

## Toward Harmonized Asylum Procedures in North America: The Proposed United States-Canada Memorandum of Understanding for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries

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# Toward Harmonized Asylum Procedures in North America: The Proposed United States-Canada Memorandum of Understanding for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries

## I. Introduction and Background

In September 1992, United States and Canadian officials began a final round of negotiations on the text of a Memorandum of Understanding, establishing a mechanism to apportion responsibility for examining refugee status claims filed by certain nationals of other countries.<sup>1</sup> A basic objective of the proposed agreement, as stated in its preamble, is to promote the "fair and effective administration"<sup>2</sup> of asylum procedures in the respective countries, including the "prevention of duplication"<sup>3</sup> of in-land (asylum) claims for refugee protection. This objective is to be accomplished principally by managing "access to the Refugee Status Determination System in one or another country."<sup>4</sup>

The proposed Memorandum of Understanding was drafted in the context of a series of policy developments and governmental discussions

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\* Director, Refugee Project, Lawyers Committee for Human Rights, New York, New York; A.B., Columbia University, 1971; J.D., New York University, 1976.

1. Internal U.S. Government documents on file with the author. The most recent version of the Draft Memorandum of Understanding Between the Government of Canada and the Government of the United States of America [hereinafter "Memorandum of Understanding"] is included as an Appendix to this article.

2. Memorandum of Understanding, Appendix at 746.

3. *Id.*

4. *Id.*

in North America.<sup>5</sup> The resulting regional cooperation is in some respects inevitable due to the proximity and perceptions of shared interests between the United States and Canada. Indeed, recently enacted Canadian legislation purports to authorize such regional arrangements concerning asylum.<sup>6</sup>

The United States also supports regional cooperative measures with Mexico. In practice, United States and Mexican authorities cooperate in intercepting Central American asylum seekers in Mexico.<sup>7</sup> The United States also provides financial assistance to Mexico to defray the costs of removing aliens, some of whom are asylum seekers, from non-contiguous countries.<sup>8</sup> In addition, informal "trilateral" meetings between Canadian, United States and Mexican authorities were held in El Paso, Texas, in September 1991, and in Ixtapa Zihuatanejo, Mexico, in July 1992.<sup>9</sup> These discussions concerned issues of harmonizing policies and procedures.<sup>10</sup> Another meeting in Canada is contemplated for some time in 1993 after senior officials in the new United States administration have been appointed.<sup>11</sup>

The discussions regarding regional arrangements in North America follow a trend of similar arrangements in Western Europe, such as the Dublin Convention.<sup>12</sup> These European arrangements were largely inspired by efforts to achieve harmonization in the economic and political spheres.<sup>13</sup> However, commentators are concerned that the efforts in Europe will falter because of inconsistency in various national practices, thus inviting the emergence of a restrictive, lowest common denominator in the criteria and procedures used to determine refugee

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5. Asylum laws and rules have recently been introduced or revised in Canada (See S.C. 1992, Ch. 49, reflecting the enactment in 1992 of Bill C-86, an extensive set of amendments to the Immigration Act [hereinafter Act]), the United States (See 55 Fed. Reg. 30,680 (July 27, 1990), promulgating final asylum rules), and Mexico (See Art. 42, Ley General de Población, as amended July 17, 1990, incorporating the essence of the Cartagena Declaration, which sets forth a broad concept of "refugee," including individuals who have fled civil strife and events seriously disturbing public order. The Cartagena Declaration on Refugees is set forth in *La Protección Internacional de los Refugiados en América, Central Mexico and Panamá: Problemas Jurídicos y Humanitarios*, Universidad Nacional de Colombia, at 332; also reproduced in Annual Report of the Inter-American Commission on Human Rights, 1984-85, OEA/Ser.L./V/II.66, Doc. 10, rev. 1, at 190-93).

6. Act, *supra* note 5, § 108.1.

7. Telephone interview with U.S. Government official, who requested anonymity (Oct. 1992) (internal U.S. Government documents on file with author).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. 1990 Dublin Convention on Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, in *ASYLUM LAW AND PRACTICE IN EUROPE AND NORTH AMERICA*, app. at 207 (Jacqueline Bhabha & Geoffrey Coll eds., 1992).

13. See Gamrasni-Ahlen, *Recent European Developments Regarding Refugees: The Dublin Convention and the French Perspective in ASYLUM LAW AND PRACTICE IN EUROPE AND NORTH AMERICA*, *supra* note 12, at 109.

status on a regional basis.<sup>14</sup>

This article discusses the specific terms of the proposed United States-Canada Memorandum of Understanding and analyzes its provisions, taking into account international refugee law and national practices. Also, the article examines the practical ramifications of the arrangement and recommends changes to achieve a more protective and feasible cooperative system.

## II. Governing Refugee Protection Criteria Under International Law

The sections of the Memorandum of Understanding relevant to a discussion of the different ways in which Canada and the United States interpret their responsibilities under international and domestic law are as follows:

“Convention Refugee” means a refugee as defined in the Protocol and as articulated in U.S. law in § 101(a)(42) of the Immigration and Nationality Act<sup>15</sup> or in Canadian law as . . .<sup>16</sup>

“Refugee Status Claim” means a request from a person other than a citizen or legal permanent resident of Canada or the United States to the government of either country for protection consistent with the Convention or Protocol. A refugee status claim shall, in the U.S. system, be understood as a claim for asylum under § 208<sup>17</sup> or a claim for withholding of deportation under § 243(h)<sup>18</sup> of the Immigration and Nationality Act.<sup>19</sup>

Canada has assumed obligations under its immigration law<sup>20</sup> which incorporate its obligations under the 1951 United Nations Convention relating to the Status of Refugees,<sup>21</sup> and its 1967 Protocol.<sup>22</sup> The United States is a party only to the Protocol relating to the Status of Refugees,<sup>23</sup> but since the Protocol incorporates the substantive provisions of the “refugee” definition in the 1951 Convention, the United States is to follow criteria equivalent to those of Canada for protecting refugees.

However, despite the apparent equivalency of substantive criteria, significant differences of interpretation exist between the United States and Canadian systems. Perhaps the most obvious divergence concerns the standard of proof for the non-return remedy available to refugees. Specifically, United States jurisprudence imposes a higher standard of

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14. *Id.* See also H. MEIJERS ET AL., SCHENGEN: INTERNATIONALIZATION OF CENTRAL CHAPTERS OF THE LAW ON ALIENS, REFUGEES, SECURITY AND THE POLICE (1991).

15. Codified at 8 U.S.C. § 1101(a)(42) (1988).

16. Memorandum of Understanding, Appendix § 1(1)(a) at 746.

17. Codified at 8 U.S.C. § 1158 (1988).

18. Codified at 8 U.S.C. § 1253(h) (1988).

19. Memorandum of Understanding, Appendix § 1(1)(b) at 746.

20. Act, *supra* note 5, Ch. I-2, §§ 2 and 53. See *infra* notes 21 and 22.

21. Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150.

22. 606 U.N.T.S. 168.

23. Protocol relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223.

proof on claims of non-return than is required under Article 33 of the Convention. The United States Supreme Court has upheld an administrative interpretation requiring that an "alien" demonstrate a "clear probability" (as opposed to a "well-founded fear") of persecution in order to be entitled to relief under the domestic law analog to Article 33, withholding of deportation.<sup>24</sup>

*Non-refoulement*, the fundamental tenet of refugee law, is the right of a refugee not to be returned to a place of prospective persecution. The principle is one of customary international law and binds even those states that are not parties to the international treaties.<sup>25</sup> Article 33 of the 1951 United Nations Convention,<sup>26</sup> as incorporated into the 1967 Protocol,<sup>27</sup> imposes the obligation of *non-refoulement* on all signatory states, including Canada. Article 33 specifically provides that:

No Contracting State shall expel or return a refugee ("refouler") in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.<sup>28</sup>

Additionally, practical differences exist in the way each nation applies the criteria. The United States, for example, is more generous than Canada in awarding protection in Chinese asylum cases. In 1992, United States immigration authorities granted 241 cases and denied 43 cases for an 85 percent approval rate, while the Canadian Immigration and Refugee Board granted 292 claims and denied 1435 claims, for a 20 percent approval rate.<sup>29</sup> However, the United States has been less generous in Guatemalan, Haitian and Salvadoran cases. In 1992, the United States approved 21 percent of Guatemalan cases, 31 percent of Haitian cases and 28 percent of Salvadoran cases; while Canada approved 65 percent, 56 percent, and 33 percent, respectively.<sup>30</sup> Developments,

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24. *INS v. Stevic*, 467 U.S. 407 (1984). See 8 U.S.C. § 1253(h) (1988). While the remedy of asylum in the United States requires a showing of only a "well-founded fear of persecution" for purposes of eligibility, the ultimate decision depends on an exercise of agency discretion. See 8 U.S.C. § 1158(a) (1988). Protection in cases where asylum is denied on discretionary grounds may thus depend on the entitlement of an individual to the withholding remedy.

25. See Guy Goodwin-Gill, *THE REFUGEE IN INTERNATIONAL LAW*, 97 (1983).

26. See *supra* note 21.

27. See *supra* note 22.

28. *Id.* art. 33. A "refugee" is defined in the Convention, as amended by the Protocol, as any person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it." *Id.* art. 1(A)(2).

29. Statistical reports concerning 1992 adjudications from the U.S. Immigration and Naturalization Service and the Immigration and Refugee Board of Canada, on file with the author. Historically, the U.S. authorities have been even less generous to these groups. See *infra* note 47 and accompanying text.

30. See *infra* note 47 and accompanying text.

such as recent Canadian guidelines on gender as a potential basis for persecution,<sup>31</sup> may inspire further divergences in practice, particularly given the relatively narrow interpretation by the United States Justice Department's Board of Immigration Appeals of the concept of persecution on account of "social group" membership.<sup>32</sup>

### III. Differences in Status Determination Procedures

The proposed Memorandum of Understanding provides a broad definition of "refugee status determination system":

"Refugee Status Determination System" in Canada or in the United States, means the sum of the laws and administrative and judicial procedures and practices employed by each national government for the purpose of adjudicating refugee status claims.<sup>33</sup>

This broad definition provides ample opportunity for nations to employ inconsistent standards in determining refugee status. The procedures employed in the United States and Canada, indeed, are quite different. The United States provides nearly universal access to its asylum procedures. An applicant may apply for asylum generally irrespective of his or her immigration status.<sup>34</sup> Canada provides broader restrictions on access for asylum seekers, including for those in transit from a country that complies with international refugee law.<sup>35</sup>

On another point of comparison, the United States provides an interview under oath before a specially trained Asylum Officer of the Immigration and Naturalization Service (INS) to applicants who present themselves affirmatively to the United States authorities.<sup>36</sup> Additionally, the Department of Justice provides more formal immigration court hearing procedures when the claim for protection is asserted as a defense to removal from the United States via exclusion or deportation procedures, including claims by applicants who are unsuccessful in the affirmative procedure.<sup>37</sup> On the other hand, Canada provides adjudication by the Immigration and Refugee Board, a specialized quasi-judicial body.<sup>38</sup> Furthermore, while federal court review of denials of status may be sought directly in the United States,<sup>39</sup> leave of court is required in

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31. *GLOBE AND MAIL*, Feb. 5, 1993, at A13. See Immigration and Refugee Board Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act (Mar. 9, 1993) (on file with author).

32. See *Matter of Acosta*, Int. Dec. No. 2986 (BIA 1985).

33. Memorandum of Understanding, Appendix § 1(1)(d) at 746.

34. 8 U.S.C. § 1158(a) (1988). The only exception to access concerns any aliens who have been convicted of an "aggravated felony." 8 U.S.C. § 1158(d), as amended by Immigration Act of 1990. Pub. L. No. 101-649, 104 Stat. 5029 (1990).

35. Act, *supra* note 5, § 46.01(1)(b). The so-called "safe country" provision has yet to be implemented by the Cabinet in Canada.

36. 8 C.F.R. § 208.2(a) (1992).

37. *Id.* § 208.2(b).

38. Act, *supra* note 5, § 57. Cf. 8 C.F.R. § 208.1(b) (1992).

39. 8 U.S.C. §§ 1105a(a), (b) (1988).

Canada.<sup>40</sup>

Differences in procedure between the United States and Canadian systems could account for significant divergences in practice. These differences may be due, in part, to the later date of implementation of United States asylum laws. As recently as 1990,<sup>41</sup> the United States issued final asylum rules implementing the Refugee Act of 1980.<sup>42</sup> The final rules took effect in a preliminary phase on October 1, 1990. They became fully effective and the new system was unveiled in a second and final phase on April 2, 1991.<sup>43</sup>

In essence, the new asylum system is designed to enhance adjudication when individuals in the United States affirmatively present claims for refugee protection to the INS.<sup>44</sup> Under the new regulatory regime, a corps of 150 "Asylum Officers" have been recruited for positions of a higher classification than was previously the case. The INS Headquarters in Washington, D.C., supervises officers located in seven offices throughout the country. Additionally, the Asylum Officers receive specialized training, as well as support from a documentation and resource center established to collect and disseminate information about socio-political conditions in the refugees' countries of origin.<sup>45</sup>

The United States has made preliminary progress in achieving its objectives under the new system. Many members of the new asylum corps, including several lawyers, were recruited from outside of the INS. The Asylum Officers' training program includes materials and instruction more professional in character than prior INS exercises. In July 1991, a director was hired for the INS Resource Information Center and has begun operations with a small staff.<sup>46</sup>

Traditionally, adjudications in the United States have been distorted by political considerations, with unjustifiably low approval levels for certain national groups, such as Guatemalans (two percent), Haitians (two percent) and Salvadorans (three percent).<sup>47</sup> Many commentators are hopeful that the new INS asylum system will ensure that adjudicators

40. Act, *supra* note 5, § 82.1.

41. See *supra* note 5.

42. Pub. L. 96-212, 94 Stat. 102 (1980) (codified as various sections of 8 and 22 U.S.C.).

43. *Id.*

44. See *supra* note 5. Unsuccessful applicants for asylum in this affirmative procedure, as well as applicants detained at the border or apprehended in the interior, may assert claims for protection as a defense to removal in the administrative immigration court. The adjudication is adversarial in character with a formal hearing. See 8 C.F.R. Part 208. In 1991, 24,730 asylum and withholding claims were resolved in the immigration court, and it can take from six months to a year for a case involving a non-detained applicant to be scheduled for a hearing on the merits. Interview with staff member of U.S. Department of Justice, Executive Office for Immigration Review, who requested anonymity (Aug. 1992).

45. Arthur C. Helton, *Practice Under the New INS Asylum Rules in 24TH ANNUAL IMMIGRATION AND NATURALIZATION INSTITUTE* (1991).

46. *Id.*

47. See Arthur C. Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REF. 243, 253 (1984).

are better insulated from foreign policy considerations than has been the case in the past, since Asylum Officers should be able to assess conditions in countries of origin independent from State Department advisories on individual cases and reports on country conditions. Also, commentators hope that asylum adjudicators will be better insulated from immigration enforcement priorities, since they report to a central authority in Washington and not to local immigration officials. Whether these objectives will be realized, of course, depends upon the provision of adequate resources and effective implementation. Some commentators have expressed doubts regarding the current performance of United States officials, given the substantial backlog of over 200,000 cases, that has developed in the system.<sup>48</sup>

#### IV. Apportionment Criteria Under the Memorandum of Understanding

The substantive criteria for apportioning the responsibility for deciding an asylum request is proposed in the draft Memorandum of Understanding as follows:

“Country of First Arrival” means that country, being either Canada or the United States, in which the refugee status claimant first arrived, regardless of subsequent movements between Canada and the United States, provided, however, the refugee status claimant has not subsequently travelled to any country other than the United States or Canada in the period preceding the submission of a claim for refugee status. A person who is in the territory of one Party solely for the purpose of joining a connecting flight or continuing the same flight from a third country to the territory of the other will not be considered to be in the country of first arrival. Notwithstanding the foregoing, the country through which a person is transiting will be considered the country of first arrival if it has issued a transit visa, waived the requirement for a visa or granted lawful entry to the person in transit, unless it did so because the person was in possession of a valid visa issued by the other Party.<sup>49</sup>

The implementing mechanism is set forth, as well, in the Memorandum of Understanding:

The Parties intend that any person who:

- (a) makes or attempts to make a refugee status claim in Canada or in the United States, and
  - (b) has arrived in Canada directly from the United States, or in the United States directly from Canada,
- will have the refugee status claim examined by and in accordance with the refugee status determination system of the country of first arrival.<sup>50</sup>

United States and Canadian officials estimate that under current circumstances, up to 10,000 asylum seekers would be affected by this new rule, and thus would be required to submit their claims through the

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48. *See, e.g.*, NATIONAL ASYLUM STUDY PROJECT, AN INTERIM ASSESSMENT OF THE ASYLUM PROCESS OF THE IMMIGRATION AND NATURALIZATION SERVICE (Dec. 1992).

49. Memorandum of Understanding, Appendix § 1(1)(e) at 747.

50. *Id.* §§ 6(1)(a), (b) at 748.



United States asylum procedure instead of the Canadian procedure.<sup>51</sup> This prospect has caused some resource-conscious bureaucrats in the United States to resist concluding this agreement with Canada.<sup>52</sup>

Also, subsidiary criteria for apportioning the responsibility of deciding an asylum request are set forth in the Memorandum of Understanding to resolve specific situations.<sup>53</sup> Included is the following criterion:

Where a person who has previously had a refugee status claim determined by one of the Parties makes a claim in the territory of the other Party, that person will be returned to the country where the initial determination was made, so that the subsequent claim may be examined in accordance with that country's refugee status determination system.<sup>54</sup>

Presumably, under this provision, a person previously denied status in one of the countries in question is to be returned to that country of denial for enforcement of the prior denial, although the language of the document is ambiguous. Such an outcome would underscore the importance of achieving relative parity in the two systems. The basic objective, of course, is to ensure that like cases will be treated alike in

51. Interview, *supra* note 7. See also *Managing Information: A Framework for the 1990s*, in EMPLOYMENT AND IMMIGRATION (CANADA) 20-21 (1992); *Refugee Determination System in EMPLOYMENT AND IMMIGRATION (CANADA) Tables 1 and 3* (1991) (monthly report).

52. Interview, *supra* note 7.

53. They include:

Where a person who has no current lawful immigration status in the territory of either Party is found on the territory of one, it is the intention of the Parties that any refugee status claim made by that person will be determined by the Party on who[se] territory the person is physically present, unless the person was granted legal permission to enter the territory of the other Party in the previous 12 months, in which case the claim will be determined by the country having granted such permission.

Memorandum of Understanding, Appendix § 6(2) at 748. Cf. The Dublin Convention, *supra* note 12, art. 6 (specifying a six-month period for a similar purpose).

Also included in the Memorandum is the following provision:

[Subject to the previous subsection] where a person is ineligible to make a refugee status claim pursuant to the laws of one Party (the "prohibiting country"), and makes a claim while in the territory of the other (the "enabling country"), whose laws entitle the person to make that claim,

(a) notwithstanding any other provision of this Memorandum of Understanding, the enabling country undertakes to examine the claim if it is in possession of information in relation to the person which entitles that Party to conclude that the person would be ineligible to make a refugee status claim pursuant to the laws of the other Party, or

(b) if the enabling country is not in possession of such information and the person is, pursuant to this Memorandum of Understanding, returned to the prohibiting country, who finds the person ineligible to make a refugee status claim, the person will then be returned to the enabling country so that the person's refugee status claim can be determined in accordance with that country's refugee status determination system.

Memorandum of Understanding, Appendix § 6(4) at 748.

This provision presumably seeks to ameliorate the risk that asylum applicants would be denied protection solely on account of differential provisions concerning access to the determination procedure in the respective country.

54. Memorandum of Understanding, Appendix § 6(3) at 748.

each system.<sup>55</sup>

## V. Analysis and Recommendations

Whether the proposed Memorandum of Understanding achieves the principal objective of avoiding duplicate asylum claims in the United States and Canada will necessarily depend upon achieving substantial equivalence in the quality of status determination, at least if the arrangement is to be "fair" to asylum seekers. Several modifications will be required for any such agreement to be faithful to these precepts.

Specifically, a structural adjustment will be required to address the United States interpretation of its obligation not to return refugees to a place of persecution in order to comply with international law. At the very least, the Attorney General of the United States would be required to give a binding assurance, probably through formal rule-making, that international standards would be applied in the future in order for the United States to be considered to comply with its obligation to refugees under international law.<sup>56</sup>

Another modification of the draft Memorandum of Understanding would include acknowledgements of family unification, a fundamental tenet of international law.<sup>57</sup> The current version of the draft Memorandum fails to recognize international standards favoring family unity in the apportionment of claims between Canada and the United States. Often, the prospect of reunification governs the movement of asylum seekers. Just as the Dublin Convention recognizes the principle in the European context,<sup>58</sup> so should the United States-Canada Memorandum

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55. Section 5 of the Memorandum of Understanding presents a potential diplomatic dilemma. That section provides that:

[n]either Party intends to return (or deport) a refugee status claimant referred to either Party under the terms of this Memorandum of Understanding to a third country until a determination of the person's claim has been made in accordance with Section 4, unless both parties have a bilateral or a multilateral agreement with the third country whereby the claimant is provided the opportunity of a determination of his refugee status claim, or, if only one Party has such an agreement, unless the other Party consents to the return.

One can imagine the diplomatic awkwardness in being required to seek or give "consent" to the return of an asylum seeker under the terms of an agreement to which the country in question is not a party.

56. Congressional enactment of a statutory amendment would provide a more enduring approach. Any further limitations on access to the U.S. asylum procedure along the lines of the Canadian system would probably require legislative amendment.

57. See Arthur C. Helton, *The Proper Role of Discretion in Political Asylum Determinations*, 22 SAN DIEGO L. REV. 999, 1015-18 (1985) (discussing international law concerning family unity).

58. See *supra* note 12, art. 4. Article 4 of the Dublin Convention provides:

Where the applicant for asylum has a member of his family who has been recognized as having refugee status within the meaning of the Geneva Convention, as amended by the New York Protocol, in a Member State and is legally resident there, that State shall be responsible for examining the application, provided that the persons concerned so desire.

of Understanding. This would require the inclusion of language apportioning the duty to examine an asylum request to that country in which an applicant's relative resides. The immigration status of the relative presumably would not be relevant to ensuring respect for the principle of family unity.

Also, the draft Memorandum should include a transitional provision in order to address the concerns of some United States authorities about the effect of an additional caseload resulting from this arrangement on an already over-burdened and under-resourced system. Canada could agree to accept for adjudication a numerical quota of cases until certain performance standards have been achieved in the United States system, including reduction in system backlogs.

Finally, recognizing the difficulty in envisioning all potentially adverse consequences that this arrangement may have on the protection of refugees, a coordinating committee should be established, including senior government officials as well as representatives from the Office of the United Nations High Commissioner for Refugees and non-governmental organizations, to monitor implementation of the draft Memorandum. Such a committee could identify divergences in practice, seeking ameliorative guidance or recommending other measures for securing a harmonized approach to the protection of the fundamental human rights of refugees. A working level sub-group of the committee should also be organized to monitor practices on a continuous basis. Such mechanisms could provide a constant source of information for corrections and adjustments that would encourage harmonization between the United States and Canadian systems.

## Conclusion

The Preamble of the 1951 Convention<sup>59</sup> observes "that the grant of asylum may place unduly heavy burdens on certain countries," and that "international cooperation" is essential in the search for a "solution of a problem of which the United Nations has recognized the international scope and nature."<sup>60</sup> A comprehensive regional arrangement as recommended in the Memorandum of Understanding could assist in the realization of international cooperation. But such arrangements will likely remain elusive until the systems in question achieve substantial equivalence in terms of the quality of status determination. This must include reliability and fairness in the resolution of claims. The proposed United States-Canada Memorandum of Understanding provides a starting

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The family member in question may not be other than the spouse of the applicant for asylum or his or her unmarried child who is a minor of under eighteen years, or his or her father or mother where the applicant for asylum is himself or herself an unmarried child who is a minor of under eighteen years.

*Id.*

59. See *supra* note 21.

60. *Id.* Preamble.

point. With some revisions, including those recommended in this article, the Memorandum could provide a consistent and appropriate standard of refugee protection.

**Appendix****Draft Memorandum of Understanding Between the Government of Canada and the Government of the United States of America****For Cooperation in Examination of Refugee Status Claims from Nationals of Third Countries**

The Government of Canada and the Government of the United States of America (hereinafter referred to as the Parties),

Considering that Canada is a party to the 1951 convention relating to the Status of Refugees (the "Convention") and its 1967 Protocol (the "Protocol"), that the United States is a party to the Protocol, and that both Parties participate actively in the international system of protection and assistance to refugees, and support the activities of the Office of the United Nations High Commissioner for Refugees,

Convinced that an important priority in their work on behalf of refugees must be the effective identification and protection of Convention Refugees, consistent with the Convention and the Protocol,

Recognizing that such identification and protection of Convention Refugees is advanced by the fair and effective administration of their respective Refugee Status Determination Systems, including the prevention of duplication of Refugee Status Claims, and Desiring to ensure that the protections of the Convention and Protocol are afforded and that refugee claimants within their respective territories have access to the Refugee Status Determination System in one or the other country,

Have reached the following understanding:

*Section 1*

1. In this Memorandum of Understanding,

(a) "Convention Refugee" means a refugee as defined in the Protocol and as articulated in U.S. law in § 101(a)(42) of the Immigration and Nationality Act or in Canadian law as . . .

(b) "Refugee Status Claim" means a request from a person other than a citizen or legal permanent resident of Canada or the United States to the government of either country for protection consistent with the Convention or Protocol. A refugee status claim shall, in the U.S. system, be understood as a claim for asylum under § 208 or a claim for withholding of deportation under § 234(h) of the Immigration and Nationality Act.

(c) "Refugee Status Claimant" means any person (other than a citizen or permanent legal resident) who makes a Refugee Status Claim in the territory of one of the Parties.

(d) "Refugee Status Determination System," in Canada or in the United States, means the sum of the laws and administrative and judicial procedures and practices employed by each national government for the purpose of adjudicating refugee status claims.

(e) "Country of First Arrival" means that country, being either Canada or the United States, in which the refugee status claimant first arrived, regardless of subsequent movements between Canada and the United States, provided, however, the refugee status claimant has not subsequently travelled to any country other than the United States or Canada in the period preceding the submission of a claim for refugee status. A person who is in the territory of one Party solely for the purpose of joining a connecting flight or continuing the same flight from a third country to the territory of the other will not be considered to be in the country of first arrival. Notwithstanding the foregoing, the country through which a person is transiting will be considered the country of first arrival if it has issued a transit visa, waived the requirement for a visa or granted lawful entry to the person in transit, unless it did so because the person was in possession of a valid visa issued by the other Party.

### *Section 2*

Nothing in this Memorandum of Understanding applies to citizens of Canada or to citizens of the United States, regardless of where they reside, or to persons other than citizens of Canada or the United States, who are legal permanent residents in either country.

### *Section 3*

The Parties reaffirm their obligations under the Protocol and, in the case of Canada, under the Convention. It is the intent of the Parties that, subject to Sections 2 and 3.B, persons who make a refugee status claim in Canada or the United States will receive a determination in accordance with the refugee status determination system of one of the Parties.

### *Section 4*

Each Party undertakes to examine the refugee status claim of any person, as set out in Section 4, for whom it is the Country of First Arrival, and through its refugee status determination system, extend protection consistent with the Convention or the Protocol, where a determination with respect to the claim warrants such action.

### *Section 5*

Neither Party intends to return (or deport) a refugee status claimant referred to either Party under the terms of this Memorandum of Understanding to a third country until a determination of the person's claim has been made in accordance with Section 4, unless both parties have a bilateral or a multilateral agreement with the third country whereby the claimant is provided the opportunity of a determination of his refugee status claim, or, if only one Party has such an agreement, unless the other Party consents to the return.

*Section 6*

1. The Parties intend that any person who:

(a) makes or attempts to make a refugee status claim in Canada or in the United States, and

(b) has arrived in Canada directly from the United States, or in the United States directly from Canada, will have the refugee status claim examined by and in accordance with the refugee status determination system of the country of first arrival.

2. Where a person who has no current lawful immigration status in the territory of either Party is found on the territory of one, it is the intention of the Parties that any refugee status claim made by that person will be determined by the Party on whose territory the person is physically present, unless the person was granted legal permission to enter the territory of the other Party in the previous 12 months, in which case the claim will be determined by the country having granted such permission.

3. Where a person who has previously had a refugee status claim determined by one of the Parties makes a claim in the territory of the other Party, that person will be returned to the country where the initial determination was made, so that the subsequent claim may be examined in accordance with that country's refugee status determination system.

4. [Subject to the previous subsection] where a person is ineligible to make a refugee status claim pursuant to the laws of one Party (the "prohibiting country"), and makes a claim while in the territory of the other (the "enabling country"), whose laws entitle the person to make that claim,

(a) notwithstanding any other provision of this Memorandum of Understanding, the enabling country undertakes to examine the claim if it is in possession of information in relation to the person which entitles that Party to conclude that the person would be ineligible to make a refugee status claim pursuant to the laws of the other Party, or

(b) if the enabling country is not in possession of such information and the person is, pursuant to this Memorandum of Understanding, returned to the prohibiting country, who finds the person ineligible to make a refugee status claim, the person will then be returned to the enabling country so that the person's refugee status claim can be determined in accordance with that country's refugee status determination system.

*Section 7*

Notwithstanding any other provision of this Memorandum of Understanding, either Party may, at its own discretion, examine any refugee status claim made before them.

*Section 8*

1. The Parties undertake to exchange information on the laws, regulations and practices governing their respective refugee status determination systems.
2. Subject to national laws and regulations, the Parties undertake to, in accordance with the Annex hereto,<sup>61</sup> exchange such information as may be necessary to determine the identities and itineraries of persons making refugee status claims, in order to establish the country of first arrival.

*Section 9*

Each Party undertakes to use its best efforts to put in place sufficient mechanisms to provide for the implementation of this agreement.

*Section 10*

This Memorandum of Understanding will become effective upon signature and will remain in effect until terminated by either Party on six months' written notice to the other Party.

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61. Not included in this Appendix. In terms of U.S. law, any such information exchange would presumably have to comply with 8 C.F.R. § 208.6 (1992) which governs disclosure of information concerning asylum claims to third parties.



