



Monitoring Report

Canada - United States “Safe Third Country” Agreement

29 December 2004 – 28 December 2005

United Nations High Commissioner for Refugees

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TABLE OF CONTENTS

Executive Summary	3
Canada Country Chapter	8
United States of America Country Chapter	41
Appendices	88
1. UNHCR Monitoring Plan (Canada / USA).....	88
2. UNHCR Monitoring Objectives (Canada / USA).....	95
3. Canada-United States “Safe Third Country” Agreement (Canada / USA).....	97
4. “Safe Third Country” Agreement - Statement of Principles – Procedural Issues (Canada / USA).....	104
5. Web Links to Canada and United States Forms and Regulations (Canada / USA).....	106
6. Summary of UNHCR Recommendations (USA).....	107
7. Statistical Chart of U.S.-Bound Cases (USA).....	110
8. Timeline Chart of U.S.-Bound Cases (USA).....	113
9. Flowchart of U.S. Safe Third Process for Those Subject to Expedited Removal (USA).....	118
10. Chart of Safe Third Related Detention Conditions (USA).....	119

EXECUTIVE SUMMARY

A. Background

On 3 December 2001, the United States and Canadian Governments formalized their intention to negotiate a "Safe Third Country" Agreement in a joint "Statement on Common Security Priorities." Discussions regarding the text of the Agreement, entitled the "*Agreement Between the Government of the United States and the Government of Canada for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries*" (Agreement), were undertaken in 2002 with comments submitted by UNHCR, United States and Canadian NGOs, and academic institutions. The final text of the Agreement was initialed by the United States and Canadian Governments on 30 August 2002, and signed by the Parties on 5 December 2002.

Canada issued its final regulations relating to the Agreement on 26 October 2002. The United States published its final implementing regulations on 29 November 2004. Both Governments also issued procedural guidance (e.g. handbooks and manuals) with more specific information on the implementation. The Agreement entered into force on 29 December 2004.

B. UNHCR Participation in Review of Agreement's Implementation

Article 8(3) of the Agreement provides that the Governments will invite UNHCR to participate in a review of the Agreement and its implementation, to take place no later than twelve months from the date of the Agreement's entry into force. Pursuant to Article 8(3) of the Agreement, and further to its mandate under the 1951 Refugee Convention and general supervisory responsibility under Article II of the 1967 Protocol, UNHCR agreed to a monitoring role to assess whether the Agreement's implementation was consistent with the terms and principles of the Agreement, and with international refugee law. UNHCR and the Governments agreed that, for purposes of Article 8(3) of the Agreement, UNHCR would not review the overall impact of the Agreement on U.S.-Canada cross-border movements nor the post-eligibility processing of asylum claims. UNHCR did, however, inform the two Governments that it reserved the right to consider these issues under its general mandate.

In January 2003, UNHCR presented a draft Monitoring Plan to the United States and Canadian Governments, which was subsequently discussed at a tripartite meeting held on 6 August 2004, and finalized on 14 December 2004. The Plan details the commitments made by both UNHCR and the Governments with regard to UNHCR's monitoring activities. The Monitoring Plan states that UNHCR will formally report its findings to the Parties after six months and submit a written report to the Parties after twelve months, to be considered in conjunction with the Parties' first review of the Agreement.

UNHCR monitored the Governments' first year of implementation of the Agreement from 29 December 2004 to 28 December 2005. UNHCR hired two Protection

Consultants for this purpose, which were supervised and supported by office staff in both Washington, D.C. and Ottawa. To facilitate its monitoring activities, UNHCR established monitoring objectives that were provided to the United States and Canadian Governments and to NGOs for comment.

UNHCR's monitoring has been guided by applicable international refugee law, the text of the Agreement and its procedural Statement of Principles, supplementary Rules and Regulations, and Standard Operating Procedures as published in agency manuals and training materials. Relevant sources of international refugee law include the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (in particular Article 33), the Statute of UNHCR, UNHCR's Executive Committee Conclusions, and other applicable human rights principles and standards.

UNHCR's monitoring activities comprised the following: (1) missions to United States-Canada land border ports-of-entry (POEs); (2) visits to detention facilities where Safe Third applicants may be detained; (3) observation of eligibility determination interviews; (4) meetings/discussions with government officials at both the local and headquarters level; (5) meetings with NGOs operating on the United States-Canada border; (6) interviews with refugee claimants subject to the Agreement, as well as with their family-members and/or lawyers; (7) individual case file review; (8) review of government policy guidance; and, (9) statistical analysis.

UNHCR conducted regular monitoring missions to all major United States-Canada land border POEs, as well as to several less-frequented land border POEs. Four of these missions were jointly undertaken by UNHCR Washington and UNHCR Ottawa. During each mission, UNHCR met with local government officials and regional NGOs, conducted interviews with individual asylum-seekers, and observed eligibility determination interviews conducted by government officials when possible. During these missions, UNHCR also visited area detention facilities where Safe Third applicants have been held and were likely to be held in the future.

UNHCR regularly met with Department of Homeland Security /Department of Justice and Citizenship and Immigration Canada/Canada Border Services Agency government representatives throughout the monitoring period in order to brief them on its monitoring activities, to review the implementation of the Agreement, and to make recommendations when appropriate.

C. Cooperation Mechanisms

In the lead up to the entry into force of the Agreement, the Governments of Canada and the U.S. convened a quadripartite meeting (the two Parties, UNHCR Ottawa and UNHCR Washington as well as NGOs from both Canada and the U.S.) on 16 December 2004, at Niagara Falls, Ontario, to provide information to NGO stakeholders and listen to their concerns regarding the implementation of the Agreement. Another quadripartite meeting

was held on 16 November 2005, in London, Ontario, to apprise relevant Canadian and U.S. NGOs of developments on the implementation of the Agreement.

As per UNHCR's Monitoring Plan, a tripartite meeting (the two Parties and UNHCR Washington and UNHCR Ottawa) was held on 6 July 2005, in Washington DC, whereby UNHCR provided the Parties a mid-term evaluation of the implementation of the Agreement and presented a number of recommendations to the Parties.

Throughout the first year of implementation, UNHCR Offices in Ottawa and Washington DC met regularly, through different bilateral structures, with officials from the Governments of Canada and the U.S. to discuss and endeavour to resolve issues, as and when they emerged, relating to the implementation of the Agreement.

D. Report Format

This report details UNHCR's assessment of the first twelve months of the Agreement's implementation, and is submitted in accordance with the UNHCR Monitoring Plan. It is hoped that this report will assist the Parties in their review of the first year of the Agreement's implementation. This report consists of two country chapters; the first chapter presents UNHCR's assessment of the Agreement's implementation in Canada, and the second chapter presents UNHCR's assessment of the Agreement's implementation in the United States. This two-part structure has allowed UNHCR to tailor its findings and recommendations to each country, given that both governments implemented the Agreement in a manner consistent with existing national immigration procedures. While UNHCR's monitoring activities in Canada and the United States were similar in scope and coordinated in practice, UNHCR's monitoring was adapted as necessary to accommodate each country's specific statutory and procedural differences.

E. Summary of Statistics

According to official statistics, there were 4,041 reported individuals who requested refugee status at Canadian land-border POEs between 29 December 2004 and 28 December 2005. Of these 4,041 claimants, more than 3,000, i.e. approximately 74% were found eligible to lodge a refugee claim in Canada.

As of 29 December 2005, there were 66 reported individuals who requested asylum at United States northern land-border POEs, none of whom were unaccompanied minors. Of the 43 claimants whose cases had been adjudicated as of 28 December 2005, 27, i.e. approximately 63% were deemed eligible to lodge an asylum application in the United States.

F. Joint Summary of Findings and Recommendations

It is UNHCR's overall assessment that the Agreement has generally been implemented by the Parties according to its terms, and, with regard to those terms, international refugee law. The Agreement appears to be functioning relatively smoothly. Individuals who request protection are generally given an adequate opportunity to lodge refugee claims at the ports of entry and eligibility determination decisions under the Agreement have generally been made correctly.

UNHCR notes, however, its particular concern with respect to the Parties' continued use of the direct back policy.¹ This has been especially problematic for asylum-seekers directed back from Canada to the United States, as a number were detained in the United States and unable to attend their scheduled interviews. UNHCR is aware of six asylum-seekers who were directed-back to the United States and subsequently removed to their country of origin without having their claims processed by the Canadian Government under the Agreement.

According to the Parties, the purpose of the Agreement is, *inter alia*, to share refugee status determination responsibility, identify persons in need of protection, and avoid *refoulement*.² During the period under review, the UNHCR expressed concern that the use of the direct back policy undermined the letter and spirit of the Agreement, and recommended that CBSA discontinue its use. While the vast majority of claimants affected by the direct back policy did gain access to the Canadian refugee protection system, the UNHCR is aware of 6 cases in which a claimant was directed back to the U.S., detained and removed without having had an opportunity to pursue a refugee claim in Canada, illustrating their concerns. Responsibility for the processing of direct-back cases is shared by both Parties. The Government of Canada has informed the UNHCR that the use of the direct back policy will end as of August 31, 2006, except in extraordinary circumstances.

Other primary areas of concern for UNHCR include: (1) lack of communication between the two Governments on cases of concern; (2) adequacy of existing reconsideration procedures; (3) delayed adjudication of eligibility under the Agreement in the United States; (4) in some respects, lack of training in interviewing techniques; (5) inadequacy of detention conditions in the United States as they affect asylum-seekers subject to the

¹ "Direct back" is the term used, particularly in Canada, when an asylum-seeker approaches a port of entry at a time when officials at the port are unable to process his/her asylum claim. The claimant is given a scheduled interview and returned to the United States to wait for his/her appointment with Canadian authorities and the eventual processing of the claim at the port of entry.

² The last paragraph of the Preamble states that the Parties are: "Aware that such sharing of responsibility must ensure in practice that persons in need of international protection are identified and that the possibility of indirect breaches of the fundamental principle of *non-refoulement* are avoided, and therefore determined to safeguard for each refugee status claimant eligible to pursue a refugee status claim who comes within their jurisdiction, access to 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."

Agreement; (6) insufficient and/or inaccessible public information on the Agreement; and (7) inadequate number of staff dealing with refugee claimants in Canada.

UNHCR Offices in Canada and the United States have mainstreamed the monitoring of the Agreement's implementation into their regular supervisory and protection activities as of 29 December 2005. UNHCR recommends that the Parties maintain many of the structures put in place to facilitate the monitoring and implementation of the Agreement and that the Parties continue to provide UNHCR with information and statistics regarding the Agreement's implementation on a regular and timely basis.

UNHCR extends its gratitude to the Parties for the excellent cooperation received from the relevant government officials of Canada and the U.S., at all administrative levels. UNHCR would also like to thank NGOs on the two sides of the border for the excellent collaboration UNHCR staff received from them throughout the monitoring period.

CANADA
COUNTRY CHAPTER

TABLE OF CONTENTS

A. Executive Summary	10
<i>Statistics</i>	11
<i>Summary of Recommendations</i>	11
B. Pre-Implementation – Overview	14
<i>Recommendation</i>	16
C. Implementation – Overview	16
<i>UNHCR monitoring activities</i>	16
<i>Co-ordination/Consultation</i>	17
<i>Statistics</i>	17
D. Analysis	19
Objectives:	
1 - <i>Asylum-seekers have access to appropriate border and adjudicating officers</i>	20
2 - <i>Asylum-seekers have the opportunity for third party presence during proceedings</i>	21
3 - <i>Asylum-seekers not subject to the Agreement are effectively identified</i>	22
4 - <i>Asylum-seekers' claims are determined and finalised expeditiously</i>	24
5 - <i>Asylum-seekers are subject to eligibility determination interviews that are carried out in accordance with recognised international standards</i>	28
6 - <i>Asylum-seekers are treated fairly and humanely, in accordance with international human rights standards</i>	30
7 - <i>Vulnerable individuals are treated in a sensitive manner</i>	31
8 - <i>Asylum-seekers benefit from the principle of family unity</i>	32
9 - <i>Asylum-seekers subject to the Agreement are aware of their rights</i>	32
10 - <i>Asylum-seekers are not subject to unwarranted detention</i>	35
11 - <i>UNHCR has access to individual files</i>	36
12 - <i>UNHCR staff has access to designated land border ports of entry and “border” detention facilities</i>	36

13 – <i>Other issues:</i>	
<i>Public interest cases</i>	37
<i>NGOs participation in monitoring</i>	38
<i>Communication between Canadian & U.S. port officials</i>	38
<i>New issues:</i>	
<i>Communication of UNHCR’s mid-term findings</i>	
<i>to CBSA land border offices</i>	39
<i>Public information on the Agreement</i>	39
<i>Maintenance of “acquis”</i>	39
V. Conclusion	40

A. EXECUTIVE SUMMARY

On 6 August 2004, the Parties to the Safe Third Country Agreement (hereinafter “the Agreement”) between Canada and the United States of America (U.S.) met with the United Nations High Commissioner for Refugees (UNHCR) and agreed upon a Monitoring Plan proposed by UNHCR Pursuant to Article 8 (3) of the Agreement, and further to its mandate under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. UNHCR undertook to monitor the Agreement to assess whether implementation is consistent with the terms and principles of the Agreement as well as with international refugee law. The Monitoring Plan, *inter alia*, states that UNHCR will provide an oral monitoring report after six months and a final written report approximately one year after implementation of the Agreement.

This report details UNHCR’s assessment of the first 12 months of implementation of the Agreement (29 December 2004 – 28 December 2005). It includes recommendations made at the time of the six month review and details progress made on those recommendations. There are some recommendations from the mid-term review that have been acted upon and therefore the recommendations no longer apply. On some issues, there has been little or no progress and therefore the recommendations remain valid.

Overall, UNHCR’s assessment of the implementation of the agreement is positive. The Safe Third Country Agreement is being implemented in keeping with both the terms of the Agreement and with international refugee law. In other words, most persons who request international protection in Canada are given the opportunity to lodge a refugee claim. Refugee claimants are treated fairly and with respect.

UNHCR is, however, very concerned with respect to the use by Canada of the direct back¹ policy. According to the Canada Border Services Agency (CBSA), approximately 129 claimants who presented themselves at Canadian ports of entry (POEs) were directed back to the U.S. during the period under review. Approximately twenty-five of these claimants were detained by U.S. authorities and six were subsequently removed to their country of origin. From among those claimants directed back and detained UNHCR is aware of six who were unable to appear at their scheduled appointment with Canadian border officials and did not have an eligibility determination made on their case in Canada. Following its expression of serious concern, UNHCR has been informed by the Government of Canada that direct backs will be discontinued as of 31 August 2006, except in extraordinary circumstances.

UNHCR has enjoyed excellent co-operation with Citizenship and Immigration Canada (CIC) and Canada Border Services Agency (CBSA) with respect to its monitoring activities. There has been regular, open and transparent communication between CIC,

¹ Direct back is the term used when an asylum seeker approaches a port of entry at a time when officials at the port are unable to deal with the asylum claim. The claimant is given a scheduled interview and returned to the U.S. to wait for his/her appointment with Canadian authorities and the eventual processing of the claim at the port of entry.

CBSA and UNHCR. In addition, UNHCR is grateful to the Government of Canada for the financial support provided for the recruitment of a Protection Consultant to assist with the monitoring of the implementation of the Agreement and reporting thereon. UNHCR is also highly appreciative of the collaboration, support and input received from non-governmental organisations (NGOs), especially those who work closely with claimants at POEs.

Statistics

According to statistics received from CIC/CBSA, there were 4,041² refugee claims made at the Canada-United States land border ports of entry during the period 29 December 2004 to 28 December 2005. Of those, more than 3,000 (approximately 74%) fell within one of the exceptions to the Agreement, and were allowed to make a refugee claim in Canada. During the above period, most refugee claimants (3,810 or 94%)³ have approached one of three ports of entry: Fort Erie, Windsor and Lacolle. Fort Erie, Ontario processed 2,462⁴ claims, while Windsor, Ontario processed 709⁵ claims, followed by Lacolle, Quebec, which processed 639 claims. Of the 4,041 refugee claimants who presented themselves at the land border, 2,156 were male and 1,885 were female. From December 2004 to December 2005, there were 190 claimants younger than 18 years old who sought refugee protection as a principal applicant at the Canada-U.S. land border, 48 of whom were unaccompanied minors⁶.

Summary of recommendations

In this report, UNHCR makes a number of positive comments. Also included are details of recommendations made at the time of the mid-term report and details of progress since July, if applicable. In addition, there are new recommendations arising out of observations during the second half of the year. The recommendations are based on UNHCR monitoring of the Agreement. They are not presented in order of importance. Instead, UNHCR has followed the order in which our monitoring objectives are presented (see attached Monitoring Objectives).

² Statistical report produced by CIC dated March 20, 2006.

³ Figure includes claims processed at Fort Erie, Niagara Falls Rainbow Bridge, Queenston-Lewiston Bridge, Windsor International Tunnel and Windsor Ambassador Bridge.

⁴ Figure includes claims processed at Fort Erie, Niagara Falls Rainbow Bridge and Queenston-Lewiston Bridge

⁵ Figure includes claims processed at Windsor International Tunnel and Ambassador Bridge

⁶ Under the Safe Third Country Regulations an unaccompanied minor is a person who has not attained the age of 18 years and is not accompanied by a mother, father or legal guardian, has neither a spouse nor a common-law partner; and does not have a mother or father or a legal guardian in Canada or the U.S.

The following is a summary of new recommendations and those that are outstanding at the time of the final report:

- During the immediate pre-implementation period (22-24 December 2004), hundreds of claimants rushed to the Fort Erie border crossing to make a refugee claim before the Agreement entered into force. It is the view of UNHCR that this situation could have been avoided. UNHCR recommends that in the future careful consideration be given to the timing of the implementation of new legislation or international agreements. In addition, to the extent possible, POE officials should prepare and put in place contingency plans to be used in the event of a surge in asylum requests.
- As a result of discussions with POEs and NGOs, UNHCR recommended in the mid-term report that CIC/CBSA National HQs provide additional clarification on the issues of statelessness, habitual residents, unaccompanied minors, vulnerable and spousal abuse cases. UNHCR is aware that CIC and CBSA have been working on changes to the manual chapter (PP1) with respect to statelessness and habitual residents. UNHCR encourages CIC and CBSA to continue work on the PP1 to enhance other sections.
- UNHCR recommends that CIC/CBSA enhance the guidelines in the manual (PP1) for reconsideration of cases determined to be ineligible.
- During the period under review, the UNHCR expressed concern that the use of the direct back policy undermined the letter and spirit of the Agreement, and recommended that CBSA discontinue its use. While the vast majority of claimants affected by the direct back policy did gain access to the Canadian refugee protection system, the UNHCR is aware of 6 cases in which a claimant was directed back to the U.S., detained and removed without having had an opportunity to pursue a refugee claim in Canada. The Government of Canada has informed the UNHCR that the use of the direct back policy will end as of August 31, 2006, except in extraordinary circumstances.
- At the Lacolle POE, in particular, UNHCR observed that during each of its monitoring missions at least one family or individual claimant had waited all day or overnight for the processing of their case to begin. While acknowledging that there are many competing priorities at POEs, UNHCR urges CBSA to process refugee claimants in as timely a manner as possible.
- UNHCR observers have noted that some officers working at land border POEs may not have received training specific to interviewing refugee claimants. As a result, UNHCR recommended in the mid-term report that officers receive training in interviewing techniques for refugee claimants. In addition, the manual chapter for POE officers should contain information on this subject.

- Although UNHCR has been advised that the PP1 manual chapter is being reviewed, UNHCR urges CIC and CBSA to modify the manual and provide relevant training as soon as possible.
- Although for the most part, POEs are sensitive to the needs of vulnerable individuals, UNHCR recommends that CBSA impress upon POE officials the need to provide, to the extent possible, priority processing to vulnerable individuals and include training and instructions on how to identify vulnerable cases.
- CIC/CBSA should create a transparent administrative mechanism for the review of cases that may have been erroneously found ineligible or in which new information in support of eligibility becomes available after the initial determination of ineligibility. CIC and CBSA should also agree with U.S. Customs and Border Patrol (CBP) and other relevant U.S. authorities to a temporary suspension of removal from the U.S. pending the timely review of such cases.
- CBSA should provide monthly data on detentions of persons to whom the Agreement applies, as per the Monitoring Plan.
- Article 6 of the Agreement permits the Parties to allow entry of certain categories of persons on the basis of public interest. In Canada, this means 1) persons who have been charged or convicted of an offence that is punishable with the death penalty in the country in which the conviction or charge takes place, and 2) nationals of a country to which Canada does not remove persons because the Minister has imposed a stay on removals. UNHCR recommends that the Government of Canada consider broadening the interpretation of Article 6 to include, for example, vulnerable persons who do not fall under any of the exceptions to the Agreement.
- UNHCR has observed that there is not a great deal of communication between the Canadian and U.S. officials who are counterparts at some POEs. UNHCR recommends that CBSA and appropriate U.S. officials communicate more frequently on issues relevant to the Agreement.
- Information on UNHCR's mid-term report of July 2005 was not sent to the CBSA regions until October. As of December the information had not reached some POEs. Therefore, UNHCR recommends that CBSA HQ ensure that when appropriate, information with respect to concerns expressed by UNHCR about activities at the POEs, be shared with the field in a timely manner.
- UNHCR recommends that both CIC and CBSA ensure that information on the Agreement, including the exceptions, is readily available on the departmental

websites. In addition, the Government should explore other means to provide relevant public information.

- The monitoring of the Agreement will no longer be considered a “special” project but will be mainstreamed into UNHCR’s regular supervisory responsibilities pursuant to Article 35 of the Convention and Paragraph 8 of the UNHCR Statute. UNHCR recommends that the *modus operandi* established between CIC/CBSA and UNHCR to facilitate the monitoring functions of UNHCR with respect to the Agreement, be maintained. This relates in particular to the Working Group⁷ and regular and timely supply of statistics.

B. PRE-IMPLEMENTATION – OVERVIEW

Positive: The POE officials processed cases until the early hours of 24 December 2004. Whilst Canadian POE officers expedited the processing of cases, it was reported that officers in the U.S. were initially taking 3 hours to process one case. Eventually, communication between managers of the Canadian and U.S. ports of entry at Fort Erie/Buffalo broke the logjam and processing from the two sides of the border was expedited.

Issue: The Agreement between Canada and the U.S. came into effect on 29 December 2004. There were problems with both the timing of the implementation and the way in which the anticipated surge in claims at the Canadian border was handled.

The date of implementation was conditional upon finalization of relevant regulations by both Canada and the U.S. Final regulations were published in Part II of the Canada Gazette on 3 November 2004. The U.S. regulations were approved and published on 29 November 2004. U.S. regulations are subject to a 30-day statutory waiting period making the effective date of implementation of the Agreement 29 December 2004.

The implementation date was problematic because it was at the end of the year during the winter festive period. With the implementation date in the winter, it was imperative to provide shelter and warm clothing to refugee claimants. This presented challenges because there was no facility at the border that could accommodate such a large group. Also, the Refugee Processing Unit at Fort Erie, the busiest POE in Canada for processing refugees, is traditionally closed on 25 and 26 December. The rush to the border in Fort Erie in particular meant that the holiday season was disrupted for employees of CBSA/CIC, NGOs, the municipality and many others.

Experience has shown that changes to refugee/immigration policy or legislation in either Canada or the U.S. that are perceived as more restrictive, result in a rush of persons applying to enter before the new regime comes into effect. Thus, it was anticipated that

⁷ The Working Group was established in October 2003. It is comprised of officials from CIC/CBSA and UNHCR Canada. It is an informal forum to discuss details of the Agreement, results of UNHCR monitoring and emergent issues.

during the transitional period leading up to the implementation of the Agreement a significant number of individuals who were already in the U.S. would come forward to make a refugee claim in Canada. The issue of preparedness was also discussed on numerous occasions between the senior management of CIC and UNHCR in the lead-up to the entry into force of the Agreement. UNHCR sought and received assurances from the Canadian authorities that a contingency plan was in place to handle any surge in refugee claims. Canada's preparedness to deal with a surge was also discussed at the Working Group. Several joint meetings were held with representatives of CIC, CBSA, UNHCR and local NGOs to assess the anticipated impact of the transitional period, particularly at the Fort Erie POE. The shared concern of all parties was that claimants be dealt with appropriately and be assured full and fair access to an eligibility determination, which is the entry point to Canada's refugee protection system.

At these meetings, the U.S. NGOs made CIC and CBSA aware of the number of individuals waiting in the U.S. and the need to provide appropriate processing and shelter to a large volume of claimants. Specifically, the Canadian authorities were advised that 700 asylum seekers who were housed temporarily by VIVE, an NGO based in Buffalo, NY, planned to approach the border before 29 December 2004. However, government officials were not receptive to suggestions of alternate methods to deal with this group of claimants. Rather, the situation was exacerbated by the authorities' insistence that in order to qualify under the pre-implementation provisions, asylum seekers must present themselves at the land border POE because CBSA no longer scheduled interview appointments by telephone.

CIC and CBSA anticipated that the direct back policy would be sufficient to manage the surge in claimants. In the days immediately preceding implementation of the Agreement, after directing back over 400 refugee claimants to the U.S., it became apparent that the direct back policy alone would not adequately manage the surge of claims being received. The POE staff was overwhelmed. The Canadian Red Cross and the Salvation Army provided food and shelter to asylum seekers and other assistance was given by other local NGOs. Ultimately, additional steps were taken by CBSA and CIC to ensure the orderly handling of these claims. These steps included using administrative measures to facilitate the processing of claims under the rules in place prior to the Agreement coming into force, calling in additional staff on overtime to manage the high volume of claimants, temporarily providing shelter in the basement of a CBSA facility and providing transportation for claimants temporarily directed back to the U.S. Finally, in order to cope with a large group of claimants who had been housed temporarily by VIVE, an alternative approach using temporary resident permits (TRP) was developed. This approach required CBSA and CIC officers to schedule appointments on-site at VIVE and make arrangements through the Canadian Consulate General in Buffalo to have TRPs granted to these claimants to facilitate their entry to Canada for their scheduled eligibility interviews. Of those directed back, 12 were detained upon return to the U.S.

It should be noted that other major land border crossings were not overwhelmed by asylum-seekers as a result of the imminent entry into force of the Agreement.

Although UNHCR observed serious problems during the pre-implementation phase, the Canadian authorities did respond by making a concerted effort to ensure that access to protection was not denied. By mid-March 2005 all claimants who appeared for their eligibility interviews as transitional cases had been fully processed. UNHCR is not aware of any persons directed back during the pre-implementation period who were not able to return for an interview at the POE.

Recommendation: In future, the timing of the implementation of legislation or Agreements affecting the border should be carefully considered. All parties should plan for a surge of refugee claimants and develop an effective contingency plan accordingly that does not involve the use of the direct back policy.

C. IMPLEMENTATION - OVERVIEW

UNHCR monitoring activities

Prior to the entry into force of the Agreement, the Parties and UNHCR agreed on a Monitoring Plan. The Plan details the commitments of the Parties and UNHCR, made with a view to facilitating the monitoring role of UNHCR.

In its role as monitor, UNHCR made frequent visits to the major POEs. In addition, UNHCR monitors visited other POEs that receive few refugee claimants. Four visits to POEs were made in conjunction with UNHCR Washington, allowing monitors to visit both the Canadian and U.S. POEs in Fort Erie/Buffalo, Lacolle/Champlain and Windsor/Detroit. Six (6) officials of UNHCR Branch Office Canada, including the Representative, conducted monitoring visits to land border crossings throughout Canada. Furthermore, UNHCR invited CBSA and CIC NHQ representatives to accompany UNHCR Protection Consultants from Ottawa and Washington on a visit to Fort Erie/Buffalo in September. The Protection Consultant and officials from CBSA HQ visited Lacolle in December 2005. From January to December 2005, UNHCR Ottawa visited the following POEs:

Douglas, BC	2 visits
Emerson, MB	2 visits
Windsor, ON	6 visits, including one joint mission with UNHCR Washington
Fort Erie/Niagara, ON	6 visits, including one joint mission with UNHCR Washington and one with officials from CBSA and CIC Headquarters and UNHCR Washington
Cornwall, ON	2 visits
Lacolle, PQ	6 visits including one joint mission with UNHCR Washington and one mission with officials from CBSA HQ
St. Armand, PQ	1 visit
St. Stephen, NB	1 visit

UNHCR also maintained contact with POEs by telephone and e-mail, as necessary.

UNHCR officials met with government officials on a regular basis in the context of the Working Group to provide feedback on UNHCR's monitoring activities, to review the implementation of the Agreement and to make recommendations for changes to procedures. UNHCR periodically provided details of UNHCR's observations following visits to some of the major POEs, to CBSA and CIC officials at the monthly UNHCR/CIC/CBSA meetings. A separate meeting was also attended by Foreign Affairs Canada and the Canadian International Development Agency during the course of 2005. During monitoring visits at POEs, UNHCR conducted interviews with asylum-seekers awaiting processing of their cases. UNHCR monitors also observed eligibility interviews carried out by CBSA officials.

Co-ordination/Consultation

UNHCR staff and the Protection Consultant held meetings with CBSA regional officials as well as with POE officials during each POE monitoring mission.

In February, the UNHCR Representative, the Protection Consultant and some senior UNHCR staff held a meeting with the CCR Executive Committee members to, *inter alia*, discuss the newly-drafted UNHCR monitoring guidelines.

In addition, UNHCR met with "border" NGOs during monitoring visits. The purpose of the meetings with NGOs was to get their views and observations on the implementation of the Agreement. In April, UNHCR hosted a conference call to discuss the Agreement with NGOs on both sides of the border. Approximately 21 individuals took part in the teleconference. UNHCR also maintains contact with border NGOs by phone and e-mail, as appropriate.

Two quadripartite meetings were held with U.S. and Canadian Government officials, UNHCR officials from Washington and Ottawa and NGO representatives from both the U.S. and Canada. The first meeting was held in Niagara Falls, Ontario, on 16 December 2004 and the second in London, Ontario, on 16 November 2005.

Statistics

The statistics for the first 3 months of 2005 include transitional cases. This means either that the person approached a POE before 29 December 2004 and was directed back to the U.S. or, at the Fort Erie/Buffalo POE, that CIC/CBSA and Foreign Affairs Canada at the Canadian Consulate in Buffalo, facilitated the entry of the person by issuing a visitor document. Such documents were issued to persons at VIVE who intended to approach the POE before 29 December 2004 and who could not be processed prior to implementation of the agreement. In both cases the persons concerned were given an appointment date

for an interview at the appropriate POE after 29 December 2004. The transitional cases were completed by mid-March 2005. UNHCR is not aware of any persons directed back during the pre-implementation period who were not able to return for an interview at the POE.

From 29 December 2004 to 28 December 2005 there were 4,041⁸ refugee status claims made at Canadian land border POEs. By comparison, during the same period in 2003-2004 there were 8,892, and in 2002-2003 there were 11,091 such claims. The overall number of refugee protection claims, including those made at airports and inland offices, is also down from previous years. The year 2004 saw a decrease from 2003 of 20% and the difference between 2004 and 2005 was a further decrease of 23%.

The Government of Canada has acknowledged that the decline in claims at the land border in 2005 is in part attributable to the Agreement.

Since implementation of the Agreement, most refugee claimants have approached one of three POEs. Of the 4,041 refugee claims made at land border ports of entry from 29 December 2004 to 28 December 2005, 3,810⁹ (94%) were made at Fort Erie, Windsor or Lacolle. Fort Erie, Ontario received 2,462¹⁰ claims (61%); Windsor, Ontario received 709¹¹ claims (18%); and Lacolle, Quebec received 639 claims (16%).

Of the 4,041 claims made at land border POEs, more than 3,000 (approximately 74%) fell under one of the exceptions to the Safe-Third Country Agreement. After the transitional cases were completed the exceptions that were most frequently used were that the applicant had an eligible relative in Canada (for example, 38% used this exception in October and 33% in November) or that the applicant is from a moratoria country (32% used this exception in October and 60% in November). From 29 December 2004 to 28 December 2005, there were 48 claimants who were granted an exception based on the fact that they were an unaccompanied minor as defined in the Agreement.

UNHCR has not been able to obtain reliable statistics on direct backs because the numbers were not gathered at the CBSA NHQ level until October. UNHCR is aware that Fort Erie continues to use direct backs on a regular basis. According to CBSA, the Fort Erie POE directed back some 55 refugee claimants during the first 6 months of the year. Another 74 claimants were directed back from August through December 2005; 69 of those from Fort Erie, 4 from POEs in the Prairies and 1 from Windsor. UNHCR is aware of at least 10 asylum seekers who were detained by U.S. authorities after being directed back from Canada. Of the ten, UNHCR knows of 6 asylum seekers who were deported to their countries of origin before an eligibility decision was made on their refugee claim in

⁸ Statistical report produced by CIC dated March 20, 2006

⁹ Figure includes claims processed at Fort Erie, Niagara Falls Rainbow Bridge, Queenston-Lewiston Bridge, Windsor International Tunnel and Windsor Ambassador Bridge.

¹⁰ Figure includes claims processed at Fort Erie, Niagara Falls Rainbow Bridge and Queenston-Lewiston Bridge

¹¹ Figure includes claims processed at Windsor International Tunnel and Ambassador Bridge

Canada. The majority of asylum seekers arriving at Fort Erie are referred through VIVE and therefore have scheduled appointments.

As of the end of October 2005, there were 14 arrivals in Canada of persons resettled under Article 9 of the Agreement (referred to Canada for resettlement by U.S. officials). All fourteen were Haitians resettled from Guantanamo Bay.

D. ANALYSIS

UNHCR monitors were guided by standards and principles derived from the Agreement, accompanying Rules and Regulations and Standard Operating Procedures (or Safe Third Manuals).

UNHCR developed objectives to guide its monitoring activities. The objectives have been shared extensively with the government (CIC/CBSA) and NGOs.

UNHCR staff also applied international refugee law standards and principles in the development of the monitoring objectives and while carrying out their monitoring responsibilities. The sources of international refugee law that are relevant in the context of the Safe Third Country Agreement between Canada and the U.S. include the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (in particular Article 33), the Statute of UNHCR, UNHCR Executive Committee Conclusions and other applicable human rights principles and standards.

In the mid-term oral report to the Governments of Canada and the U.S., presented in Washington DC on 6 July 2005, UNHCR gave an overview of its findings which comprised positive aspects as well as a number of recommendations for change. The report was well received by the Parties. With respect to Canada, both CIC and CBSA agreed to begin work on the recommendations. At a meeting of the Working Group on 19 July 2005, CIC, CBSA and UNHCR agreed on a course of action to implement some of the recommendations.

UNHCR continued to work closely with the government on the implementation of the recommendations as well as on pressing emergent issues. A follow-up meeting of the Working Group was held on 29 September 2005 to discuss progress on the recommendations.

While the government has made significant progress or has conclusively dealt with some of UNHCR's recommendations, there remain a number of outstanding issues. In this report, UNHCR details the recommendations made in the mid-term report in July, provides a report of developments on each issue since that time and details some revised or new recommendations which have been added based on observations during the second half of the year. As already stated, the recommendations do not appear in any order of priority but rather follow the order used in the objectives that guide UNHCR

monitoring. The outline of the monitoring objectives follows the flow of the eligibility determination process.

1. Objective: Asylum-seekers have access to appropriate border and adjudicating officers

Mid-term

Positive: From UNHCR observations, asylum seekers do have access to appropriate border and adjudicating officers at POEs and are provided with information and necessary forms without undue delay. UNHCR has noted that at POEs where the process is facilitated by NGOs in the U.S., applicants have had the process explained and in some cases have completed some of the necessary documentation in advance. Given that appointments are scheduled and that claimants are expected at POEs, access to CBSA officers is not an issue. This facilitates the process and helps to make asylum seekers aware of what to expect. In addition, the services provided by the Peace Bridge Newcomer Centre at the Refugee Processing Unit in Fort Erie help to make the process less intimidating. The long waiting period before the eligibility determination is made, is rendered less difficult for some claimants by the reception accorded claimants at the Centre.

Issue 1.1: Not all POEs use the services of NGOs to assist refugee claimants prepare for the interview and other procedures (see also Objective 6). UNHCR has observed that “spontaneous” arrivals at POEs are usually disoriented and anxious, especially those who have to wait for long periods of time before their cases are processed.

Recommendation 1.1: Where possible, POEs should use U.S.-based NGOs to assist refugee claimants prepare for the pre-processing as well as the processing phases. The major POE at Lacolle should be encouraged to enlist the co-operation of, for example, Vermont Refugee Assistance (VRA).

Post mid-term

At the Working Group meeting in July 2005, CIC and CBSA agreed to explore the use of U.S. - based NGOs to assist claimants. CBSA has reported that, for a variety of reasons, officials at the Lacolle POE are not convinced of the advantage of instituting an appointment system.

Each time that UNHCR has gone on mission to the Lacolle POE, monitors have observed that waiting and processing times at Lacolle are too long in many cases. However, after discussions with officials at the Lacolle POE, UNHCR is of the view that the use of the VRA may not be sufficient to significantly reduce the length of time that claimants spend

at the POE, since VRA deals with a relatively small proportion of cases that make claims at Lacolle.

New recommendation 1.1: UNHCR recommends that, to the extent possible, POEs adhere to the guidelines for processing cases found in the section 17.9 of the PPI manual (Processing Refugee Claims) which states “Officers should generally make eligibility decisions on the day of application or the next day in the case of late arrivals,” (see also New recommendation 4.2.) In addition, officers should identify and deal expeditiously with claims from vulnerable individuals (see also **R e c o m m e n d a t i o n 7 . 1) .**

2. Objective: Asylum-seekers have the opportunity for third party presence during proceedings.

Mid-term

Positive: The policy of CIC/CBSA permits third party presence at interviews. UNHCR was permitted free access to observe interviews. In addition, at the Windsor Ambassador Bridge a representative of the NGO Freedom House was permitted to observe interviews.

Issue 2.1: In general, applicants are not informed of the fact that they may avail themselves of the opportunity to contact a third party (e.g. UNHCR, NGO) to request a third party presence at their interview. The POEs advise that in principle, if an applicant indicates that he/she wants a third party to attend the interview, it is permitted provided it does not unduly delay the interview.

While this is clearly stated in the Manual and CBSA/CIC reiterated the principle to NGO representatives at the quadripartite meeting (Canadian government, U.S. government, UNHCR Canada and U.S., as well as NGO representatives from Canada and the U.S.) on 16 December 2004 at Niagara Falls, some “border” NGO officials in Canada seemed unaware of this opportunity.

Recommendation 2.1: There is a need for those who arrive spontaneously at POEs to be advised of the opportunity for third party presence. It can be safely assumed that those who present themselves to a POE through U.S.-based NGOs are informed of the process.

Post mid-term

At the Working Group meeting in July 2005, CIC and CBSA agreed to prepare a handout for refugee claimants to include information about the possibility to have an observer at an interview. UNHCR was advised in early November that this handout was sent to POEs in late October. It was in use at Fort Erie during a monitoring visit the week of

21 November 2005 but had not yet been received by Lacolle in early December 2005. CBSA has advised UNHCR that the handout was in use nation-wide by the end of December 2005.

3. Objective: Asylum-seekers not subject to the Agreement are effectively identified.

Mid-term

Positive: Asylum seekers who approached the border prior to the implementation of the Agreement on 29 December 2004, and were given a scheduled appointment after 28 December 2004, were not subject to the Agreement.

Another group who received scheduled appointments even though the claimants had not physically approached the border was considered under the Agreement and found eligible. As already stated, they were granted Canadian temporary resident permits to facilitate their entry to Canada to make a refugee claim.

In UNHCR's observations and conversations with CBSA officers, the officers make an exemplary effort to determine whether an applicant qualifies for an exception under the Agreement.

In accordance with the manual PP1 (Processing Refugee Claims), land border officers seek to establish whether or not a claimant has an eligible relative in Canada, including by contacting the claimed relative. Applicants may be requested to draw a family tree and officers use other measures with a view to assisting claimants to establish family links, in the absence of reliable documentation. Affidavits are generally accepted as valid documentary evidence. In this regard, CBSA officers at POEs make every effort to adhere to the required standard of proof – i.e. the “balance of probabilities” - (see PP1 Section 17.7, 17.9).

UNHCR is aware of one case in which a common-law, same-sex couple was permitted to make a refugee claim in Canada based on the fact that one was a U.S. citizen and therefore, exempt from the Agreement.

Issue 3.1: : UNHCR has been advised by officers at the POEs and by NGOs that they would like additional guidance on statelessness, habitual residents, unaccompanied minors subject to an exception and spousal abuse cases. There have been at least two cases in which a woman claimed refugee status in Canada on the basis that her spouse was abusing her. Subsequently the abusive spouse made a refugee claim at a POE and claimed an exemption under the Agreement because of the presence of his wife in Canada. The abusive spouses were deemed eligible to make a refugee claim in Canada. The POEs are in ongoing consultation with CIC and CBSA headquarters for functional guidance on this issue.

UNHCR action 3.1: At the Working Group meeting in May 2005, UNHCR advised CIC/CBSA of the need for further clarification of these issues. Assistance was offered in areas in which UNHCR has expertise. At the time of the mid-term report, there were no additional guidelines provided on these issues aside from those requested for specific cases.

Recommendation 3.1: UNHCR recommends that CBSA and CIC provide written clarification to POEs on the issues of statelessness, habitual residents, unaccompanied minors, and the handling of spousal abuse cases. POEs should be encouraged to seek guidance on complex individual cases from HQs, should the need arise.

Post mid-term

UNHCR continued to observe confusion regarding the identification of persons who are stateless and habitual residents of the U.S. At the 19 July 2005 Working Group meeting, UNHCR offered to train CBSA officers on statelessness and habitual residence concepts during UNHCR staff members' monitoring missions at POEs. This training has yet to be facilitated. UNHCR provided comments on CIC draft guidelines on statelessness and habitual residents. These guidelines, which will appear in the manual chapter PP1, will provide more detailed information to decision-makers. UNHCR is advised that the revisions will appear in the manual by the end of March 2006.

In the interim, a case came to the attention of UNHCR in which a claimant, who stated that he was a stateless habitual resident of the U.S., was found not eligible to make a refugee claim in Canada. UNHCR is of the view that in the complex case in question, the decision that the claimant was not stateless was made before a thorough investigation of the case could be completed. The consequence is that the claimant was detained by U.S. authorities and remained in detention at the end of the period under review. The additional guidelines on statelessness should assist POEs to make informed decisions on such cases.

UNHCR is aware that in October 2005 CIC HQ asked POEs for their recommendations as to how the manual chapter PP1 could be improved. UNHCR is not aware of any recent amendments to the manual with respect to dealing with unaccompanied minors and spousal abuse cases. Comments from a meeting with NGO stakeholders in November 2005, along with other consultations and legal advice, are expected to be taken into consideration in the revision of the manual chapters.

New issue

Positive: UNHCR is aware of four requests for reconsideration that have been sent to U.S. Port Directors. Three of those requests were sent on to Canadian POEs for review. UNHCR is also aware of a reconsideration that was initiated by a POE (they requested that claimant appear for a second interview).

Issue 3.2: In the manual chapter PP1 “Processing Claims for Protection in Canada” section 17.18, there is a brief description of the process for submitting a request for reconsideration. UNHCR has observed confusion about when and how a reconsideration request may be made, both on the part of NGOs and Canadian and U.S. POEs. This is the case in spite of the fact that this issue was discussed and clarified at the 16 December 2004 quadripartite meeting. A senior officer at one U.S. POE expressed the opinion to UNHCR observers that they do not believe it is incumbent upon them to determine whether or not a request will be forwarded to Canadian authorities.

Recommendation 3.2: UNHCR recommends that sections 17.18 and 17.20 in the manual chapter PP1 be enhanced to provide clearer guidelines on the process to be followed for the submission and review of reconsideration requests.

4. Objective: *Asylum-seekers’ claims are determined and finalised expeditiously.*

Mid-term

Positive: At major POEs, asylum seekers are given contact information for U.S. - based NGOs when they are directed back to the U.S.

Issue 4.1: The continued use of direct back procedures is of serious concern to UNHCR. As of 27 January 2003, there has been no requirement for CBSA officers to determine whether or not a person risks detention if returned to the U.S. Some POEs check with U.S. border officials before directing a claimant back but this is not always done. In some cases, in particular those of persons without status in the U.S., the asylum seeker risks being detained upon return to the U.S. If detained, the claimant may be unable to appear for the scheduled interview with CBSA (e.g. a person directed back from Fort Erie on 29 December 2004, detained by U.S. officials because of an outstanding removal order was deported from the U.S. to his home country on 20 January 2005.)

UNHCR has been advised that upon release from detention in the U.S., a claimant may contact CBSA to be given a new eligibility interview date in Canada. Such appointments have indeed been given in a number of cases.

The issue of direct backs was discussed at length during the 16 December 2004 quadripartite meeting at Niagara Falls, Ontario. In response to questions from NGO representatives, U.S. officials stated that direct back claimants will “be dealt with on a case-by-case basis” and that the decision to detain will be determined by the personal status of the claimant and detention bed space.

Most, if not all, of the direct backs occur at Fort Erie, Peace Bridge. In some cases claimants are directed back because of the need for an interpreter and in other cases because the RPU is closed (it is open Monday-Friday 8-5pm), or staff at the RPU are fully occupied dealing with scheduled interviews. In contrast, telephone interpretation is used routinely at the Lacolle POE.

Recommendation 4.1: UNHCR strongly recommends that CBSA find an alternative to direct backs, particularly for claimants who are without legal status in the U.S. and who therefore risk being detained upon return. In cases in which an interpreter is not available locally, telephone interpretation should be used instead of resorting to direct back.

Post mid-term

In spite of the fact that UNHCR included this issue in the mid-term report and had repeated discussions with CIC and CBSA at all levels, the practice of direct backs continued until the end of the reporting period. With close to 50 % reduction in the number of asylum seekers at land border POEs, and no significant surge of claimants since the third week of December 2004, UNHCR is of the view that CBSA border officials should not be directing back because of a lack of capacity to deal with cases.

As of October 2005, CBSA HQ advised that they started to collect statistics on direct backs, which had not been done at that level in the past. As no formal statistics have been collected up until that time, UNHCR does not know how many persons have been directed back and how many of those have not appeared for their scheduled interview over the course of the reporting period. UNHCR has been told by CBSA that in the first 6 months of the year, 55 claimants were directed back at Fort Erie. Of those, CBSA believes that 5 persons failed to return for their interview, for unknown reasons.

However, in a 4-week period from mid-September to mid-October 2005, UNHCR is aware of 7 persons directed back at Fort Erie and who subsequently did not appear for their scheduled interviews. (UNHCR does not know the total number of claimants directed back during that 4 week period who were able to appear for their interviews and therefore did not come to the attention of monitors). UNHCR was able to obtain information that 3 of the 7 persons were detained by U.S. authorities when they were directed back. One of the 3 was eventually released on an Order of Supervision. A fourth apparently crossed the Canadian border illegally and made an inland refugee claim in

Canada. UNHCR was unable to find out what happened to the other 3 refugee claimants. It is often not possible for persons detained in the U.S. to contact CBSA from detention due to restrictions on international calls from detention centres.

In another case an applicant was directed back at the Fort Erie POE in August 2005, was detained by U.S. authorities and was not able to attend a scheduled interview at Fort Erie. Fortunately the claimant had close family in Canada who contacted UNHCR. UNHCR notified CIC and CBSA of the situation. Eventually the claimant was released from detention in order to return to the Canadian border but this happened only after extensive negotiations between Canadian and U.S. officials. The claimant was found eligible to make a refugee claim in Canada. It was brought to the attention of UNHCR that in December 2005 a second direct back case was released from detention in the U.S. and allowed to proceed to Canada.

UNHCR is also aware that during the reporting period, six asylum seekers who were directed back at Fort Erie, were detained by U.S. officials and removed to their countries of origin without having had eligibility determinations made by Canadian officials.

On a positive note, UNHCR is aware of at least two major POEs that do not direct back as a matter of policy. In addition, some POEs have deferred claimants into Canada following front-end security screening. That is, the POEs have allowed claimants to enter Canada with a direction to return to the POE the following day to complete processing of the refugee claim, where the POE was unable to complete processing of a claim within a reasonable time.

Many direct back cases do not come to the attention of UNHCR. UNHCR does know that because persons are directed back to the U.S. before a determination with respect to their eligibility to make a refugee claim in Canada is made, claimants may, as a result of the direct back process, be improperly denied access to the Canadian refugee determination system if they are unable to return to Canada for their scheduled interview.

Mid-term

Issue 4.2: At some POEs that do not accept appointments, or where there is no NGO present to facilitate the process, waiting times at the POE before processing of the case begins can be lengthy (more than 24 hours). At Lacolle, for example, in some cases a claimant may wait 20-24 hours from the time they arrive at the POE until processing of the case begins (interview, fingerprinting, photographs etc.). This means that an overnight stay in the waiting area is often required. Long delays at the POE create hardship for applicants, particularly vulnerable cases and applicants with young children. It is also evident that POEs with little experience dealing with asylum seekers take longer to complete the necessary processing.

UNHCR Action 4.2: UNHCR brought the issue of lengthy waiting times to the attention of CIC/CBSA both at the regional and national levels. UNHCR also brought it to the attention of the Working Group.

Recommendation 4.2: [superseded by New recommendation 4.2] Given that the role played by U.S.-based NGOs is undeniably positive in reducing the waiting and processing time for refugee claimants, UNHCR recommends that, where possible, an appointment be given prior to arrival at other major Canadian POEs, particularly Lacolle. Vermont Refugee Assistance, which provided scheduling assistance to Lacolle and Phillipsburg/St. Armand in the past, should be requested to do so again. See also Recommendation 5.1. Training on proper interview techniques may also reduce the time required for interviews. [See New recommendation 4.2 below]

Post mid-term

CIC/CBSA officials participating in the Working Group were of the view that variances in processing times should be expected due to each POE's particularities. On a positive note, it was pointed out that Lacolle does not use direct back procedures but prefers that claimants wait until an officer is available to conduct the interview and other procedures. At the 19 July 2005 meeting of the Working Group, CBSA noted that it was difficult to ensure adequate staffing given that there are fluctuations in requirements at POEs. CBSA members of the Working Group agreed to look into lengthy waiting and processing times at Lacolle and report to the Working Group.

In spite of this, UNHCR's monitoring confirms that waits in excess of 20 hours before processing begins appear not to be unusual at Lacolle. In fact, in July 2005, UNHCR spoke to a claimant during a monitoring visit to the Lacolle POE who waited more than 48 hours before processing of her case began and another 6 hours for the interview and other procedures. The explanation given was that there was heavy traffic due to a special event (a punk rock concert tour). During an October 2005 monitoring visit, UNHCR observed an interview with a woman who had arrived at the POE at noon on 16 October 2005. Her interview began just after noon on 17 October 2005. When the UNHCR observer departed the POE at 17:00 the claimant, who was found eligible, was still waiting for documentation. On 17 October 2005, 2 claimants arrived in the morning – one at 06:00 and another at 10:00. Neither interview had commenced when the UNHCR observer left the POE at 17:00. During a monitoring visit to Lacolle conducted in December 2005, a UNHCR monitor observed an interview of a claimant who spent almost 30 hours at the POE before his interview began. In addition, an elderly couple had arrived the previous evening, spent the night in the waiting room and had not yet been interviewed by early afternoon the following day.

UNHCR believes that a claimant, who has waited overnight without a comfortable place to sleep, may have difficulty being alert and coherent during the lengthy interview and processing that follow.

It is noteworthy that some claimants with scheduled interviews at Fort Erie may spend the better part of the day waiting for their interview and finalisation of processing because all claimants scheduled for interview for the day are asked to appear at 8 am at the Refugee Processing Unit. This is due, in part, to the fact that VIVE makes transportation arrangements for the claimants who have used their services and prefers to transport everyone at the same time. In addition, it frees accommodation space at VIVE for new arrivals.

The long waiting time is alleviated by the fact that the Peace Bridge Newcomer Centre provides counselling, assists claimants to find shelter, and provides other services, including snacks, to claimants while they wait for processing. Young children have access to a play room equipped with toys and books.

New recommendation 4.2: There should be adequate staffing devoted to immigration processing at POEs to ensure that refugee claimants are processed within a reasonable time after arrival at the POE. In addition, all immigration officers should receive training in refugee claimant interview techniques, which should help reduce the time required to conduct interviews (see also Recommendation 5.1).

5. Objective: Asylum-seekers are subject to eligibility determination interviews that are carried out in accordance with recognised international standards.

Mid-term

Positive: For the most part, interviews are carried out in accordance with international standards. In general, officers make an effort to put the asylum seeker at ease and the interview is carried out in a professional, polite and sensitive manner.

From UNHCR's observations, interpreters are both qualified and neutral. Many are experienced interpreters used by CBSA, CIC and the Immigration and Refugee Board (IRB).

Issue 5.1: There are exceptions, most notably a case in St. Stephen N.B. In this particular case, which was observed by UNHCR, the interviewing officer left the room and, having given the interpreter a list of questions, allowed the interpreter to continue with the interview. It was evident that a lack of experience and training in dealing with refugee claim cases led to some errors in approach and resulted in an unnecessarily long processing time. The woman had a sister who is Canadian citizen and the sister was with the applicant. By the end of the interview the refugee claimant appeared to be both exhausted and upset.

Although the interviewing officer usually explains the purpose of the interview to the asylum seeker, it is evident that due to the complexity of the process, asylum seekers frequently do not understand. This view is supported by the confusion expressed by asylum seekers found ineligible under the Agreement, returned to the U.S., detained and subsequently interviewed by the Protection Consultant from UNHCR Washington.

It has also been observed that some officers may not have received training specific to interviewing refugee claimants. Notable is the fact that the manual chapter for dealing with asylum seekers at Canadian ports of entry does not contain any information on interview techniques or how to structure an interview.

Recommendation 5.1: UNHCR recommends that officers working at land border POEs receive training in interviewing techniques for refugee claimants. In addition, the manual chapter (Processing Claims for Protection in Canada – PP1) should contain information on interview techniques and on how to communicate the necessary information in such a way that it is better understood by the claimant.

Post mid-term

UNHCR understands that CIC and CBSA are in the process of reviewing the manual chapter (PP1) and have requested POEs' views on areas that could be improved. It is, however, evident that little progress has yet been made with respect to training of POE officers on refugee claimant interview techniques. It appears that the division of responsibility between the two departments after the transfer of some CIC functions to CBSA has continued to cause confusion. Training for POE officers doing immigration work is one of those functions.

UNHCR observes that the quality of interviewing techniques varies greatly. At Fort Erie for example, where officers are dedicated specifically to refugee processing and therefore have extensive experience doing refugee claimant interviews, the officers do a very good job of interviewing. On the other hand, at many POEs where there are no officers dedicated specifically to refugee processing, the quality of interviewing skills is inconsistent. For example, UNHCR has observed interviews in which the officers do not introduce themselves and fail to explain the purpose of the interview.

UNHCR urges CIC and CBSA to work together to ensure that training for POE immigration staff includes interview techniques for refugee claimants.

6. Objective: Asylum-seekers are treated fairly and humanely, in accordance with international human rights standards.

Positive: UNHCR observers in Canada have not received complaints of unfair and/or inhumane treatment from claimants or from NGOs.

UNHCR observes that in most instances, the waiting areas at POEs are clean and comfortable and food and drink are made available to those required to wait long periods.

Persons found ineligible are returned promptly to the U.S.

It is clear that the work done by U.S. based NGOs (VIVE and Freedom House) assists asylum seekers to understand the process at the POEs and, as a result, to feel more at ease during the interview and other procedures. In addition, the services provided by the Peace Bridge Newcomer Centre at the Refugee Processing Unit in Fort Erie help to make the process less intimidating.

7. Objective: Vulnerable individuals are treated in a sensitive manner.

Mid-term

Positive: For the most part, POEs are sensitive to the special needs of vulnerable individuals.

Issue 7.1: UNHCR is concerned that lengthy waiting and processing times at some POEs may result in hardship for vulnerable cases. UNHCR had a report from an NGO of an obviously pregnant woman who spent almost 24 hours at Lacolle while her case was processed.

UNHCR Action 7.1: The matter was reported to the members of the Working Group and CBSA promised to follow up with POEs.

Recommendation 7.1: UNHCR recommends that CBSA impress upon POE officials the need to provide, to the extent possible, processing priority to vulnerable individuals.

Post mid-term

At the 19 July 2005 meeting of the Working Group CIC and CBSA agreed to review the manual chapter (PP1) and other instructions as they relate to vulnerable cases. There was agreement that POEs should provide priority processing to vulnerable individuals and that guidance on how to identify a vulnerable case is required. UNHCR pointed out that although no clear definition of vulnerable individuals exists; some categories of persons (e.g. unaccompanied minors, pregnant women, the elderly, persons in need of urgent

medical attention, physically and mentally challenged persons, victims of torture, etc.) should be regarded as vulnerable.

UNHCR is aware that at POEs where U.S.-based NGOs provide services to refugee claimants destined to Canada, the POE is often advised in advance of the arrival of a vulnerable individual and is therefore better able to provide appropriate assistance. For example, Freedom House in Detroit advised the Windsor Ambassador Bridge that a refugee claimant used sign language. When the claimant arrived at the POE for a scheduled appointment, a sign language interpreter was available. In another case at Fort Erie, a claimant with active tuberculosis was interviewed with the assistance of medical personnel. The claimant, who was found eligible, was then referred for appropriate medical treatment.

To the knowledge of UNHCR, CBSA/CIC has not yet provided guidance to POEs on identifying and dealing with vulnerable cases.

8. Objective: Asylum-seekers benefit from the principle of family unity.

Mid-term

Positive: Immediate family members (spouse and dependant children) are allowed to accompany a family member who has been found eligible to make a refugee claim in Canada, including common-law and same sex partners.

Issue 8.1: UNHCR notes with interest a case in Fort Erie in which a child was allowed to make a refugee claim in Canada based on an assessment of the best interest of the child, in spite of the fact that the child's mother was in the U.S. It is the understanding of UNHCR that the mother would like to join her child in Canada.

Recommendation 8.1: If the parent in such a case makes a refugee claim at a Canadian land border POE, UNHCR urges that the best interest of the family be taken into consideration when determining eligibility of the parent to make a refugee claim in Canada.

Post mid-term

This issue was discussed at the Working Group meeting in July 2005. At that time, CIC and CBSA stated that it is their policy to take into consideration the best interest of the family. They suggested that if there is a parent in this situation, they should approach either a Canadian Consulate in the U.S. or a Canadian POE to make a request to join their child in Canada.

Since that time, UNHCR was made aware of a case in which an unaccompanied minor made a refugee claim at the Fort Erie POE in September 2005. The child's mother was in Canada but had been found not to be a refugee by the IRB. The mother was pursuing a humanitarian and compassionate application. Although the child was found not eligible to make a refugee claim, she was admitted to Canada to be with her mother pending the determination of the mother's humanitarian and compassionate application.

9. Objective: Asylum-seekers subject to the Agreement are aware of their rights.

Mid-term

Positive: For the most part, officers explain the interview process and the reason for the interview to applicants. UNHCR has observed that POE officials usually give ineligible claimants a detailed explanation of the basis for the decision.

UNHCR understands that all negative decisions are reviewed by a separate decision maker (called a Minister's Delegate in the Canadian context). UNHCR is aware that at least one POE gives a copy of the officer's interview notes along with other documentation to persons found ineligible. Although it is policy to provide copies of forms, relevant documents and the officer's interview notes to refugee claimants, at least one POE does not provide POE notes. The officers at Lacolle state that the notes are not finalized at the time that the claimant leaves the POE.

Issue 9.1: UNHCR has observed that officers do not always review the Schedule 1 and IMM 5500 forms with the applicant to ensure the accuracy of the information. This may result in inaccurate information and may cause difficulties for claimants at a later date (e.g. at the Immigration and Refugee Board or upon application to sponsor family members).

Recommendation 9.1: Schedule 1, IMM 5500 and any other forms should be reviewed by the officer directly with the applicant and, if necessary, an interpreter.

Post mid-term

CBSA promised to remind POEs of the necessity to review all documents with the claimant. UNHCR has observed during monitoring visits subsequent to the mid-term report that officers are reviewing both the Schedule 1 and the IMM5500 with claimants, although with varying degrees of thoroughness. (See also Recommendation 5.1).

Mid-term

Issue 9.2: As explained in Issue 5.1, asylum seekers often do not understand the process because it is complex and the explanation given by officers is often legalistic.

***Recommendation 9.2:* CBSA should ensure that the refugee claimant process is explained in clear, comprehensible language to the claimants. (See also Recommendation 5.1 regarding additional guidance and training on interview techniques.)**

Post mid-term

CIC and CBSA prepared a handout to be given to all refugee claimants. The purpose of the handout is to explain in plain language, the process for claiming refugee status in Canada so that claimants have a better understanding of what to expect. UNHCR has been advised that the handout was provided to POEs in mid-October and is now in use at some POEs. (During a monitoring visit to Lacolle in December, POE staff advised UNHCR and CBSA HQ officials that the handout had not yet been received by that POE.) UNHCR understands that the handout will be amended as required based on comments received from the POEs.

The handout will assist to explain the process to claimants and help to create a comfortable environment before and during the interview.

***Recommendation 9.2.1:* UNHCR recommends that the handout be shared with U.S.-based NGOs that assist Canada-bound claimants.**

Mid-term

Issue 9.3: During the first quarter, UNHCR observed that some POEs, including Fort Erie were notifying U.S. border officials by telephone of the return of ineligible claimants but were not sending a copy of the IMM 5569 by fax. All other formalities seem to have been carried out according to the guidelines (e.g. claimant was provided with copies of the decision, legitimate documents returned to the claimant).

***UNHCR Action 9.3:* UNHCR advised CIC/CBSA (at the Fort Erie POE and the Working Group) that procedures were not always being followed with respect to fax notification to the U.S. POE of the return of an individual. After this omission was pointed out, POEs began sending all documentation and notifying the U.S. POE by fax of persons returned under the terms of the Agreement. This has been beneficial in assisting UNHCR to locate ineligible cases once they are returned to the U.S.**

Post mid-term

Since UNHCR advised CIC/CBSA of the need to notify the U.S. POE in writing of the imminent return of a claimant found ineligible, UNHCR is not aware of any POEs that are not following this procedure.

New Issue

Issue 9.4: Among claimants who are determined ineligible under the Agreement, UNHCR is concerned about two sub-groups: those who believe that the decision was not correct, and those to whom new information becomes available to support eligibility under an exception. In one case that came to the attention of the UNHCR, a Palestinian claimant approached a POE in August and stated that he was both stateless and a habitual resident of the U.S. The claimant was found not eligible to have his claim referred to the Immigration and Refugee Board because the officer determined that he did not establish that he was stateless. However, as he was leaving the POE, the claimant produced additional information in support of his claim. He was given a direct back form (in addition to a removal order) and asked to return the following day. The claimant, however, was detained on the U.S. side and was unable to return with additional information in support of his claim. The case is now before the Federal Court of Canada and awaiting a court date. In addition, a request for reconsideration was submitted to the Detroit POE. The U.S. Port Director determined that the new evidence submitted did not provide conclusive proof that IC was stateless and therefore the request was not forwarded to the Windsor POE for reconsideration.

Recommendation 9.4: CIC/CBSA should create an administrative mechanism for the review of cases that may have been erroneously found ineligible or where new evidence may have come to light. This review mechanism would, at the instance of the claimant, look into situations where new information relevant to the eligibility determination becomes available only after the completion of the eligibility process. Such a review mechanism should not be discretionary as is the case with the present reconsideration procedures (PP1 17.18 and 17.20). CIC and CBSA should also agree with CBP and other relevant U.S. authorities on suspension of removal from the U.S. pending the timely review of such cases.

10. Objective: *Asylum-seekers are not subject to unwarranted detention.*

Mid-term

Positive: Visits to the POEs and information from CBSA indicate that there have been relatively few instances detention of claimants to whom the Agreement applied. POE staff has attributed this to the fact that applicants often have identification documents in support of their claimed relationship or source country.

Issue 10.1: UNHCR has not received detention statistics as per the Monitoring Plan. The Plan states that CBSA will provide a monthly detention report. It is difficult for UNHCR to monitor detention rights, conditions and trends in the absence of reliable statistics.

Recommendation 10.1: CBSA should provide monthly data on detention of cases to which the Agreement applies, as per the Monitoring Plan.

Post mid-term

CBSA has advised that they are unable to separate other immigration detainees from those who claim refugee status at a land border. They agreed to investigate how best to provide the statistics required under the Monitoring Plan. UNHCR was advised that a manual reporting system had been instituted in September 2005 and that, as of October 2005, POEs started to collect statistics on detentions longer than 48 hours, of refugee claimants subject to the Agreement.

11. Objective: UNHCR has access to individual files.

Mid-term

Positive: CBSA has been helpful in terms of providing information on individual files.

Issue 11.1: CIC has not provided statistical reports on a regular basis, which has made it difficult for UNHCR to monitor some aspects of the Agreement as effectively as UNHCR would like. It was the understanding of UNHCR that when the Monitoring Plan was discussed, the Parties committed to give only those statistics they would be in a position to provide.

It should be noted that the National HQ of CBSA and CIC discourage POEs from directly providing UNHCR with statistical information. CIC and CBSA National Headquarters inform that they provide UNHCR with centralized statistics in order to ensure accuracy and consistency.

UNHCR Action 11.1: On numerous occasions, UNHCR urged CBSA/CIC to provide statistics as required under the Monitoring Plan. Due to technical difficulties the government was not able to provide UNHCR with the requested statistics for the first quarter and preliminary April statistics until June 2005.

Post mid-term

Since the mid-term report, CIC has provided timely statistical reports to UNHCR on a monthly basis.

12. Objective: UNHCR staff has access to designated land border ports of entry and “border” detention facilities.

Positive: UNHCR has enjoyed excellent cooperation with CBSA and CIC in terms of access to land border ports of entry and detention facilities. CBSA and CIC officials at all levels (POE, regional, national) have spared no effort to ensure free access for UNHCR monitors to POEs and detention facilities for the purpose of monitoring the implementation of the Agreement.

Post mid-term

UNHCR has continued to enjoy excellent cooperation from CBSA and CIC with respect to access to land border POEs and detention centres.

13. Other issues

- **Public interest cases**

Mid-term

Positive: The public interest provision (Article 6 of the Agreement), which gives the Government the discretion to exempt certain individuals/categories of individuals from the application of the Agreement is being effectively implemented.

Issue 13.0: UNHCR is not aware of any public interest cases apart from applicants from the moratoria countries, which is a frequently used exception. The public interest provision in Article 6 is interpreted in a way that leaves little room for discretion. On a monitoring visit, UNHCR observed a situation that serves as an example of a case that may warrant exceptional consideration. A mother and her minor son made a refugee claim at a land border POE. The son had a paternal aunt in Canada and would therefore be eligible to make a refugee claim in Canada. However, his mother was not eligible to make a claim as she did not fall under any exception. In this case, the mother indicated that she was a victim of domestic violence and feared that her husband would find her if she was returned to the U.S.

Recommendation 13.0: There are cases that fall outside the Agreement but that would otherwise warrant exceptional consideration. The interpretation of Article 6 should permit sufficient flexibility to allow for the consideration of certain cases based on the public interest provision of the Agreement. For example, vulnerable individuals who would not normally be eligible under an exception but who nevertheless warrant special consideration because of their vulnerability (e.g. victims of torture, disabled claimants, the elderly, etc.) should be deemed eligible for consideration under Article 6.

Post mid-term

The issue of broadening the application of the public interest exception was discussed again at the 19 July 2005 meeting of the Working Group. CIC indicated that it wanted to keep a clearly delineated definition of public interest case (Regulation 159.6) and that, to that point, no discrete category had been identified that would justify expansion of the exception. CIC also indicated that the review after the Agreement had been in force for one year would present a good opportunity to consider changes to the public interest exception. UNHCR urges CIC to give serious consideration to including vulnerable individuals under the public interest exception.

- **NGOs participation in monitoring**

Mid-term

Issue 13.1: UNHCR has been advised that some border NGOs would like training with a view to participating in the monitoring of the Agreement. The Agreement states that the governments will seek input from NGOs with respect to monitoring. However, it is not clear that border NGOs understand their role in this respect, which situation potentially deprives the Parties of NGO input.

UNHCR action 13.1: UNHCR advised the Working Group of this issue at the May 2005 meeting. CIC/CBSA advised that they planned to attend the May meeting of the Canadian Council for Refugees and would solicit NGO input on the Agreement at that time.

Post mid-term

This issue was discussed at the July 2005 meeting of the Working Group. CIC and CBSA stated that NGOs working in the field should contact local offices of CIC or CBSA if they require more information about the Agreement. UNHCR along with representatives of CIC and CBSA HQs met with NGOs in Fort Erie in September 2005. In addition, CIC hosted a quadripartite meeting (U.S. and Canadian governments, UNHCR and NGOs from both Canada and the U.S.) in November 2005 to discuss the Agreement.

- **Communication between Canadian and U.S. port officials**

Mid-term

Issue 13.2: UNHCR has observed and has been told by CBSA border officials that there is not a great deal of contact between some Canadian and U.S. POEs. UNHCR monitors noted that contact between some Canadian and U.S. POEs continues to be minimal.

***UNHCR Action 13.2:* This issue was mentioned to CIC/CBSA at an informal monthly meeting in April 2005. It was also raised at the mid-term oral report in Washington DC in July 2005, and on other occasions.**

***Recommendation 13.2:* UNHCR recommends that CBSA border officials and their counterparts in the U.S. communicate more regularly on issues relevant to the Agreement.**

Post mid-term

It is the view of UNHCR that lack of communication between counterparts on either side of the border continues to be an issue at some POEs.

A factor that compounds the situation at POEs is that in Canada, cases are processed by front-line officers at the POE, i.e. CBSA, but in the U.S., eligibility interviews (called “threshold screenings”) are done by Asylum Officers who are not based at the land border crossings.

New Issues

- **Communication of UNHCR’s mid-term findings to CBSA land border officers**

Issue 13.3: During the mid-term review in Washington DC in July 2005, CBSA HQ undertook to advise all land border POEs of UNHCR’s recommendations. As of mid-October 2005, POEs advised that they had not yet received any information from CBSA headquarters with respect to the mid-term report. UNHCR has been advised by CBSA officials that the necessary information was eventually sent in late October, nearly four months after the mid-term report was shared with the Canadian authorities. However, during a December monitoring visit, the Lacolle POE staff advised that they had not yet received this information.

Recommendation 13.3: UNHCR recommends that CBSA HQ ensure that, when appropriate, information regarding concerns expressed by UNHCR about activities at the POEs be shared with the field in a timely manner.

- **Public information on the Agreement**

Issue 13.4: UNHCR notes that there is still some confusion on the part of the public and immigration practitioners with respect to the Agreement. UNHCR monitors have been told by lawyers based in the U.S. that it is the belief of many legal practitioners in that country that there are no exceptions to the Agreement. A review of the CIC and CBSA websites highlights the need for more and better information about the Agreement. On the CIC website, information on the Agreement is difficult to find. The CBSA website

does not appear to include any references to the Agreement, and the word “refugee” does not feature in the alphabetic index for the website.

***Recommendation 13.4:* It is recommended that both CIC and CBSA ensure that information on the Agreement, including the exceptions, is readily available on the websites of both departments. Moreover, other methods of providing public information should also be explored (e.g. fact sheets on the Agreement).**

- **Maintenance of “acquis”**

Issue 13.5: The monitoring of the Agreement will no longer be considered a “special” project but will be mainstreamed into UNHCR’s regular supervisory responsibilities pursuant to Article 35 of the Convention and Paragraph 8 of the UNHCR Statute.

***Recommendation 13.5:* UNHCR recommends that the *modus operandi* established between CIC/CBSA and UNHCR to facilitate the monitoring functions of UNHCR be maintained. This relates in particular to the Working Group and the regular and timely provision of statistics.**

E. CONCLUSION

In general, the Agreement is being implemented in keeping with its own terms and with international refugee law.

For the most part, it may be said that the Agreement is being implemented by Canadian border officials not only in line with the letter, but also with the object and purpose of the Agreement. Refugee claimants are treated fairly and with respect. Those who meet an exception to the Agreement are effectively identified and interviews are generally carried out in accordance with international standards.

UNHCR has enjoyed excellent co-operation with both CIC and CBSA at all levels and there has been regular, open and transparent communication between CIC/CBSA and UNHCR.

Since the mid-term report was delivered in July, CIC and CBSA have made progress on a number of recommendations. This includes the preparation of a handout to explain the process at POEs to refugee claimants, the timely provision of statistics to UNHCR and the collection of statistics on direct backs and detentions of cases subject to the Agreement. In addition, considerable progress has been made on amendments to the PPI manual to expand the section on statelessness and habitual residents.

During the period under review, the UNHCR expressed concern that the use of the direct back policy undermined the letter and spirit of the Agreement, and recommended that CBSA discontinue its use. The Government of Canada has informed the UNHCR that the

use of the direct back policy will end as of August 31, 2006, except in extraordinary circumstances.

Lengthy waiting and processing times continue to be of concern at some POEs. There is still a need for additional information and training on conducting refugee claimant interviews. In addition, UNHCR believes that the relatively narrow definition of Article 6 should be reviewed and expanded to include vulnerable claimants. Furthermore, information on the Agreement should be more readily available to the public.

UNHCR is pleased with the progress made to date on many issues relating to the implementation of the Agreement. It is the hope of UNHCR that CIC/CBSA will act promptly on the recommendations that have not yet been implemented, as well as the new ones contained in this document.

UNITED STATES of AMERICA
COUNTRY CHAPTER

TABLE OF CONTENTS

I.	Executive Summary	43
II.	Introduction	44
	A. United States Safe Third Country Process	44
	B. Training of DHS Officials	46
	C. Methodology / Monitoring Activities	46
	D. Statistics	46
	E. UNHCR Cooperation with DHS and EOIR	46
III.	Summary of Findings and Recommendations	49
IV.	Findings and Recommendations	52
	A. Objective One: Asylum-seekers have access to appropriate border and adjudicating officers	52
	1. Identification and Referral at Ports-of-Entry.....	52
	2. Applicants Directed-Back to Canada.....	52
	3. Detained Safe Third Applicants.....	55
	B. Objective Two: Safe Third procedures are followed according to the Agreement and international refugee law	57
	1. U.S.-Bound Applicants.....	57
	2. Applicants Directed-Back to Canada.....	60
	3. Applicants Returned from Canada.....	60
	C. Objective Three: Substantive eligibility decisions are made consistent with the terms of the Agreement and international refugee law	63
	1. Family-Based Eligibility.....	64
	2. Public Interest Eligibility.....	64
	D. Objective Four: Asylum-seekers' claims are timely adjudicated	65
	1. CIS Adjudications.....	66
	2. EOIR Adjudications.....	67
	E. Objective Five: Asylum-seekers are aware of their rights and understand the Safe Third process	68
	1. DHS Processing.....	68
	2. EOIR Processing.....	70

F. Objective Six: Asylum-seekers have the opportunity for third party assistance throughout the process.....	71
1. Advisal of Opportunity for Assistance.....	71
2. Third Party Presence at Interviews / Hearings.....	72
3. Ability to Contact / Communicate with Third Parties.....	72
G. Objective Seven: Asylum-seekers have a meaningful opportunity to present evidence in their cases.....	73
1. Access to Evidence.....	74
2. Consideration of Evidence.....	75
H. Objective Eight: Asylum-seekers are treated fairly and humanely, and are not subject to unwarranted detention. If detained, conditions of detention are appropriate.....	76
1. Treatment at Ports-of-Entry.....	76
2. Decisions to Detain Safe Third Applicants.....	77
3. Conditions of Detention.....	78
I. Objective Nine: Asylum-seekers benefit from the principle of family unity and particularly vulnerable asylum-seekers are treated appropriately.....	83
1. Family Unity.....	83
2. Treatment of Vulnerable Asylum-Seekers.....	84

I. Executive Summary

On 6 August 2004, the Parties to the “*Agreement Between the Government of the United States and the Government of Canada for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries*” (Agreement) and UNHCR agreed upon a UNHCR Monitoring Plan detailing UNHCR’s monitoring role pursuant to Article 8(3) of the Agreement and further to UNHCR’s mandate under the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol. The objective of UNHCR’s monitoring was to assess whether the Parties’ implementation of the Agreement was consistent with its terms and with international refugee law. This Chapter details UNHCR’s evaluation of the first year of the Agreement’s implementation in the United States.

UNHCR’s overall assessment of the Agreement’s implementation in the United States is that it has generally been implemented appropriately and in keeping with the terms of the Agreement and, with regard to those terms, international refugee law. Individuals who request protection are given an adequate opportunity to lodge a refugee claim in the United States; however the timely determination of their eligibility to do so has been an issue. Detention conditions in the United States are of concern to UNCHR to the extent that they affect detained asylum-seekers throughout the Safe Third process. Asylum-seekers’ ability to establish their eligibility under the Agreement may also be compromised by inadequacies with the reconsideration mechanism and a lack of coordination between the Parties.

II. Introduction

A. United States Safe Third Country Process

The Agreement went into effect in the United States on 29 December 2004 pursuant to Department of Homeland Security (DHS) and Department of Justice (DOJ) regulations that were published one month earlier.¹ The Immigration and Nationality Act (INA), Section 208(a)(2)(A), allows for the use of such bi-lateral or multi-lateral agreements to restrict the eligibility of individuals to apply for asylum in the United States, although this provision of the INA had not been exercised until the Agreement went into effect. Since issuance of the DHS and DOJ regulations, agencies within DHS and DOJ have issued more specific guidance on the Agreement's implementation.² United States procedures implementing the Agreement were largely folded into existing procedures for asylum-seekers who are processed at United States ports-of-entry (POEs), in particular the expedited removal procedures under INA Section 235.

1. Port-of-Entry Processing

Asylum-seekers who request admission to the United States at a United States-Canada land border POE are initially inspected by officers with the DHS Bureau of Customs and Border Protection (CBP). If the asylum-seeker is inadmissible, he/she will generally be placed in either expedited removal proceedings, regular removal proceedings under INA Section 240, or "asylum-only" proceedings under the Visa Waiver Program (VWP).³

CBP provides asylum-seekers who are placed in expedited removal at United States-Canada land border POEs with an "*Information about Threshold Screening Interview*" Form (TSI Form) and the Executive Office for Immigration Review (EOIR) local legal service provider list. Asylum-seekers attempting entry under the VWP are also provided with a copy of the TSI Form. Asylum-seekers placed in regular removal proceedings (separated children, Cuban nationals, and others subject to certain charges of inadmissibility) do not impose any additional procedural obligations on CBP officers under the Agreement. They are processed as would any applicant for admission who is referred to immigration court.

¹ 69480 Federal Register Vol. 69, No. 228, 29 November 2004.

² Such internal guidance includes: Revisions to Chapter 17.11 and 17.15 of the Customs and Border Patrol (CBP) Inspector's Field Manual (IFM); Revisions to Section IV of the Citizenship and Immigration Service (CIS) Credible Fear Procedures Manual; and, the Executive Office for Immigration Review (EOIR) Interim OPPM dated 28 December 2004.

³ Other options also exist for those seeking admission, such as withdrawal of the request for admission or placement in reinstatement of removal proceedings, but these are less common in the case of asylum-seekers.

2. Threshold Screening Interview

Those asylum-seekers placed in expedited removal or VWP “asylum-only” proceedings are referred by CBP to the DHS Bureau of Citizenship and Immigration Services (CIS) for a “Threshold Screening Interview.” Once referred, CIS Asylum Officers must confirm that each applicant has received and understood the contents of the TSI Form. If the applicant did not receive and/or understand this Form, CIS must provide and/or explain its contents, with translation if necessary. A CIS Asylum Officer is then charged with conducting the threshold screening interview. During this interview, the Asylum Officer will question the asylum-seeker to determine whether he/she meets one of the Agreement's exceptions.

If the Asylum Officer determines that the asylum-seeker qualifies for an exception to the Agreement, the Asylum Officer will then proceed to a consideration of whether the asylum-seeker has a credible fear of persecution or torture if returned to his or her country. Asylum-seekers found to have a credible fear of persecution are then allowed to submit their asylum claim before an Immigration Judge. If the Asylum Officer determines that an asylum-seeker does not meet an exception to the Agreement, the asylum-seeker will be returned to Canada and is not eligible to apply for asylum in the United States. While all Safe Third eligibility decisions are reviewed by CIS Headquarters, there is no appeal mechanism for negative eligibility decisions. Either Government, may, however, request the reconsideration of a negative eligibility decision if there is new material evidence to be considered, if all available evidence was not initially considered, or if an asylum-seeker's true identity is later established.

3. Regular Removal Proceedings

Unaccompanied minors, Cuban nationals, and any other asylum-seekers not placed in expedited removal proceedings due to the nature of their charges of inadmissibility are generally placed into removal proceedings under INA Section 240. In these cases, an Immigration Judge will apply the terms of the Agreement with respect to the asylum-seeker's claim and will determine whether the Agreement is applicable and, if so, whether the asylum-seeker is eligible for any exceptions under the Agreement or should be returned to Canada. Negative eligibility decisions can be appealed to the Board of Immigration Appeals (BIA).

4. Detention

Those asylum-seekers placed in expedited removal proceedings are mandatorily detained by the DHS Bureau of Immigration and Customs Enforcement (ICE). Asylum-seekers placed into removal proceedings under INA Section 240 are detained at the discretion of the local ICE office. Detained asylum-seekers may be held at a Service Processing Center (SPC) owned and operated by DHS, a “contract facility” owned and operated by a private company, or a local/county jail. All facilities holding DHS detainees are to meet DHS detention standards.

B. Training of DHS Officials

Formal Safe Third training for DHS consisted of a one-day session held by DHS HQ in early December 2004 in Washington, D.C. All CIS Asylum Division Directors were invited, along with one or two representatives from each CBP Field Office and each ICE Detention and Removal Field Office. The training consisted of a Safe Third powerpoint overview in the morning for all participants, and breakout sessions for each separate bureau in the afternoon. This one-day event was intended as a “train the trainer” session, with those in attendance expected to disseminate the training information locally, although no formal training sessions at the local level were ever envisioned.⁴

C. Methodology / Monitoring Activities

Pursuant to UNHCR’s monitoring mandate under Article 8(3) of the Agreement and its general supervisory responsibility under Article II of the 1967 Protocol, UNHCR monitored the first year of implementation of the Agreement by the United States. UNHCR Washington hired a Protection Consultant, funded by the United States government, who was supervised and supported by office staff. UNHCR focused its monitoring on three types of Safe Third cases: (1) U.S.-bound asylum seekers; (2) Canada-bound asylum-seekers who were directed-back to the United States to await scheduled interviews in Canada; and, to a limited degree, (3) Canada-bound asylum-seekers who were found ineligible to lodge refugee claims in Canada and were returned to the United States.⁵ To facilitate its monitoring, UNHCR established monitoring objectives that were provided to DHS and NGOs for comment. For purposes of this report, some of these objectives have been consolidated and/or reformulated for ease of presentation.

UNHCR Washington’s monitoring activities comprised the following: (1) missions to United States-Canada land border POEs; (2) missions to detention facilities where Safe Third applicants were detained; (3) observation of CIS orientations and Threshold Screening Interviews; (4) observation of immigration court proceedings; (4) meetings/discussions with DHS and EOIR officials at both the local and HQ level; (5) meetings with United States NGOs operating on the United States-Canada border; (6) interviews with asylum-seekers subject to the Agreement, as well as with their family-members and/or lawyers; (7) individual case file review; (8) review of DHS/DOJ policy guidance; and, (9) statistics review.

⁴ CBP HQ followed-up the session by forwarding CBP attendees and CBP Field Offices the following: 22 December Memorandum from CBP Assistant Commissioner Jayson Ahern; Safe-Third related amendments to the CIS Procedures Manual; 26 December Safe Third Weekly Muster to the CBP Field Offices; a copy of the training packet; the Threshold Screening Information Form, and a list of ENFORCE actions. CIS HQ has trained Asylum Officers locally using updated information to the Asylum Officer basic training course.

⁵ UNHCR monitored this group of applicants only with regard to the transfer of documents from Canadian to United States authorities and the processing of any requests for reconsideration of a negative Canadian eligibility decision.

With regard to monitoring missions, ROW conducted 16 monitoring missions to four major United States-Canada ports-of-entry (POEs) and area detention facilities between January and December 2005.⁶ During each mission, UNHCR Washington met with local DHS officials, local NGOs, and individual asylum-seekers. The four POEs visited were Buffalo, NY; Champlain, NY; Detroit, MI; and, Blaine, WA.⁷ Four of these missions were joint missions by UNHCR Washington and UNHCR Ottawa. During these missions, UNHCR Washington made 18 visits to ten separate detention facilities where Safe Third applicants had been held and were likely to be held in the future. These detention facilities included: the Buffalo Federal Detention Facility (Batavia, NY); Northwest Detention Center (Tacoma, WA); Clinton County Jail (Plattsburgh, NY); Franklin County Jail (Malone, NY); Monroe County Jail - main and dormitory facilities (Monroe, MI); Calhoun County Jail (Battle Creek, MI); Wayne County Jail - Division III facility (Detroit, MI); Erie County Holding Center (Buffalo, NY); Albany County Jail (Albany, NY); and, the Elizabeth Detention Facility (Elizabeth, NJ).

ROW observed 10 CIS threshold screening interviews⁸ and two CIS Safe Third orientations. These interviews and orientations were conducted by CIS Asylum Officers with the Buffalo, Newark, Chicago, and San Francisco Asylum Offices. Due to the timing of immigration court hearings, ROW was able to observe only one master calendar hearing in immigration court.

ROW reviewed redacted CIS case files for 44 U.S.-bound asylum-seekers and seven case files of persons directed-back or returned to the United States from Canada. CIS and CBP also provided statistics and case information on a regular basis.

UNHCR notes that there were certain limitations on its monitoring activities, including: (1) UNHCR's inability to observe secondary inspection at the POEs due to the limited number of U.S.-bound cases and the spontaneous nature of their arrivals; (2) UNHCR's inability to identify and interview all U.S.-bound applicants due to the confidentiality of their claims; (3) lack of individual hearings scheduled in immigration court during the monitoring period (all such hearings have been continued until 2006); (4) difficulties in identifying asylum-seekers directed-back or returned to the United States from Canada; and, (5) certain limitations on case file information due to the redacted nature of the documents contained therein. These limitations have, at times, required UNHCR to qualify its findings.

D. Statistics

As of 28 December 2005 there were 66 reported U.S.-bound asylum applicants; 62 of them were subject to the Agreement. Of these, 43 cases were adjudicated by DHS, 18 were referred to EOIR (17 by CBP, 1 by CIS), and five were either abandoned or dissolved. DHS found that of the 43 DHS-adjudicated cases, 27 (63%) were deemed

⁶ Two of these missions included visits to detention facilities only.

⁷ UNHCR visited the Buffalo, Champlain, and Detroit POEs four times each and the Blaine POE twice.

⁸ Three of these interviews were observed in person and seven were observed telephonically.

eligible to lodge an asylum application in the United States, either under an exception to the Agreement (23 cases) or because the Agreement was not applicable to them (i.e. Canadian citizens or stateless/habitual residents of Canada) (4 cases). Of the 39 applicants subject to the Agreement, 23 (59%) qualified for an exception under the Agreement. Twenty-two of these 26 applicants were found eligible under a family-based exception. Thirty-five total applicants (46%) were Cuban nationals. There were no unaccompanied minors.

Of the 66 U.S.-bound cases, 47 were placed in expedited removal proceedings, two were placed in VWP “asylum-only” proceedings, and 18 (all Cuban but for one Argentinean whose safe third adjudication had been pending for over 90 days such that he could not be returned to Canada under the Agreement as a matter of right) were placed in regular removal proceedings. All of the positive eligibility determinations were based on one of the Agreement’s family-based exceptions. DHS did not determine eligibility in any case based on the Agreement’s public interest exception.

E. UNHCR Cooperation with DHS and EOIR

UNHCR notes that it generally enjoyed excellent cooperation with DHS and EOIR at both the Headquarters and the local level. Local CBP, CIS, and ICE Officers at the various POEs and detention facilities were particularly accommodating with respect to UNHCR’s site visits and the provision of Safe Third-related information. CIS HQ, CBP HQ and ICE HQ, in particular the ICE Detention Standards Compliance Unit, all participated in regular meetings and other communication with UNHCR to discuss implementation issues. CIS HQ was helpful in its regular provision of case files and statistics, as well as its facilitation of UNHCR’s observation of threshold screening interviews. ICE HQ cooperated UNHCR’s monitoring of Safe-Third related detention conditions and consistently provided UNHCR with reports on ICE’s follow-up actions. CBP HQ provided statistics to UNHCR when available, and although UNHCR had difficulty obtaining information on returnee and direct-back cases from CBP HQ, CBP Officers at the Champlain and Buffalo POEs made significant efforts to gather and track this information at the local level as the year progressed.

III. Summary of Findings and Recommendations

UNHCR found that the Safe Third Agreement has generally been implemented appropriately in the United States and appears to be functioning relatively well. Asylum-seekers have been given the opportunity to establish their eligibility and those eligibility decisions have generally been made correctly under the Agreement. UNHCR found that detained asylum-seekers' ability to establish their eligibility under the Agreement may be compromised, however, by detention conditions in the United States. Procedurally, the folding of Safe Third procedures into the expedited removal/credible fear process appears to have been relatively well executed. This is likely due in part to the fact that trained Asylum Officers are responsible for Safe Third adjudications and in part a result of DHS' use of the Threshold Screening Information Form and other efforts to orient asylum-seekers. UNHCR has found, however, that the process could be much enhanced by more timely adjudication, improved applicant comprehension of the process, and improved reconsideration procedures.

While UNHCR Regional Office Washington has found that in the United States the Safe Third Agreement has generally been implemented appropriately, it has identified certain areas of concern.

A. Primary Areas of Concern

1. Timely Adjudication

UNHCR found that the processing time for Safe Third cases was significantly prolonged in many cases. Some U.S.-bound Safe Third cases took months to adjudicate. Almost half of the U.S.-bound asylum-seekers waited over one month for their Safe Third eligibility decisions.

Recommendation One: *To ensure efficient processing, UNHCR recommends that DHS establish timeframes for the adjudicative phase of the Safe Third process, with some flexibility for a more thorough consideration of public interest cases. UNHCR also recommends that, as a matter of practice and in line with Principle Two of the Parties' Statement of Principles, credible testimony alone be considered sufficient to prove eligibility under one of the Agreements' exceptions, especially if efforts to obtain documentary proof would unnecessarily prolong detention.*

Detention Conditions

UNHCR found that conditions of detention varied widely at detention facilities despite the requirement that all facilities meet DHS' Detention Standards. As most U.S.-bound Safe Third applicants are mandatorily detained pending their eligibility decisions, UNHCR is particularly concerned about those detention conditions which could affect an applicant's ability to establish their eligibility under the Agreement. Detention conditions of primary concern include: Telephone Access, DHS Access, and Interpretation.

Recommendation Two: UNHCR recommends that DHS ensure adequate detention conditions for Safe Third applicants. In particular, UNHCR recommends that ICE: (a) Provide adequate telephone access for detained asylum-seekers subject to the Agreement; (b) Ensure that detained asylum-seekers have free telephone access to local CBP and CIS officials, and to Canadian officials when necessary; (c) Ensure free telephone calls to legal service providers and UNHCR from all detention facilities where Safe Third applicants may be held, and post telephone use instructions and relevant contact information; (d) ICE ensure that detained asylum-seekers have meaningful access to DHS Deportation Officers; and, (e) Issue guidance ensuring that all detention facilities have access to the ICE interpreter service and advise detention facility staff to use it whenever necessary to communicate with detainees.

3. Reconsideration Procedures

UNHCR has expressed concern that the Agreement's reconsideration procedures are inadequate in cases where new evidence is later obtained or there has been a flawed adjudication process, particularly for detainees and those in removal proceedings.

Recommendation Three: UNHCR recommends that the reconsideration mechanism be revised to allow for direct referral of timely reconsideration requests to the Party issuing the negative eligibility decision. In the alternative, UNHCR recommends that DHS re-assign the responsibility of reviewing reconsideration requests from CBP to CIS given CIS' expertise in the adjudication of Safe Third cases, and that in considering such requests, DHS obtain relevant case information from CIC/CBSA.

UNHCR also recommends that the Parties stay any asylum-seeker's deportation pending a final decision on his/her request for reconsideration, and facilitate the return of a detained asylum-seeker to the border should his/her reconsideration be granted.

Direct-Back Policy

UNHCR remains concerned about the Parties' continued use of direct-back procedures. This has been particularly problematic for asylum-seekers directed back from Canada to the United States, as at least ten asylum-seekers directed-back from Canada were detained in the United States and unable to attend their interviews, and six were also deported to their countries of origin without having their claims processed under the Agreement. There were some asylum-seekers who were directed-back from the United States who also appear to have been at risk of deportation from Canada at the time they were directed-back.

Recommendation Four: *In order to ensure access to the refugee status determination process in the receiving country for applicants who would otherwise be eligible to lodge refugee claims under the Agreement, UNHCR recommends that the Parties discontinue direct-backs. If an asylum-seeker is directed-back, UNHCR recommends that the Parties confirm the asylum-seeker's valid legal status in the country to which he/she is being directed-back and ability to appear for his/her scheduled interview/hearing.*

B. Secondary Areas of Concern

Included is a brief overview of some of UNHCR's secondary issues of concern. Please refer to Appendix 7 for a more complete listing of these issues.

Department of Homeland Security

- Simplification, translation, and distribution of the TSI Form (CBP/CIS)
- Advisal to asylum-seekers directed-back to Canada (CBP/CIS)
- Detention of direct-backs from Canada in the United States (CBP/ICE)
- Detention of asylum-seekers with mental health issues (CBP/ICE)

Customs and Border Protection

- Use of restraints at ports-of-entry

Citizenship and Immigration Services

- Applicants' comprehension of the Safe Third process
- Adjudication of applicants' eligibility under the public interest exception
- Sufficiency of credible testimony as evidence of eligibility under the Agreement
- Facilitation of telephone calls by detained asylum-seekers to establish eligibility under the Agreement

Immigration and Customs Enforcement

- Provision of mental health care to detained asylum-seekers

Executive Office for Immigration Review

- Additional procedures for processing Safe Third cases and ensuring applicants' comprehension of the Safe Third process

IV. Findings and Recommendations

A. Objective One: Asylum-seekers have access to appropriate border and adjudicating officers.

Safe Third applicants in the United States may require access to border or adjudicating officers at various stages of the Safe Third process. As applicants may either be paroled, detained, or directed-back to Canada, they may have distinctly different needs for accessing border and adjudicating officers. UNHCR identified three areas of inquiry with regard to access to DHS officials: (1) ensuring that U.S.-bound asylum-seekers are identified and referred to the appropriate adjudicating agency; (2) ensuring that U.S.-bound asylum-seekers who are directed-back to Canada are able to return to the United States for their eligibility interviews/hearings; and, (3) ensuring that detained Safe Third applicants are able to communicate with relevant DHS officials throughout the Safe Third process.

1. Identification and Referral at Ports-of-Entry

Given the limited number of U.S.-bound Safe Third cases and the spontaneous nature of their arrivals, UNHCR was unable to observe any secondary inspection interviews during its monitoring visits to the POEs. As a result, UNHCR cannot comment on whether CBP Officers at POEs along the United States-Canada border correctly identified individuals seeking asylum in the United States and subject to the Agreement. UNHCR was able to verify through personal interviews with Safe Third applicants that asylum-seekers have had adequate access to CBP officers upon their arrival and identification at the POE. CBP officers were available and accessible for the duration of asylum-seekers' custody at the POE. Translation services were available and used as necessary at the POEs that UNHCR visited. CBP appropriately referred Safe Third applicants to CIS or EOIR for an eligibility determination.⁹

2. Applicants Directed-Back to Canada

a. Background

INA Section 235(b)(2)(C) states that applicants for admission to the United States who arrive on land from a foreign contiguous territory (*e.g.*, Mexico or Canada) - including those subject to expedited removal - may be returned to that territory pending their removal proceedings under INA Section 240.¹⁰ In March 1997, INS issued guidance stating that in the event of insufficient detention space, INS could return individuals placed in expedited removal proceedings at land border POEs to foreign contiguous territory pending their credible fear determinations.

⁹ UNHCR notes, however, that adherence to referral procedures was not always consistent. *See* discussion under Objective Two.

¹⁰ *See also* 8 C.F.R. § 235.3(d).

This “direct-back” option was rescinded in February 2002 amidst concerns that asylum-seekers returned to Mexico or Canada risked removal from that country before their claims were adjudicated by the INS. Under the 2002 policy guidance, all individuals arriving at a land border POE who were subject to expedited removal were to be placed in expedited removal proceedings and detained in the United States in accordance with INA Section 235(b).¹¹ Only those asylum-seekers who voluntarily withdrew their applications for admission and indicated that they had no concerns about returning to Mexico or Canada could be returned to a foreign contiguous territory. Prior to an asylum-seeker’s return, INS officers were to ascertain his/her legal status in the country of return.

The INS February 2002 policy was modified in June 2005 with respect to Cuban nationals. Under the June 2005 guidance, Cuban asylum-seekers arriving at land border POEs were no longer to be placed in expedited removal proceedings, but rather referred directly for regular removal hearings under INA Section 240.¹² The guidance also allowed CBP to return these Cuban asylum-seekers to either Mexico or Canada while awaiting their removal hearings under certain conditions. These conditions included: (1) ineligibility for parole; (2) valid immigration status in Canada or Mexico; (3) agreement by the Canadian or Mexican border officials to accept the individual’s return; and, (4) that the asylum-seeker’s claim of fear of persecution or torture did not relate to Canada or Mexico.¹³

b. Findings

UNHCR was able to monitor 11 of the cases where asylum-seekers had been directed-back from the United States to Canada. All direct-backs from the United States known to UNHCR occurred at the Buffalo POE. Before CBP’s change of policy regarding Cuban nationals in June 2005, twelve Cuban nationals were detained in the United States and nine were directed-back to Canada.¹⁴ The direct-back of these individuals appears to have been contrary to the February 2002 INS/DHS policy in effect at that time. After CBP’s change of policy regarding Cuban nationals, at least two Cuban nationals were initially directed-back to Canada and fifteen were paroled into the United States.¹⁵

To UNHCR’s knowledge, all asylum-seekers directed-back to Canada were able to physically return to the United States POE and meet with United States authorities when required. However, several asylum-seekers who were directed-back to Canada appear to have been *at risk* of detention in and/or deportation from Canada at the time they were

¹¹ *Id.*

¹² Memorandum from Jayson Ahern, Assistant Commissioner, Office of Field Operations, United States Customs and Border Patrol, “*Treatment of Cuban Asylum Seekers at Land Border Ports of Entry*” (June 10, 2005).

¹³ See also, CBP Inspector’s Field Manual (IFM) Chapter 15.15(a)(6).

¹⁴ There were 38 total Cuban U.S.-bound asylum-seekers - 21 of them were placed in expedited removal before the June 2005 change in policy.

¹⁵ These numbers reflect information and statistics officially reported by DHS.

directed-back.¹⁶ UNHCR is aware of at least two instances when asylum-seekers with temporary Canadian visas were directed-back to Canada to await immigration hearings that were scheduled *after* their temporary visa status in Canada would expire.¹⁷ It is UNHCR's view that, due to the risk of subsequent detention in and/or deportation from Canada, asylum-seekers should not be directed-back to Canada.¹⁸

Once asylum-seekers are directed-back to Canada from the United States, United States government officials need to maintain contact with them in order to schedule interviews/hearings and to coordinate their re-entry into the United States and any advance submission of evidence. UNHCR found that while asylum-seekers who were directed-back to Canada were generally able to maintain communication with CBP and, during the period they were subject to expedited removal, CIS officers *via* telephone and in person, there were difficulties in doing so. These difficulties were often the result of asylum-seekers' lack of a personal phone number in Canada, inability to communicate in English *via* telephone, and CIS' not uncommon need to re-schedule interviews. These issues seemed to be exacerbated by unclear agency responsibility for communication with the asylum-seeker. These difficulties resulted in increased anxiety, travel costs, delays, and other inconveniences for asylum-seekers who had to return to the POE multiple times.¹⁹ Given that Cuban asylum-seekers are no longer subject to expedited removal, but rather placed directly in INA section 240 removal proceedings, coordination for those who are directed-back to Canada now falls with CBP and EOIR, rather than CIS.

¹⁶ For example, UNHCR interviewed one applicant who was directed-back to Canada from the Buffalo POE four times between 23 May and late July. The applicant's refugee claim in Canada had been denied in May 2005, and Canada had sent him a 30-day warning letter ordering him to leave Canada. The second time the applicant was directed-back to Canada, Canadian officials requested his United States immigration documents and threatened that they were "processing" his deportation order. The third time he was directed-back, the CBSA Supervisor at the Fort Erie POE told him that he did not have "much time left in Canada," as applicant's deportation order would be executed. During his CIS threshold screening interview, the applicant explained to the CIS Asylum Officer that he had a Canadian deportation order and expressed concern that he would be detained and/or deported from Canada if he continued to be directed-back there. The CIS Asylum Officer assured him that he would be allowed to return to the United States, although the basis for this assurance is unclear.

¹⁷ After UNHCR and NGO intervention, the two applicants directed-back to Canada after the June 2005 change in CBP policy were subsequently paroled into the United States.

¹⁸ See e.g. Universal Declaration of Human Rights, Article 14 (1) (adopted and proclaimed by the U.N. General Assembly resolution 217 A(III) on December 10, 1948) ("[e]veryone has the right to seek and to enjoy in other countries asylum from persecution."). See also UNHCR Executive Committee, *Conclusions on the Determination of Refugee Status*, No. 8, para. (e)(vii) (1977) ("The applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority referred to in para. (iii) above, unless it has been established by that authority that his request is clearly abusive."). Article 4(3) of the Agreement also states that the Party of the country of last presence "shall not be required to accept the return of a refugee status claimant until a final determination with respect to this Agreement is made by the receiving Party."

¹⁹ For example, UNHCR interviewed one applicant who was directed-back from the Buffalo POE and told by CBP that it would call him with an interview date. After several re-scheduled appointments by CIS, applicant was finally given an interview date one month after his initial arrival at the POE. This applicant's case was not completed until more than five months after his initial arrival at the POE.

3. Detained Safe Third Applicants

For Safe Third applicants detained in the United States, adequate access to CBP or CIS officials, often accomplished through ICE Deportation Officers, can be critical. U.S.-bound asylum-seekers may require access to CIS Asylum Officers in order to submit additional evidence supporting their eligibility to apply for asylum in the United States and to obtain case status information. Canada-bound asylum-seekers who are returned to the United States under the Agreement may require access to CBP Port Directors to submit a request for reconsideration of their eligibility decision. Canada-bound asylum-seekers who are directed-back to the United States may need to contact Canadian border officials to inform them of their detention in the United States and to reschedule their eligibility interviews.

a. Telephone Access

As discussed in greater detail under Objective Eight, UNHCR visited ten United States detention facilities where Safe Third applicants had been held during the period of Safe Third processing/adjudication. The majority of these facilities had telephone issues that affected or could affect the ability of asylum-seekers to contact CBP, CIS or CBSA officials. A primary obstacle to adequate communication with adjudicating officials was the restriction at some facilities to collect telephone calls only, as government offices do not generally accept collect calls.²⁰ Another obstacle was that international calls were often either prohibited altogether or allowed on a collect-call basis only, making it difficult if not impossible to contact Canadian adjudicating officers when necessary.²¹

b. Access to Deportation Officers

Access to ICE Deportation Officers can also be critical in facilitating communication with border and adjudicating officers. Half of the detention facilities that UNHCR visited during its Safe Third monitoring did not provide adequate detainee access to DHS Deportation Officers.²² Access to Deportation Officers was a particular problem in

²⁰ Half of the facilities visited were collect-call only facilities (Clinton County Jail, Franklin County Jail, Wayne County Jail, Erie County Holding Center, and Albany County Jail). UNHCR found that asylum-seekers were unable to call CBP or CIS offices directly for free. Indeed, on a few occasions, although CIS Asylum Officers provided asylum-seekers with their phone numbers for follow-up contact, asylum-seekers were unable to place these calls from the detention facilities where they were held.

²¹ These restrictions affected asylum-seekers' ability to contact Canadian border officials when such asylum-seekers had been directed-back or returned to the United States from Canada under the Agreement. One applicant who was directed-back to the United States was detained at the Batavia Facility and was unable to attend his scheduled interview with CBSA. He was unable to contact CBSA to inform them of his detention because he did not have the money to make the required international direct-dial call, and was scheduled for imminent deportation to his home country from the United States.

²² Wayne County Jail, Monroe County Jail, Calhoun County Jail, Erie County Holding Center, and Albany County Jail.

Detroit, where there were two to three Deportation Officers for eight detention facilities.²³

UNHCR is aware of several detained U.S.-bound asylum-seekers who were unable to contact CIS to submit additional case information or to obtain case status information.²⁴ UNHCR is also aware of detained asylum-seekers who were returned from Canada under the Agreement or directed-back from Canada who wished to contact CBSA officials regarding their cases but were unable to.²⁵ In some cases, detainees' efforts to contact ICE Deportation Officers to facilitate communication with CIS or CBSA were unsuccessful, and in others, detainees were unaware that Deportation Officers might be able to make special arrangements to assist them with telephone calls.

Recommendations:

- 1.1 *In order to ensure access to the refugee status determination process in the receiving country for applicants who would otherwise be eligible to lodge refugee claims under the Agreement, UNHCR recommends that the Parties discontinue direct-backs. If an asylum-seeker is directed-back, confirm the asylum-seeker's valid legal status in the country to which he/she is being directed-back and ability to appear for his/her scheduled interview/hearing. (CBP/ICE)*
- 1.2 *Stay any asylum-seeker's deportation pending a final decision on his/her request for reconsideration, and facilitate the return of a detained asylum-seeker to the border should his/her reconsideration be granted. (ICE)*

- 1.3 *Ensure that detained asylum-seekers have free telephone access to local CBP and CIS officials, and to Canadian officials when necessary. Ensure that detained asylum-seekers have meaningful weekly access to DHS Deportation Officers. Increase staffing of Deportation Officers at the ICE Detroit Field*

²³ ICE HQ has informed UNHCR that it is aware of staffing shortages in the Detroit Field Office and plans to hire more deportation officers for that field office.

²⁴ For example, UNHCR interviewed an applicant at the Buffalo Federal Detention Center who had received a threshold screening interview on 11 May. He stated that he was not given a CIS contact number and did not receive any case status information, however, until 8 August, almost three months after his interview and three weeks after CIS finalized its decision on his case. Applicant stated that he submitted 15 written requests to speak to an officer about his case, and that he was not able to speak to a deportation officer for three months. UNHCR also interviewed several asylum-seekers who stated that they had not seen a Deportation Officer for the duration of their detention at the Calhoun County Jail, over nine months. Applicants generally reported that they were sometimes given the Asylum Office phone number but were unable to call due to collect-call only telephone systems and language barriers.

²⁵ For example, UNHCR interviewed two applicants at the Buffalo Federal Detention Center (one direct-back and one returnee) who wished to call CBSA but were unable to do so because of telephone restrictions.

B. Objective Two: Safe Third procedures are followed according to the Agreement and international refugee law.

This objective refers to the process by which eligibility determinations are made and assesses whether such decisions are made consistent with established procedures under the Agreement and with international refugee law.

1. U.S.-Bound Applicants

Eligibility under the Agreement can be adjudicated either by CIS Asylum Officers or by Immigration Judges. CIS Asylum Officers adjudicate the cases of asylum-seekers placed in expedited removal proceedings (under INA Section 235) and of asylum-seekers attempting entry under the Visa Waiver Program (VWP). The immigration courts adjudicate the cases of those asylum-seekers placed in regular removal proceedings (under INA Section 240), such as unaccompanied minors, Cuban nationals (as of June 2005), and any other asylum-seeker not placed in expedited removal due to the nature of their inadmissibility charges.

a. CBP

Procedures

CBP officers are responsible for determining both the inadmissibility charges lodged against asylum-seekers applying for admission to the United States and the proceedings into which they will be placed (*e.g.*, expedited removal, VWP “asylum-only” proceedings, or regular removal proceedings).

For asylum-seekers who are placed in expedited removal, CBP Officers are to provide the TSI Form, in addition to the “*Information about Credible Fear*” Form (“M-444 Form”), and the legal service provider list.²⁶ They are required to have the TSI Form read to the applicant by an interpreter in his/her native language if the applicant does not read English and to have it signed by the asylum-seeker. CBP then refers the asylum-seeker to the CIS Asylum Office for a threshold screening interview. CBP Officers must also provide a copy of the TSI Form to those asylum-seekers seeking entry under the VWP prior to referral to a CIS Asylum Officer.²⁷ Under CBP referral procedures, CBP officers are required to fax relevant case documents to CIS.²⁸ Copies of the TSI Form, M-444 Form, and legal service provider list are to be provided to the asylum-seeker.

²⁶ CBP IFM Chapter 17.11(d)(1).

²⁷ CBP IFM Chapter 17.11(d)(8)(e).

²⁸ For those placed in expedited removal, these include the Notice and Order of Expedited Removal Form (I-860 Form), Sworn Statement and Jurat (I-867A & B Form), M-444, TSI Form, legal service provider list, and any other relevant information that is available. IFM Chapter 17.11(d)(1). For those placed in VWP asylum-only hearings, these include the TSI form, the sworn statement, and the I-275 Form (indicating that applicant is being referred for a Safe Third threshold screening). IFM Chapter 17.11(d)(8)(f).

The Agreement imposes no additional procedural obligations on CBP officers who are placing asylum-seekers in regular removal proceedings (*i.e.*, separated children, Cuban nationals, and others based on charges of inadmissibility). These asylum-seekers are processed as would any applicant for admission who is referred to immigration court.

Findings

As noted in Objective One, UNHCR was unable to observe CBP processing of Safe Third applicants at the time of their arrival at the POE. However, based on UNHCR's review of case files and personal interviews with applicants, UNHCR is concerned that CBP Officers may not have consistently provided applicants with copies of all of the Safe Third related forms, most notably the TSI Form. Of the thirteen Safe Third applicants UNHCR interviewed who were placed in expedited removal or VWP "asylum-only" proceedings, three claimed that CBP did not provide them with personal copies of the TSI Form and two claimed that CBP did not provide them with a legal service provider list.²⁹ UNHCR's review of redacted case files indicated that in all of these cases such documents from the POE were missing from applicants' case files. In total, 10 redacted case files were missing TSI Forms completely and 17 files had TSI Forms with orientation or interview dates instead of their date of arrival at the POE. UNHCR notes that, in its discussions with CBP Officers, Officers generally appeared to understand their obligation to distribute, sign, and translate if necessary all of the required forms to Safe Third applicants placed in expedited removal or VWP "asylum-only" proceedings. It is unclear, therefore, whether the absence of these forms indicates that they were not provided to Safe Third applicants or, if provided, that copies were simply not included in the case files.

With regard to VWP cases, while UNHCR is aware of only two Safe Third asylum-seekers who sought admission to the United States under the VWP, there appeared to be some confusion regarding the procedures for their referral to CIS. While these applicants were appropriately *not* placed in expedited removal, it appears that TSI Forms were not provided to the asylum-seekers and/or forwarded to CIS in these cases.³⁰

²⁹ Two applicants confirmed that they had received all of the forms. Six applicants were unable to confirm whether or not they received all of these forms.

³⁰ One VWP Safe Third applicant's redacted case file as received by UNHCR contained his sworn statement, but did not include an I-275 or a TSI form issued at the POE.

b. CIS

Procedures

For those individuals referred to CIS for Safe Third eligibility adjudication, CIS Asylum Officers must confirm that each applicant received and understood the TSI Form. If the applicant did not receive and/or understand this form, CIS must provide and/or explain its contents, with translation if necessary.³¹ The Asylum Officer is to complete a Threshold Screening Adjudication Worksheet, which contains a written summary of his/her findings, a copy of which the asylum-seeker is to receive.³² The Asylum Officer is to complete the applicant's sworn statement, reading the sworn statement back to the applicant and making any necessary corrections.³³ In the event that an applicant is found ineligible to apply for asylum under the Agreement, he/she should also receive his/her sworn statement and the Notice and Order of Expedited Removal (I-860 Form).³⁴ Copies of all documents are to be included in the asylum-seeker's immigration "A" file.

Findings

Based on a review of redacted case files, UNHCR found that the above CIS procedures were generally followed and all of the required forms were included in an applicant's "A" file, with the exception of the CIS-distributed TSI Form, which was not included in ten files, and the TSI worksheet, which was not included in two redacted case files. It is unclear whether the absence of these forms indicates that they were not provided to Safe Third applicants or, if provided, that copies were simply not included in the case files.³⁵ UNHCR was unable to confirm whether applicants found ineligible to apply for asylum in the United States received copies of their sworn statements and expedited removal orders.³⁶

³¹ CIS Credible Fear Procedures Manual, Section III(J)(2)(a), as amended December 2004. This is consistent with UNHCR Executive Committee, *Conclusions on the Determination of Refugee Status*, No. 8, para. (e)(ii) (1977) ("The applicant should receive the necessary guidance as to the procedure to be followed.")

³² *Id.* at Sections III(J)(2)(a), III(J)(6), and II(J)(7).

³³ *Id.* at Section III(J)(2)(a).

³⁴ *Id.* at Section III(J)(7).

³⁵ At least three of these applicants reported not receiving the TSI Form.

³⁶ UNHCR also noted a few instances where Asylum Officers failed to follow procedures regarding the review of statements. In some cases, the Asylum Officer offered to print out an applicant's sworn statement and have the applicant read it over him/herself rather than reading the sworn statement back to the applicant and making corrections where necessary.

c. EOIR

Under the final regulations implementing the Agreement, Immigration Judges are responsible for determining whether asylum-seekers placed in INA Section 240 proceedings are eligible to apply for asylum in the United States.³⁷ EOIR, however, has issued little procedural guidance on how these cases are to be adjudicated.³⁸ In the three cases for which UNHCR has been able to obtain first-hand information, all have been continued by Immigration Judges for later hearings in 2006 to allow applicants the opportunity to apply for legal permanent residency under the Cuban Adjustment Act. To UNHCR's knowledge, none of the seventeen Safe Third applicants referred to immigration court for Section 240 removal proceedings had received a Safe Third adjudication hearing in immigration court as of 28 December 2005. As a result, UNHCR has been unable to monitor EOIR's Safe Third eligibility determination procedures.

2. Applicants Directed-Back to Canada

Under guidance issued by CBP in June 2005, DHS may detain, parole, or direct Cuban nationals back to Canada who seek asylum at a land border POE. Under this guidance, CBP is to exercise its direct-back authority only if the option of parole is not available. There appeared to be some confusion at the Buffalo POE as to whether the parole option was to be considered in the first instance or whether direct-back and parole were to be given equal weight. This may have resulted in the inappropriate direct-back of two Cuban asylum-seekers to Canada on four separate occasions in June, July, August, and October.³⁹ According to UNHCR's latest discussions with Buffalo CBP however, its direct-back practices have since been regularized and appear to reflect CBP's priorities as described in the June 2005 guidance.

3. Applicants Returned from Canada

Under the Statement of Principles accompanying the Agreement, the Parties agreed that each has the discretion to request the reconsideration of the other's negative eligibility decision should new information, or information that had not been previously considered,

³⁷ 8 C.F.R. § 1240.11(g)

³⁸ An EOIR Memorandum issued on 28 December 2004 on the processing of Safe Third applicants offers very little procedural guidance. It introduces the Agreement and notes DHS' implementation, but limits its discussion of EOIR's implementation to a review of the Agreement's terms, EOIR's jurisdiction, and administrative procedures regarding case tracking. EOIR Interim Operating Policies and Procedures Memorandum 2004 – 09 from Michael J. Creppy, Chief Immigration Judge, Office of the Chief Immigration Judge, "U.S.-Canada Agreement Regarding Cooperation in the Examination of Refugee Status Claims – 'Safe Third Country'" (December 28, 2004).

³⁹ These two asylum-seekers were not initially paroled although they presented identification and had clear background checks. They also had temporary Canadian visas that were expiring before their scheduled return to the United States. CBP Buffalo later informed UNHCR that at least one of these direct-backs was done in error under the 10 June 2005 memorandum. These two asylum seekers were subsequently paroled into the United States after their counsel wrote letters to the CBP authorities requesting parole on their behalf.

come to light.⁴⁰ CBP procedures implementing this reconsideration mechanism provide that the United States may, *via* the CBP Port Director, request of the Canadian Government a reconsideration of an ineligibility decision. The CBP Port Director would contact the CIC manager in writing and provide the name and FOSS ID number of the applicant and a summary of the new material evidence to be considered along with any supporting documentation.⁴¹ If it were determined that the applicant was eligible to make a refugee claim in Canada, the CIC manager would request the return of the applicant.⁴²

UNHCR found that some CBP officials were unfamiliar with the reconsideration mechanism and procedures,⁴³ resulting in long delays and inconsistencies in implementation.⁴⁴ Lack of familiarity with procedures may improve with time and more experience working with reconsideration requests.

As a result of its monitoring, UNHCR is of the view that the current reconsideration procedures are inadequate. CBP's lack of resources and specialized training make it an inappropriate agency for reviewing reconsideration requests which may require substantive legal analysis;⁴⁵ Also, in those cases where CIC/CBSA has agreed to reconsider a case, applicants detained in the United States have had great difficulty securing their release from detention to travel to the Canadian border for their re-scheduled interviews. This is largely due to DHS insistence that CIC/CBSA "admit" the claimants to Canada with no possibility of return to the United States should the underlying refugee claim ultimately be rejected, and CIC/CBSA insistence that the possibility of return to the United States remain available. In addition, DHS has been unwilling to ensure a meaningful stay of removal while a request for reconsideration is under consideration, even if CIC/CBSA agrees to re-interview the individual. For these reasons, the existing reconsideration mechanism lacks fundamental safeguards, especially for those applicants who are detained in the United States upon return and subject to removal.

⁴⁰ Statement of Principles, *Procedural Issues Associated with Implementing the Agreement for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries*, para. 6, (August 30, 2002) ("Each Party will have the discretion to request the reconsideration of a decision by either Party to deny an applicant's request for an exception under the Agreement should new information, or information that has not been previously been considered, come to light.").

⁴¹ CBP IFM Chapter 17.11(e).

⁴² *Id.*

⁴³ CBP Officers in Detroit stated that they were unclear about what the reconsideration procedures were and whether CBP had the authority to consider such requests. UNHCR also received an NGO report that CBP Buffalo's initial response to a request for reconsideration was that it was not its responsibility to forward such requests to the Canadian government.

⁴⁴ For example, CBP has taken anywhere from several weeks to several months to decide requests for reconsideration. In some cases requests were automatically forwarded to the Canadian authorities and in others they were provided more thorough consideration by CBP. In the one case in which CBP refused to forward the request to the Canadian authorities, CBP provided a written reasoned decision regarding the applicant's request. CBP's decision notification procedures for asylum-seekers whose requests had been denied by the Canadian authorities varied among POEs.

⁴⁵ For example, one reconsideration request required CBP to conduct an analysis of whether an individual had presented sufficient evidence to establish his status as a "stateless" person.

A streamlined reconsideration procedure should be instituted allowing for the submission of reconsideration requests directly to the Government that rendered the negative eligibility decision.⁴⁶ Should the Parties choose to maintain the present “screening” procedure by the country of return, however, then the DHS agency with expertise and training in adjudicating such requests would be more appropriate to conduct such case review, *i.e.*, the CIS Asylum Division.⁴⁷ A procedure should also be instituted whereby asylum-seekers returned from one country to the other would have their deportation stayed while their request for reconsideration is pending.⁴⁸

Recommendations:

- 2.1 *In order to ensure access to the refugee status determination process in the United States for applicants who would otherwise be eligible to lodge refugee claims under the Agreement, asylum-seekers should not be directed-back to Canada. If an asylum-seeker is directed-back, confirm valid legal status in Canada and ability to appear for scheduled interview/hearing. (CBP/ICE)*
- 2.2 *Revise the reconsideration mechanism to allow for direct referral of timely reconsideration requests to the government issuing the negative eligibility decision. In the alternative, UNHCR recommends that DHS re-assign the responsibility of reviewing reconsideration requests from CBP to CIS given CIS’ expertise in the adjudication of Safe Third cases, and that in considering such requests, DHS obtain relevant case information from CIC/CBSA. UNHCR recommends that the Parties stay any asylum-seeker’s deportation pending a final decision on his/her request for reconsideration, and facilitate the return of a detained asylum-seeker to the border should the reconsideration request be granted. (CBP/CIS/ICE)*
- 2.3 *Ensure compliance with established guidelines on the distribution of the TSI Form. (CBP/CIS)*

⁴⁶ See Global Consultations on International Protection, Second Meeting, *Asylum Processes: Fair and Efficient Asylum Procedures*, EC/GC/01/12, para. 50(p) (May 31, 2001) “All applicants should have the right to an independent appeal or review against a negative decision, including a negative admissibility decision...”). See also Executive Committee, *Conclusions on the Determination of Refugee Status*, No. 8, paras. (e)(vi) and (vii) (1977) (“If the applicant is not recognized, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing stem.”).

⁴⁷ See Global Consultations on International Protection, Second Meeting, *Asylum Processes: Fair and Efficient Asylum Procedures*, EC/GC/01/12, para. 50(j) (May 31, 2001) (“Decision-makers should...have requisite knowledge of refugee and asylum matters.”). CBP Officers at several POEs also expressed the view that due to CBP’s lack of resources and specialized training, it was not the appropriate agency for the review of reconsideration requests.

⁴⁸ Executive Committee, *Conclusions on the Determination of Refugee Status*, No. 8, para. (e)(vii) (1977) (“...[The applicant] should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending.”).

2.4 *Adopt further guidance regarding Safe Third eligibility adjudications for asylum-seekers placed in 240 removal proceedings. (EOIR)*

C. Objective Three: Substantive eligibility decisions are made consistent with the terms of the Agreement and international refugee law.

Under the Agreement, individuals seeking to lodge asylum claims in the United States at a United States-Canada land border POE are ineligible to do so unless they fall within certain exceptions. These exceptions include persons with eligible “anchor relatives” in the United States,⁴⁹ unaccompanied minors (as defined by the Agreement),⁵⁰ and those who either possess a validly issued United States visa or admission document (other than a transit visa) or who are not required to obtain a United States visa.⁵¹ The Agreement also allows for a category of persons for whom the United States may determine, in its discretion, that it is in the “public interest” to except from the Agreement.⁵² The Agreement does not apply to citizens of Canada or the United States or to those who, not having a country of nationality, are habitual residents of the United States or Canada.⁵³

DHS issued regulations which provide some additional guidance regarding the definition of these categories of individuals.⁵⁴ CIS also amended the Credible Fear Process section of its Procedures Manual to include further guidance to its Asylum Officers on Safe Third eligibility adjudications. To UNHCR’s knowledge, EOIR has not provided similar guidance to its Immigration Judges.

Of the 43 individuals whose cases were adjudicated by CIS Asylum Officers between 29 December 2004 and 28 December 2005, four were found to be Canadian citizens not subject to the Agreement, 16 were deemed ineligible to apply for asylum in the United States under the Agreement,⁵⁵ and 23 were deemed eligible to apply for asylum under one of the Agreement’s exceptions. Of those deemed eligible to apply, all fell under the Agreement’s family-based exceptions. No applicant established eligibility under the public interest exception. No applicant claimed to be either stateless or was determined to

⁴⁹ Agreement, Art. 4(2)(a) and (b).

⁵⁰ *Id.* at Art. 4(2)(c).

⁵¹ *Id.* at Art. 4(2)(d).

⁵² *Id.* at Art. 6.

⁵³ *Id.* at Art. 2.

⁵⁴ For example, with regard to the public interest exception, the Supplementary Information included in DHS’ regulations state that “issues of minor anchor relatives, past torture, and health needs, are some of the factors that may be considered” and that “humanitarian concerns” is an “important consideration.” 69483 F.R. Vol. 29, No. 228 (29 November 2004). Likewise, with regard to validly issued visas, the Supplementary Information notes that the term “validly issued visas” refers to visas that are “genuine (i.e., not counterfeit) and were issued to the alien by the United States government.” 69484 F.R. Vol. 29, No. 228 (29 November 2004).

⁵⁵ Of these 16 individuals, the majority (seven) did not have any known family members in the United States. Three applicants had family members who were of more distant relation than allowed under the Agreement, four applicants had family members who lacked or could not establish the required legal status in the United States to qualify as “anchor relatives, and one applicant could not establish *bona fide* relationships with potential “anchor relatives.”

be an unaccompanied minor. Please refer to Appendix 8 for a statistical breakdown of all U.S.-bound Safe Third applicants by date of entry.

1. Family-Based Eligibility

Through case file review, threshold screening interview observation, and personal interviews with Safe Third applicants, UNHCR found that eligibility decisions made by CIS Asylum Officers were, in general, correctly made. UNHCR found that Canadian citizens were correctly identified and exempted from the Agreement's application, and that the criteria for family-based eligibility were correctly applied.

2. Public Interest Eligibility

UNHCR considers the public interest provision to be of critical importance in ensuring that asylum-seekers who merit consideration of their refugee claims in the United States yet who fall outside the scope of the Agreement's other exceptions, are able to access the United States asylum system. This provision is particularly important in situations where an asylum-seeker may not be able to establish eligibility for a family-based exception under the Agreement, yet family unity principles would still support the consideration of his/her claim in the United States.

UNHCR appreciates CIS' policy of exploring asylum-seekers' eligibility for the public interest exception in cases where they do not clearly establish eligibility under the other exceptions to the Agreement. UNHCR also appreciates CIS' stated willingness to consider a variety of humanitarian factors when deciding eligibility under the public interest exception.

While UNHCR acknowledges the need for a certain margin of government discretion in adjudicating public interest cases, UNHCR disagrees with CIS' decisions not to exercise the public interest exception in two cases – both of which raised family unity principles. While CIS considered these cases under the public interest exception, it decided that there were “insufficient humanitarian factors” to support their eligibility. One of these cases involved same-sex partners⁵⁶ and the other involved a close family member who did not have the required legal status in the United States to qualify as an “anchor relative.”⁵⁷

⁵⁶ In one case, the applicant was a 32-year old Filipino man who sought entry at the Blaine POE on 12 July 2005. The applicant was in a committed relationship with his United States citizen partner of four years. As applicant's family had disowned him and persecuted him on account of his homosexuality, the applicant considered his partner to be his only family. The applicant submitted a declaration; a psychological evaluation diagnosing him with chronic post-traumatic stress disorder, recurrent major depressive disorder, and baseline dysthymic disorder; and various letters of support from his partner and his partner's friends. UNHCR has not received the case file for the other case involving a same-sex partner.

⁵⁷ The case involved a 45-year old Cuban man who sought entry to the United States at the Champlain POE on 30 May 2005 to seek asylum in the United States and to join his 21-year old daughter who resided in the country. When the daughter entered the United States in 2004, she was placed in

UNHCR notes that in its comments to the Agreement and the United States regulations, UNHCR urged DHS to consider the presence of *de facto* family members (including same-sex partners) in determining eligibility under the Agreement - be it under the family-based or public interest exceptions.

Recommendation:

3.1 Amend the CIS Procedures Manual to provide for the consideration of family unity principles in exercising the Agreement's public interest exception, e.g., "de facto" family members, family members with pending legal status, and same-sex partners. (CIS)

D. Objective Four: Asylum-seekers' claims are timely adjudicated.

The timely adjudication of Safe Third cases is of particular importance in the United States given that the majority of Safe Third applicants are mandatorily detained throughout the eligibility determination process. UNHCR recognizes that in adjudicating a claim, a balance must be struck between affording sufficient time for the applicant to prepare his/her case and ensuring that the process is not unduly prolonged. As "public interest" cases tend to be more complicated than those raising exceptions under Article 4 of the Agreement, additional time might also be necessary for a full consideration of these cases.

UNHCR has noted three distinct phases for the processing of U.S.-bound Safe Third cases:⁵⁸

- 1) Time from an asylum-seeker's appearance at the POE to an asylum-seeker's threshold screening interview/hearing;
- 2) Time from an asylum-seeker's threshold screening interview/hearing to the issuance of a final eligibility decision;

expedited removal proceedings and was found to have a credible fear of persecution. She did not file an application for asylum, which would have made her an eligible anchor relative under the Agreement, because she was advised by the immigration court not to do so. Rather, the court advised her to seek adjustment to lawful permanent resident status under the Cuban Adjustment Act (CAA). The court continued her case until 18 August 2005, two months after her father's appearance at the POE, so that she would acquire the twelve months of physical presence in the United States required for adjustment of status under the CAA and be eligible for adjustment at the time of her hearing date. The daughter's mother (applicant's wife) was deceased, such that the applicant was the daughter's only surviving parent.

⁵⁸ In principle, a fourth stage would exist for those denied eligibility under the Agreement who seek a reconsideration of this decision. UNHCR is unaware, however, of any requests for reconsideration that were submitted by persons deemed ineligible to apply for asylum in the United States under the Agreement.

- 3) For those found ineligible to apply for asylum in the United States under the Agreement, time from the final eligibility decision to the asylum-seeker's return to Canada.

1. CIS Adjudications

For cases considered by CIS Asylum Officers, there is a minimum 48 hour waiting period (unless waived by the asylum-seeker) between the asylum-seeker's arrival/detention in the United States and his/her Threshold Screening Interview.⁵⁹ DHS has not issued a deadline, however, as to when a decision must be rendered.

UNHCR has monitored both the overall Safe Third processing time for cases adjudicated by CIS as well as the processing time for each of the above three stages. The average overall processing time from appearance at the POE or, for those cases referred for criminal prosecution, from date of referral to CIS, to issuance of a final eligibility decision was 42 days, with times ranging from two days to seven months (221 days).⁶⁰ The processing times for each phase is discussed below and in more detail in the adjudication timeline chart attached as Appendix 9.

Stage 1 - Time from an asylum-seeker's appearance at the POE to the threshold screening interview:

The average time for completion of this stage was 15 days, with times ranging from the same day to 35 days. It should be noted that the average time for completion of this stage for those cases that were referred and accepted for criminal prosecution by the United States Attorney's Office for use of false documents was more than two months (69 days), with times ranging 24 days to six and a half months.⁶¹

Stage 2 - Time from an asylum-seeker's threshold screening interview to issuance of a final eligibility decision:

The average time for completion of this stage was 25 days, with times ranging from the same day to six and a half months (194 days). Adjudication time of possible public interest cases was particularly long, with an average time of 72 days, ranging from 16 days to six and a half months. UNHCR is concerned about the lengthy delays in some cases during this phase of the Safe Third process given asylum-seekers'

⁵⁹ See TSI Form ("You have the right to wait 48 hours after arrival at a detention center before your interview. You also have the right to waive this waiting period if you would like to have the interview sooner."). This is consistent with CIS policy with regard to credible fear interviews in expedited removal proceedings. See CIS Credible Fear Procedures Manual, Section III(D)(1)(a).

⁶⁰ Statistics are reported in cases. For statistics by individuals, see Appendix 9. Statistics do not include cases that were dissolved or abandoned.

⁶¹ UNHCR is aware of seven cases referred for criminal prosecution for use of invalid documents and other related charges, largely from the Champlain POE. See Appendix 9.

continued detention.⁶² As discussed in detail under Objective Seven, adjudication time could perhaps be reduced if DHS were to relax its documentary evidence requirements in cases where credible testimony alone might be sufficient to establish eligibility under the Agreement.

Stage 3 - Time from issuance of a final negative eligibility decision to asylum-seeker's return to Canada:

While UNHCR was unable to monitor this stage of the process for the majority of cases, UNHCR confirmed one case in which an ineligible applicant was not returned to Canada for two months after his ineligibility decision, and only then due to UNHCR intervention. This delay, however, occurred early in the Agreement's implementation, and return times may have since been reduced.

2. EOIR Adjudications

EOIR has not issued any policies or guidelines regarding the timing of Safe Third adjudications, either for detained or non-detained cases.

As noted above in Objective Two, UNHCR is aware of 18 Safe Third cases to date that have been placed in Section 240 removal proceedings and referred to immigration court for a determination of eligibility under the Agreement. All of these individuals except one (Argentinian national discussed above) were Cuban nationals and to UNHCR's knowledge, none were detained. While some have had their initial master calendar hearings, none have yet had their eligibility under the Agreement adjudicated. As a result, it has not been possible to estimate the length of time for each of the above three stages of the Safe Third process.

UNHCR considers the timely adjudication of Safe Third cases to be of primary importance in the context of detained cases. UNHCR understands that EOIR already has a system in place to prioritize processing of detained cases, and encourages compliance with this system.⁶³ Consistent with existing law and procedures, it would seem most logical to adjudicate Safe Third eligibility during the relief stage of removal proceedings, *i.e.*, after removability has been determined and concurrent with the adjudication of a request for asylum as a form of relief from removal.

⁶² UNHCR Executive Committee, *Conclusion on Detention of Refugees and Asylum-Seekers*, No. 44, para. (c) ("Recognize[s] the importance of fair and expeditious procedures for determining refugee status or granting asylum in protecting refugees and asylum-seekers from unjustified or unduly prolonged detention.").

⁶³ See EOIR Interim Operating Policies and Procedures Memorandum 84-1 from William R. Robie, Chief Immigration Judge, "Case Policies and Processing", para. 1 (February 6, 1984) (the completion of detained cases and detained bond redetermination hearings should be the highest priority relative to all other cases and calendared at the earliest possible date consistent with the Uniform Docketing System. All efforts should be made to complete these cases expeditiously.).

Recommendations:

- 4.1 *To ensure efficient processing, establish timeframes for the adjudicative phase of the Safe Third process, with flexibility for more thorough consideration of possible public interest cases. (CIS)*
- 4.2 *Consistent with CIS training materials and Principle Two of the Parties' Statement of Principles, amend the CIS Procedures Manual to ensure that credible testimony alone may be considered sufficient to prove eligibility under one of the Agreement's exceptions. (CIS)*

E. Objective Five: Asylum-seekers are aware of their rights and understand the Safe Third process.

UNHCR found that asylum-seekers often have questions about the Safe Third process and may rely on DHS officials to explain the process to them either at the POE, while in detention, during adjudication of their claim, and - for those who wish to submit a request for reconsideration - after an eligibility decision has been rendered.

1. DHS Processing

a. TSI Form/Orientations

DHS has employed several mechanisms to ensure that Safe Third applicants are aware of their rights and understand the Safe Third eligibility determination process. As noted earlier, CBP Officers are to give asylum-seekers who are subject to the Agreement and placed in expedited removal proceedings a Threshold Screening Information (TSI) Form, which explains the Safe Third process.⁶⁴ Individuals seeking admission under the VWP who request asylum or indicate a fear of persecution are to be provided a copy of the TSI Form as well. CBP Officers are required to have the Form read to the applicant by an interpreter in his/her native language if the applicant does not read English. (The TSI Form is currently available only in English). CIS Asylum Officers are to confirm that each asylum-seeker received and understood the contents of the TSI Form. If the asylum-seeker has not received or has not understood the TSI Form, the Asylum Officer must provide the asylum-seeker with a copy of the TSI Form as well as a verbal orientation.⁶⁵

As noted above in Objective Two, numerous case files did not contact TSI Forms, raising concerns that CBP and/or CIS did not systematically provide them to Safe Third applicants. Safe Third applicants interviewed by UNHCR stated that Asylum Officer's orientations were generally conducted either telephonically in advance of the threshold screening interview or in person just before the threshold screening interview. UNHCR was able to observe only two orientations. One of these orientations consisted of the Asylum Officer simply reading the TSI Form to the asylum-seeker. The other orientation was more thorough, and included an explanation of what types of evidence the asylum-

⁶⁴ CBP IFM, Chapter 17.11(d).

⁶⁵ CIS Procedures Manual, Section III(D)(I)(b).

seeker may be required to present. During the 12 threshold screening interviews that UNHCR observed, Asylum Officers consistently offered asylum-seekers the opportunity to ask questions. Asylum Officers were courteous, patient, and generally utilized appropriate interview techniques.⁶⁶

UNHCR supports DHS' provision of the TSI Form to asylum-seekers, as well as DHS' policy of providing verbal orientations as needed, as this information has proven to be a valuable resource.⁶⁷ UNHCR found, however, that despite the provision of the Form and the orientation, a number of asylum-seekers interviewed by UNHCR remained confused about the Safe Third process and/or their rights under the Agreement. Many applicants did not understand that they had to prove their eligibility under the Agreement in order to proceed with their asylum claim. Of those who did not understand the process, most did also not comprehend the family based exceptions under the Agreement.⁶⁸ UNHCR also found that many Safe Third applicants remained confused about the threshold screening interview *vis-à-vis* the credible fear interview, and were uncertain whether or not they had already received an "asylum" interview. UNHCR has encouraged DHS to minimize this confusion by delineating the Safe Third and Credible Fear portions of the Asylum Officer interviews as much as possible. UNHCR understands that in response to this recommendation, CIS issued informal guidance to its Asylum Officers which instructed them to clearly explain when they are ending a Threshold Screening Interview and beginning a Credible Fear Interview.⁶⁹ UNHCR has since observed some improvements in the delineation of the Safe Third/credible fear interviews as well as in comprehension of the interview process by asylum-seekers.

While UNHCR understands that it is impossible to ensure that all asylum-seekers fully understand the Safe Third process, the current safeguards nonetheless can be improved. In particular, UNHCR notes that the TSI Form often uses legalistic terminology that might be confusing even for highly literate asylum-seekers. The simple recitation of the TSI Form during a telephonic orientation, to the extent this occurs, does little to improve its accessibility. Asylum-seekers may understand the process better were the TSI Form re-drafted in more simplified language, or were a flowchart attached that explains the Safe Third process more visually. UNHCR has drafted a flowchart as an example of supplementary explanatory material, attached at Appendix 10. The TSI Form should also be translated into other frequently encountered languages, such as Spanish and Mandarin.

⁶⁶ UNHCR noted a few instances where Asylum Officers failed to follow procedures regarding the review of statements. As discussed *supra* in fn. 38, on several occasions Asylum Officers instructed the asylum-seeker to read their sworn statement him/herself rather than reading the sworn statement back to the asylum-seeker and making corrections where necessary.

⁶⁷ See UNHCR Executive Committee, *Conclusions on the Determination of Refugee Status*, No. 8, para. (e)(ii) (1977) ("The applicant should receive the necessary guidance as to the procedure to be followed.")

⁶⁸ For example, many applicants stated that while they remembered being asked questions about their family members, they did not understand the purpose of the questions.

⁶⁹ On 30 June, CIS Headquarters issued guidance by e-mail to Supervisory Asylum Officers instructing them to remind Asylum Officers to clarify when they are switching from the threshold screening interview to the credible fear interview and to encourage asylum-seekers to ask questions when they do not understand the process.

b. Direct-Backs to Canada

As noted earlier, UNHCR is aware of 11 Cuban asylum-seekers who were directed-back to Canada to await either their Threshold Screening Interview or their immigration court hearings. Several of these asylum-seekers stated in interviews with UNHCR that they were confused and concerned about why they had been directed-back to Canada, how the eligibility determination process would operate given their presence outside of the country, the amount of time they were required to wait for a decision, and the possibility of deportation from Canada to their home country. Neither CBP nor CIS adequately responded to these concerns. Given that Cuban nationals are no longer subject to expedited removal, but rather are placed in regular removal proceedings, this issue will need to be addressed in the future for this caseload by CBP and EOIR.

2. EOIR Processing

To UNHCR's knowledge, there are no specific orientation procedures or materials for Safe Third applicants placed directly into INA Section 240 removal proceedings. CBP Officers do not provide an information sheet comparable to the TSI Form to these applicants and EOIR has not created any comparable information form to be provided during court proceedings. No such immigration court removal proceedings have progressed beyond initial master calendar hearings to date.

Recommendations:

- 5.1 Simplify the TSI Form and/or distribute a flowchart to asylum-seekers at the POEs. Translate the TSI Form into other languages, particularly Spanish and other frequently-encountered languages. (CBP/CIS)*
- 5.2 Revise the CIS Procedures Manual and/or training materials to advise Asylum Officers on how to clearly explain the Safe Third process to asylum-seekers and to adequately delineate the threshold screening interview from the credible fear interview. (CIS)*
- 5.3 Inform asylum-seekers who are directed-back to Canada of DHS direct-back procedures and explain how DHS will ensure their return for a scheduled interview/hearing. (CBP/EOIR)*
- 5.4 Establish orientation procedures and forms for those placed in 240 removal proceedings comparable to those created by DHS regarding the Safe Third eligibility process. (EOIR)*

F. Objective Six: Asylum-seekers have the opportunity for third party assistance throughout the process.

Access to third party assistance is of significant importance for asylum-seekers under the Agreement.⁷⁰ Third parties - including asylum-seekers' attorneys, family members, NGOs, and UNHCR - help explain relevant procedures to the asylum-seeker, facilitate communication with DHS officials, prepare submissions to adjudicating officials, and advocate for the asylum-seeker at interviews and/or hearings.

Access to third party assistance is especially important for U.S.-bound asylum-seekers, as UNHCR has found that they are generally unaware of the Agreement and its procedures upon arrival at the United States POE. This in contrast to Canada-bound asylum-seekers, many of whom receive legal counselling and assistance from United States border NGOs before submitting their refugee claim to Canadian authorities. As a result of their detention and frequent need to submit documentary evidence, U.S.-bound asylum-seekers are also often more reliant on third party assistance. Asylum-seekers returned to the United States from Canada under the Agreement may also require third party assistance to understand the reconsideration mechanism and how to submit a reconsideration request to United States POE officials.

Third party assistance is predicated on an awareness of the opportunity for assistance; the ability of the third party to be present, either in person or telephonically, at relevant interviews and hearings; and the ability to contact and communicate with the third party.

1. Advisal of Opportunity for Assistance

As noted earlier, the CBP Field Inspector's Manual requires CBP Officers to distribute the Threshold Screening Information (TSI) Form and a legal service provider list to all Safe Third asylum-seekers placed in expedited removal proceedings.⁷¹ The TSI Form includes an advisal of the right to counsel (at no expense to the government).⁷² The CBP Field Inspector's Manual also requires that Safe Third applicants subject to the VWP be given the TSI Form,⁷³ although there is no mention of the legal service providers list. While CBP officers have stated that they provide the legal service provider list to VWP applicants as a matter of practice, it was not included in the one redacted case file UNHCR received regarding a VWP applicant. Asylum-seekers placed in Section 240 removal proceedings are advised of their right to representation at their initial master

⁷⁰ See Global Consultations on International Protection, Second Meeting, *Asylum Processes: Fair and Efficient Asylum Procedures*, EC/GC/01/12, para. 50(g) (May 31, 2001) (“At all stages of the procedure, including the admissibility stage, asylum-seekers should receive guidance and advice on the procedure and have access to legal counsel.”).

⁷¹ CBP IFM, Chapters. 17.11(d)(2) and (3).

⁷² Paragraph 5 of the Form states that “during the threshold screening” applicants may “consult with a person or persons of [their] choosing, at no expense to the United States government.”

⁷³ CBP IFM, Chapter 17.11(d)(8).

calendar hearing in immigration court and are provided a list of legal service providers at that time.⁷⁴

UNHCR found that U.S.-bound asylum-seekers placed in expedited removal generally understood that they had a right to third party assistance. The distribution of the TSI Form and the legal service provider list was likely to have been helpful in this regard. Due to privacy concerns and a lack of identifying information, UNHCR was unable to verify with Cuban asylum-seekers placed in Section 240 proceedings whether they were aware of their right to counsel. However, UNHCR is aware that several Cuban asylum-seekers placed in Section 240 proceedings did obtain legal assistance from local NGOs.

2. Third Party Presence at Interviews / Hearings

Under DHS regulations, Safe Third applicants are permitted to bring a “consultant” with them to their Threshold Screening Interviews before CIS Asylum Officers.⁷⁵ INA Section 292 and accompanying regulations ensure the right to representation by counsel and accredited representatives during Section 240 removal proceedings.⁷⁶

During interviews monitored by UNHCR, attorneys were allowed to attend such interviews, to present evidence on behalf of their clients, and to make arguments regarding their clients’ eligibility to apply for asylum in the United States under the Agreement. Several of the Cuban asylum-seekers placed in Section 240 removal proceedings also reported that they had legal representatives who attended their master calendar hearings.

3. Ability to Contact / Communicate with Third Parties

UNHCR is concerned about the ability of detained asylum-seekers to contact and communicate with third parties for assistance during the Safe Third process.⁷⁷ As discussed earlier, many border detention facilities provided no access to free telephone calls to local legal service providers and had other telephone access issues which impeded detainees’ access to third party assistance.⁷⁸ These restrictions on telephone access affected asylum-seekers’ ability to communicate not only with legal service providers, but also to family members and other third parties who may be providing similar assistance.

⁷⁴ 8 C.F.R. § 1240.10(a).

⁷⁵ 8 C.F.R. § 208.30(d)(4) and (e)(6).

⁷⁶ 8 C.F.R. § 208.30(d)(4) and 8 C.F.R. § 1240.10(a).

⁷⁷ UNHCR Guidelines on Detention of Asylum Seekers, Guideline 5, Geneva (February 10, 1999) (“If detained, asylum-seekers should be entitled to the following minimum procedural guarantees: (v) to contact and be contacted by the local UNHCR Office, available national refugee bodies or other agencies and an advocate. The right to communicate with these representatives in private, and the means to make such contact should be made available. Detention should in no way constitute an obstacle to the asylum-seekers’ possibilities to pursue their asylum application.”).

⁷⁸ See Objective Eight for a fuller discussion of these issues.

Recommendation:

6.1 Provide adequate telephone access for detained asylum-seekers subject to the Agreement. Ensure free telephone calls to legal service providers and UNHCR from all detention facilities where Safe Third applicants may be held, and post telephone use instructions and relevant contact information. (ICE)

G. Objective Seven: Asylum-seekers have a meaningful opportunity to present evidence in their cases.

DHS and DOJ regulations state that Safe Third applicants bear the burden of establishing by a “preponderance of the evidence” that they qualify for an exception under the Agreement to apply for asylum in the United States.⁷⁹ Other DHS guidance, as detailed in the CIS Asylum Manual, instructs Asylum Officers to “elicit testimony and evaluate it with other available evidence” to determine applicants’ eligibility under the Agreement.⁸⁰ While a lack of documentary evidence does not preclude asylum-seekers from establishing eligibility under the Agreement, it is expected that evidence will be provided unless there is a satisfactory explanation of why corroborative evidence is not reasonably available.⁸¹ Under international refugee law and as specifically noted in the Parties’ Statement of Principles, credible testimony may be sufficient to satisfy a decision-maker in the absence of documentary evidence or computer records.⁸² To UNHCR’s knowledge, EOIR has not issued any specific guidance to Immigration Judges on the consideration of evidence in Safe Third cases.⁸³

UNHCR examined two issues related to the opportunity to present evidence in individual Safe Third cases: (1) the ability of detained asylum-seekers to access and submit evidence; and (2) the consideration of evidence by United States adjudicators.

⁷⁹ 8 C.F.R. § 208.30(e)(6)(ii) and 8 C.F.R. § 1240.11(g).

⁸⁰ CIS Procedures Manual, Credible Fear Process, Section IV(J)(3).

⁸¹ DHS also provides in its CIS Safe Third Country Instructor Guide that credible testimony may be sufficient to establish that an exception applies if there. CIS Instructor Guide, *Asylum Officer Basic Training Course on Safe Third Country Threshold Screening*, Section IV.

⁸² Statement of Principles, *Procedural Issues Associated with Implementing the Agreement for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries*, para. 2, (August 30, 2002) See also UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, paras. 196 and 197 (iv) (Jan. 1992) (“...where the applicant’s account appears credible...he should, unless there are good reasons to the contrary, be given the benefit of the doubt.”) (“The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which a refugee claimant finds himself.”).

⁸³ As noted earlier in fn. 40, EOIR has issued a memorandum explaining administrative procedures as well as a Safe Third Worksheet to assist immigration judges in their adjudication of Safe Third cases. None of this guidance, however, refers specifically to the specific type or weight of evidence to consider in Safe Third cases.

1. Access to Evidence

UNHCR has been particularly concerned with the ability of detained asylum-seekers to access evidence to prove their eligibility under one of the Agreement's exceptions. Unlike credible fear determinations where an asylum-seeker's testimony is usually considered sufficient to determine eligibility to apply for asylum, UNHCR has found that in order to establish eligibility under one of the Agreement's exceptions, asylum-seekers have generally been expected to provide some documentation in support of their claim, be it copies of birth/marriage certificates or third party affidavits.

Given that the ability of asylum-seekers to obtain evidence while in detention depends in large part on their ability to communicate with persons outside of the detention facility, telephone access to legal representatives, family members, and other third parties is critical. However, as noted earlier, UNHCR found serious problems with phone access in most of the detention facilities that it visited during its Safe Third monitoring. Many of the facilities provided no access to free telephone calls to local legal service providers and/or had other phone access issues.⁸⁴ Detainees frequently stated that they were unable to call family members, attorneys, or other third parties as a result of phone access problems.⁸⁵ UNHCR found that while CIS Asylum Officers were at times willing to facilitate detainee phone calls in order to obtain evidence, they were unclear about how to do so.⁸⁶ On 30 June 2005, CIS issued informal guidance to Asylum Officers on the facilitation of detainee phone calls.⁸⁷ UNHCR has observed some improvement in Asylum Officers' facilitation of telephone calls since the issuance of this guidance.⁸⁸

⁸⁴ As noted in Objective Eight, the most serious additional issues of concern included problems with: collect calls (particularly at collect-call only facilities) and functionality issues (such as the necessity to program phone numbers into the system and/or the delay/lack of response to requests to "add" numbers or activate PIN numbers in order to make calls).

⁸⁵ For a fuller discussion of phone access issues, *see* Objective 8 and Appendix 11.

⁸⁶ For example, in one case, an Asylum Officer appeared unclear about whether she was authorized to use the CBP phone at the POE to facilitate a phone call. In other cases, Asylum Officers asked detained applicants whether they could make a phone call to obtain the required evidence, and when the applicants responded that they could not due to a lack of phone access at their detention center, the Asylum Officers were unclear about how to proceed.

⁸⁷ This guidance instructed Asylum Officers, pursuant to a request by CBP HQ, to check with authorities at local POEs to ensure that asylum-seekers are able to make phone calls to third parties at the POEs. This guidance also instructed Asylum Officers to inform CIS HQ of any telephone access issues at particular detention centers.

⁸⁸ For example, during an orientation on 14 November, an Asylum Officer from the Newark Field Office asked a detained asylum-seeker if it would be easier to have the Asylum Officer call relatives in order to obtain evidence of their legal status rather than attempting to personally telephone them from the detention facility. The Asylum Officer then asked a Deportation Officer for permission to allow the asylum-seeker access to his previously unavailable luggage in order to allow him to access his telephone numbers and make the necessary calls to his relatives.

2. Consideration of Evidence

In its observation of interviews and its review of case files, UNHCR found that CIS Asylum Officers, in general, properly elicited testimony, made reasonable efforts to confirm family relationships, and applied the correct standard of proof in evaluating Safe Third eligibility.

In particular, UNHCR found that CIS accommodated asylum-seekers for whom certain types of documentation were not reasonably available. For example, several applicants told Asylum Officers during their threshold screening interviews that it would be extremely difficult, if not impossible, to obtain birth or marriage certificates from their home countries in order to establish a family relationship. In these cases, Asylum Officers were prepared to accept affidavits and other forms of evidence in *lieu* of government-issued documentation. Asylum Officers also generally gave asylum-seekers the necessary time to gather and present evidence after their threshold screening interviews.

As a result of the above policies and practice, no asylum-seekers were denied eligibility under one of the Agreement's exceptions due to their failure to produce documentation in support of their claims. Regrettably, while the additional time provided by CIS to obtain evidence enabled asylum-seekers to prove the required family relationships, it also resulted in longer periods of detention. To UNHCR's knowledge, CIS has required the submission of documentary evidence in all cases to date to establish eligibility to apply for asylum under the Agreement, and has not determined eligibility based on credible testimony alone. An easing of documentary requirements in certain cases may result in shorter periods of detention.

Recommendations:

- 7.1 *Provide adequate telephone access for detained asylum-seekers subject to the Agreement. Ensure free telephone calls to legal service providers and UNHCR from all detention facilities where Safe Third applicants may be held, and post telephone use instructions and relevant contact information. (ICE)*
- 7.2 *To ensure detainees' ability to submit evidence, develop inter-agency DHS procedures to authorize Asylum Officers to facilitate telephone calls between detained asylum-seekers and third parties while physically present at POEs and detention facilities. (CBP/CIS/ICE)*
- 7.3 *Consistent with CIS training materials and Principle Two of the Parties' Statement of Principles, amend the CIS Procedures Manual to ensure that credible testimony alone may be sufficient to prove eligibility under one of the Agreement's exceptions. (CIS)*

H. Objective Eight: Asylum-seekers are treated fairly and humanely, and are not subject to unwarranted detention. If detained, conditions of detention are appropriate.

1. Treatment at Ports-of-Entry

In personal interviews with Safe Third applicants, UNHCR received relatively few complaints from asylum-seekers about their treatment at United States POEs. Safe Third applicants generally reported that CBP officers treated them fairly and humanely, although two Safe Third applicants commented on a lack of access to basic services at the Detroit POE.⁸⁹

UNHCR has some concerns, however, regarding CBP's varying use of restraints and holding cells at different POEs. According to CBP policy, all decisions to use restraints are to be based on an individualized assessment of the danger and/or flight risk posed by the individual.⁹⁰ CBP's restraint policy enumerates certain categories of people according to "priority of detention." Persons who attempt to enter with fraudulent documents or who have committed fraud are on this list, but are of the lowest detention priority. The policy also excepts certain categories of vulnerable populations from detention, and directs that asylum applicants not be placed in a detention cell unless otherwise indicated by their behavior.⁹¹ CBP officers at the Champlain POE, however, informed UNHCR that CBP's general policy was to restrain and/or detain in holding cells all individuals, including asylum-seekers, who attempt to enter the United States using false documents. Several Safe Third applicants complained that they were handcuffed for extended periods of time at the Champlain POE, sometimes to chairs or benches.⁹² CBP officers at the Blaine POE stated that CBP's general policy is to similarly restrain and/or detain anyone who will be transferred into ICE custody, although they noted that practices at the smaller

⁸⁹ One U.S.-bound asylum-seeker stated that she was kept in a cold cell in a tank top and without a blanket for four hours, was not allowed to make a call to her brother, and was not provided with food overnight until the next afternoon. Another south-bound asylum-seeker stated that he was not allowed food overnight.

⁹⁰ See Memorandum from Assistant Commissioner Jayson Ahern on "Discretionary Use of Restraints" (July 19, 2004), as incorporated in the CBP IFM, Chapter 17.8(i) (November 2004) (when restraints are used, "the officer must have reasonable articulable facts to support the decision. Officers should employ only the amount of restraint needed to ensure the safety of the detainee or others, and to prevent escape. Officers should take into account known criminal activity, observed dangerous or violent behavior, verbal threats, and/or the nature of the inadmissibility of the individual in determining whether to use restraints, continue their use, or remove the restraints.").

⁹¹ *Id.*

⁹² Two U.S.-bound asylum seekers stated that they were kept handcuffed either to a chair or in a "small room" for the duration of their time at the Champlain POE – up to 24 hours. UNHCR is also aware of at least one other south-bound at the Champlain POE who was handcuffed to a bench for over an hour because he attempted entry with false documents and was subsequently placed in a wet cell.

POEs within the Blaine District may differ.⁹³ Buffalo CBP stated that restraints would be used on a case-by-case basis.⁹⁴

UNHCR recognizes that the use of restraints and holding cells at POEs may be necessary and appropriate in particular situations, such as when there is a genuine flight risk or potential harm to officers or to the asylum-seeker. UNHCR is concerned, however, that at certain POEs, such as Champlain and Blaine, CBP may be using restraints and holding cells for general categories of individuals, without an individualized assessment of the person's flight risk or danger.

2. Decisions to Detain Safe Third Applicants

All U.S.-bound asylum-seekers who are placed in expedited removal proceedings are mandatorily detained, including those subject to the Agreement.⁹⁵ Subject to certain exceptions,⁹⁶ DHS retains the discretion to detain or release asylum-seekers who are not subject to expedited removal; for example, those who are applying for admission under the VWP, those placed in Section 240 removal proceedings (such as unaccompanied minors and Cuban nationals), and those who were Canada-bound and directed-back to the United States from Canada with scheduled interview dates. In such cases, local DHS officials have indicated that the primary criteria for determining eligibility for parole include danger to the community, establishment of identity, and flight risk. The availability of bed-space in local detention facilities also appears to be a factor. With regard to direct-backs from Canada, DHS officials from at least one POE noted that a scheduled interview in Canada is not a "mitigating factor" warranting an asylum-seeker's release.

To UNHCR's knowledge, DHS did not detain any of the 17 U.S.-bound asylum-seekers who were not subject to expedited removal proceedings. UNHCR considers this a positive aspect of CBP/ICE implementation of the Agreement to date.

While UNHCR was unable to systematically monitor the detention status of asylum-seekers directed-back to the United States from Canada, we were able to confirm through DHS that at least ten asylum-seekers who were directed-back and who did not appear for

⁹³ One U.S.-bound asylum-seeker complained of being kept in handcuffs at a holding area at the Boundary, WA POE upon his entry on 12 July.

⁹⁴ One applicant who was directed-back from Canada and claimed to have no criminal background stated that he was both handcuffed and placed in a holding cell at the Buffalo POE. This applicant also stated that he was restrained by his ankles to a bench inside a holding area during questioning.

⁹⁵ UNHCR would note that this policy is contrary to international principles and UNHCR guidelines which state that because asylum seekers are not criminals and are exercising their right to seek asylum in a safe country, detention should only be resorted to in cases of necessity. *See e.g.* UNHCR Executive Committee, *Conclusions on the Detention of Refugees and Asylum Seekers*, No. 44, paras. (a) and (b) (1986).

⁹⁶ DHS does not have the discretion to parole individuals with criminal convictions and/or final orders of removal. INA 240 Section 236(c)(1) and Section 241(a)(2).

their scheduled interviews were detained in the United States.⁹⁷ Eight of the ten had outstanding orders of removal in the United States. In such cases, UNHCR does not consider detention in the United States, at least initially, to be unwarranted. UNHCR would note, however, that asylum-seekers who were not detained after being directed-back from Canada during the May/June 2002 “rush” to the Canadian border generally appeared for their scheduled interviews at the Canadian POE, suggesting that they were not “flight risks” *per se*.⁹⁸ On this basis, UNHCR has in the past encouraged the United States not to detain asylum-seekers directed-back from Canada absent an individualized determination of criminality or security risk so as to ensure asylum-seekers’ access to the Canadian refugee system.⁹⁹ Two of the ten detained asylum-seekers did not have outstanding removal orders or criminal backgrounds, but were released from detention within two weeks either on bond or under an order of supervision.

3. Conditions of Detention

In its monitoring of conditions of detention for asylum-seekers subject to the Agreement, UNHCR focused on those aspects of detention that would either have the most impact on persons detained for the relatively short period of time required to complete the Safe Third process and/or that could impact an individual’s ability to establish eligibility under one of the Agreement’s exceptions. In this regard, UNHCR focused on three categories of detention conditions: (1) telephone access; (2) detainee-ICE communication; and, (3) interpretation. To the extent possible, UNHCR also examined the treatment of particularly vulnerable persons, which is addressed in further detail under Objective Nine. While UNHCR limits its discussion here to the above three detention-related concerns, it recognizes that other detention-related issues may also be of particular importance to certain Safe Third applicants.

UNHCR Washington visited ten detention facilities where Safe Third applicants were held during the processing of their cases. Four of these facilities were visited on more than one occasion.¹⁰⁰ UNHCR found that conditions of detention varied widely at these facilities, despite the requirement that all meet DHS Detention Standards. UNHCR notes, however, that the main detention facilities used for Safe Third cases on the East and West

⁹⁷ Six of these individuals were subsequently deported from the United States to their countries of origin (El Salvador, Nicaragua, Trinidad & Tobago, Egypt, and Colombia [two individuals]).

⁹⁸ CIC reported that all but five of the 189 refugee claimants directed-back to the United States from the Lacolle POE during the May/June 2002 “rush” later appeared for their scheduled CIC interviews. It is believed that the other five presented themselves at a different POE. *See* UNHCR letter to INS and adjoining Report, *Report on UNHCR Missions to U.S.-Canada Border* (August 29, 2002) regarding two mission undertaken by UNHCR to the United States-Canada border in July 2002.

⁹⁹ *See, e.g.* UNHCR letter to Mr. Victor Cerda, Acting Director of the Office of Detention and Removal, Bureau of Immigration and Customs Enforcement, *Implementation of U.S.-Canada “Safe Third Country” Agreement and Possible Pre-Implementation Surge of Asylum-Seekers at Land Border POEs* (December 3, 2004) regarding the anticipated implementation of the Agreement and the expected surge in asylum-seekers at the United States-Canada border.

¹⁰⁰ *See* “Detention Conditions Summary Chart” at Appendix 11.

Coasts - the Buffalo Federal Detention Facility in Batavia, NY (“Batavia facility”)¹⁰¹ and the Northwest Detention Center in Tacoma, WA¹⁰² - maintained better conditions of confinement than the other facilities visited during the monitoring period. UNHCR also notes, however, that because the Batavia facility does not hold female detainees, female Safe Third applicants on the East Coast were generally detained in local and county jails that had inferior conditions.¹⁰³

a. Telephone Access

As previously noted, telephone access can be critical to Safe Third applicants as it may affect applicants’ ability to obtain evidence, legal representation/assistance, or information about their case status and the Safe Third process.¹⁰⁴ Of the ten detention facilities that ROW visited, six or seven provided no access to free telephone calls to local legal service providers.¹⁰⁵ Eight facilities had additional phone access issues of concern. *See* attached Appendix 11 for a listing of telephone issues by facility. Primary telephone issues of concern included the following:

- Free Calls – While eight facilities had access in principle to the “PCS *Pro Bono* Platform” that enables free calls to legal service providers, only the systems at the Northwest Detention Center, the Elizabeth Detention Facility, and most recently, the Batavia facility, were fully functional.¹⁰⁶ Many facilities also did not post instructions on how to use the phone system or did not post the PCS dial codes for the legal service providers, embassies and UNHCR. UNHCR notes that during its monitoring period, ICE made significant improvements in its posting of phone use instructions, PCS dial codes, and free direct-dial phone numbers for legal service providers at several facilities, most notably at the Batavia facility.

¹⁰¹ At least six U.S.-bound Safe Third applicants (40% of the total detained U.S.-bound male applicants in the Buffalo District) were detained for some period of time at the Batavia facility, as were the majority of detained applicants directed-back from Canada.

¹⁰² Five United States bound Safe Third applicants were detained at the Northwest Detention Center.

¹⁰³ Female Safe Third applicants were held in the following local and county jails on the East Coast: Northwest Detention Center, Calhoun County Jail, Monroe County Jail, Erie County Holding Center, and Wyoming County Jail. Female Safe Third applicants were also held at the Elizabeth Detention Facility, where conditions were generally better than at the local and county jails.

¹⁰⁴ Executive Committee, *Conclusions on the Detention of Refugees and Asylum Seekers*, No. 44, para. (g) (1986) (“refugees and asylum-seekers who are detained be provided with the opportunity to contact the Office of the United Nations High Commissioner for Refugees or, in the absence of such office, available national refugee assistance agencies.”).

¹⁰⁵ DHS Detention Standards provide that all detainees must have the ability to make free telephone calls to local legal service providers. *See* INS Detention Standards on Telephone Access, Section III(E) (September 20, 2000) (“The facility shall enable all detainees to make calls to the INS-provided list of free legal service providers...at no charge to the detainee or the receiving party.”).

¹⁰⁶ Lack of full telephone functionality at the facilities was a result in four cases of a failure to program legal service provider numbers into the system (Monroe, Erie, Franklin, and Albany County Jails), and in another case the result of a failure to update the outdated PCS codes (Calhoun County Jail).

- Collect Calls – Of the ten facilities visited, five permitted only collect-calls (*i.e.*, detainees were unable to use phone cards to initiate phone calls), making it difficult for detainees to contact government offices and NGOs that did not accept collect calls. Detainees reported that telephone service providers frequently blocked collect calls, for example, to family members and UNHCR, and that international collect calls were often permitted only on a collect-call basis or were prohibited altogether.¹⁰⁷
- Access to Telephones – At one facility staff reported that there was no telephone access for an initial 72 hours while detainees were held in mandatory holding cells.¹⁰⁸
- General Calling – At several facilities, all telephone numbers had to be programmed into the system in order to make calls.¹⁰⁹ At a few facilities, detainees reported a significant delay in activating PIN numbers or “adding” numbers to the list of approved numbers, or a lack of response to requests to do so.¹¹⁰
- Notification of Legal Service Provider Phone Numbers – In five facilities, legal service provider and UNHCR phone numbers were not posted in one or more detainee living areas.
- Access to Property – Detainees in a few facilities reported that requests to obtain phone numbers from their luggage or from their cell phones were ignored or denied.
- Functionality of Telephone System - Various problems were reported by detainees, including: restricted calls, disconnected calls, connection problems, audibility problems, and inability to navigate phone trees, dial extensions, or to be transferred to another line.

¹⁰⁷ International collect calls can be of importance in Safe Third cases given applicants’ frequent reliance on family members in the country of origin to facilitate their submission of evidence and to identify, hire, and communicate with legal counsel. International calls also may be necessary for individuals directed-back or seeking reconsideration to contact Canadian government authorities.

¹⁰⁸ Franklin County Jail in Malone, NY.

¹⁰⁹ For example, at the Batavia facility and at the Franklin, Wayne, and Albany County Jails, detainees were unable to make calls to telephone numbers that had not been previously submitted to and approved by the facility. Once approved, such telephone numbers would be programmed into the telephone system under a detainee’s “PIN” number to permit him/her access to that number.

¹¹⁰ For example, at least one Safe Third applicant claimed he was prevented from making any calls during his week-long detention at the Batavia facility due to inactivation of his PIN number.

b. Detainee-ICE Communication

As previously noted, detained asylum-seekers often rely on access to ICE officials to obtain case status information, communicate with CIS or CBP officials, or request ICE assistance in facilitating return to a Canadian POE (if directed-back from Canada). Detainee-ICE communication can also be critical in resolving non-legal issues relating to conditions of detention. DHS standards state that ICE officers shall conduct weekly scheduled and unannounced visits to a facility's living and activity areas to address detainees' personal concerns and to encourage informal communication between staff and detainees.¹¹¹

UNHCR found that half of the detention facilities that it visited during its Safe Third monitoring did not provide adequate access to DHS Deportation Officers.¹¹² Many detainees complained that they had not been able to speak to an ICE officer for prolonged periods of time, and in some cases for as long as nine months.¹¹³ This problem was particularly acute in the Detroit area, where there were only a few Deportation Officers responsible for visiting eight detention facilities located in the Detroit district.¹¹⁴ ICE HQ acknowledged the staff shortages in the Detroit Field Office, which local ICE officials stated made it extremely difficult to conduct weekly visits to all area facilities.¹¹⁵

¹¹¹ ICE Detention Standard on Staff-Detainee Communication, Section III(A)(1) and (2), dated 11 July 2003.

¹¹² Wayne County Jail, Monroe County Jail, Calhoun County Jail, Erie County Holding Center, and Albany County Jail. Other than the one complaint noted in fn. 113, below, UNHCR found that ICE-Detainee communication was adequate at the Batavia facility, the Northwest Detention Center, Clinton County Jail, and Elizabeth Detention Facility.

¹¹³ For example, UNHCR interviewed a U.S.-bound Safe Third applicant at the Batavia facility who claimed he had not been able to speak to an immigration official for two months after his Safe Third eligibility decision and was not informed of his decision until three weeks after the decision was finalized. Applicant stated that despite submitting numerous written requests to speak to an officer about his case he had not been able to do so for three months. UNHCR also interviewed several asylum-seekers who stated that they had not seen a Deportation Officer for the over nine month duration of their detention at the Calhoun County Jail.

¹¹⁴ This staffing problem is exemplified by the case of one Safe Third applicant at the Monroe County Jail who had received a threshold screening interview and had been determined to be ineligible under the Agreement yet remained in detention for over two months thereafter, apparently because ICE was not aware of the decision and/or their duty to process the applicant for return to Canada. The applicant was unaware of his status and had no means of contacting the Asylum Office directly, as the phones only accepted collect calls.

¹¹⁵ ICE HQ has informed UNHCR that it intends to hire more Deportation Officers for the ICE Detroit Field Office.

Elsewhere, it was unclear whether reported problems with detainee-ICE communication were a result of infrequent facility visits by ICE officials or a result of the nature of ICE-detainee communications during these visits.¹¹⁶ While UNHCR was unable to independently verify whether ICE visits were occurring on a weekly basis or the nature of those visits, the frequency of the complaints received by detained asylum-seekers is of concern. UNHCR recognizes, however, that detainees bear some responsibility for initiating contact with ICE officials, provided they understand the process for doing so.¹¹⁷

c. Interpretation

Interpretation can be especially important during the Safe Third process, as non-native English speakers' inability to adequately communicate with DHS and jail staff could hamper their efforts to obtain and present evidence in their cases. Adequate interpretation may also be necessary for the appropriate medical treatment of detainees. DHS regulations and international standards both require the use of interpretive assistance when necessary to communicate with asylum-seekers, particularly when assistance may be needed to submit a refugee claim.¹¹⁸

Five facilities visited by UNHCR failed to provide regular access to professional interpretation when conducting intakes and/or medical exams.¹¹⁹ UNHCR found that in these facilities, a phone interpreter service was either never used or was rarely used, and only when officers or other detainees were not available. This was a particular problem in the local and county jails used by DHS to hold immigration detainees. UNHCR notes that the use of other detainees for interpretation may be inappropriate, in particular in the medical context, for accuracy and privacy reasons.

¹¹⁶ Some detainees at the Monroe County Jail complained, for example, that while a Deportation Officer did visit their detention facility, the Officer never entered the living areas to make herself available, choosing instead to call detainees she was responsible for over the intercom and meeting them outside the pods.

¹¹⁷ Many applicants interviewed by UNHCR were unaware that they could request certain types of assistance from Deportation Officers, i.e. facilitation of telephone calls.

¹¹⁸ 8 C.F.R. § 235.3(b)(2)(i) ("Interpretative assistance shall be used if necessary to communicate with the alien" by an examining immigration officer during expedited removal); UNHCR Executive Committee, *Conclusions on the Determination of Refugee Status*, No. 8, para. (e)(iv) (1977) and UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, para. 192 (iv) (Jan. 1992) (a refugee applicant "shall be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned."). See also Standard Minimum Rules for the Treatment of Prisoners, Rule 51(2) ("Whenever necessary, the services of an interpreter shall be used."). *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders. Held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

¹¹⁹ Facilities without regular professional interpretation included: Clinton County Jail in Plattsburgh, NY; Franklin County Jail in Malone, NY; Erie County Holding Center in Buffalo, NY; Wayne County Jail in Detroit, MI; and the Monroe County Jail in Monroe, MI.

Recommendations:

- 8.1 *Consistent with CBP guidance, restrain asylum-seekers at POEs only if deemed necessary after an individualized risk assessment. (CBP)*
- 8.2 *To ensure that asylum-seekers directed-back from Canada can appear for their scheduled CBSA interviews, do not detain those directed-back absent criminal or security concerns. (CBP/ICE)*
- 8.3 *Ensure adequate detention conditions for Safe Third applicants. In particular: (a) Provide adequate telephone access for detained asylum-seekers subject to the Agreement; (b) Ensure free telephone calls to legal service providers from all detention facilities where Safe Third applicants may be held, and post telephone use instructions and contact information for legal service providers and UNHCR; (c) Ensure that detained asylum-seekers have meaningful weekly access to DHS Deportation Officers (d) Ensure that facilities have access to the ICE interpreter service and instruct facilities to use it whenever necessary to communicate with detainees. (ICE)*

I. Objective Nine: Asylum-seekers benefit from the principle of family unity and particularly vulnerable asylum-seekers are treated appropriately.

1. Family Unity

The maintenance of family unity has been an area of primary concern for UNHCR with regard to both the content and the implementation of the Agreement. In its monitoring, UNHCR examined this issue in two contexts: family unity as the basis for an exception under the Agreement and detention during the eligibility process.

a. Family-Based Eligibility Under the Agreement

UNHCR recognizes that in comparison to Safe Third country agreements concluded elsewhere, the United States-Canada Agreement has adopted a relatively broad category of family members who may qualify as eligible “anchor relatives” under the Agreement.¹²⁰ The breadth of this category is limited, however, by the requirement that the anchor relative have a certain legal status in the destination country.¹²¹ The Parties chose not to adopt UNHCR’s recommendation that *de facto* family members qualify as

¹²⁰ Eligible anchor relatives under the Agreement may include: parents or guardians, children, spouses, grandparents, aunts/uncles and nieces/nephews.

¹²¹ Under the Agreement, any family member (including minors) can serve as anchor relatives if he/she has been granted refugee/asylum status or has legal status other than as a visitor. Family members over 18 years of age without legal status can also serve as eligible anchor relatives if they are not ineligible to pursue an asylum claim or have such a claim pending.

either eligible anchor relatives under the family-based exceptions or as a basis for establishing eligibility under the public interest exception.

As noted earlier, UNHCR found that asylum-seekers were able to establish their required relationships to anchor relatives in the United States for purposes of eligibility under the family-based exceptions to the Agreement. In this regard, Safe Third applicants with close family members in the United States were generally able to lodge asylum claims in the United States, resulting in the preservation of family unity. UNHCR found, however, that there were some cases where close family members remained separated due to either a failure to satisfy the legal status requirement for eligible anchor relatives (*e.g.*, daughter in the United States with adjustment to lawful permanent resident status application pending) or due to non-inclusion in the category of eligible family members (*e.g.*, same sex partner). UNHCR found that the principle of family unity was not maintained in these cases, despite the equities in these cases and the availability of the public interest exception for establishing eligibility under the Agreement.

b. Detention

As previously noted, all asylum-seekers subject to expedited removal under the Agreement are mandatorily detained. However, DHS currently has only one detention facility in the United States that can accommodate family units. If space in this facility is not available, DHS practice has been to separate the family; detaining the husband/father in a detention facility and holding the wife and/or children in a hotel room.

Based on past practice, it appears that DHS has the authority to parole some individuals who are in expedited removal proceedings, although the scope of this authority is unclear. During UNHCR's monitoring of the Agreement, there was only one family subject to expedited removal, an Argentinean family of four.¹²² The family consisted of a mother and three minor children. DHS chose to exercise its parole authority favorably and did not detain any of the family members. DHS has indicated, however, that it would normally detain an adult male family member if he were placed in expedited removal or otherwise met the detention criteria, irrespective of his connection to a family unit or his status under the Safe Third Agreement.¹²³

2. Treatment of Vulnerable Asylum-Seekers

UNHCR also monitored whether DHS was identifying particularly vulnerable Safe Third applicants and treating them appropriately. During its monitoring, UNHCR encountered several categories of particularly vulnerable Safe Third applicants, including children (accompanied), persons with medical issues, and persons with mental health issues.

¹²² The family applied for admission at the Buffalo POE on 17 February.

¹²³ At least one family unit, a husband and wife from Colombia, was directed-back to the United States from Canada and detained in the United States. The spouses were detained separately at the same facility for a period of time.

a. CBP

The CBP Inspector's Field Manual includes special procedures on the handling of juveniles, family units, and persons of advanced age.¹²⁴ While UNHCR was unable to observe any secondary inspections first-hand, there is no indication that cases of particularly vulnerable people were handled inappropriately by DHS at the United States-Canada POEs that UNHCR monitored.¹²⁵ With regard to mental health cases, two U.S.-bound Safe Third applicants were determined by DHS to be potential suicide risks.¹²⁶ UNHCR's ability to obtain information on these two cases was limited due to the confidentiality of medical records, however, it appears that CBP appropriately handled the one applicant who was identified as a potential suicide risk at the POE.¹²⁷

b. ICE

UNHCR is not aware of any juvenile, elderly, or physically disabled Safe Third applicants who were detained. UNHCR is aware of one elderly asylum-seeker in poor health who was directed-back to the United States from Canada and who was not detained by ICE despite an outstanding order of removal. UNHCR considers this an appropriate exercise of ICE's parole authority.¹²⁸

UNHCR notes, however, that the two U.S.-bound asylum-seekers who were considered potential suicide risks (*i.e.*, possible mental health issues) were detained by ICE. DHS Detention Standards state that all new arrivals are to receive initial mental health screenings immediately, including observation and interview questions related to the detainee's potential suicide risk.¹²⁹ Detainees identified as "at risk" for suicide are to be promptly referred to medical staff for evaluation. Depending on a determination of the imminence of potential harm, a detainee may be segregated from the general population either in a special isolation room or in a Special Management Unit. DHS Detention

¹²⁴ CBP IFM, Chapter 17.8.

¹²⁵ For example, UNHCR received reports from Safe Third applicants that children were fed and were not detained at POEs.

¹²⁶ One asylum-seeker from Angola was identified as a suicide risk by CBP at the Champlain POE. The other asylum-seeker was from Nigeria and was identified as a suicide risk by Corrections Officers at the Albany County Jail while in the custody of the United States Marshals Service.

¹²⁷ According to CBP, the asylum-seeker attempted suicide after being placed in a POE holding cell to use the bathroom. An officer went to get him some water and when he returned, the asylum-seeker was sitting on the floor leaning back with one of his pant legs tied to the base of the bench and the other pant leg wrapped around his neck. The Officer untied the asylum-seeker's pants and called an EMT, who made a determination that he was not a threat to himself. He was kept in the cell with an officer watching him at all times until he was transferred to United States Marshals Service custody. CBP notified DRO that the asylum-seeker may be suicidal. CBP provided UNHCR with the asylum-seeker's "personal detention log sheet" which appears to confirm this succession of events.

¹²⁸ This discretionary parole authority is granted under 8 C.F.R. § 212.5(b) for "urgent humanitarian reasons" or "significant public benefit."

¹²⁹ DHS Detention Standard on Suicide Prevention and Intervention, Sections III(B) and (C), dated September 20, 2000. *See also* UNHCR Guidelines on Applicable Standards and Criteria Related to Detention of Asylum Seekers, Guideline 10 (asylum-seekers should have "the opportunity to receive appropriate medical treatment, and psychological counselling where appropriate.").

Standards do not specify for how long a detainee may be kept in isolation before referral for hospitalization. DHS Detention Standards also do not discuss how medications prescribed for mental health reasons are to be administered.

Due to medical confidentiality reasons, UNHCR was unable to independently verify whether the two suicide-risk asylum-seekers received appropriate mental health services once placed in detention. UNHCR would note, however, that one of the asylum-seekers reported that the mental health services available to him at the Albany County Jail (where both he and the other U.S.-bound applicant were detained for approximately one month), were inadequate;¹³⁰ especially as compared to those available at the Buffalo Federal Detention Facility, where he was subsequently detained.¹³¹ While UNHCR visited the Albany County Jail and did not observe any obvious deficiencies in its mental health care, it does have general concerns about the conditions of confinement for asylum-seekers considered suicide-risks.¹³² UNHCR is also concerned about the unavailability of mental health services at the Monroe County Jail.¹³³

¹³⁰ UNHCR learned that the Albany County facility had held an inmate who committed suicide in the facility two months prior to UNHCR's visit. This inmate was screened for mental health issues and placed on constant observation as a suicide threat. He was, however, released from constant observation when it was determined that he was no longer a threat to himself, and he hung himself in the early morning.

¹³¹ The Nigerian asylum-seeker stated that after mentioning that he wanted to harm himself, he was placed in "lock down" for two days at Albany County Jail and was then kept in segregation for two weeks. He stated that the mental health services offered to him consisted of a "mental health officer" who asked him daily if he still wanted to kill himself. In order to be released from segregation, the asylum-seeker informed the mental health officer that he did not intend to harm himself. According to the asylum-seeker, this statement alone was sufficient for him to be no longer considered a suicide risk. The asylum-seeker stated that while at the Albany County Jail he was not provided with any medication to address his anxiety and/or depression. After being transferred to Batavia some two months later, he was seen by a psychologist and was prescribed anxiety medication, which he stated reduced his anxiety significantly. The asylum-seeker noted that he was also given X-rays and an EKG at Batavia in order to diagnose and treat his symptoms of anxiety, such as insomnia, numbness, temporary paralyzation, and profuse sweating.

¹³² Medical staff at the jail informed UNHCR that the jail had a policy of constant observation for suicide risks which requires the detainees' placement in a segregation cell. The detainee may be held in the cell, potentially without any sheets or blankets and/or in a "safety smock" for up to two weeks.

¹³³ The Monroe County Assistant Jail Administrator explained to UNHCR that there are no "in-house" mental health care workers at the Monroe County Jail. There are two mental health care providers who make visits to the Jail, however they are mandated to see inmates only, and DHS detainees do not generally receive their services. If a detainee requires mental health care, Jail staff must report this to a Deportation Officer, who must then transfer the detainee to another facility.

As a general matter, UNHCR recommends that States refrain from detaining asylum-seekers with mental health issues.¹³⁴ All detained asylum-seekers should receive appropriate medical treatment and psychological counseling. UNHCR would note that while neither of the two U.S.-bound asylum-seekers of concern were found to be eligible under the Agreement and were ultimately returned to Canada, one was held in detention for 40 days (10 days by U.S. Marshals Service and 1 month by DHS), and the other for at least 127 days (27 days by U.S. Marshals Service and 100 days by DHS).

c. CIS

As previously noted, CIS Asylum Officers were generally courteous and sensitive to asylum-seekers during threshold screening interviews. UNHCR observed during the interview of one of the two U.S.-bound asylum-seekers with mental health issues that the Asylum Officer asked him about his physical and mental health with concern, and that the Officer made an effort to make the applicant feel comfortable during the questioning.¹³⁵ The transcript of the interview with the other applicant with possible mental health issues indicates that the Asylum Officer also treated his case with appropriate discretion and sensitivity.¹³⁶

Recommendation:

9.1 Do not detain asylum-seekers with mental health issues. If detained: (a) Do so only be on the certification of a qualified medical practitioner that detention will not adversely affect their health and well being; (b) Require regular follow up and support by a relevant skilled professional, and; (c) Provide access to mental health services, hospitalization and medication counseling, etc., should it become necessary. (CBP/ICE)

¹³⁴ UNHCR Guidelines on Applicable Standards and Criteria Related to Detention of Asylum Seekers, Guideline 7 (“Given the very negative effects of detention on the psychological well being of those detained, active consideration of possible alternatives should precede any order to detain asylum-seekers falling within the following vulnerable categories listed: ...Torture or Trauma Victims; and Persons with Mental or Physical Disability. In the event that individuals falling within these categories are detained, it is advisable that this should only be on the certification of a qualified medical practitioner that detention will not adversely affect their health and well being. In addition there must be regular follow up and support by a relevant skilled professional. They must also have access to services, hospitalisation and medication counselling, etc., should it become necessary.”).

¹³⁵ Observed during the Nigerian asylum-seeker’s threshold screening interview, held on 5 April at ICE Field Office in Latham, NY.

¹³⁶ Transcript of the Angolan asylum-seeker’s threshold screening interview, held on 27 June at the ICE Field Office in Latham, NY.

UNHCR MONITORING PLAN

US-CANADA “SAFE THIRD COUNTRY” AGREEMENT

(Subject to final exchange of letters between the Parties and UNHCR)

The Safe Third Country agreement (hereinafter “the Agreement”) notes, in keeping with the advice of UNHCR and its Executive Committee, that agreements among states may enhance international protection of refugees by promotion of orderly handling of asylum applications by the responsible party and the principle of burden sharing.

The Agreement acknowledges the international legal obligations of the Government of Canada and the Government of the United States (the “Parties”) under the principle of *non-refoulement* outlined in the 1951 Convention and its 1967 Protocol, as well as the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture).

The Agreement notes the Parties’ determination to safeguard for each eligible refugee claimant on its territory access to a full and fair refugee status determination procedure as a means to afford the protections of the 1951 Convention, its Protocol and the Convention Against Torture.

Article 8(3) of the Agreement further provides that the parties to the Agreement will invite UNHCR to participate in the first review of the Agreement and its implementation. Under the Agreement, this review is to take place not later than twelve months from the date of the Agreement's entry into force. Under Article 8(3) “Parties shall cooperate with UNHCR in the monitoring of this Agreement and seek input from non-governmental organizations.”

Objectives of UNHCR Monitoring

Pursuant to Article 8(3) of the Agreement, and further to its mandate under the 1951 Refugees Convention and Protocol, UNHCR will monitor the Agreement to assess whether implementation is consistent with its terms and principles, and with international refugee law.

Policy & Operating Guidelines

Before the commencement of monitoring activities, UNHCR will receive copies of all American and Canadian policy and operating guidelines for the Agreement. These will include any guidelines or instructions specific to each of the five major ports of entry (POEs) to be visited by UNHCR on a regular basis.

Methodology

Before Agreement Enters into Force

- One tripartite meeting (US, Canada, and UNHCR) to discuss the monitoring plan, on 6 August 2004, to be followed by any subsequent meetings deemed necessary by the parties;
- To the extent the data are reliable and may reasonably be obtained, US and Canada supply the latest statistics on the number of persons who presented refugee claims at a US-Canada land border POE and, of those, the number who were then detained;
- An “introductory” UNHCR visit to one designated land border POE after the monitoring plan is finalized and prior to entry into force of the Agreement;
- “Exchange of Letters” between US, Canada and UNHCR.

After Agreement Enters Into Force

- UNHCR visits to US-Canada designated land border POEs, in accordance with existing field visit protocols;
- UNHCR visits to detention centers in Canada and the US which hold asylum claimants referred by border officials, in accordance with existing practice or field visit protocols;
- Analysis of DHS/DOJ and CIC statistics, policies, case files, and other relevant documents;
- Analysis of information received from NGOs, including statistics, case files, and other relevant documents;
- Ongoing discussions with governmental and non-governmental counterparts;
- Interviews with individual asylum-seekers subject to the Agreement;
- Two tri-partite meetings (US, Canada and UNHCR) to discuss findings, after 6 months and 12 months of monitoring, as part of the first annual review (see also “Reporting” below).

Reporting

- **General:** UNHCR will formally report to the Parties its findings on the Agreement's implementation approximately six months and twelve months after the Agreement has entered into force. UNHCR expects that these reports will assist the Parties both in their implementation of the Agreement during the first year, and in their twelve-month review of the Agreements' implementation.
- **UNHCR Six-Month Briefing:** UNHCR will report orally to the Parties its interim observations regarding the implementation of the Agreement approximately six months after its entry into force.

- UNHCR Twelve-Month Review: UNHCR will report orally to the Parties its observations on the implementation of the Agreement approximately twelve months from the date of entry into force, focusing primarily on the last six months of implementation. The Parties and UNHCR will also discuss UNHCR's draft written monitoring report at this time. The final written monitoring report will be submitted to the Parties prior to their final review of the Agreement's implementation.
- Parties' Twelve-Month Report: The Parties will prepare, and share with UNHCR, their twelve-month implementation report, for review and comments. Following tripartite discussions on the Parties' draft report, the Parties and UNHCR will adopt a final report, provided UNHCR is satisfied that its credibility and independence would be properly maintained. The joint tripartite report will be made public upon agreement of the Parties and UNHCR.
- UNHCR may report on, and/or request additional tripartite meetings to discuss emergent issues as necessary. This would not affect any ongoing and regular bilateral dialogue between UNHCR and the respective host Government on the Agreement.

Site Visits: Ports of Entry (POE) and Detention Facilities

In accordance with existing field visit protocols, UNHCR will conduct site visits to US/Canada POEs during the twelve months following the entry into force of the Agreement. The focus of the site visits will be to the major ports of entry, namely:

- Detroit/Windsor
- Buffalo/Fort Erie, coupled with
- Niagara/Rainbow Bridge
- Champlain/LaColle
- Blaine/Douglas

Some visits may be extended over a period of days. UNHCR visits to other land-border POEs may also be undertaken.

UNHCR staff in the US and in Canada may visit area detention facilities in connection with the scheduled monitoring visits; each office may visit detention centres on other occasions, scheduled separately by each office.

Prior to and/or during visits to ports of entry and detention facilities, the Parties will make individual case files available to UNHCR upon request, either with applicant's consent or redacted as necessary, and will enable UNHCR to have access to individual applicants detained either at the POE or at a detention facility (for purposes of confidential interviews, with applicants' consent).

Assumptions / Constraints

- UNHCR human and financial resources;
- UNHCR access to all aspects of border procedures, including to individuals seeking asylum subject to the Agreement and related documentation; Availability of reliable statistical data.

Statistics

The following statistical information from the Parties may assist the UNHCR in its monitoring objectives, once the Agreement comes into force. The following list is not exhaustive and may be supplemented at any time. In keeping with Article 8(3) of the Agreement, UNHCR will also seek input, to the extent available, from non-governmental organizations. For statistics originating from agencies other than the US Department of Homeland Security (DHS) or the Canadian Citizenship and Immigration Canada (CIC), the Parties will make best efforts to ensure that the requested information is made available to UNHCR. With respect to the statistics described below, the Parties will provide them to the extent that they are reliable and reasonably available. The Parties will inform UNHCR if requested data is not being provided for reasons of reliability or availability.

1. General

(The Parties will provide statistical data in this category on a monthly basis. All data will be broken down to reflect each of the five major ports of entry separately. Data on all other ports of entry may be grouped or provided individually. Data will also be broken down to reflect gender, age and country of origin.)

- a) Total number of persons requesting asylum in the US and Canada at a US-Canada land border POE;
- b) Total number of persons found not to meet an exception and returned to country of last presence under the Agreement, and total number found to meet an exception.

2. Exceptions under Article 4 (2) (a) and (b) - Family Unity

(The Parties will provide statistical data in this category on a monthly basis. All data will be broken down to reflect each of the five major ports of entry separately. Data on all other ports of entry may be grouped or provided individually. Data will also be broken down to reflect gender, age and country of origin.)

- a) Number of persons deemed eligible to lodge refugee protection claims in the receiving country under Article 4(2)(a) and (b), and number of persons found to be ineligible under this exception.

3. Exceptions under Article 4 (2) (c) Unaccompanied Minors

(The Parties will provide statistical data in this category on a monthly basis. All data will be broken down to reflect each of the five major ports of entry separately. Data on all other ports of entry may be grouped or provided individually. Data will also be broken down to reflect gender, age and country of origin.)

- a) Number of persons considered “unaccompanied minors” subject to Article 4(2)(c);
- b) Number of unaccompanied minors (persons under the age of 18 not accompanied by a parent/guardian) who have parents, guardians, or close family members in the receiving country, but do not fall under Article 4(2)(a) or (b) of the Agreement, and who are returned to the country of last presence under the Agreement;
- c) To facilitate UNHCR access to these statistics in the US, UNHCR requests that the DHS Bureau of Customs and Border Protection provide Alien Registration Numbers and names of unaccompanied minors placed in removal proceedings at US-Canada land border POEs to the Executive Office for Immigration Review so that appropriate cases may be identified and case-files made available for review by UNHCR.

4. Detention

(The Parties will provide statistical data in this category on a monthly basis. All data will be broken down to reflect each of the five major ports of entry separately vis a vis where the application was initially lodged. Data on all other ports of entry may be grouped or provided individually. Data will also be broken down to reflect gender, age and country of origin.)

Total number of persons detained for more than 48 hours in the US or Canada while their cases are being examined under the Agreement. Data should include: (a) names and locations of detention centers; (b) reasons for detention; (c) dates of detention; and (d) for those detained while their cases are being examined under the Agreement, whether the person was deemed eligible to lodge a refugee claim in the receiving country under the Agreement.

5. Processing time

(The Parties will provide statistical data in this category on a monthly basis, broken down to reflect each of the five major ports of entry separately. Data on all other ports of entry may be grouped or provided individually.)

The length of time it takes the Parties to make a decision regarding eligibility to apply for refugee protection in the receiving country under the Agreement for each application for refugee protection received, as well as the average length of time.

6. Expedited Removal

(The Parties will provide statistical data in this category on a monthly basis. All data will be broken down to reflect each of the five major ports of entry separately. Data on all other ports of entry may be grouped or provided individually. Data will also be broken down to reflect gender, age and country of origin.)

- a) Number of persons seeking refugee protection in the US at a US-Canada land border POE who were placed in: (1) expedited removal proceedings, and, (2) regular (INA 240) removal proceedings.
- b) Of those persons identified in (a)(1) and (a)(2) above, the number of persons deemed eligible to lodge an asylum claim in the US under the Agreement.

7. Removal through Territory of Other Party (Article 5)

(The Parties will provide statistical data in this category on a quarterly basis, which will be broken down to reflect gender, age and country of origin.)

- a) Total number of persons removed from Canada via the US and the number returned to Canada under Article 5(a);
- b) Total number of persons removed from the US via Canada, who are subject to Article 5(b)(i);
- c) Total number of persons removed from the US via Canada, who are returned to the United States under Article 5(b)(ii).

8. Effective Review Procedures

(The Parties will provide statistical data in this category on a monthly basis. Data will also be broken down to reflect gender, age and country of origin.)

- a) For the US, the total number of persons placed in regular (INA § 240) removal proceedings who appealed the decision of the Immigration Judge regarding their eligibility to apply for asylum in the US under the Agreement, and the decisions of the Board of Immigration Appeals on those appeals;
- b) For the US, total number of applicants placed in regular (INA § 240) removal proceedings who sought reconsideration of a determination that they do not fall under any of the exceptions to the Agreement. Information should also include: (i) the exception of the Agreement at issue (e.g., Article 4(2)(a)), and (ii) final decision rendered. For Canada, and to the extent possible, the number of persons who sought the review of the negative decision before the Federal Court;

- c) To facilitate UNHCR access to the requested statistics under (a) and (b) above in the US, UNHCR requests that the DHS Bureau of Customs and Border Protection provide Alien Registration Numbers and names of unaccompanied minors placed in removal proceedings at US-Canada land border POEs to the Executive Office for Immigration Review so that appropriate cases may be identified and case-files made available for review by UNHCR;
- d) The total number of cases reconsidered by each Party under the bilateral dispute resolution mechanism, the substantive provision of the Agreement at issue, and the outcome of such reconsiderations/decisions.

9. Use of Discretion (Article 6)

(The Parties will provide statistical data in this category on a monthly basis. All data will be broken down to reflect each of the five major ports of entry separately. Data on all other ports of entry may be grouped or provided individually. Data will also be broken down to reflect gender, age and country of origin.)

Total number of cases considered under Article 6 of the Agreement and total number deemed eligible to lodge a refugee protection claim in the receiving country under Article 6.

10. Resettlement provision (Article 9)

(The Parties will provide statistical data in this category once before the six-month review and as available thereafter.)

Total number of persons resettled to either the US or Canada, including information on first country of asylum, dates of resettlement and country of resettlement pursuant to Article 9 of the Agreement.

11. Other information on asylum applications

(The Parties will provide statistical data in this category on a monthly basis.)

Total number of refugee claims lodged inland in either country (i.e., not at a POE). Total number for the same period of claims lodged in either country during the previous year, broken down by month, should also be provided.

Estimated UNHCR Monitoring Costs (in US\$)

The estimated costs (both UNHCR Canada and UNHCR USA) for the proposed UNHCR monitoring plan is approximately \$200,000, covering costs of staff travel, vehicle rental and daily subsistence allowances while on mission. The cost could be higher, depending on the number of site visits undertaken. Given UNHCR's current financial constraints, UNHCR encourages both governments to underwrite these costs to the extent possible.

14 December 2004

UNHCR MONITORING OBJECTIVES OF THE CANADA-US SAFE THIRD COUNTRY AGREEMENT

On 5 December 2002, Canada and the US signed The Safe Third Country Agreement for Cooperation in the Examination of refugee Status Claims from Nationals of Third Countries. The Canadian accompanying Regulations were published on 3 November, 2004 and the US implementing Regulations were published on 29 November 2004. The Agreement entered into force on 29 December 2004.

Under the Agreement the Parties acknowledge their international legal obligations under the principle of *non-refoulement* enshrined in the 1951 Convention and its 1967 Protocol as well as in the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Furthermore, the Parties are aware that they “must ensure... that persons in need of international protection are identified and that the possibility of indirect breaches of the fundamental principle of *non-refoulement* is avoided.” The Parties are therefore “determined to safeguard for each refugee status claimant eligible to pursue a refugee status claim who comes within 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.”

In line with Article 8(3) of the Agreement, the Parties invited UNHCR to review the Agreement and its implementation no later than 12 months from the date of entry into force. The Parties also committed to cooperating with UNHCR in the monitoring of the Agreement. Towards that end, UNHCR submitted to, and discussed with, the Parties a Safe Third Country Monitoring Plan. The Monitoring Plan outlines, inter alia, the scope of UNHCR’s monitoring role as well as the relevant information and statistical data required to carry out the monitoring role effectively. In addition, the Parties agreed to seek input from non-governmental organisations regarding implementation of the agreement.

SUBSTANTIVE PROVISIONS OF THE AGREEMENT

The Agreement requires that asylum-seekers who transit through either the U.S. or Canada lodge their refugee claim in the “last country of presence” on the grounds that they were in a country with adequate refugee protection procedures and safeguards. The Agreement applies only at U.S.-Canada land borders. The Agreement provides exceptions for certain asylum-seekers, including: (1) those with “adult” family members (defined broadly) who have either legal status or a refugee claim pending in the “receiving country”; (2) unaccompanied minors; and (3) those who do not require a visa to enter the receiving country. The Agreement also establishes that asylum-seekers will not be referred to a third country for adjudication of their claim, thus creating a “closed system” and avoiding the possibility of “refugees in orbit.”

MONITORING STANDARDS AND PRINCIPLES

UNHCR monitors will be using, on the one hand, standards and principles derived from the Agreement, accompanying Rules and Regulations, Standard Operating Procedures (or Safe Third Manuals). In addition, monitors will also use the Statement of Mutual Understanding (SMU) regarding the sharing of information on asylum and refugee status claims, as well as its Asylum Annex, that were agreed between the Department of Citizenship and Immigration Canada (CIC) and the Bureau of Citizenship and Immigration Services (BCIS) of the U.S. Department of Homeland Security (DHS).

On the other hand, UNHCR staff will be using international refugee law standards and principles in their monitoring responsibilities. The sources of international refugee law – those relevant in the context of the Safe Third Country Agreement between Canada and the U.S. - are, among others, the 1951 Convention and its 1967 Protocol (in particular Article 33), Statute of UNHCR, Executive Committee Conclusions and other applicable human rights principles and standards. Considered relevant in this context are the numerous policies and guidelines issued by UNHCR on, *inter alia*, asylum-seeking women and children and other vulnerable groups.

MONITORING OBJECTIVES

The following are the objectives of UNHCR monitoring of the implementation of the Safe-third country Agreement.

Overall objective: The Agreement is implemented in keeping with the letter and spirit of the Agreement as well as in accordance with international refugee law.

1. Asylum-seekers have access to relevant border and adjudicating officers.
2. Asylum-seekers have the opportunity for third party presence during proceedings.
3. Asylum-seekers not subject to the Agreement are effectively identified.
4. Asylum-seekers' claims are determined and finalised expeditiously.
5. Asylum-seekers are subject to eligibility determination interviews that are carried out in accordance with recognised international standards.
6. Asylum-seekers are treated fairly and humanely in accordance with international human rights standards.
7. Vulnerable individuals are treated in a sensitive manner.
8. Asylum-seekers benefit from the principle of family unity.
9. Asylum-seekers subject to the Agreement are aware of their rights.
10. Asylum-seekers are not subject to unwarranted detention.
11. UNHCR staff has access to individual files.
12. UNHCR staff has access to designated land border ports of entry and "border" detention facilities.

**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**

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, done at Geneva, July 28, 1951 (the "Convention"), and the Protocol Relating to the Status of Refugees, done at New York, January 31, 1967 (the "Protocol"), that the United States is a party to the Protocol, and reaffirming their obligation to provide protection for refugees on their territory in accordance with these instruments;

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 and Other Cruel, Inhuman or Degrading Treatment or Punishment, done at New York, December 10, 1984 (the "Torture Convention ") and reaffirming their mutual obligations to promote and protect human rights and fundamental freedoms.

RECOGNIZING and respecting the obligations of each Party under its immigration laws and policies;

EMPHASIZING that the United States and Canada offer generous systems of refugee protection, recalling both countries' traditions of assistance to refugees and displaced persons abroad, consistent with the principles of international solidarity that underpin the international refugee protection system, and committed to the notion that cooperation and burden-sharing with respect to refugee status claimants can be enhanced;

DESIRING to uphold asylum as an indispensable instrument of the international protection of refugees, and resolved to strengthen the integrity of that institution and the public support on which it depends;

NOTING that refugee status claimants may arrive at the Canadian or United States land border directly from the other Party, territory where they could have found effective protection;

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 by the responsible party and the principle of burden-sharing;

AWARE that such sharing of responsibility must ensure in practice that persons in need of international protection are identified and that the possibility of indirect breaches of the fundamental principle of non-refoulement are avoided, and therefore determined to safeguard for each refugee status claimant eligible to pursue a refugee status claim who comes within 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;

HAVE AGREED as follows:

ARTICLE 1

1. In this Agreement,
 - (a) **“Country of Last Presence”** means that country, being either Canada or the United States, in which the refugee claimant was physically present immediately prior to making a refugee status claim at a land border port of entry.
 - (b) **“Family Member”** means the spouse, sons, daughters, parents, legal guardians, siblings, grandparents, grandchildren, aunts, uncles, nieces, and nephews.
 - (c) **“Refugee Status Claim”** means a request from a person to the government of either Party for protection consistent with the Convention or the Protocol, the Torture Convention, or other protection grounds in accordance with the respective laws of each Party.
 - (d) **“Refugee Status Claimant”** means any person who makes a refugee status claim in the territory of one of the Parties.

(e) “**Refugee Status Determination System**” means the sum of laws and administrative and judicial practices employed by each Party's national government for the purpose of adjudicating refugees status claims.

(f) “**Unaccompanied Minor**” means an unmarried refugee status claimant who has not yet reached his or her eighteenth birthday and does not have a parent or legal guardian in either Canada or the United States.

2. Each Party shall apply this Agreement in respect of family members and unaccompanied minors consistent with its national law.

ARTICLE 2

This Agreement does not apply to refugee status claimants who are citizens of Canada or the United States or who, not having a country of nationality, are habitual residents of Canada or the United States.

ARTICLE 3

1. In order to ensure that refugee status claimants have access to a refugee status determination system, the Parties shall not return or remove a refugee status claimant referred by either Party under the terms of Article 4 to another country until an adjudication of the person's refugee status claim has been made.

2. The Parties shall not remove a refugee status claimant returned to the country of last presence under the terms of this Agreement to another country pursuant to any other safe third country agreement or regulatory designation.

ARTICLE 4

1. Subject to paragraphs 2 and 3, the Party of the country of last presence shall examine, in accordance with its refugee status determination system, the refugee status claim of any person who arrives at a land border port of entry on or after the effective date of this Agreement and makes a refugee status claim.

2. Responsibility for determining the refugee status claim of any person referred to in paragraph 1 shall rest with the Party of the receiving country, and not the Party of the country of last presence, where the receiving Party determines that the person:

- (a) Has in the territory of the receiving Party at least one family member who has had a refugee status claim granted or has been granted lawful status, other than as a visitor, in the receiving Party's territory; or
 - (b) Has in the territory of the receiving Party at least one family member who is at least 18 years of age and is not ineligible to pursue a refugee status claim in the receiving Party's refugee status determination system and has such a claim pending; or
 - (c) Is an unaccompanied minor; or
 - (d) Arrived in the territory of the receiving Party:
 - (i) With a validly issued visa or other valid admission document, other than for transit, issued by the receiving Party; or
 - (ii) Not being required to obtain a visa by only the receiving Party.
3. The Party of the country of last presence shall not be required to accept the return of a refugee status claimant until a final determination with respect to this Agreement is made by the receiving Party.
4. Neither Party shall reconsider any decision that an individual qualifies for an exception under Articles 4 and 6 of this Agreement.

ARTICLE 5

In cases involving the removal of a person by one Party in transit through the territory of the other Party, the Parties agree as follows:

- (a) Any person being removed from Canada in transit through the United States, who makes a refugee status claim in the United States, shall be returned to Canada to have the refugee status claim examined by and in accordance with the refugee status determination system of Canada.
- (b) Any person being removed from the United States in transit through Canada, who makes a refugee status claim in Canada, and:
 - (i) whose refugee status claim has been rejected by the United States, shall be permitted onward movement to the country to which the person is being removed; or

- (ii) who has not had a refugee status claim determined by the United States, shall be returned to the United States to have the refugee status claim examined by and in accordance with the refugee status determination system of the United States.

ARTICLE 6

Notwithstanding any provision of this Agreement, either Party may at its own discretion examine any refugee status claim made to that Party where it determines that it is in its public interest to do so.

ARTICLE 7

The Parties may:

- a) Exchange such information as may be necessary for the effective implementation of this Agreement subject to national laws and regulations. This information shall not be disclosed by the Party of the receiving country except in accordance with its national laws and regulations. The Parties shall seek to ensure that information is not exchanged or disclosed in such a way as to place refugee status claimants or their families at risk in their countries of origin.
- b) Exchange on a regular basis information on the laws, regulations and practices relating to their respective refugee status determination system.

ARTICLE 8

1. The Parties shall develop standard operating procedures to assist with the implementation of this Agreement. These procedures shall include provisions for notification, to the country of last presence, in advance of the return of any refugee status claimant pursuant to this Agreement.
2. These procedures shall include mechanisms for resolving differences respecting the interpretation and implementation of the terms of this Agreement. Issues which cannot be resolved through these mechanisms shall be settled through diplomatic channels.

3. The Parties agree to review this Agreement and its implementation. The first review shall take place not later than 12 months from the date of entry into force and shall be jointly conducted by representatives of each Party. The Parties shall invite the UNHCR to participate in this review. The Parties shall cooperate with UNHCR in the monitoring of this Agreement and seek input from non-governmental organizations.

ARTICLE 9

Both Parties shall, upon request, endeavor to assist the other in the resettlement of persons determined to require protection in appropriate circumstances.

ARTICLE 10

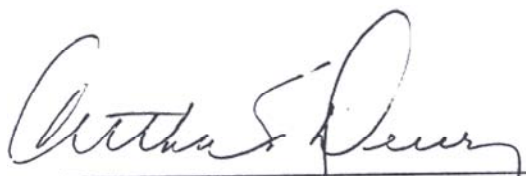
1. This Agreement shall enter into force upon an exchange of notes between the Parties indicating that each has completed the necessary domestic legal procedures for bringing the Agreement into force.
2. Either Party may terminate this Agreement upon six months written notice to the other Party.
3. Either Party may, upon written notice to the other Party, suspend for a period of up to three months application of this Agreement. Such suspension may be renewed for additional periods of up to three months. Either Party may, with the agreement of the other Party, suspend any part of this Agreement.
4. The Parties may agree on any modification of or addition to this Agreement in writing. When so agreed, and approved in accordance with the applicable legal procedures of each Party, a modification or addition shall constitute an integral part of this Agreement.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective governments, have signed this Agreement.

DONE at Washington D.C., 'this 5th day of December 2002, in duplicate in the English and French languages, each text being equally authentic.



**FOR THE GOVERNMENT
OF CANADA**



**FOR THE GOVERNMENT
OF THE UNITED STATES
OF AMERICA**

**PROCEDURAL ISSUES ASSOCIATED WITH IMPLEMENTING THE
AGREEMENT FOR COOPERATION IN THE EXAMINATION OF REFUGEE
STATUS CLAIMS FROM NATIONALS OF THIRD COUNTRIES**

STATEMENT OF PRINCIPLES

The Parties intend to act according to the following principles:

1. **Opportunity for Third Party During Proceedings.** Provided no undue delay results and it does not unduly interfere with the process, each Party will provide an opportunity for the applicant to have a person of his or her own choosing present at appropriate points during proceedings related to the Agreement. Details concerning access to proceedings will be set out in operational procedures.
2. **Proof of Family Relationship.** Procedures will acknowledge that the burden of proof is on the applicant to satisfy the decision-maker that a family relationship exists and that the relative in question has the required status. Credible testimony may be sufficient to satisfy a decision-maker in the absence of documentary evidence or computer records. It may be appropriate in these circumstances to request that the applicant and the relative provide sworn statements attesting to their family relationship.
3. **Standard for Determining Eligibility for an Exception to the Agreement.** The United States will use the preponderance of evidence standard to determine whether an applicant qualifies for an exception under the Agreement. Canada will use the balance of probabilities standard to determine whether an applicant qualifies for an exception under the Agreement. These standards are functionally equivalent.
4. **Review.** Each Party will ensure that its procedures provide, at a minimum: (1) an opportunity for the applicant to understand the basis for the proposed determination; (2) an opportunity for the applicant to provide corrections or additional relevant information, provided it does not unduly delay the process; and (3) an opportunity for the applicant to have a separate decision-maker, who was not involved in preparing the proposed determination, review any proposed determination before it is finally made.
5. **Record of Interview and Eligibility Determination.** Upon request and subject to national law, Canada and the United States will share all written materials pertaining to whether an applicant qualifies for an exception under the Agreement. Subject to national law, this information will also be available to the applicant.

6. **Requests to Reconsider Exception Determinations.** Each Party will have the discretion to request reconsideration of a decision by either Party to deny an applicant's request for an exception under the Agreement should new information, or information that has not previously been considered, come to light.
7. **No Reconsideration of Positive Determinations.** Neither Party will reconsider any decision that an applicant qualifies for an exception under the Agreement.
8. **Timeframe for Return Under the Agreement.** Returns to the country of last presence under the Agreement must take place within 90 days after the original refugee status claim is made.

Web Links to Canada and United States Forms and Regulations

Canada

Link to PP1 (CIC website)

<http://www.cic.gc.ca/manuals-guides/english/pp/pp01e.pdf>

Link to IRPA, STCA regulations (CIC website)

<http://www.cic.gc.ca/english/irpa/index.html>

United States

Link to DHS STCA regulations

<http://a257.g.akamaitech.net/7/257/2422/06jun20041800/edocket.access.gpo.gov/2004/pdf/04-26239.pdf>

Link to DOJ STCA regulations

<http://frwebgate5.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=081486178221+7+0+0&WAIAction=retrieve>

Summary of UNHCR Recommendations by Agency/Bureau

DHS / EOIR

1. In order to ensure access to the refugee status determination process in the receiving country for applicants who would otherwise be eligible to lodge refugee claims under the Agreement, UNHCR recommends that the Parties discontinue direct-backs. If an asylum-seeker is directed-back, confirm the asylum-seeker's valid legal status in the country to which he/she is being directed-back and ability to appear for his/her scheduled interview/hearing. To ensure that asylum-seekers directed-back from Canada can appear for their scheduled CBSA interviews, do not detain them absent criminal or security concerns. (CBP/ICE) [*Recommendations 1.1, 2.1, and 8.2*]
2. Revise the reconsideration mechanism to allow for direct referral of timely reconsideration requests to the government issuing the negative eligibility decision. In the alternative, UNHCR recommends that DHS re-assign the responsibility of reviewing reconsideration requests from CBP to CIS given CIS' expertise in the adjudication of Safe Third cases, and that in considering such requests, DHS obtain relevant case information from CIC/CBSA. UNHCR recommends that the Parties stay any asylum-seeker's deportation pending a final decision on his/her request for reconsideration, and facilitate the release and return of a detained asylum-seeker to the border should the reconsideration request be granted. (CBP/CIS/ICE) [*Recommendations 1.2 and 2.2*]
3. Ensure compliance with established guidelines on the distribution of the TSI Form. (CBP/CIS) [*Recommendation 2.3*]
4. Simplify the TSI Form and/or distribute a flowchart to asylum-seekers at the POEs. Translate the TSI Form into other languages, particularly Spanish and other frequently-encountered languages. (CBP/CIS) [*Recommendation 5.1*]
5. Inform asylum-seekers who are directed-back to Canada of DHS direct-back procedures and explain how DHS/EOIR will ensure their return for a scheduled interview/hearing. (CBP/EOIR) [*Recommendation 5.3*]
6. To ensure detainees' ability to submit evidence, develop inter-agency DHS procedures to authorize Asylum Officers to facilitate telephone calls between detained asylum-seekers and third parties while physically present at POEs and detention facilities. (CBP/CIS/ICE) [*Recommendation 7.2*]

7. Do not detain asylum-seekers with mental health issues. If detained: (a) Do so only be on the certification of a qualified medical practitioner that detention will not adversely affect their health and well being; (b) Require regular follow up and support by a relevant skilled professional, and; (c) Provide access to mental health services, hospitalization and medication counseling, etc., should it become necessary. (CBP/ICE) *[Recommendation 9.1]*

CBP

1. Consistent with CBP guidance, restrain asylum-seekers at POEs only if deemed necessary after an individualized risk assessment. *[Recommendation 8.1]*

CIS

1. Amend the CIS Procedures Manual to provide for the consideration of family unity principles in exercising the Agreement's public interest exception, e.g., "de facto" family members, family members with pending legal status, and same-sex partners. *[Recommendation 3.1]*
2. To ensure efficient processing, establish timeframes for the adjudicative phase of the Safe Third process, with flexibility for more thorough consideration of possible public interest cases. *[Recommendation 4.1]*
3. Consistent with CIS training materials and Principle Two of the Parties' Statement of Principles, amend the CIS Procedures Manual to ensure that credible testimony alone may be considered sufficient to prove eligibility under one of the Agreements' exceptions. *[Recommendations 4.2 and 7.3]*
4. Revise the CIS Procedures Manual and/or training materials to advise Asylum Officers on how to clearly explain the Safe Third process to asylum-seekers and to adequately delineate the threshold screening interview from the credible fear interview. *[Recommendation 5.2]*

ICE

1. Ensure that detained asylum-seekers have free telephone access to local CBP and CIS officials, and to Canadian officials when necessary. Provide adequate telephone access for detained asylum-seekers subject to the Agreement. Ensure free telephone calls to legal service providers and UNHCR from all detention facilities where Safe Third applicants may be held, and post telephone use instructions and relevant contact information. *[Recommendations 1.3, 6.1, 7.1, and 8.3]*
2. Ensure that detained asylum-seekers have meaningful weekly access to DHS Deportation Officers. Increase staffing of Deportation Officers at the ICE Detroit Field Office. *[Recommendations 1.3 and 8.3]*

3. Ensure that facilities have access to the ICE interpreter service and instruct facilities to use it whenever necessary to communicate with detainees. *[Recommendation 8.3]*

EOIR

1. Adopt further guidance regarding Safe Third eligibility adjudications for asylum-seekers placed in 240 removal proceedings. *[Recommendation 2.4]*
2. Establish orientation procedures and forms for those placed in 240 removal proceedings comparable to those created by DHS regarding the Safe Third eligibility process. *[Recommendation 5.4]*

**"Safe Third Country" Agreement - Cases Adjudicated by DHS -
Subject to Agreement**
**"Safe Third Country" Agreement - Cases Adjudicated by
DHS - Not Subject to Agreement**

Date of Entry	Nationality	Gender	Age	Family Group	Exception Found	Basis for Exception	Port of Entry	Asylum Office
12/29/04	Armenia	M	19	No	Yes	USC Aunt	Peace Bridge, NY	Newark, NJ
1/5/05	China	M	53	No	No	-----	Detroit, MI	Chicago, IL
1/26/05	Cuba	M	25	No	Yes	LPR Brother	Rainbow Bridge, NY	Newark, NJ
2/16/05	Cuba	M	38	No	Yes	USC Aunt	Champlain, NY	Newark, NJ
2/11/05	Nigeria	M	40	No	No	-----	Champlain, NY	Newark, NJ
2/17/05	Cuba	F	20	No	No	-----	Houlton, ME	Newark, NJ
2/20/05	Cuba	F	31	Yes	Yes	LPR Uncle	Peace Bridge, NY	Newark, NJ
2/20/05	Cuba	M	4	Yes	Yes	LPR Uncle	Peace Bridge, NY	Newark, NJ
2/25/05	Cuba	M	65	No	Yes	LPR Aunt	Rainbow Bridge, NY	Newark, NJ
3/9/05	Cuba	M	19	No	Yes	LPR Aunt	Rainbow Bridge, NY	Newark, NJ
3/17/05	Uzbekistan	M	36	No	Yes	Asylee Brother	Champlain, NY	Newark, NJ
3/29/05	Fr. Soviet Republic	F	20	No	No	-----	Highgate Springs, VT	Newark, NJ
3/30/05	Cuba	M	43	Yes	Yes	LPR Niece	Champlain, NY	Newark, NJ
3/30/05	Cuba	F	43	Yes	Yes	LPR Niece	Champlain, NY	Newark, NJ
3/30/05	Cuba	M	45	No	No	-----	Champlain, NY	Newark, NJ
4/4/05	Cuba	M	40	No	No	-----	Rainbow Brige, NY	Newark, NJ
4/9/05	Liberia	M	35	No	No	-----	Peace Bridge, NY	Newark, NJ
4/17/05	Cuba	F	4	Yes	Yes	USC Aunt	Rainbow Bridge, NY	Newark, NJ
4/17/05	Cuba	F	33	Yes	Yes	USC Aunt	Rainbow Bridge, NY	Newark, NJ
4/17/05	Cuba	F	17	Yes	Yes	USC Aunt	Rainbow Bridge, NY	Newark, NJ
4/17/05	Cuba	M	54	Yes	Yes	USC Aunt	Rainbow Bridge, NY	Newark, NJ
4/22/05	Cuba	F	35	No	Yes	LPR Uncle	Detroit, MI	Chicago, IL
5/4/05	China	F	26	No	No	-----	Detroit, MI	Chicago, IL
5/16/05	Cuba	M	24	No	Yes	LPR Uncle	Rainbow Bridge, NY	Newark, NJ
5/23/05	Cuba/Mexico	M	27	No	Yes	Refugee Father	Rainbow Bridge, NY	Newark, NJ
5/23/05	Cuba	M	53	No	Yes	USC Sister	Rainbow Bridge, NY	Newark, NJ
5/28/05	China	M	20	No	Yes	Asylee Uncle	Detroit, MI	Chicago, IL
6/3/05	Angola	M	32	No	No	-----	Champlain, NY	Newark, NJ
6/5/05	Cuba	M	38	No	No	-----	Rainbow Bridge, NY	Newark, NJ
6/7/05	Cuba	F	24	No	No	-----	Rainbow Bridge, NY	Newark, NJ
6/11/05	Mexico	F	21	No	Yes	TPS Husband	Rainbow Bridge, NY	Newark, NJ
6/17/05	Haiti	F	30	No	No	-----	Champlain, NY	Newark, NJ
7/12/05	Philippines	M	32	No	No	-----	Boundary, WA	San Francisco, CA
7/12/05	Dem. Rep. of Congo	M	22	No	No	-----	Derby Line, VT	Newark, NJ
7/23/05	Sri Lanka	M	39	No	Yes	LPR Father	Rainbow Bridge, NY	Newark, NJ
8/29/05	Colombia	M	32	No	No	-----	Massena, NY	Newark, NJ
10/8/05	Nigeria	F	35	No	Yes	USC Brother	Detroit, MI	Chicago, IL
10/28/05	Ethiopia	M	29	No	Yes	LPR Sister, USC Uncle	Peace Bridge, NY	Newark, NJ
11/6/05	Colombia	M	33	No	No	-----	Pacific Hwy, WA	San Francisco, CA

"Safe Third Country" Agreement - Cases Adjudicated by DHS - Not Subject to Agreement

Date of Entry	Nationality	Gender	Age	Family Group	Subject to Agmt.	Basis	Port of Entry	Asylum Office
1/14/05	Canada	F	38	No	No	Canadian Citizen	Seattle, WA	San Francisco, CA
2/4/05	Canada	F	50	No	No	Canadian Citizen	Sumas, WA	San Francisco, CA
5/30/05	Canada	M	53	No	No	Canadian Citizen	Sumas, WA	San Francisco, CA
10/1/05	Canada	M	44	No	No	Canadian Citizen	Pacific Hwy, WA	San Francisco, CA

"Safe Third Country" Agreement - Abandoned/Dissolved Cases

Date of Entry	Nationality	Gender	Age	Family Group	Subject to Agmt.	Basis	Port of Entry	Asylum Office
2/17/05	Argentina	M	<1	Yes	Abandoned	N/A	Peace Bridge, NY	Newark, NJ
2/17/05	Argentina	F	<1	Yes	Abandoned	N/A	Peace Bridge, NY	Newark, NJ
2/17/05	Argentina	F	39	Yes	Abandoned	N/A	Peace Bridge, NY	Newark, NJ
2/17/05	Argentina	M	<1	Yes	Abandoned	N/A	Peace Bridge, NY	Newark, NJ
4/30/05	Nigeria	M	36	No	Dissolved	N/A	Champlain, NY	Newark, NJ

"Safe Third Country" Agreement - Cases Adjudicated by EOIR

Date of Entry	Nationality	Gender	Age	Family Group	Charge	Case Status	Port of Entry	Court
6/16/05	Cuba	M	36	unreported	212(a)(7)(A)(i)(I)	Terminated on 10/20/05	Rainbow Bridge, NY	Buffalo, NY
6/19/05	Cuba	M	34	unreported	212(a)(7)(A)(i)(I)	unreported	Rainbow Bridge, NY	Buffalo, NY; Bradenton, FL
6/20/05	Cuba	M	30	unreported	212(a)(7)(A)(i)(I)	unreported	Rainbow Bridge, NY	Buffalo, NY; Bradenton, FL
7/7/05	Cuba	F	51	unreported	212(a)(7)(A)(i)(I)	Motion to change venue	Rainbow Bridge, NY	Buffalo, NY
7/11/05	Cuba	F	48	Yes	212(a)(7)(A)(i)(I)	MC hearing on 2/9/06	Champlain, NY	Newark, NJ
7/11/05	Cuba	F	67	Yes	212(a)(7)(A)(i)(I)	MC hearing on 2/9/06	Champlain, NY	Newark, NJ
7/11/05	Cuba	F	14	Yes	212(a)(7)(A)(i)(I)	MC hearing on 2/9/06	Champlain, NY	Newark, NJ
7/21/05	Argentina	M	34	No	Referred by CIS	-----	Champlain, NY	Newark, NJ
9/2/05	Cuba	F	46	unreported	212(a)(7)(A)(i)(I)	MC hearing on 3/28/06	Ogdensburg, NY	Newark, NJ
10/25/05	Cuba	M	24	unreported	212(a)(7)(A)(i)(I)	MC hearing on 9/22/06	Peace Bridge, NY	Buffalo, NY; Miami, FL
10/25/05	Cuba	M	23	unreported	212(a)(7)(A)(i)(I)	MC hearing on 6/14/06	Peace Bridge, NY	Buffalo, NY
10/25/05	Cuba	F	24	unreported	212(a)(7)(A)(i)(I)	MC hearing on 6/14/06	Peace Bridge, NY	Buffalo, NY
10/28/05	Cuba	F	20	unreported	212(a)(7)(A)(i)(I)	MC hearing on 3/6/06	Peace Bridge, NY	Buffalo, NY; Memphis, TN
11/15/05	Cuba	F	26	unreported	212(a)(7)(A)(i)(I)	MC hearing on 7/19/06	Rainbow Bridge, NY	Buffalo, NY
11/23/05	Cuba	M	26	unreported	212(a)(7)(A)(i)(I)	MC hearing on 7/26/06	Rainbow Bridge, NY	Buffalo, NY
12/5/05	Cuba	M	41	unreported	212(a)(7)(A)(i)(I)	MC hearing on 10/26/20	Rainbow Bridge, NY	Buffalo, NY
12/9/05	Cuba	F	38	unreported	212(a)(7)(A)(i)(I)	MC hearing on 8/24/2001	Peace Bridge, NY	Miami, FL
12/9/05	Cuba	M	39	unreported	212(a)(7)(A)(i)(I)	MC hearing on 8/24/2001	Peace Bridge, NY	Miami, FL

CUMULATIVE STATISTICS

Total U.S. Asylum Applicants at U.S.-Canada Land Border Ports-of-Entry: 66
Total U.S. Asylum Applicants Subject to the "Safe Third Country" Agreement: 62

Nationalities	Cuba	38 (58%)
	Argentina	5 (7.5%)
	Canada	4 (6%)
	China	3 (4.5%)
	Nigeria	3 (4.5%)
	Columbia	2 (3%)
	Other	11 (17%)
Gender	Male	38 (60%)
	Female	25 (40%)
Age	over 55	2 (3%)
	46-55	8 (13%)
	36-45	14 (22%)
	26-35	18 (28.5%)
	18-25	14 (22%)
	Under 18	7 (11%)

Family Groups 5 family groups (15 total applicants)

Total "Safe Third" Claims Abandoned/Dissolved: 5
Total "Safe Third" Claims Finally Adjudicated: 39
Exception Found

Yes	23 (59%)
No	16 (41%)

Basis for Exceptions Found (by relationship to principal applicant)
 (percentage of all cases (23) where exception was found)

Family Relationship:

Aunt/Uncle	13 (56%)
Parent	2 (9%)
Sibling	5 (22%)
Spouse	1 (4%)
Niece/Nephew	2 (9%)

Legal Status:

USC	8 (35%)
LPR	11 (48%)
Refugee/Asylee	3 (13%)
TPS	1 (4%)

Ports-of-Entry (by CBP District)

Buffalo	36 (57%)
Champlain	13 (21%)
Detroit	5 (8%)
Seattle	6 (9.5%)
Other	3 (5%)

Timetable for DHS Adjudication of U.S.-Bound Asylum-Seekers under the “Safe Third Country” Agreement

POE by CBP District	ENTRY / CIS REFERRAL*	ORIENTATION	INTERVIEW from entry/referral date	DECISION from interview date	CONCURRENCE from decision date	TOTAL TIME
BUFFALO	12/29	1/6 <i>8 days</i>	1/6 <i>8 days</i>	1/13 <i>7 days</i>	1/13 <i>0 days</i>	15 days
	1/26	1/26 <i>0 days</i>	2/1 <i>6 days</i>	2/2 <i>1 day</i>	2/2 <i>0 days</i>	7 days
	2/20 (a) (family)	2/20 <i>0 days</i>	2/23 <i>3 days</i>	2/23 <i>0 days</i>	2/24 <i>1 day</i>	4 days
	2/20 (b) (family)	2/20 <i>0 days</i>	2/23 <i>3 days</i>	2/23 <i>0 days</i>	2/24 <i>1 day</i>	4 days
	3/9	3/9 <i>0 days</i>	3/9 <i>0 days</i>	3/9 <i>0 days</i>	3/11 <i>2 days</i>	2 days
	2/25	3/8 <i>11 days</i>	3/8 <i>11 days</i>	3/21 <i>13 days</i>	3/21 <i>0 days</i>	24 days
	4/4	4/8 <i>4 days</i>	5/3 <i>29 days</i>	8/8 <i>97 days</i>	8/30 <i>22 days</i>	148 days
	4/17 (a) (family)	4/18 <i>1 day</i>	5/3 <i>16 days</i>	5/3 <i>0 days</i>	5/3 <i>0 days</i>	16 days
	4/17 (b) (family)	4/18 <i>1 day</i>	5/3 <i>16 days</i>	5/3 <i>0 days</i>	5/3 <i>0 days</i>	16 days
	4/17 (c) (family)	4/18 <i>1 day</i>	5/3 <i>16 days</i>	5/3 <i>0 days</i>	5/3 <i>0 days</i>	16 days
	4/17 (d) (family)	4/18 <i>1 day</i>	5/3 <i>16 days</i>	5/3 <i>0 days</i>	5/3 <i>0 days</i>	16 days
	5/16	5/25 <i>9 days</i>	6/8 <i>23 days</i>	6/13 <i>5 days</i>	6/15 <i>2 days</i>	30 days
	5/23	5/26 <i>3 days</i>	6/9 <i>17 days</i>	7/14 <i>35 days</i>	7/15 <i>1 day</i>	53 days
	5/23	5/25 <i>2 days</i>	6/8 <i>16 days</i>	6/16 <i>8 days</i>	7/15 <i>29 days</i>	53 days
	6/5	6/8 <i>3 days</i>	6/8, 6/28 <i>3 days</i>	7/1 <i>3 days</i>	7/11 <i>10 days</i>	16 days
	6/7	6/8 <i>1 day</i>	6/28 <i>21 days</i>	7/1 <i>3 days</i>	7/5 <i>4 days</i>	28 days
	6/11	6/16 <i>5 days</i>	6/29 <i>18 days</i>	7/1 <i>2 days</i>	7/8 <i>7 days</i>	27 days
	7/23	7/29 <i>6 days</i>	8/11 <i>19 days</i>	8/11 <i>0 days</i>	unreported	-----
	8/29 Massena, NY	8/29 <i>0 days</i>	9/8 <i>10 days</i>	9/27 <i>19 days</i>	9/29 <i>2 days</i>	31 days
	10/18*	10/18 <i>0 days</i>	10/19, 10/20 <i>1 day</i>	10/20 <i>1 day</i>	10/21 <i>1 day</i>	3 days
10/28	11/14 <i>17 days</i>	11/16 <i>20 days</i>	11/16 <i>0 days</i>	11/16 <i>0 days</i>	20 days	
<i>Average</i>	<i>Individual: 3.5 days</i> <i>Case: 4.1 days</i>	<i>Individual: 13 days</i> <i>Case: 13 days</i>	<i>Individual: 9days</i> <i>Case: 11 days</i>	<i>Individual: 4 days</i> <i>Case: 5 days</i>	<i>Individual: 26 days</i> <i>Case: 30 days</i>	

* Criminal prosecution case – date referred to CIS after serving criminal sentence.

Timetable for DHS Adjudication of U.S.-Bound Asylum-Seekers under the “Safe Third Country” Agreement (cont.)

PORT of ENTRY by CBP District	ENTRY / CIS REFERRAL*	ORIENTATION	INTERVIEW from entry/referral date	DECISION from interview date	CONCURRENCE from decision date	TOTAL TIME
CHAMPLAIN	2/16	2/18 <i>2 days</i>	2/18, 2/22 <i>6 days</i>	2/24 <i>2 days</i>	unreported	-----
	3/18*	3/22 <i>4 days</i>	4/5 <i>18 days</i>	4/5 <i>0 days</i>	6/10 <i>66 days</i>	84 days
	3/30 (a) (family)	4/1 <i>2 days</i>	4/25 <i>26 days</i>	4/26 <i>1 day</i>	4/26 <i>0 days</i>	27 days
	3/30 (b) (family)	4/1 <i>2 days</i>	4/25 <i>26 days</i>	4/26 <i>1 day</i>	4/26 <i>0 days</i>	27 days
	3/30	3/30 <i>0 days</i>	4/1, 4/8 <i>1 day</i>	4/15 <i>15 days</i>	6/20 <i>66 days</i>	82 days
	5/6* ¹	5/11 <i>5 days</i>	5/26 <i>20 days</i>	6/21 <i>26 days</i>	7/15 <i>24 days</i>	70 days
	6/16* ²	6/21 <i>5 days</i>	6/27 <i>11 days</i>	7/5 <i>8 days</i>	7/6 <i>1 day</i>	20 days
	6/30* ³	7/7 <i>7 days</i>	7/20 <i>20 days</i>	7/25 <i>5 days</i>	7/25 <i>0 days</i>	25 days
	8/11* ⁴	8/16 <i>5 days</i>	9/7 <i>27 days</i>	9/8 <i>1 day</i>	3/20/06 (referred to EOIR) <i>193 days</i>	221 days
<i>Average</i>	<i>Individual: 3.4 days</i> <i>Case: 3.6 days</i>	<i>Individual: 17 days</i> <i>Case: 16 days</i>	<i>Individual: 4.1 days</i> <i>Case: 4.6 days</i>	<i>Individual: 47 days</i> <i>Case: 54 days</i>	<i>Indiv: 69 days</i> <i>Case: 77 days</i>	

* **Criminal prosecution case – date referred to CIS from after serving criminal sentence.**

¹ Date applicant indicated that he was transferred from Albany County Jail to Batavia Federal Detention Center.

² Date CBP executed Notice and Order of Expedited Removal.

³ Date applicant completed criminal sentence.

⁴ Date of Record of Sworn Statement.

Timetable for DHS Adjudication of U.S.-Bound Asylum-Seekers under the “Safe Third Country” Agreement (cont.)

PORT of ENTRY by CBP District	ENTRY	ORIENTATION	INTERVIEW from entry date	DECISION from interview date	CONCURRENCE from decision date	TOTAL TIME
DETROIT	1/5	1/19 14 days	2/4 30 days	2/4 0 days	2/4 0 days	91 days
	4/22	5/20 28 days	5/27 35 days	5/31 5 days	5/31 0 days	40 days
	5/4	5/12 8 days	5/27 23 days	5/27 0 days	5/27 0 days	23 days
	5/28	6/16 19 days	6/16 19 days	7/15 29 days	9/2 49 days	97 days
	10/8	10/8 0 days	10/21 13 days	11/10 20 days	11/16 6 days	39 days
	<i>Average</i>	<i>Average:</i> <i>Individual: 14 days</i> <i>Case: 14 days</i>	<i>Average:</i> <i>Individual: 24 days</i> <i>Case: 24 days</i>	<i>Average:</i> <i>Individual: 11 days</i> <i>Case: 11 days</i>	<i>Average:</i> <i>Individual: 11 days</i> <i>Case: 11 days</i>	<i>Average:</i> <i>Individual: 58 days</i> <i>Case: 58 days</i>
SEATTLE	1/14	1/14 0 days	1/31 17 days	2/3 4 days	2/3 0 days	21 days
	2/4 Sumas, WA	2/4 0 days	2/8 4 days	2/10 2 days	2/10 0 days	6 days
	5/30 Sumas, WA	5/30 0 days	6/16 17 days	6/17 1 day	6/21 4 days	22 days
	7/12 – referred 7/28 Boundary, WA	8/9 17 days	8/11 30 days	8/29 18 days	9/20 22 days	70 days
	10/1 Pacific Hwy	Unreported	Unreported	Unreported	Unreported	-----
	11/6	11/15 9 days	11/17 11 days	11/17 0 days	11/18 1 day	12 days
	<i>Average</i>	<i>Average:</i> <i>Individual: 5 days</i> <i>Case: 5 days</i>	<i>Average:</i> <i>Individual: 16 days</i> <i>Case: 16 days</i>	<i>Average:</i> <i>Individual: 5 days</i> <i>Case: 5 days</i>	<i>Average:</i> <i>Individual: 5 days</i> <i>Case: 5 days</i>	<i>Average:</i> <i>Individual: 26 days</i> <i>Case: 26 days</i>
BOSTON	2/17 Houlton, ME	2/18 1 day	2/22 5 days	3/10 16 days	3/10 0 days	21 days
	3/29 Highgate Springs,VT	3/31 2 days	4/12 14 days	5/18 36 days	5/18 0 days	50 days
	7/12 Derby Line,VT	7/21 9 days	7/28 16 days	8/18 21 days	8/19 1 day	38 days
	<i>Average</i>	<i>Average:</i> <i>Individual: 4 days</i> <i>Case: 4 days</i>	<i>Average:</i> <i>Individual: 12 days</i> <i>Case: 12 days</i>	<i>Average:</i> <i>Individual: 24 days</i> <i>Case: 24 days</i>	<i>Average:</i> <i>Individual: 0.3 days</i> <i>Case: 0.3 days</i>	<i>Average:</i> <i>Individual: 36 days</i> <i>Case: 36 days</i>

U.S.-Bound Asylum-Seekers Referred for Criminal Prosecution at the U.S.-Canada Border:

PORT of ENTRY By CBP District	ENTRY	REFERRAL to CIS	ORIENTATION from entry date	INTERVIEW from entry date	DECISION from interview date	CONCURRENCE from decision date	TOTAL TIME
Champlain	2/11	3/18 36 days	3/22 40 days	4/5 53 days	4/5 0 days	6/10 61 days	114 days
Champlain	3/17	5/6 ⁵ 52 days	5/11 57 days	5/26 69 days	6/21 26 days	7/15 24 days	119 days
Buffalo	4/9	10/18 192 days	10/18 192 days	10/19, 10/20 193 days	10/20 1 day	10/21 1 day	195 days
Champlain	6/3	6/16 ⁶ 13 days	6/21 18 days	6/27 24 days	7/5 8 days	7/6 1 day	33 days
Champlain	6/17	6/30 ⁷ 13 days	7/7 20 days	7/20 27 days	7/25 5 days	7/25 0 days	32 days
Champlain	7/21	8/11 21 days	8/16 26 days	9/7 48 days	9/8 1 day	3/20/06 (referred to EOIR) 193 days	242 days
	<i>Average</i>	<i>Individual: 55 days Case: 55 days</i>	<i>Individual: 59 days Case: 59 days</i>	<i>Individual: 69 days Case: 69 days</i>	<i>Individual: 7 days Case: 7 days</i>	<i>Individual: 47 days Case: 47 days</i>	<i>Indiv: 123 days Case: 123 days</i>

⁵ Date applicant indicated that he was transferred from Albany County Jail to Batavia Federal Detention Center.

⁶ Date CBP executed Notice and Order of Expedited Removal.

⁷ Date applicant completed criminal sentence.

SUMMARY STATISTICS**STAGE 1****CUMULATIVE AVERAGE TIME from POE/CIS REFERRAL to INTERVIEW:****15 DAYS (Case)****15 DAYS (Individual)**

	<u>Individual</u>	<u>Case</u>
BUFFALO:	13 days	13 days
CHAMPLAIN:	17 days	16 days
DETROIT:	24 days	24 days
SEATTLE:	16 days	16 days
BOSTON:	12 days	12 days

STAGE 2**CUMULATIVE AVERAGE TIME from INTERVIEW to FINAL DECISION:****25 DAYS (Case)****22 DAYS (Individual)**

	<u>Individual</u>	<u>Case</u>
BUFFALO:	14 days	17 days
CHAMPLAIN:	51 days	59 days
DETROIT:	22 days	22 days
SEATTLE:	10 days	10 days
BOSTON:	25 days	25 days

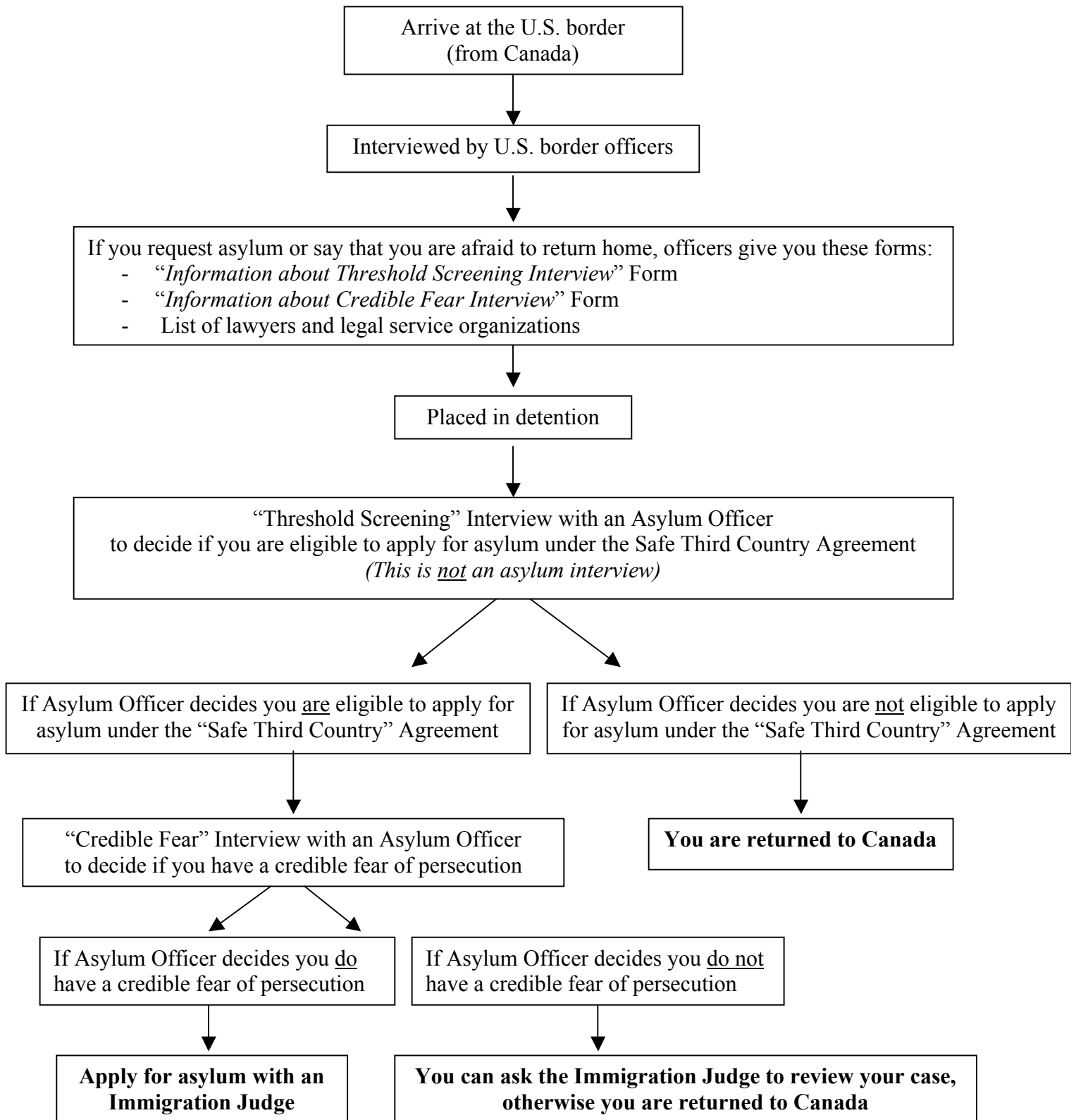
CUMULATIVE AVERAGE TOTAL TIME from POE/CIS REFERRAL to FINAL DECISION:**42 DAYS (Case)****39 DAYS (Individual)**

	<u>Individual</u>	<u>Case</u>
BUFFALO:	26 days	30 days
CHAMPLAIN:	69 days	77 days
DETROIT:	58 days	58 days
SEATTLE:	26 days	26 days
BOSTON:	36 days	36 days

CUMULATIVE AVERAGE TOTAL TIME from POE to CONCURRENCE for PROSECUTION CASES:**123 DAYS (Case)****123 DAYS (Individual)**

	<u>Individual</u>	<u>Case</u>
BUFFALO:	195 days	195 days
CHAMPLAIN:	108 days	108 days

Flowchart of U.S. Safe Third Process for Those Subject to Expedited Removal



Summary of UNHCR’s Safe Third Detention Visits in 2005

POE	Detention Facility	Phone Access Issues	Interpretation	Access to DHS	Other
SEATTLE	Northwest Detention Center (Seattle, WA) <i>Visited 14 April and 23 November</i>	<i>Positive: No major concerns</i> -----	-----	-----	-----
	Wayne County Jail – Div. III (Detroit, MI) <i>Visited 23 June</i>	<ul style="list-style-type: none"> - No free calls to LSPs. - No LSP or UNHCR numbers posted. - Detainees reported collect-call numbers frequently blocked by telephone service provider. 	<ul style="list-style-type: none"> - Interpreter number not used at time of UNHCR’s visit - provided to medical staff at time of UNHCR’s visit. - Have used other detainees if available. 	<ul style="list-style-type: none"> - Not regularly visited by DHS officers. 	-----
DETROIT	Monroe County Jail (Monroe, MI) <u>Dormitory Facility</u> <i>Visited 31 March, 21 June, 29 September, and 18 November</i>	<ul style="list-style-type: none"> - PCS system in place but LSP phone numbers not programmed - free calls to LSPs not possible. - Detainees prohibited from accessing phone numbers stored in their property on cell phones. - <i>Positive:</i> UNHCR and consulate numbers posted, although no LSP numbers posted. 	<ul style="list-style-type: none"> - Have an interpreter number available but rarely used, as use of other detainees is preferred. 	<ul style="list-style-type: none"> - May not be regularly visited by DHS officers. Detainees reported no pod visits by their deportation officers for periods of two weeks to five months. 	<i>Positive - Law Library:</i> Lexis Nexis CDs installed and functional (as of 29 September). <i>Mental Health:</i> No psychiatrist or social worker available.
	Monroe County Jail (Monroe, MI) <u>Main Facility</u> <i>Visited 31 March, 21 June, and 18 November</i>	<ul style="list-style-type: none"> - PCS system in place but LSP phone numbers not programmed - free calls to LSPs not possible. - No instructions posted on use of phones. - No consulate, LSP, or UNHCR numbers posted. 	<ul style="list-style-type: none"> - Have an interpreter number available but rarely used as use of other detainees is preferred. 	<ul style="list-style-type: none"> - May not be regularly visited by DHS officers. 	<i>Law Library:</i> No immigration materials available. <i>Mental Health:</i> No psychiatrist or social worker available for detainees, despite people frequently being on suicide watch. <i>Isolation Room:</i> Detainees reported being held in crowded isolation/classification Room #153 for up to 12 days. Reports of denial of access to deportation officers, recreation, and showers.
	Calhoun County Jail (Battle Creek, MI) <i>Visited 1 April</i>	<ul style="list-style-type: none"> - PCS system in place but LSP and 57 embassy phone codes non-operational - free calls to LSPs not possible. - LSP phone codes and embassy phone codes are not posted in the female dorm. - All calls are recorded (notification in handbook), including attorney-client calls, unless the attorney requests otherwise. 	<ul style="list-style-type: none"> - Either interpreter number or other detainees are used. 	<ul style="list-style-type: none"> - Not regularly visited by DHS officers. Non-English speaking detainees reported no visits by deportation officers for several months. 	<i>Law Library:</i> Lexis-Nexis and Matthew Benders CDs were expired and therefore inaccessible.

		Phone Access Issues	Interpretation	Access to DHS	Other
BUFFALO	Buffalo Federal Detention Facility (Batavia, NY) <i>Visited 24 February, 5 May, 16 September, and 28 Nov.r</i>	<ul style="list-style-type: none"> - <u>Positive</u>: PCS system functional - permitting free calls to LSPs. - <u>Positive</u>: International calls permitted. - Timely activation of PIN numbers - delays up to a week. - “Adding” phone numbers – requests processed only once a month. 	<p><u>Positive</u>: Pods regularly visited by DHS officers.</p>		<p><u>Property Access</u>: Detainees state that they are discouraged from requesting documents or phone numbers from luggage. Several requests have been denied, including requests for legal documents.</p>
	Erie County Holding Center (Buffalo, NY) <i>Visited 12 September</i>	<ul style="list-style-type: none"> - PCS system in place but LSP phone numbers not programmed - free calls to LSPs not possible. - No international calls (international collect calls restricted) - Collect call numbers are frequently restricted, including those for consulates and UNHCR. 	<ul style="list-style-type: none"> - Do not use interpreter number. Intake staff reports that it will not accept detainees that cannot answer booking questions in English. 	<ul style="list-style-type: none"> - Only one detainee present during UNHCR’s visit. She had not spoken to DHS for two weeks. 	<p><u>Law Library</u>: No immigration materials available.</p>
BUF. & CHM.	Elizabeth Detention Facility (Elizabeth, NJ) <i>Visited 1 September</i>	<ul style="list-style-type: none"> - Phone system change in August resulted in reports of restricted calls, disconnected calls, connection problems, audibility problems, and inability to navigate phone trees, dial extensions, or be transferred to another line in the male dorms. <p>* UNHCR visited soon after this system change, and has not verified whether the issues have been resolved.</p>	<ul style="list-style-type: none"> - One report of an asylum-seeker’s intake done in a language he did not speak. 	<p>-----</p>	<p><u>Medical Care</u>: Detainees reported inconsistent and delayed responses to medical request forms. One complaint about lack of access to surgery recommended by hospital.</p>
CHAMPLAIN	Clinton County Jail (Plattsburgh, NY) <i>Visited 18 March and 10 August</i>	<ul style="list-style-type: none"> - No free calls to LSPs. - No international calls (international collect calls restricted) - No access to EOIR line (1-800 numbers restricted) - No LSP or UNHCR numbers posted. 	<ul style="list-style-type: none"> - Do not use phone interpreter service, although have used other detainees if available. 	<p>-----</p>	<p><u>Property Access</u>: Detainees state that requests to obtain phone numbers from luggage have been denied.</p> <p><u>Law Library</u>: No immigration materials available.</p> <p><u>Detainee Treatment/Medical Care</u>: One incident of physical abuse reported - appears to have been committed by a detainee against a detainee. No immediate medical care available at the facility on Sundays.</p>
	Franklin County Jail (Malone, NY) <i>Visited 19 May</i>	<ul style="list-style-type: none"> - PCS system in place but LSP phone numbers not programmed - free calls to LSPs not possible. - All numbers must be programmed into the system before accessible, including attorney numbers. UNHCR’s number was not pre-programmed. - No LSP or UNHCR numbers posted. - No phone access for 72 hours in mandatory holding cells - All phone calls may be recorded but there is no advisal notice posted. - Various problems reported – disconnections, recordings prohibiting “three way calls,” blocked calls. 	<ul style="list-style-type: none"> - Do not use phone interpreter service, although have used other detainees if available. 	<p><i>No info. available.</i></p>	<p><u>Law Library</u>: Lexis-Nexis CDs are available to DHS but not installed on computers. No alternative written legal materials are available.</p>

	<p>Albany County Jail (Albany, NY)</p> <p><i>Visited 31 August</i></p>	<ul style="list-style-type: none"> - PCS system in place but LSP phone numbers not programmed – free calls to all eligible LSPs not possible, as certain LSP and UNHCR numbers need to be “added” to the system in order to allow access to free phone calls. - No instructions posted for phone use. - No LSP or UNHCR numbers posted. 	<p>-----</p>	<ul style="list-style-type: none"> - Detainees reported that they have not been visited weekly. Detainees reported no visits by deportation officers for periods of two weeks to over two months. 	<p><u><i>Mental Health:</i></u> Concerns about availability of psychiatric medication.</p>
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