflict between honouring our international obligations and deflecting asylum seekers to the US.

This Agreement is not the first or only tactic devised by the Canadian government to impede asylum seekers from reaching Canadian territory and claiming asylum, thereby triggering Canada's international legal obligations. Canada is something of a pioneer in instruments of interdiction. The tools range from carrier sanctions that punish private airlines and shipping lines from transporting improperly documented passengers, to imposition of visa requirements on so-called 'refugee-producing' countries, to the interception and deflection of ships suspected of carrying migrants to Canada.¹¹

One might query whether preventing asylum seekers from entering our territory is a legitimate means of circumventing our duty toward refugees. To put it another way, does the Agreement contradict Canada's international obligation to refrain from directly "in any manner whatsoever" returning a refugee to the frontiers of a country where the refugee's life or freedom would be threatened?

In the field of taxation, the law distinguishes between 'tax avoidance', which is legal, and 'tax evasion,' which is a crime. Does the Agreement represent avoidance or evasion of Canada's international obligations? Are such nuanced distinctions even appropriate in the domain of human rights – where the stakes are not money – but liberty, security and life itself? In the context of the Agreement, the relevance

of these questions turns on the extent to which the protection that this Agreement allows Canada to withhold can and will be furnished by the United States. If the United States departs in important ways from the standards of procedural and substantive protection that Canada observes, then the Agreement allows Canada to do indirectly what it cannot do directly, namely deny refugees the rights to which they are entitled according to international and domestic law. A more systematic consideration of the US asylum regime follows below.

2. Acknowledging in particular the international legal obligations of the Parties under the principle of *non-refoulement* set forth in the *Convention and Protocol*, as well as the *Convention Against Torture*...

The principle of *non-refoulement* lies at the heart of refugee protection. Article 33 of the *Convention* permits derogation from the principle of *non-refoulement* only where the refugee poses a serious danger to the country of asylum. However, the *Convention Against Torture* permits no exemption from its prohibition on returning a person to face torture. Both Canadian and US law incorporate exceptions to the principle of *non-refoulement* into domestic asylum law. The United States expressly provides relief from removal where a person faces a substantial risk of torture. Canadian law leaves open the hypothetical possibility of deporting a security risk to face torture in another country, although the Supreme Court of Canada has signaled its doubt that such action event could actually be justified under the *Canadian Charter of Rights and Freedoms*.¹² On the issue of returning a person to torture, US and Canadian law converge.

As noted above, Article 3 forbids the removal of a refugee claimant unless one of the parties actually determines the claim for refugee

status. Here too, the Agreement evinces a joint commitment to ensuring access to a refugee protection procedure in either Canada or the US.

3. Noting that refugee status claimants may arrive at the Canadian or United States land border directly from the other Party's territory where they could have found effective protection ...

The Agreement is premised on the idea that refugee claimants ought to apply for protection in the first country of arrival (at least as between Canada and the US), rather than choosing their preferred destination. The expression 'forum shopping' connotes the idea that choosing the country of asylum is essentially an opportunistic abuse of the international regime of refugee protection. We value 'playing by the rules,' and so-called 'forum shopping' breaches those rules.

Why? One possible explanation for resistance to the exercise of choice by asylum seekers is the notion that refugee protection is a form of humanitarianism, motivated by kindness, not by duty. Recipients of generosity are not entitled to choose the donor in the hopes of maximizing the benefits they receive. Asylum seekers are the world's supplicants – and beggars can't be choosers. As Deputy Prime Minister John Manley declared in June 2002, after initiating the formal process leading to the Agreement: "It's not a matter of shopping for the country that you want, it's a matter of escaping the oppression that you face."¹³

A related rationale for opposing choice turns on credibility. One might suppose that if people genuinely flee their countries of origin out of fear of persecution, they will seek safe haven at the earliest opportunity in the first country that might offer protection. The inference

is that asylum seekers who fail to do so are suspect. US anti-immigration activist Mark Krikorian elaborates:

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 immigration¹⁴

Krikorian insinuates that asylum seekers who do not make a claim in the first country of arrival are not really refugees, and are merely economic migrants trying to 'jump the queue.' It seems reasonable to suggest that Canadians value integrity and fair play. If the refugee system is indeed being abused by undeserving people, Canadians might support a change to the system that would prevent further abuse.

Asylum seekers may have many reasons for preferring to apply for refugee status in one country over another. These include: greater likelihood of acceptance, presence of kin or friends, language or cultural affinity, and better treatment pending the determination of status (physical liberty, access to legal aid, work permits, social services, language training, health care). Arguably, it is no more pernicious to seek refugee status in the country most likely to grant it than it is to apply for a job from the employer most likely to hire you. That is, unless you believe that most job seekers misrepresent their qualifications and the employers who hire them are dupes. Of course, the solution to that problem would be to improve the process, not to refuse further applications. The Agreement selectively acknowledges the legitimacy of some of these reasons for preferring to make a refugee claim somewhere other than the country of first arrival. Thus, a refugee claimant arriving at the Canada-US border will be permitted to cross over into her destination country and make a refugee status

application if she has a visa to enter that country (or comes from a visa-exempt country), has a family member there, or is an unaccompanied minor. The family member must possess refugee status, or have some other lawful status other than as a visitor; if they have only a refugee claim pending, they must be over 18.

The exemption for asylum seekers with family members harmonizes with the value Canadians place on familial relationships as sources of emotional, social and economic support. Allowing asylum seekers to apply for refugee status in the country where their relatives reside opens up the possibility that the family may ultimately be able to settle together in the same country. Indeed, the relatively expansive definition of the family indicates a recognition of the wider net of kinship responsibility cast by many non-Anglo-European cultures. Article 1(B) defines ‘family member’ as “spouse, sons, daughters, parents, legal guardians, siblings, grandparents, grandchildren, aunts, uncles, nieces and nephews.”

The exclusion of first cousins seems arbitrary, since nieces, nephews, aunts and uncles are listed as family members. Common-law and same-sex partners are not explicitly named as family members, although the recent Immigration and Refugee Protection Act added these to the definition of the family class in the recent *Immigration and Refugee Protection Act*.¹⁵ Another curious feature of the family member exemption is that it applies only if the family member has a secure legal status, which seems arbitrary. Assume an asylum seeker arrives on the US side of the Canada-US border. Her aunt is in Canada as an undocumented migrant, and thus does not fall within the exceptions under Article 4(2)(a) or (b). According to the definition in Article 1(F), the asylum seeker cannot join her

aunt because the latter is undocumented. It is difficult to understand how the irregular immigration status of a relative detracts from the value of family reunification.

The exception created for visa holders (or those who do not require visas to enter the destination country) seems explicable as a diluted variation of the “keep your promises” rule: A visa (or a visa exemption) amounts to conditional permission to enter. The asylum seeker would have legitimate expectation that she could enter the country that issued her the visa, or exempted her from a visa requirement, and the destination country should not be able to defeat that expectation which it created and upon which the asylum seeker relied.

The provision for unaccompanied minors is the only exception directly linked to a difference between the Canadian and US immigration systems. Article 1(F) defines a minor as “an unmarried refugee status claimant who has not yet reached his or her 18th birthday and does not have a parent or legal guardian in either Canada or the United States.” Recent clarifications by CIC indicate that a minor traveling with an adult will still be considered an unaccompanied minor unless “the adult accompanying the child is either a parent or has lawful responsibility for the child.”¹⁶

Although Article 4(c) frames the exemption for unaccompanied minors in neutral terms, in reality it is directed at Canada-bound unaccompanied minors who are in the US. Though nowhere conceded openly, the exception for unaccompanied minors reflects a sharp distinction in values between Canadian and US migration law: The former considers the best interests of children to weigh heavily as a matter of law in decisions affecting children; the latter does not.

The difference between the practices of the two states surfaces most starkly in the detention of children for immigration-related reasons. The United States routinely detains unaccompanied minors who lack legal status in the US and may be asylum seekers. This practice has been widely criticized by US and international human rights organizations. A 2002 study by the Women's Commission for Refugee Women and Children (a division of the International Rescue Committee) reported that: "In recent years, the US Immigration and Naturalization Service (INS) has taken approximately 5,000 children into its custody annually. These children range in age from toddlers to teenagers. ... Increasingly, among these minors are children fleeing armed conflict and human rights abuses. ..."17 A recent report by Amnesty International USA, *Why am I Here? Children in Immigration Detention*, extensively documents the treatment of minors in immigration detention in the US. It comes to the following conclusion:

According to the United Nations High Commissioner for Refugees (UNHCR), children seeking asylum, particularly if they are unaccompanied, are entitled to special care and protection.

Unaccompanied children in the US immigration system are routinely deprived of their rights in contravention of international and US standards. Children should be confined and imprisoned only in exceptional circumstances or as a last resort, and then only for the shortest possible time. Unaccompanied children arriving in the US are not only detained but are often held in facilities that routinely fail to adhere to both international and US standards governing the detention of children. AI has documented violations of rights essential to protection from arbitrary detention, including access to counsel, to translators, and to telephones. Violations of the right to humane treatment have also been documented: some children may be housed alongside juvenile offenders, denied access to appropriate education and exercise, and may be subjected to punitive and degrading treatment including the

excessive use of shackles and restraints and routine strip searches.

Freedom from arbitrary detention is a fundamental human right. The system of determining whether a child should be held in a secure or non-secure facility and whether a child should remain in detention is fraught with difficulties and inconsistencies, and in some cases may amount to arbitrary detention. The decision to continue to detain a child may rest on factors such as whether a parent has appropriate immigration status in the United States, the availability of detention spaces, the attitude of the official involved, or an arbitrary and unreviewed decision that a child is a flight risk.¹⁸

In 1999, following the arrival in British Columbia of three ships from Fujian province, several unaccompanied minors were detained. The governments of British Columbia and Citizenship and Immigration Canada eventually developed alternatives to detention for minors, and s. 60 of the *Immigration and Refugee Protection Act* affirms the principle that "a minor child shall be detained only as a measure of last resort, taking into account the other applicable grounds and criteria including the best interests of the child." The best interests of the child do not formally constrain migration-related decisions in the US. In the result, Canada will permit the entry of unaccompanied minors who would otherwise be required to apply for asylum in the US.

Given this rule on unaccompanied minors, it may seem odd that family member is defined to exclude asylum seekers under 18. Consider this possibility: A 14-year-old enters Canada from the United States and makes a refugee claim. Before her claim is heard, her mother arrives at the US side of the Canada-US border and wishes to enter Canada in order to apply for refugee status. She chooses Canada because her daughter is already there. Under the

terms of the Agreement, she will not be permitted to enter because her family member (daughter) is under 18 and has a refugee claim pending.

It is unclear how the values of family unity and the best interests of the child would be served by these outcomes. The Agreement yields such perverse results because the Canadian drafters contemplated that families would try to thwart the Agreement by sending a child ahead as an unaccompanied minor, after which the child could function as the ‘anchor.’ The family would follow afterwards, and would qualify for entry because they have a family member in Canada (the unaccompanied minor).¹⁹ In order to remove this incentive, the Agreement excludes refugee claimants under 18 from the definition of family.

Although the Agreement takes account of certain family connections, it does not acknowledge other significant links, such as linguistic affiliation. Refugee claimants from Francophone countries, or where French is a second language, might wish to apply for refugee status in Quebec, where language, culture and a community of people from the same country of origin can minimize the trauma of dislocation. The significance of this type of communal connection may go unappreciated in the United States (which has only one official language and no linguistic national minority), but the value of promoting and protecting the Francophone community is recognized in Canada.²⁰ Although the Standing Committee on Citizenship and Immigration recommended that francophone claimants should be permitted to make their claims in Canada, Citizenship and Immigration Canada summarily rejected the recommendation.²¹

Finally, in considering the valid reasons why an asylum seeker might choose Canada over the US, one cannot ignore the prospects awaiting

an Arab or Muslim asylum seeker arriving in the US post-9/11. The Migration Policy Institute describes some of the immigration measures taken in the wake of September 11 in the following terms:

The US government has imposed some immigration measures more commonly associated with totalitarian regimes. [T]here have been too many instances of long-time US residents deprived of their liberty with due process of law, detained by the government and held without charge, denied effective access to legal counsel, or subjected to closed hearings. These actions violate bedrock principles of US law and society. Rather than relying on individualized suspicion or intelligence-driven criteria, the government has used national origin as a proxy for evidence of dangerousness. By targeting specific ethnic groups with its new measures, the government has violated another core principle of American justice: the Fifth Amendment guarantee of equal protection.”²²

I will consider the specific laws governing asylum seekers below, but briefly mention here two other instruments directed at Arab or Muslim non-citizens: first, ‘preventive detention’ of Muslim and Arab non-citizens in the aftermath of September 11; second, the National Security Entry-Exit Registration System (NSEERS), commonly known as “Special Registration.”

Recent reports by government and non-governmental organizations reveal that following September 11, the US government detained hundreds of migrants of Arab or Muslim descent on ‘preventive’ grounds, meaning that they were not suspected of any particular offence. Some had legal immigration status; some did not. In truth, the United States had tacitly tolerated the presence of millions of undocumented migrants for decades, but following September 11, immigration irregularities furnished a pretext for

detaining and deporting mainly Muslim and Arab aliens. Detainees' status and location were deliberately withheld from family members and attorneys.²³

The Office of the Inspector General (OIG) for the Department of Justice issued two reports in summer 2003 that investigated and criticized certain aspects of the treatment of detainees.²⁴ The Migration Policy Institute was able to obtain information about 406 detainees, despite the "government's attempts to shroud these actions in secrecy:"

More than 1200 people – the government has refused to say exactly how many, who they are, or what has happened to all of them – were detained after September 11. ... Unlike the hijackers, the majority of noncitizens detained since September 11 had significant ties to the United States and roots in their communities. ... Almost half had spouses, children, or other family relationships in the United States. Even in an immigration system known for its systemic problems, the post-September 11 detainees suffered exceptionally harsh treatment. ... Many of the detainees were subjected to solitary confinement, 24-hour lighting of cells, and physical abuse Many of the detainees were incarcerated because of profiling by ordinary citizens, who called government agencies about neighbors, coworkers, and strangers based on their ethnicity, religion, name or appearance Most important, immigration arrests based upon tips, sweeps, and profiling have not resulted in any terrorism-related convictions against those detainees.²⁵

In August 2002, the US government introduced the Special Registration system to track the presence of men and boys over 16 from 25 countries which do not hold permanent resident status or citizenship in the US.²⁶ With the exception of North Korea and Eritrea, every country is predominantly Muslim or Arab. These males must report to immigration authorities, where they are fingerprinted, photographed and interviewed under oath. Failure to register is a

deportable offence. Here is how researchers for the Migration Policy Institute described the Special Registration Program and its impact on the targeted groups:

The program evoked fresh memories of the post-September 11th detentions, in which 1,200 or more people were detained and held for immigration violations without being charged with a terrorism-related crime. Fear of Special Registration increased when registrants living in the US legally were detained due to errors by immigration officials.

As a result of Special Registration, America has, for the first time in our history, become a place from which people flee. Hundreds of people from Muslim countries, some of whom have legal permission to live in the US, have fled to Canada. They feel a country that once welcomed them now targets them because of their religion or nationality. These immigrants are terrified of trusting a poorly managed program that has detained and deported many members of their community. Others, too scared to register but determined not to leave their new home, now live in fear of deportation.

It is unlikely that the Special Registration program will help capture terrorists. As a short-term security strategy, Special Registration is equivalent to asking terrorists to turn themselves in. The Administration's poorly planned efforts have only intimidated immigrants, discouraging them from turning to law enforcement authorities. This, in turn, makes it harder to improve national security.²⁷

Between the Special Registration Program's inception and March 2003, over 60,000 males were registered, over 2,000 detained, and an unknown number deported.²⁸ A recent Migration Policy Institute report examines the effect of targeted immigration enforcement, employment discrimination. It concluded that the government's actions have left Muslims and Arabs in the US feeling stigmatized and doubly victimized: first by the events of September 11, and second by the reaction to it.

Given this climate toward Arabs and Muslims in the US, one can scarcely deny the reasonableness of an Arab or Muslim asylum seeker's preference for Canada rather than the US.

4. Convinced, in keeping with advice from the United Nations High Commissioner for Refugees (UNHCR) and its Executive Committee, that agreements among states may enhance the international protection of refugees by promoting the orderly handling of asylum applications and the principle of burden sharing ...

This portion of the Preamble conveys two messages. The first is that the opinions of the UNHCR and its Executive Committee are relevant – though not determinative – in ensuring a regime complies with Canada's and American international obligations under the Refugee Convention and Protocol. In this regard, the UNHCR Executive Committee Conclusion 15 (XXX) of 1995 states that the preferred destination of asylum seekers should “as far as possible be taken into account.”

The UNHCR has softened its position since 1995, perhaps as a concession to western states, which both wish to deflect asylum seekers and are the UNHCR's major funders. The UNHCR now tentatively supports measures to “ensure an appropriate allocation of States responsibility for determining refugee status.”²⁹

The more contentious aspect of this segment of the Preamble are the putative correlations between the Agreement and the “orderly handling of asylum applications,” and between the Agreement and “burden sharing.”

The phrase “burden sharing” portrays refugees as a liability for the nations that accept

them. Interestingly, Canadian evidence suggests that refugees, like other migrants to Canada, make a positive contribution to the economic, social and cultural life of the country.³⁰ Quite apart from a cost/benefit analysis of refugees for Canada, the expression “responsibility sharing” seems to capture better the fact that the refugee regime operates on the basis of duties voluntarily assumed by the states which accede to the 1951 *Refugee Convention* and the 1967 *Protocol*.

In any event, “burden sharing” in this specific context tacitly refers to the asymmetrical flow of refugee claimants from the US into Canada and vice versa. According to statistics compiled by Citizenship and Immigration, between 1995 and 2001, about one-third of all refugee claimants in Canada entered at the US-Canada border. Of those claiming refugee status at a port of entry (as opposed to inland), 60-70 percent arrived via the US. In 2001, roughly 14,000 refugee claimants came to Canada from the US, and 95 percent of these claims were made at land border ports of entry.³¹ During this same period, about 200 refugee claimants entered the US from Canada annually.³² The total number of refugee claims increased to almost 45,000 in 2001, but declined to about 33,000 in 2002.³³ Meanwhile, the US receives about 85,000 to 90,000 asylum claims annually, and has a backlog of about 250,000.

Given that the US has a population almost ten times that of Canada, the fact that Canada receives one-third to half the total number of refugee claimants received by the US seems like a major disparity. The value promoted under the rubric “burden sharing” is the notion that each state should take responsibility for a proportion of the refugee flow that is commensurate with its population, or resources, or some combination thereof. And according to this metric, Canada seems to bear more than its ‘fair

share.’ But only if you are comparing Canada to the US. Consider the distribution of Afghan refugees following the crisis that ensued after the US-led invasion post-September 11. By the end of 2001, the distribution of Afghan refugees appeared as follows:³⁴

Canada	11,371
US	7,426
Iran	1,482,000
Pakistan	2,197,821

Taking into account the population size and resources of Canada and the US compared to Pakistan and Iran, the disparity between Canada and the US dwindles to insignificance. The UNHCR estimates that by the end of 2001, “Asia hosted the largest refugee population (48.3%), followed by Africa (27.5%), Europe (18.3%) North America (5%), Oceania (0.6%) and Latin America and the Caribbean (0.3%).” To get a slightly different perspective, consider that in 2001, refugees comprised 70 of 1,000 inhabitants in Armenia, and 40 per 1,000 inhabitants of Congo.³⁵

If doing our ‘fair share’ is the value underpinning responsibility-sharing agreements, and we take this value seriously, perhaps we need to enlarge the frame of reference beyond the US. Indeed, recognition of the asymmetry in refugee burdens worldwide casts the Preamble’s emphasis on Canadian and American “generous systems of refugee protection” in a dimmer light. Canada and the US may look generous in relation to certain European states, but not when compared to many states in Africa or Asia.

Finally, the preamble highlights the virtue of “orderly handling of asylum claims.” No one can deny that Canadians value order – we are famously polite, wait uncomplainingly in lineups, and like to keep our streets tidy. Indeed, “peace, order and good government” were

embraced as constitutional principles at the time of Confederation, in marked (and rather tepid) contrast to the American exhortation of life, liberty and the pursuit of happiness. Will this Agreement actually enhance the orderliness of refugee processing?

All other things being equal, fewer refugee claimants entering Canada will result in more efficient processing for those refugee claimants who are admitted, but only at the cost of less efficient process on the US side, which will absorb the higher numbers. Moreover, a wide array of commentators, including Joseph Langlois, Director of the Asylum Division of the [now defunct] Immigration and Naturalization Service, front line immigration officers, refugee advocates, and migration scholars (including me), fully expect that the Agreement will deflect only some Canada-bound asylum seekers back to the US. Most observers anticipate that thousands of other asylum seekers who would otherwise present themselves at the Canadian border will be diverted into a clandestine flow of undocumented migrants crossing the border surreptitiously with the aid of smugglers and traffickers.³⁶ Instead of having their entry duly recorded by Canadian officials, they will try to enter the country and either go ‘underground’ or make their refugee claim inland, since the Agreement does not apply inland.

Canada and the US share an 8,000 km non-militarized border. Even if both states poured billions of dollars into building fences, erecting floodlights and policing the border, the sheer geographic immensity of the undertaking defies achievement; money that could be spent on intelligence gathering, refugee determination, legal representation and other costs will be wasted on an essentially futile task. Meanwhile, more asylum seekers will risk – and lose – their lives through hazardous and furtive border crossing. The only beneficiaries will be smug-

glers and traffickers, who can extract more money from desperate clients. In the end, the central mechanism of the Agreement will almost certainly undermine rather than enhance the orderly handling of asylum claims.

5. Aware that such sharing of responsibility must ... safeguard for each refugee status claimant eligible to pursue a refugee status claim who comes with their jurisdiction, access to a full and fair refugee status determination procedure as a means to guarantee that the protections of the Convention, the Protocol and the Torture Convention are effectively afforded...

This passage in the preamble affirms that the legitimacy of the Agreement depends on the process of refugee determination, as well as the approach to the refugee definition, being full and fair in both Canada and the US. For purposes of this Agreement, it is important to recall that Canada all along has pushed for this Agreement, given that it offers (hypothetically) the opportunity to deflect thousands of asylum seekers into the US. If the US system does not secure full and fair treatment to asylum seekers, the blame ultimately falls on Canada for insisting on an Agreement that will subject asylum seekers to an unjust system.

This principle was alluded to earlier. It is that Canada should not do indirectly to asylum seekers what it cannot do directly, which is to violate their fundamental rights. In circumstances where the treatment might amount to persecution, torture or capital punishment, the Supreme Court of Canada has elevated this norm of non-complicity to a constitutional right: In *Singh v. MEI*,³⁷ the Supreme Court of Canada first articulated the principle that Canada violates the constitutional right of a refugee claimant's

“security of the person” by returning her to a country where she may be persecuted. A corollary of that finding was a constitutional entitlement to fair procedures in determining whether a claimant meets the definition of a refugee. Several years later, in *US v. Burns and Rafay*,³⁸ the Supreme Court of Canada reversed its earlier position and ruled that Canada should not, save in extraordinary circumstances, extradite a person to face capital punishment. In *Suresh*,³⁹ the Court arrived at the same conclusion regarding torture.

I am not arguing here that implementation of the Agreement would violate the Canadian *Charter of Rights and Freedoms*, though I believe a cogent argument to this effect could be advanced. Rather, I am pointing to the broader value that these legal decisions evoke, which relates to our indirect responsibility for enabling conduct by others that we would not do ourselves.

The Agreement implicitly acknowledges this responsibility with respect to the treatment of unaccompanied minors. But unaccompanied minors are not the only refugee claimants in the US subject to violations of fundamental rights.

Many international and refugee law scholars have examined the US asylum regime, both before and after September 11, and found it deficient: Professor Patty Blum concluded in 1997 that: “United States refugee law and policy continues to diverge from the aims and requirements of international refugee law.”⁴⁰

The 1996-expedited removal procedure has elicited widespread criticism. It permits front-line immigration officials to render an unreviewable decision that a person seeking admission is improperly documented or otherwise attempting to enter (or aid another's entry) through fraud or misrepresentation. An immi-

gration officer may issue a removal order that bars admission for five years, or encourage the person to ‘voluntarily’ abandon the attempt to enter in order to avoid the five-year ban. Persons in expedited removal proceedings may make an asylum claim, but first must prove to an asylum officer that they have a ‘credible fear’ of persecution. If they fail to satisfy the asylum officer, they may ask for review by an immigration judge. If they cannot establish a credible fear, they will be *refouled* without further opportunity to fully present their refugee claim. Asylum seekers in expedited removal proceedings are also subject to automatic detention. Release from detention is a matter of discretion.⁴¹

Since the United States introduced expedited removal in 1997, the UNHCR has expressed concern that the program violated international legal standards regarding access to asylum, legal representation, the treatment of vulnerable and at-risk populations, and review by an independent body. Not only was the program problematic as conceived, but credible allegations of abuse surfaced. Studies by academics and non-governmental organizations revealed that immigration officials improperly encourage asylum seekers to withdraw their applications, fail to refer asylum seekers to the credible fear interview, detain asylum seekers, and even remove asylum seekers to countries where they may be persecuted. As the Lawyers Committee for Human Rights asserts: “mistakes are in fact inevitable given the summary nature of expedited removal and its lack of procedural safeguards.”⁴²

Moreover, Attorney-General John Ashcroft recently reduced the opportunities for independent review of asylum decisions by directing the Board of Immigration Appeals (BIA) to clear a backlog of 56,000 cases in about six months. One of the BIA’s tasks is to hear

appeals from first level asylum decisions. According to Professor Alex Aleinikoff: “Many, many cases are decided at a speed that makes it impossible to believe they got the scrutiny a person who faces removal from the United States deserves.”⁴³ One Board member signed more than 50 decisions in one day, or about one every ten minutes based on a continuous nine-hour day.

The terrorist attacks of 2001 also provided a pretext for the extension of expedited removal to aliens arriving by sea, and the automatic detention of Haitian asylum seekers. In March 2003, Tom Ridge, Director of the Department of Homeland Security, announced the automatic detention of “asylum applicants from nations where al-Qaeda, al-Qaeda sympathizers, and other terrorist groups are known to have operated ... for the duration of their processing period.” It is not unusual for asylum processing to take several months or even years. The UNHCR has criticized the blanket imposition of detention as inconsistent with international legal norms in several respects: First, the practice discriminates on the basis of a prohibited ground (nationality). Secondly, detention must not be used to deter asylum seekers from the legitimate attempt to obtain refuge from persecution. Thirdly, where detention is used to prevent absconding or for security reasons, “international standards dictate that there must be some substantive basis for such a conclusion in the individual case.” Nationality and method of entry do not furnish a sufficient basis.

The United States has provided assurances that refugee claimants returned to the US under the Agreement would not be subject to expedited removal procedure, though this undertaking is not formalized in the Agreement. However, the policy of automatic detention of asylum seekers from designated countries still will apply.

Recently, US immigration authorities have begun charging newly arrived asylum seekers with the criminal offence of entering the country with false documents.⁴⁴ This practice appears to be in direct contravention of Article 31.1 of the 1951 Refugee Convention, which states that: “The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees ... provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”

Whereas the vast majority of refugee claimants in Canada are eligible for legal aid, there is no systematic provision for legal aid for asylum seekers in the US. The crucial role played by competent counsel in facilitating a fair and thorough presentation of a refugee claim can hardly be overstated. According to Professor Deborah Anker, “There is a real risk than an indigent asylum seeker who meets the refugee criteria [of] persecution will be removed from the US as a result of the lack of representation.”⁴⁵

United States asylum rules impose a one-year time limit for making an asylum claim on those already present in the US. Exceptions to this rule exist, but the concern remains that the one-year filing deadline can, does and will arbitrarily disqualify persons who are in need of protection. Given the present political climate in the US, and the widespread use of detention, it would hardly be surprising if some asylum seekers in the US opted to go ‘underground’ for as long as possible for fear of making a refugee claim and ending up in detention. Yet, if caught after a year, they would be precluded from making a refugee claim and face *refoulement*. If they attempted to enter Canada to pursue a refugee claim (with less likelihood of detention), the Agreement would deny them access. Thus, it is conceivable that such an individual would not,

in fact, have her claim adjudicated under either the Canadian or US system prior to being returned to her country of nationality, contrary to the language of Article 3(1).

Another area of divergence between the Canadian and US systems is the treatment of female asylum seekers, especially those claiming asylum on grounds of gender-related persecution. One finding of a longitudinal study on expedited removal was that the program has a gendered impact: A greater proportion of women are more often removed via expedited removal (instead of under regular immigration proceedings) in comparison to men. The Lawyers Committee for Human Rights speculates that female asylum seekers often may fear disclosing to US immigration officials the gender-related reasons for their flight. Shame, ignorance of the possibility of seeking asylum, trauma and re-traumatization through shackling, strip searches and intimidation, may all contribute to silencing a woman.⁴⁶ Although immigration officials have discretion to release a person from detention pending determination of an asylum claim, the policy is administered arbitrarily and inconsistently. The devastating impact of prolonged detention on any refugee may be compounded by gender and culturally specific factors, such as the denial of privacy, re-traumatization and depression, separation from children, and sexual, physical, verbal and emotional abuse by immigration officials.⁴⁷ Analysis of the gendered impact of the one-year filing deadline for asylum yields similar concerns.⁴⁸

Of particular concern is the fate of women fleeing domestic violence. According to the groundbreaking Canadian Immigration and Refugee Board’s *Guidelines on Gender-Related Persecution and Refugee Status*,⁴⁹ women who flee private violence in circumstances where the state is unable or unwilling to protect them, may be

recognized as refugees. The US also has guidelines on gender-related persecution, but they are less comprehensive and more tentative. One of Attorney-General Janet Reno's last acts before departing the Clinton Administration was to vacate the decision of the Board of Immigration Appeals in the case of Rodi-Alvaredo Pena, where a majority of the Board rejected an asylum claim by a Guatemalan woman based on domestic violence. It is now widely rumoured that Attorney-General John Ashcroft will restore the BIA decision.

Attorney-General Ashcroft has also dismissed several members of the Board of Immigration Appeals who were appointed by the Clinton Administration, including three of the five dissenting members from the Rodi Alvaredo Pena case.⁵⁰ In addition, Ashcroft is reportedly reconsidering the draft regulations on gender-related persecution left by his predecessor. At present, the fate of women with claims of gender-related persecution is certainly more precarious under US law than Canadian law. Despite the recommendation of the Standing Committee on Citizenship and Immigration, Canada refused to exempt women fleeing gender-related persecution from the Agreement, though the government indicated that it would review the comparative treatment of gender-related cases as part of the overall monitoring of the Agreement.

Taken on their own, each of the aforementioned features of the US system is worrisome. Taken together, they cast into serious doubt whether the US is able and willing to provide a "full and fair" refugee status determination procedure. One might contend that it is not for Canada to dictate to the US how it should conduct refugee determination, as long as it meets the minimum international standards. There are two responses: First, the UNHCR has, in fact, expressed concern about each of the aforementioned aspects of the US system.⁵¹ Secondly, the

issue here is not Canada's entitlement to judge the US system in the abstract. Rather, the question is whether it comports with Canadian values to expose a refugee claimant to a regime that is not merely different and less fair, but also falls short of the international legal standards binding upon both the US and Canada.

Apart from the relative merits of the Canadian and US refugee determination systems, the Agreement creates a new layer of decision-making whose fairness and efficiency are open to question. A system must be implemented to determine whether an asylum seeker actually falls within one of the exemptions, in circumstances where documentation will often be scarce. How will a minor prove that he is under 18 years of age? If a claimant says she has a nephew in Cincinnati, how will that relationship be authenticated? What if the border official does not believe the refugee claimant? Will there be an opportunity for independent review? How long will it take? Where will the asylum seeker go in the meantime? Will there be access to counsel? How? None of these questions have, to my knowledge, been answered yet. It is difficult to reconcile dealing with these predictable procedural issues in a fair manner with the objective of promoting the orderly and expeditious handling of asylum claims at land border ports of entry.

5. Resolved to strengthen the integrity of that institution [of asylum] and the public support on which it depends...

The implicit message conveyed here is that the integrity of the institution of asylum is damaged and that public support for it is dwindling. The subtext of this passage is patent. It is the "elephant on the table" which the Agreement does not address explicitly. It explains why the United States would assent to an agreement that it refused to sign a few years earlier and which

can only amount to a make-work project for the US asylum system. The subtext is security, and the unstated argument goes as follows: the integrity of asylum is weakened through its abuse by terrorists; the Canadian system is more lax and vulnerable to abuse than the US system; public support for refugees on both sides of the border is eroding because admission of asylum seekers is perceived to (or does) constitute a menace to security; *ergo*, deflecting asylum seekers into the allegedly more vigilant US system enhances security.

No one disputes national security as a value of great importance to Canadians. Although none of the perpetrators of 9/11 entered the US as asylum seekers, and none had even been to Canada, the claim that Canada's asylum system is somehow particularly vulnerable to abuse by terrorists has acquired the status of conventional wisdom. In actuality, in cases where alleged terrorists had made refugee claims in Canada, their claims were refused or abandoned. The refugee determination system did not 'fail;' the problem was rather the lack of enforcement of removal.⁵² Canada does have a very poor record of enforcing removals, though no worse than the US and virtually every other Western country on this matter. The overall acceptance rate for refugee claims decided in 2001 was around 58 percent in Canada, and around 48 percent in the US.⁵³ The ten percentage point disparity hardly seems great enough to warrant labeling Canada relatively generous, much less a 'sieve.' Furthermore, if the Canadian border is so much more porous than its US counterpart, how and why would 15,000 refugee claimants have entered the US in 2001 in order to reach the Canadian border? Why not travel directly to Canada? One can only infer that it must be easier to enter the US than Canada from another country.

Yet the perception of Canada remains. Even Citizenship and Immigration Minister

Denis Coderre has encouraged the Canadian public to associate the Agreement with security. In an open letter published in various Canadian newspapers, Coderre alludes to the Safe Third Agreement as one of several measures "taken under the Canada-US Smart Border Action Plan [to] help ensure the safety of Canadians in the fight against terrorism that this department is pursuing in collaboration with Canadian and US partners."⁵⁴ Yet Coderre knows that Canada has been trying to persuade the US to enter into an agreement since the mid-1990s, long before security issues came to dominate the agenda. Senator Hilary Clinton is so eager to blame Canada that even when stories of terrorists 'infiltrating' the US from Canada turn out to be a hoax, she refuses to apologize, insisting that the deficiencies of the Canadian system are what made the story plausible. In the last few months, Canada has begun detaining more refugee claimants who arrive without documentation allegedly in furtherance of Canada's security agenda. In addition to its traumatizing and dehumanizing impact on refugee claimants – who have not, it must be remembered, committed any crime – detention is enormously expensive, and it is doubtful that its indiscriminate use confers any security benefit. It does, however, divert funds that could be spent elsewhere, whether on removals, clearing backlogs or perhaps even on settlement. It may also serve to deter refugee claimants from coming to Canada, and this may be its ultimate, if illegitimate, purpose.

Both Canadian and US immigration bureaucrats know that the Canadian refugee determination system is not the culprit for terrorism generally or 9/11 in particular. I have asked myself where the political momentum for the Agreement came from, especially on the US side. After all, if one assumes that the Agreement actually will work in the manner intended, the US will be facing thousands of additional

asylum claims annually – not to mention the existing backlog of a quarter million.

Two answers come to the fore. First, Canada has insisted on the Agreement as a *quid pro quo* for various concessions it has made to the US on matters of sovereignty and border control under the 30 point border plan formulated after 9/11. Secondly, it is always politically advantageous for one state to encourage its voters to scapegoat another country for its problems. Even if US policy makers know that the Canadian refugee system plays a minimal role in the presence of terrorists on US soil, it may be worth the cost of adjudicating several thousand additional asylum claims to reinforce the perception that the Canadian refugee system is dangerously lax, and that the United States can and will do a better job.

Yet, if commentators are correct in speculating that the Agreement will probably drive asylum seekers into the hands of smugglers and traffickers in order to enter Canada, the Agreement not only will fail to enhance security, it actually will be detrimental to security. When people initiate refugee claims at a port of entry, a process of record keeping begins, and claimants must, for example, keep the Immigration and Refugee Board as well as Citizenship and Immigration Canada apprised of their address in Canada in order to attend their hearings. None of this obtains where the individual enters clandestinely, unless and until they apply for refugee status from within Canada. Surely it is a greater risk to security to have a population of undocumented migrants living ‘underground’ than a population of official refugee claimants whose presence and whereabouts can be determined. Thus, even if one accepts that security provides a justification for a safe third country agreement, I would argue that the Agreement either will have no effect or a negative impact on national secu-

urity. Its impact on the security of refugees is, of course, another matter.

Conclusion

In subjecting the Agreement to a normative analysis, I have identified the values implicitly or explicitly contained in the Preamble, as well as constraints imposed by Canada’s constitutional legal order. I have distilled them down to the following list, though I make no claim to comprehensiveness:

1. Canadians value honouring our commitments, including our international legal obligations not to *refouler* a refugee and not to return a person to a country where she faces a substantial risk of torture.
2. Canadians value keeping families intact and reuniting family members.
3. Canadians consider the best interests of the child to be an important factor in decisions affecting minors.
4. Canadians believe in following the rules and maintaining order.
5. Canadians accept that they ought to ‘do their fair share,’ and expect others to do the same.
6. Canadians accept that they bear direct responsibility for their own unjust actions, and also bear indirect responsibility for what others do when Canada knowingly enables unjust conduct by others.
7. Canadians value security.

I have demonstrated that the Safe Third Country Agreement, as presently drafted, contains elements that are consistent with some of the aforementioned values. Examples include the exemption for minors and family members, and the assurance that neither Canada nor the United States will remove a person without first determining their refugee status.

Unfortunately, many other provisions are either inconsistent with these values, or actually undermine them. For instance, the one-year filing deadline for asylum claims in the US is inconsistent with the duty to determine a refugee claim, and will be applied to refugee claimants who are deflected from Canada. Canada's prodigious efforts to prevent asylum seekers from reaching our border, including this Agreement, are arguably inconsistent with the spirit of our international commitments toward refugees. The presumption that Canada is doing more than its fair share to protect refugees vis à vis the United States occludes the fact that Canada and the United States do relatively little in comparison to much poorer, much less stable countries.

I have also suggested that the Agreement will actively undermine the orderly processing of refugee claims, and may thereby prove detrimental to security. Finally, I have argued that the current deficiencies in the US asylum system – compounded by the recent registration system and moral panic directed at Muslims and Arabs – generate serious concern about whether implementation of this Agreement will impose on Canada a share of indirect responsibility for the excesses, the harms and the rights violations inflicted by law and otherwise in the United States.

There are certain measures that might improve the Agreement in terms of rendering it more consistent with our professed values. The grounds of exemption should expand to include

linguistic factors, gender-related persecution, and common-law/same-sex partners. To the extent that Canada anticipates receiving 15,000 fewer refugee claimants annually, it should supplement the number of government-sponsored refugees by an equivalent number. In terms of global 'responsibility sharing,' it is the least Canada can do.

Ultimately, I am doubtful that these improvements can raise the Agreement to the level of legitimacy. We have witnessed in recent months how citizens of Canada who happened to have been born elsewhere have been treated with contempt and disregard by US authorities, in circumstances that cause concern about Canada's commitment to protect all its citizens equally. Maher Arar, a Canadian citizen born in Syria, was detained for over a year and quite likely tortured in a Syrian jail through the indisputably illegal act of the United States government in sending him to Syria rather than allowing him to return to Canada. If this is how the US government treats individuals who ostensibly enjoy the protection of a government such as Canada, how might we expect the US will treat those who have no country of nationality from whom they can claim protection? I raise this question not to indulge in that smug Canadian pastime of demonstrating our superiority over our US neighbours. Quite the contrary, because the worse the US looks in its treatment of non-citizens, the worse Canada looks for insisting on an agreement that will forcibly divert people into that system.

Some opponents of the Safe Third Party Agreement have dubbed it the "None is Too Many" Agreement. In so doing, they invoke the notorious response of Canada's senior immigration bureaucrat to the question asked of him in 1939, namely, how many Jews fleeing Nazi Europe should Canada accept?

As evocative as the label may be, it is probably more apt to analogize the Agreement to another disgraceful instrument of Canadian immigration policy. In the early 20th century, the government of Canada passed a regulation that denied admission to immigrants to Canada unless they arrived by “continuous journey” from their country of birth or nationality. Canada then adopted measures to ensure that it would be impossible for Asians to make a direct journey to Canada. This regulation was designed and administered to prevent the entry of Asian migrants. Although framed in neutral language, in practice the continuous journey provision applied only to Asians. Indeed, s. 101(1)(e) of the *Immigration and Refugee Protection Act* eerily echoes the language of the original continuous journey provision. The section authorizes the Canadian government to enter into the Safe Third Party Agreement and to make claimants subject to the Agreement ineligible to have their refugee claims considered in Canada:

A claim is ineligible to be referred to the Refugee Protection Division if ... 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.

The regulation naming the United States as a designated country has already been drafted and approved, and awaits the passage of companion regulations on the United States side before being declared in force.

Today, Canada expends considerable resources to ensure that asylum seekers – most of whom are non-white – do not succeed in reaching Canada. The Safe Third Country Agreement represents the latest step in this process: Even when asylum seekers make it to the door, they will be turned away. Why? Because they did not make a continuous journey – they passed through the United States en route. The continuous journey provision was an odious policy a century ago. It deserves condemnation, not resurrection.

Endnotes

1. *Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries*. <http://www.cic.gc.ca/english/policy/safe-third.html>, accessed 19/02/03. All references to provisions of the Agreement can be located at this website.

2. I use the term ‘asylum seeker’ and ‘refugee claimant’ interchangeably.

3. For stateless persons, the phrase ‘country of nationality’ is replaced by ‘country of former habitual residence.’

4. It does not apply to asylum seekers arriving at airports, presumably because airlines successfully opposed a regime that would assign them the task of shuttling refugee claimants back and forth between Canada and the US.

5. This latter situation may arise if, for example, a person lawfully admitted on a visitor or student visa subsequently submits a refugee application while in the country.

6. Stephen Legomsky, “Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection.” Consultant’s Report to UNHCR, Department of International Protection, 2003, citing Bill Frelick, “North America Considers Agreement to Deflect Asylum Seekers,” 7 *Bender’s Immigration Bulletin* 1404 (15 November 2002) (on file with author).

7. Draft Note to Accompany a Canada-United States Agreement for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, June 2002 (unpublished). The text of the Draft Note was contained in e-mail correspondence distributed by the Canadian Council for Refugees via e-mail on 4 August 2002.

8. Nan Kennelly, US Department of State, *supra* note 4.

9. Campbell Clark. “Plan to Send Canada Refugees from Ships Criticized.” *Globe and Mail*, August 5, 2002, A4.

10. The Draft Regulations are available at <http://canadagazette.gc.ca/partI/2002/20021026/pdf/g1-13643.pdf>. The Standing Committee’s Report, entitled “The Safe Third Country Regulations: Report of the Standing Committee on Citizenship and Immigration,” Joe Fontana, MP (Chair), House of Commons, December 2002, can be accessed at <http://www.parl.gc.ca/InfoComDoc/37/>

2/CIMM/Studies/Reports/cimmrp01-e.htm. The government’s response is available online at <http://www.cic.gc.ca/english/pub/safe-third.html>. I will not address the regulations directly, but have taken them into account in so far as they clarify certain provisions of the Agreement.

11. See, generally, Canadian Council for Refugees, “Canadian Measures of Interdiction,” 1998. The most notorious recent example is the deflection of a boatload of Sri Lankans departing from the African coast. Canadian immigration officials were notified that the ship was headed for Canada, and managed to interdict the ship and deflect it back to Sri Lanka without permitting any of the passengers to make refugee claims. At least one of the passengers was tortured by Sri Lankan officials shortly after his return. The episode is described in Sharryn Aiken, “Manufacturing Terrorists: Refugees, National Security and Canadian Law (Part 2),” (2001) 19 *Refugee* 116, 124. On the other hand, Canada has not interdicted ships carrying undocumented migrants that have sailed into or near Canadian waters. In the last 15 years, a handful of ships have arrived in Newfoundland, Nova Scotia and British Columbia. The passengers disembarked in Canada and most pursued refugee claims.

12. *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] SCC 1.

13. Alisa Solomon. “Northern Closure: The U.S.-Canada ‘Smart Borders’ Accord Sells Refugees Down the River.” *Village Voice*, August 28 - September 3, 2002.

14. Quoted in “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), 197th Congress, 2nd Session, Serial No. 111, October 16, 2002, at 12.

15. US immigration law does not include commonlaw or same-sex couples within its definition of family. Citizenship and Immigration Canada has indicated that it will interpret ‘spouse’ in Article 1(B) broadly to include these relationships.

16. Government Response to the Report of the Standing Committee on Citizenship and Immigration Safe Third Country Regulations (May 2003), *supra* note 10.

17. Women’s Commission for Refugee Women and Children, *Prison Guard or Parent? INS Treatment of Unaccompanied Refugee Children*, May 2002, at 1-2. http://www.womenscommission.org/pdf/ins_det.pdf;

18. Amnesty International USA, *Why am I Here? Children in Immigration Detention*, June 2003, http://www.amnestyusa.org/refugee/children_detention.html. See also Human Rights Watch, *Detained and Deprived of Rights: Children in the Custody of the US Immigration and Naturalization Service*, December, 1998. <http://www.hrw.org/reports98/ins2/>.
19. The steps involved would be as follows: First, send one of the children to the Canada-US border as an unaccompanied minor. Second, the child will be admitted to Canada under the exception for unaccompanied minors. Next, the child makes a refugee claim in Canada. Finally, an adult family member seeks and obtains entry to Canada on the basis of having a family member in Canada, namely the formerly unaccompanied minor, now minor refugee claimant. The remainder of the family can then assert the exemption for family members on the basis of the adult's presence in Canada.
20. Section 3(3)(e) of the *Immigration and Refugee Protection Act* states that the Act should be interpreted and applied in a manner that "supports the commitment of the Government of Canada to enhance the vitality of the English and French linguistic minority communities in Canada."
21. Government Response to the Standing Committee on Citizenship and Immigration: Safe Third Country Agreement.
22. Migration Policy Institute, *America's Challenge: Domestic Security, Civil Liberties, and National Unity After September 11* (Summary), at 8. http://www.migrationpolicy.org/pubs/Americas_Challenges.pdf.
23. Although the USA PATRIOT Act requires that persons designated as "suspected terrorists" be charged or released within seven days of arrest, the Department of Justice relied on the regulatory power to detain any non-citizen, whether designated a "suspected terrorist" or not, for a "reasonable period" in the event of an emergency or other "extraordinary circumstances."
24. Office of the Inspector General, "The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 22 Attacks," June 2, 2003 <http://www.usdoj.gov/oig/special/03-06/index.htm>; "Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act (as required by Section 1001(3) of Public Law 107-56)" July 17, 2003. <http://www.usdoj.gov/oig/special/03-07/index.htm>.
23. Migration Policy Institute, *America's Challenge*, *supra* note 21. at 9. See also Anita Ramasastry, "A Flawed Report Card: How DOJ Mishandled the Post-September 11 Detention Process." *Findlaw Legal Commentary*, August 1, 2003 <http://writ.news.findlaw.com/ramasastry>.
24. For descriptions of the program, see Lawyers Committee for Human Rights, *Imbalance of Powers: How Changes to US Law & Policy since 9/11 Erode Human Rights and Civil Liberties*, September 2002-2003. <http://www.lchr.org>; US Department of Homeland Security, "Immigration Information: Special Registration," <http://www.immigration.gov/graphics/shared/lawenfor/specialreg/index.htm> (accessed 01/08/2003).
27. Migration Policy Institute (Maia Jachimowicz and Kevin O'Neil). "At War with Immigrants." <http://www.migrationpolicy.org/news/042903LHL.doc> (accessed 01/08/2003).
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29. "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.'" <http://www.web.net/~ccr/safethird.htm>, accessed 19/02/03.
30. Although refugees often struggle initially, the gap between the economic performance of most refugees and native-born Canadians closes in less than a decade. Over time, they rely less on social assistance than native-born Canadians Canadian cultural life has been immeasurably enriched by the talents of newcomers. The diversity and multicultural vibrancy of Canada – which most consider an asset – is directly attributable to those who came to Canada as immigrants and refugees. Assessing the economic impact of migration is admittedly complex and controversial. A useful survey of recent data is contained in Peter Li, *Destination Canada: Immigration Debates and Issues*, (Oxford: Oxford University Press, 2003), 78-123.
31. Report of the Standing Committee on Citizenship and Immigration, *supra* note 10, at 3.
32. Notes from consultation between CCR, UNHCR, CIC, US Department of State and US INS, August 2, 2002.

33. "Refugee Claims Plummet in 2002." *Toronto Star*, January 10, 2003
34. UNHCR, "2001 UNHCR Population Statistics (Provisional)." Table 6. <http://www.unhcr.ch/cgi-bin/texis/vtx/home/opedoc.pdf?tbl=STATISTICS&id=3d0df33d4&page=statistics>.
35. NHCR, "Refugees by numbers 2002." <http://www.unhcr.ch/cgi-bin/texis/vtx/home>
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40. Carolyn Patty Blum. "A Question of Values: Continuing Divergences Between US and International Refugee Norms." (1997) 15 *Berkeley J Int'l L* 1, at 38; Jaya Ramji, "Legislating Away International Law: The Refugee Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act," (2001) 37 *Stanford J Int'l L* 117.
41. For the most thorough analysis and evaluation of expedited removal, see the Expedited Removal Study, a multi-year study conducted by a team of US legal academics and researchers led by Prof. Karen Musalo of UC Hastings School of Law. <http://www.uchastings.edu/ers/>. See also Thomas J. White Center on Law and Government, "The Expedited Removal Study: Report on the First Three Years of Implementation of Expedited Removal." (2001). 15 *Notre Dame J Law, Ethics and Public Policy* 1.
42. Lawyers Committee for Human Rights. *Refugee Women at Risk: Unfair US Laws Hurt Asylum Seekers*. 2002. www.lchr.org.
43. Lisa Getter and Jonathan Peterson. "Speedier Rate of Deportation Rulings Assailed." *Los Angeles Times*, January 5, 2003, 1.
44. Tanya Weinberg. "Asylum Seekers Face US Charges." *Fort Lauderdale Sun-Sentinel*, April 16, 2003, 1B.
45. Asylum seekers in the US are between four and six times more likely to succeed if represented by legal counsel. The odds of success without counsel are, in Prof. Anker's words "remarkably slim." Deborah Anker, "Responses to Points and Questions re: Jose Patricio Jacombe Salas." n.d. (on file with author).
46. Lawyers Committee for Human Rights. *Refugee Women at Risk*, *supra* note 42 at 6.
47. In October 2000, the Women's Commission for Refugee Women and Children reported "widespread" abuse of detainees, especially women, at the Krome immigration detention center near Miami. In reaction to the report, female detainees were moved to the Turner Guilford Knight Correctional Center. A follow-up report by the Women's Commission found that abuses continued. See Women's Commission for Refugee Women and Children. *Behind Locked Doors: Abuse of Refugee Women at the Krome Detention Center*, October 2000. <http://www.womenscommission.org/reports/krome.html>; *Innocents in Jail: INS Moves Refugee Women from Krome to Turner Guilford Knight Correctional Center, Miami*, June 2001. http://www.womenscommission.org/pdf/ins_tgk.pdf.
48. Lawyers Committee for Human Rights. *Refugee Women at Risk*, *supra* note 42 at 14-16.
49. Immigration and Refugee Board, Revised 1996. <http://www.irb.gc.ca>.
50. "Ashcroft Reconsiders Asylum Granted to Abused Guatemalan." *Washington Post*, March 3, 2003, A02.
51. See UNHCR Comments, *supra* note 29
52. See Audrey Macklin. "Borderline Security" in Ron Daniels et al., eds. *The Security of Freedom*. Toronto: University of Toronto Press, 2002.