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New Directions for Refugee Policy

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New Directions for Refugee Policy: Of Curtains, Doors, and Locks

Audrey Macklin

Halfway through the last century, Winston Churchill presaged one of the most profound transformations of the modern political map with the warning that "an iron curtain has descended" on Europe. This potent metaphor conjured up an impenetrable partition holding citizens of Eastern Europe captive to Communist regimes, depriving them of basic liberties. Subsequently, the Berlin Wall became the physical representation of the abrogation of the fundamental right of exit for the people of Eastern Europe. Five years after Churchill's speech, the 1951 UN Convention relating to the Status of Refugees entered into force. The convention's initial geographic limitation to Europe revealed the West's cold-war preoccupation with citizens under Communism. If they could escape—breach the wall, pass through the curtain—they were virtually assured of asylum.

In February 2001, on the eve of the 1951 convention's fiftieth anniversary, United Nations High Commissioner for Refugees Ruud Lubbers ironically (if inadvertently) recalled Churchill's metaphor. In response to the question of whether the European Union was doing enough to grapple with the problem of refugees, Lubbers replied, "No . . . We are closing the curtains . . . and saying there is no real problem there."

Fortress Europe has supplanted the Berlin Wall, and the locks barring exit from the east have been switched to bar entry to the west. In North America, Australia, and New Zealand the pattern is the same. The world's wealthiest nations want to prevent refugees from crossing into their territory uninvited, no matter where they come from, why they fled, or even whether the demographic self-interest of the country of asylum could actually benefit from the infusion of more people. Although Canada appears less draconian than some nations in dealing with claimants who actually arrive within its borders, it has also pioneered many deflection strategies. Moreover, Canada's relatively remoteness from the major refugee- and migrant-producing regions of the world means that (despite media reports to the contrary) it receives few undocumented migrants and refugee claimants in relative and absolute terms.

The embargo on refugees is accomplished in several ways. Refugees are excluded physically through interdiction and non-entrée policies, and discursively through their demonization as criminals and illegals. Restrictive eligibility requirements and narrow interpretations of the convention further limit access to refuge protection. Detention and limited assistance (or no assistance at all) while refugee determination is pending operate to socially marginalize refugee claimants within host countries.

These themes are repeated, with local variation, in legislation and institutional practice in the nation-states of North America, Europe, Australia, and New Zealand. In Canada, incremental changes in migration legislation since the mid-1980s were punctuated by judicial pronouncements demarcating the scope of fundamental rights available to non-citizens under the Canadian Charter of Rights and Freedoms. In the mid-1990s, momentum began building toward an overhaul of Canada's Immigration Act. In late 1997, a government-appointed legislative review committee issued a report entitled *Not Just Numbers,* whose tone and recommendations for reform reflected the neo-liberal discourse of economic globalization, privatization of the

public sphere, and the application of private market norms to Canadian migration policy.

Following the usual round of consultations with several "stakeholders," the government issued a white paper in 1998 outlining the direction of future legislative reform in immigration. The process might have proceeded at the same steady pace, but as is so often the case in immigration policy, a single event catapulted immigration to the front page and legislative reform to the front burner: In the summer of 1999, four ships carrying almost six hundred migrants from Fujian, China, arrived off the coast of British Columbia. Virtually all aboard claimed refugee status.

There's something about people on boats that Canadians find deeply threatening: In 1914, the *Komagata Maru* spent months marooned in Vancouver Harbour with over two hundred South Asians aboard, British subjects denied their right to enter another of the king's dominions. In 1939, four hundred Jews aboard the *St. Louis,* desperately attempting to escape the Holocaust were four hundred too many Jews for Canada. In 1987, two boatloads of South Asians landing off the Atlantic Coast was enough to trigger an emergency session of Parliament to pass legislation to respond to the apparent crisis. Despite the fact that the Fujian migrants comprised a mere 2 per cent of Canada's annual intake of inland refugee claimants, the emotive force of boatloads of uninvited migrants washing ashore precipitated a moral panic that catalyzed the speedy introduction of a legislative package. Bill C-31 (The Immigration and Refugee Protection Act) highlighted deterrence, deflection, detention, and criminal penalties as easy remedies for the complex problems of irregular migration. The fact that refugees often have no alternative but to use the services of smugglers, and may also fall prey to traffickers, is submerged by powerful tropes featuring Canada as a country losing control of its borders and thus its sovereignty. On this telling, impoverished migrants are cast as invaders and Canada the victim as it defends its vulnerable borders against the foreign intruder.

The proposed legislation contained many other proposals directly or indirectly affecting refugees. These included modifications to the refugee determination process, the introduction of an internal appeal mechanism and pre-removal risk assessment, increased powers to find certain classes of refugee claimants ineligible for refugee protection, and changes to family sponsorship provisions. But just as external events thrust the new legislation onto the parliamentary agenda, so too did external forces take it off the table. An election was called in the fall of 2000, and Bill C-31 died on the order paper.

At the time of writing, the Liberal government has been returned to power, and the minister of Citizenship and Immigration has reintroduced the Immigration and Refugee Protection Act (now Bill C-11) in the latest parliamentary session. Although Bill C-11 differs in certain aspects from its predecessor, its essential elements remain unchanged.

The articles in this special issue of *Refuge* offer a diverse and stimulating array of perspectives from which to evaluate the direction of legislative reform in Canada.

Judith Kumin, the UNHCR representative in Canada, explains the impending Global Consultation Process initiated by the UNHCR to "revitalize the international protection regime and discuss measures to ensure international protection for all who need it." At a moment when more people than ever are "lost on earth," this sharing of ideas, information, and commitment between states, NGOs, and civil society is crucial and timely.

Refugee scholar Anthony Richmond revisits a thesis he explored in his 1994 book *Global Apartheid: Refugees, Racism and the New World Order* and asks whether anything has changed since the early 1990s. After comparing selected elements of the Canadian refugee system with the practices of the United States and Europe, his response is a tentative yes and no: Western industrial states remain willing in principle to accept small numbers of demonstrably desperate refugees from Africa and Asia, but the countervailing fear of opened floodgates has led to increasingly stringent measures of exclusion.

Jacqueline Oxman-Martinez, Andrea Martinez, and Jill Hanley report the findings of their study into trafficking in Canada and the implications of current legislative policy on refugees' ability to access protection. The authors place irregular migration into a global context, and take a critical approach to the trend revealed in Bill C-31, which focuses on border control and punitive measures at the expense of protecting the human rights of trafficked persons, including refugees.

Sunera Thobani pursues the theme of trafficking and smuggling from a feminist perspective. She illustrates that existing terms of entry for women structure and enable forms of trafficking, such as mail-order marriages, the sex trade, and live-in domestic work. Thobani argues that the current direction of law reform in Canada allows the state to pose as the protector of Canadians, while exacerbating the vulnerability of women who are trafficked, and doing nothing to alleviate the causes of trafficking or address the complicity of those Canadians who profit and benefit from the exploitation of trafficked workers.

Janet Dench addresses the evolution of Canadian interdiction policies up to and including Bill C-31, focusing on the detrimental impact of these practices on refugees' abil-

ity to reach a safe haven. Dench situates her analysis of the impact of these policies on asylum seekers in the context of a broader critique of the international regime's failure to approach the issues of trafficking and smuggling from a human rights perspective, preferring instead to frame them as criminal matters. The result is an erasure of refugees, coupled with the collective demonization of those who resort to irregular migration as illegals and criminals.

Stephen Knight offers a timely and invaluable comparative perspective on border controls through his analysis of the U.S. "expedited removal" law. Knight describes how the heightened powers of immigration officers to detain and deport those found to lack valid or suitable travel documents, coupled with the virtual elimination of judicial review, has led to grave concerns about abuse of due process and profoundly unjust outcomes. Moreover, Knight illustrates that the U.S. "expedited removal" process also impedes Canadian-bound asylum seekers transiting through the United States, effectively compelling them to seek asylum in the U.S. Knight's analysis is a useful reminder that nation-states do not operate in a vacuum, and that the impact of national migration policies inevitably traverses borders, even as asylum seekers themselves cannot.

David Matas traces the tortuous path of Canadian refugee determination—a system notable for both "complexity and unfairness"—from its inception to the latest proposals contained in Bill C-31. He offers an astute diagnosis of this dysfunctional combination, and assigns responsibility to Canada's overriding immigration objective of controlling borders.

Michael Bossin reviews the various provisions that restrict access of asylum seekers to refugee determination. After noting the deficiencies of overseas determinations at Canadian missions abroad, he turns his attention to the grounds for ineligibility under existing and proposed legislation. These include criminality, prior refusal of refugee protection, and prior abandonment or withdrawal of claims. Bossin highlights the potential for each of these grounds of ineligibility to deny a hearing into the merits of the claim of a person in need of refugee protection.

François Crépeau, Patricia Foxen, France Houle and Cécile Rousseau turn their lens onto the actual process of refugee determination, and adopt a behaviouralist methodology to expose serious concerns about the sensitivity and competence of some decision makers on Canada's Immigration and Refugee Board.

Michael Casasola's contribution examines Canada's refugee resettlement program. His review emphasizes the need for adaptability in the program to keep pace with the evolving global landscape. Casasola's examples draw our attention to the relationship between the UNHCR and national governments in formulating and implementing programs that are responsive to urgent resettlement needs.

Robert Barsky stands back from the particulars of Bill C-31 and launches a broad and impassioned denunciation of the statist conception underlying borders, arguing that "people have the inalienable right to move around as they wish, for whatever reason they think appropriate. Period." He uses aspects of Bill C-31 as an illustration of the deficiencies and injustices of any system premised on a presumptive right to exclude the Other.

Colin Harvey reminds us of the potential and the limitations of national and supra-national human rights norms to complement refugee law and contest the "race to the bottom" approach to refugee protection among Western nations. He turns to the U.K. Human Rights Act, 1998, which incorporates into domestic law an interpretive presumption in favour of significant elements of the European Convention on Human Rights. Harvey surveys some jurisprudence of the European Court of Human Rights on asylum as a way to explore the potential of human rights law to advance the human security of refugees and asylum seekers.

Joseph Rikhof's contribution on Canadian immigration policy on war crimes, terrorism, organized crime, and general criminality elaborates upon the complex legal regime that regulates the substance and process of exclusionary provisions. His discussion sets the stage for considering how international law, politics, and human rights norms has shaped existing domestic law and how such forces may (or may not) constrain future developments.

Sharryn Aiken's article, the second of two parts, explores interpretations of terrorism by the Federal Court of Canada, in the context of numerous provisions in the Canadian Immigration Act for exclusion and ineligibility. Her critique focuses in particular on the *Suresh* case, wherein a Sri Lankan refugee was determined to pose a danger to the security of Canada, and therefore liable to *refoulement*, despite evidence that he would face serious risk of torture if returned to Sri Lanka. This case is *en route* to the Supreme Court of Canada where, among other things, the court will have the opportunity to elaborate on the interaction of Canadian refugee policy, the Canadian Charter of Rights and Freedoms, and Canada's international obligations on *refoulement* and torture.

The contributors to this issue of *Refuge* speak from a wide range of vantage points, and include scholars, advocates, representatives of international organizations, and government lawyers. Many participated in the consultation after introduction of Bill C-31. In addition to their geographic range, the authors' insightful—often incisive—

appraisals of trends in legislation and policy span the various institutional sites of law creation and implementation (Parliament, Congress, the UN, courts, bureaucracy) as well as different methodological approaches (analytical, behavioural, jurisprudential, feminist, theoretical).

Some contemporary migration literature tends to diminish the role of the state in directing and regulating migration flows. Economic globalization and supra-national human rights norms are projected as exerting significant constraints on the abilities of individual states to police bodies legally and practically. The articles in this volume, with their attention to myriad ways in which national legal regimes affect forced migrants in general, and refugees in particular, serves as an important reminder of the resilience and the coercive power of state migration policies and practices. In case of any lingering doubt, just ask any refugee.

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Revitalizing International Protection: The UNHCR's Global Consultations

Judith Kumin

Abstract

This article explains why the UN High Commissioner for Refugees is convening Global Consultations on "revitalizing the international protection regime." These consultations, which will take place throughout 2001 and probably beyond, will involve state parties to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, as well as non-signatory states, non-governmental groups, academics, and practitioners of refugee law. The consultations are intended to result in a reaffirmation of the 1951 convention, and in consensus on some of the more complex interpretative aspects of that instrument. They should show the way on thorny problems faced by states in dealing with refugee and migration challenges today.

Résumé

Cet article explique pourquoi le Haut Commissariat des Nations Unies pour les réfugiés organise actuellement des Consultations globales pour « revitaliser le régime international de protection des réfugiés ». Ces consultations, qui se tiendront tout au long de l'année 2001, et probablement bien au-delà, réuniront des états signataires de la Convention de 1951 relative au statut des réfugiés et de son Protocole de 1967, ainsi que des états non-signataires, des organisations non-gouvernementales, des universitaires et des membres de la profession légale opérant dans le domaine du droit d'asile. Ces consultations ont pour but de réaffirmer la Convention de 1951 et de dégager un consensus d'opinions sur quelques-uns des aspects interprétatifs les plus complexes de cet instrument. Elles devraient indiquer la voie à suivre sur plusieurs questions épineuses auxquelles les états ont à faire face aujourd'hui lorsqu'ils confrontent les défis dans le domaine du droit d'asile et de la migration.

Every year in October, at the annual meeting of the UNHCR's Executive Committee, the assembled states agree to a "Conclusion on International Protection." The conclusion adopted at the fifty-first meeting of the committee in October 2000 was a departure from the usual approach. Missing from it is the lengthy enumeration of accepted principles and the appeal to states to take specific steps to improve refugee protection. Instead, in its most recent conclusion, the Executive Committee limited itself to "[Welcoming] the proposal of UNHCR to commence a process of Global Consultations with States . . . to revitalize the international protection regime and to discuss measures to ensure international protection for all who need it . . ."

Why is the UNHCR taking this step now? What are the goals of these Global Consultations, and what is the likely outcome? Who stands to benefit from this process—and does anyone stand to lose from it? These questions are being asked in governmental and non-governmental circles alike.

The UNHCR proposal to organize Global Consultations on the international refugee protection regime was first presented to governments in July 2000. It was motivated by a number of parallel considerations: States in all regions of the world are preoccupied by growing numbers of refugees and asylum-seekers. They are unsure how to meet the challenges posed by irregular migration and by abuse of asylum procedures. And they are frustrated by the seemingly intractable nature of certain refugee problems. States often complain that the current international legal regime is inadequate to address these problems.

At the same time, the UNHCR is noting restrictions on access to asylum, and the deteriorating quality of asylum, in many parts of the world. The agency worries that the universal refugee protection regime, which was set up in the aftermath of World War II, will become increasingly weak and fragmented. It firmly believes that a universally

supported protection regime that is stable and predictable is in the interests of states and refugees alike.

The primary goal of the consultations is therefore to enhance refugee protection. The consultations are *not* intended to provide governments with a forum to "re-open" or "re-negotiate" the 1951 Convention relating to the Status of Refugees—though one or the other government may well be tempted by such a prospect. But UN Secretary General Kofi Annan, addressing this year's UNHCR Executive Committee, insisted that "we must strengthen the notion of asylum—the bedrock on which all our work for refugees is based. States must resist the temptation to deal with their immigration problems, or what they perceive as such, by limiting the protection they give to refugees or by denying asylum-seekers access to their territory." Annan welcomed the UNHCR proposal to launch Global Consultations aimed at "revitalizing the protection regime" and at "reaffirming the centrality of the 1951 Convention."

It is obvious, however, that a universal refugee protection regime is useful only if it has unwavering international agreement and support, and that it can be effective only if it is responsive to the concerns of all. Not only refugees, but also their host communities, states, and the international community in general have an interest in the functioning of the refugee protection system. Balancing competing interests is a permanent feature of human rights law, and refugee law is no exception. The consultations, which will bring together not only government representatives, but also non-governmental agencies, academic experts, and practitioners of refugee law, should provide a forum for discussing the issues and reaching a proper balance.

The UNHCR has suggested that the consultations be composed of a three-fold process, organized around three very broad purposes, which can be thought of as "tracks." The first should consist of a reaffirmation of the commitment of states to the full and effective implementation of the 1951 Convention relating to the Status of Refugees and its 1967 protocol. The 1951 convention will mark its fiftieth anniversary in July 2001—an ideal occasion for states to recommit themselves to the Magna Carta of international refugee law. It is also an occasion to appeal for more universal accession to the convention and protocol, which have 140 signatories. By comparison, 198 states (all but the United States and Somalia) have acceded to the much more recent 1989 Convention on the Rights of the Child.

The second track will be devoted to examining and seeking consensus on specific interpretative aspects of the convention. State parties as well as representatives of non-governmental organizations and refugee law experts will meet in round-tables to explore developments and trends in law and practice relating to the convention. Topics will include the interpretation of the refugee definition (for instance, such aspects as gender-based persecution, or membership of a social group); interpretation of the convention's exclusion and cessation clauses; and the UNHCR's supervisory role, including article 35 of the convention. These are all areas where greater agreement on the interpretation of the convention would strengthen the instrument itself.

The third track is likely to be the most challenging one, since it will tackle areas of tension between migration control concerns and refugee protection. It will be devoted to issues that do not fall strictly within the confines of the 1951 convention, or are not adequately covered by the convention, but are nonetheless important to the international refugee protection regime. The UNHCR hopes that participants will map out new pathways for resolution of these problems.

Discussions within the third track will be broadened to include states that are not signatories to the 1951 convention or its 1967 protocol, along with those that are. There are many potential topics in this track: methods to maintain the civilian nature of asylum during large-scale refugee flows; how to disentangle refugees and asylum-seekers from the web of immigration control measures; and ways to strengthen the capacity of first asylum countries to offer protection, to name just a few.

These Global Consultations are not a no-risk, or even a low-risk, venture. Although during meeting after meeting of the UNHCR's Executive Committee, governments repeat that protection is the UNHCR's primary function, and although they encourage the agency to give top priority to its protection mandate, it is precisely the exercise of this responsibility that generates the most suspicion, and sometimes even hostility, among states.

The problems that challenge the delivery of protection to refugees in the twenty-first century cut across regions of the world and groups of asylum-seekers and refugees with surprising commonality. While the problems are many and complex, they can be summarized under three main headings.

The most acute question is, How can protection of refugees be ensured during a "mass influx"? In the post–cold war period, these large-scale population movements are usually the result of a new and particularly brutal type of conflict, one waged within the borders of a state, pitting groups against each other along ethnic or religious lines. The combatants show blatant disregard for human rights norms and international humanitarian law. Civilians flee,

but often take the conflict with them. When armed elements are among the refugee groups, and/or when the conflict spills across borders, trouble is not far behind.

In these mass influxes, concerns about national security and the safety of the population in neighbouring countries often result in the closure of borders to persons in flight, the denial of asylum, the detention of refugees, and even in *refoulement.* It is hardly surprising that in such contexts, refugees become a convenient scapegoat for all manner of national problems, thus fuelling xenophobia and acts of hostility toward the refugees themselves. Especially where a conflict has been going on for years (or even decades) with no end to the resulting refugee problem in sight, and when international humanitarian assistance has fallen to pitifully low levels, asylum fatigue tends to translate into harsh policies toward those who are the innocent victims.

On the other side of the coin, but not altogether different, are situations where persons seeking asylum arrive not in large groups, but individually, although in large numbers, and where their eligibility for refugee protection is determined case by case. Countries are concerned about over-burdening the structures that have been established to handle such claims, about the rising costs of the system, about abuse of these procedures, and about the authorities' inability to return persons to their countries of origin, when they have been found not to be in need of protection.

The most common response in such situations has been to opt for a variety of control measures, in an effort to reduce the number of persons who are able to reach countries of potential asylum. Protection (of the state) from the pressures of irregular migration (including refugees and asylum-seekers) thus begins to take precedence over refugee protection. When this happens, refugees and asylum-seekers are very often demonized. They tend to be "criminalized" in the public eye because of their illegal entry, use of false documents, or their resort to the services of people-smugglers. It is not uncommon for the media in Western countries to refer to asylum-seekers, illegal immigrants, criminals, and even to terrorists in the same breath.

Finally, both in situations of mass influx and individual arrivals, host countries are concerned about how to find solutions for those persons who *are* in need of protection. It is a sad fact that the much-touted and "preferred" solution of voluntary repatriation is often not achievable, because of chronic conflict or insecurity in the country of origin. In fact, where large-scale repatriation has taken place in recent years, it has frequently been under conditions that are less than satisfactory. The resettlement of refugees to third countries (primarily the United States, Canada, and Australia) offers refugees a genuine new start, and asylum in the fullest sense of the word. But resettlement is an option for a minute proportion of the world's refugees—currently only about 100,000 places a year are available.

At the same time, the possibility for refugees to settle and become self-sufficient in their first countries of asylum is increasingly rare. Former President Julius Nyerere of Tanzania told the UNHCR in an interview just months before his death that, paradoxically, democratization may make local integration more, not less, difficult. When he was in office in the 1970s, he said, he had near absolute powers and could easily decide to give asylum to thousands of refugees. He contrasted the free hand he had at the time with the situation of the current, democratically elected president. The latter, he pointed out, has to deal with party politics, the population's xenophobic fears, and competition for scarce resources. He will inevitably have to be more cautious in publicly upholding respect for asylum.

The Global Consultations will take place throughout 2001 and are likely to continue well into 2002, with events in several regions of the world. In convening these consultations, the UNHCR recognizes that refugee protection is not a static function. To be viable, it has to be able to adjust and develop as the world changes. But this adjustment must be rooted in a solid, normative, rights-based framework. If the consultations result in a reaffirmation of that framework, and succeed in providing an impetus for workable new approaches to today's refugee protection challenges, they will have met their objective.

Judith Kumin is the representative in Canada of the United Nations High Commissioner for Refugees.

Global Apartheid: A Postscript

Anthony H. Richmond

Abstract

Trends in the numbers and location of refugees and asylum seekers during the 1980s and the 1990s are compared. The question of whether the world has created a system of "global apartheid" is reviewed. The outcome of asylum applications filed in European countries is compared with those in Canada and the United States. It is concluded that racism still prevails in the treatment of refugees. Canada's record compares favourably with those of other developed countries, although the main burden of refugee protection still falls on less developed regions of the world.

Résumé

Cet article compare les tendances contenues dans le nombre et la localisation géographique de réfugiés et de demandeurs d'asile pendant toute la période des années 80 et 90. Il passe en revue la question de savoir si notre monde a crée un système d'« apartheid global ». Il compare aussi les suites données aux demandes d'asile soumises dans des pays européens et celles soumises au Canada et aux États-Unis. La conclusion tirée est que le racisme prévaut toujours dans le traitement réservé aux réfugiés. La performance du Canada se compare favorablement avec celle d'autres pays développés, bien que le gros du fardeau de la protection des réfugiés pèse toujours sur les régions les moins développées du monde.

Introduction

Arising out of an examination of refugee policies and procedures in the decade of the 1980s, and up to the early 1990s, the question was asked, "[A]re we creating a system of global apartheid based on discrimination against migrants and refugees from poorer developing countries?"[1] Subsequently, Aiken repeated the question. She examined the issue of racism in Canadian refugee policy and concluded that Canada was still "quite far from the vision of an anti-racist refugee program."[2] This article contrasts selected elements of the refugee regime in Canada with those of European countries. The 1980s are compared with the 1990s.

First, it is necessary to note the changing size, character, and composition of refugee movements in recent years.

Trends in Refugee Movements

In 1989, the UNHCR recorded approximately 15 million refugees, of whom 4.6 million were located in Africa, 6.7 million in Asia, 1.2 million in Latin America and the Caribbean, and 1.4 million in North America (including 447,000 in Canada). The total in Europe was 788,720. The total rose to 18 million in 1992, the largest increase being in Europe, which then reported over 3 million refugees and asylum applicants. By the end of 1999, the UNHCR identified 11.68 million refugees and an additional 10.58 million "others of concern," of whom approximately 1.2 million were currently asylum seekers. The overall distribution at the end of 1999 is shown in table 1.

In its annual report, the UNHCR noted that "1999 was one of the most challenging years in UNHCR's history. Conflicts in Kosovo, East Timor, and Chechnya dominate the daily headlines and many of UNHCR's resources, but there were 'forgotten' humanitarian cries around the world, especially in Africa."[3] More than half a million new asylum applications were lodged in the main industrialized countries in 1999, an increase of 21 per cent over the previous year, giving rise to growing concern over humanitarian

Table 1: Refugees and Others of Concern to the UNHCR
Population End 1999

Region of Asylum/ Residence	Refugees	Asylum Seekers	Returned Refugees	Internally Displaced	Returned IDPs	Various	Total
Africa	3,523,250	61,110	933,890	640,600	1,054,700	36,990	6,250,540
Asia	4,781,750	24,750	617,620	1,724,800	10,590	149,350	7,308,860
Europe	2,608,380	473,060	952,060	1,603,300	370,000	1,279,000	7,285,800
Latin America & Caribbean	61,200	1,510	6,260	-	-	21,200	90,170
N. America	636,300	605,630	-	-	-	-	1,241,930
Oceana	64,500	15,540	-	-	-	-	80,040
Total	11,675,380	1,181,600	2,509,830	3,968,700	1,435,290	1,486,540	22,257,340

Source: UNHCR: 1999, Statistical Overview

considerations in relation to questions of human security, organized crime involved in "people smuggling," and "economic migrants." The involvement of transnational organized crime has been described as the "dark side" of globalization. The UNHCR Policy Unit stated that "there are very few legal possibilities for refugees to enter the European Union and so the majority are required to attempt ever more clandestine forms of entry."[4]

Recognition of Asylum Seekers

In order to understand the differential treatment of asylum seekers among countries, it is necessary to appreciate that, notwithstanding the UN Convention on the Status of Refugees (1951/1967), every state has its own legal and administrative procedures for dealing with asylum applicants.[5] Furthermore, the interpretation of the UN convention definition of a refugee varies considerably from one administration to another. The most important distinction is between those who use a convention definition for recognition only, and those that have introduced a form of "temporary asylum," which affords limited protection but does not give the right to permanent residence and eventual citizenship.[6]

When one considers the total number of asylum applications in Europe and North America for the whole of decade of the 1980s, there were 2,247,600 submissions, of which 421,730 (18.8 per cent) were given full convention recognition, and a further 103,150 (4.6 per cent) "humanitarian and other comparable status." The total for the decade 1990–9 was 5,549,560 submissions, of which only 648,000 (11.7 per cent) were given full convention status. A further 475,260 (8.6 per cent) of the applicants were given "humanitarian and other comparable status."[7] In the 1980s, there were 923,870 rejections of asylum applications, compared with 3,194,460 rejections in the whole of the decade 1990–9. It is evident that the last decade saw a huge increase in the number of applications for asylum, a decline in the proportion given full convention status, and an increase in the numbers and proportion who were give some form of "temporary asylum."

Given that at the end of each decade there were asylum applications still pending, or at an appeal stage, a slightly different picture emerges when only substantive decisions are taken into account. These are shown in table 2 for the main regions of Europe and for North America, comparing the situation in the 1980s and the 1990s. The numbers of refugees increased by more than 50 per cent, and asylum seekers in industrialized countries by 300 per cent.[8] When convention and other humanitarian status are combined, the acceptance rate fell from an average 36.2 per cent in the 1980s to 26 per cent for the decade of the 1990s. Specific country rates varied. Germany's overall acceptance rate fell from 15 per cent to 11.5 per cent; the United Kingdom's overall rate was 78.9 per cent in the 1980s but fell to 43 per cent in the 1990s, although an average of only 12.1 per cent were given full convention refugee status. The arrival of Kosova refugees in Britain in 1999 changed the pattern somewhat, as they were given more favourable treatment,

raising the acceptance rate to 22 per cent in 1999. It fell to 12 per cent again in the first half of the year 2000.[9] The pattern in Canada and the United States was different. Neither offered temporary asylum, although the Kosova situation was exceptional. The acceptance rate in the U.S. rose from 26.8 per cent in the 1980s to an average of 43.9 per cent in the 1990s.[10] Canada saw a similar increase in acceptance of asylum seekers as full refugees, from 36 per cent of applicants in the earlier period to 61.8 per cent in the subsequent decade (see table 2). In 1999 the average was 46 per cent acceptance, but there was considerable variation by country of origin, as shown in table 3. (Table 3 shows the percentage accepted as convention refugees, as a proportion of claims finalized—the sum of positive and negative decisions, together with cases withdrawn and abandoned. When only cases actually adjudicated are considered, the overall acceptance rate, in 1999, was 58 per cent.)

Following the decline of the Soviet Union, the end of the cold war, the removal of many barriers to trade and commerce, the electronic linking of money markets, and the technological revolution in travel and communications that is associated with globalization, economically related international migration of the "proactive" type burgeoned. At the same time, political upheavals have generated ethnic conflicts and civil wars, giving rise to a rapid growth in reactive migration. Nevertheless, the main burden of support for victims of war, political persecution, and forced displacement from other causes remains in the developing countries of the Third World. The largest concentrations of refugees and others of concern to the UNHCR in 1999 were in Asia and Africa (with a combined total of 13.6 million). Europe's share increased to 7.3 million by 1999, compared with 1.24 million in North America. The largest single concentrations were 1.8 million in Iran and 1.2 million in Pakistan.

The response in Europe and North America has been a tightening of regulations and new legislation designed to deter migration, interdict undocumented travellers, reinforce border controls, and penalize airlines, shipping companies, and truckers if they are discovered to have knowingly, or unknowingly, carried passengers who do not have a legal right of entry. Special efforts have been made to punish those involved in the organized smuggling of illegal immigrants across borders. Canada's Bill C-31, which died on the order paper as a result of a general election, was designed to "harmonize" its laws and administrative procedures with those of the United States and other countries. The concepts of a "safe third country" has been institutionalized, requiring asylum seekers to apply in the first country they enter after flight from persecution.

Discrimination or Persecution?

There is a fine distinction in law between "a well-founded fear of persecution" and the experience of "discrimination." The former is generally interpreted to mean a life-threatening situation, or one involving torture, unjust imprisonment, or exile. Furthermore, claimants must show that they cannot rely on the protection of the state from which they have come, whose agents may be the source of the persecution. Problems of interpretation of the UN Convention arise when non-state agents of persecution are involved.[11]

The Roma in central Europe provide an interesting case study. There is no doubt that historically they have been victims of individual and systemic discrimination in many countries and that this discrimination persists to the present day.[12] It may even have been exacerbated by the economic crises that many former Communist countries have experienced since the end of the cold war. Following a television broadcast in the Czech Republic and Slovakia that described Canada as a "safe haven" for the Roma, there was a sudden surge of asylum applications from that region in 1998. (It cannot be assumed that all applications from these countries were Roma, but a high proportion were.) In order to stem the flow, Canada subsequently imposed visa requirements on travellers from countries in central and eastern Europe. The results of asylum applications in 1997–9 for the Czech Republic, Hungary, and Slovakia are shown in table 4. The Canadian refugee determination system was more sympathetic to such claims than other countries, such as Germany and the United Kingdom.

Courts in Britain held that, in the case of the Roma, states such as the Czech Republic and Slovakia provide a measure of protection for the Roma (even when neglecting to enforce their own laws in this respect). Consequently, Romany asylum seekers from central Europe have generally failed to establish a claim to refugee status. The issue was judicially reviewed in the British House of Lords in the case of *Horvath* v. *Secretary of State for the Home Department.*[13] The appellant was a citizen of the republic of Slovakia, where he lived with his wife and child and other members of his family. On October 15, 1997, he arrived in the United Kingdom with his wife and child and claimed asylum. He said that he feared persecution in Slovakia by skinheads, against whom the Slovak police were failing to provide protection for Roma. He also said that, along with other Roma, he had been unable to find work, that he had

Table 2: Percentage Recogniton of Asylum Seekers
Europe and North America

	1980–9		1990–9	
Region	*Convention*	*Total Recognized*[13]	*Convention*	*Total Recognized*[15]
Eastern Europe	100.0	100.0	26.8	35.1
Northern Europe	35.8	83.8	7.6	49.4
Southern Europe	38.6	38.6	8.2	10.7
Western Europe	27.2	28.7	11.4	18.0
Total Europe	29.2	37.6	10.8	23.3
European Union	30.5	37.7	11.1	21.4
North America	28.4	28.4	53.4	53.4
Average Per cent	29.1	36.2	15.0	26.0
Number of Decisions		1,448,750		4,317, 720

*Includes refugees granted convention status and those given humanitarian and comparable status

Source: Adapted from UNHCR: Statistical Overview

not been afforded the normal public facilities as to his marriage and schooling for his child, and that in these respects he was being discriminated against. He maintained that he was afraid that if he and his family were returned to Slovakia, as Roma, they would again be attacked by skinheads. They believed that they would not get protection from the police. In the course of the hearing it was stated,

> This purpose has a direct bearing on the meaning that is to be given to the word "persecution" for the purposes of the Convention. As Professor James C. Hathaway, *The Law of Refugee Status* (Butterworths, 1991) p. 112 has explained, "persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognised by the international community." At p. 135 he refers to the protection which the Convention provides as "surrogate or substitute protection", which is activated only upon the failure of protection by the home state. On this view the failure of state protection is central to the whole system. It also has a direct bearing on the test that is to be applied in order to answer the question whether the protection against persecution which is available in the country of his nationality is sufficiently lacking to enable the person to obtain protection internationally as a refugee. If the principle of surrogacy is applied, the criterion must be whether the alleged lack of protection is such as to indicate that the home state is unable or unwilling to discharge its duty to establish and operate a system for the protection against persecution of its own nationals.[14]

After arguments for and against deportation were heard, one judge concluded and the others agreed,

> Where the allegation is of persecution by non-state agents, the sufficiency of state protection is relevant to a consideration whether each of the two tests—the "fear" test and the "protection" test—is satisfied. The proper starting point, once the tribunal is satisfied that the applicant has a genuine and well-founded fear of serious violence or ill-treatment for a Convention reason, is to consider whether what he fears is "persecution" within the meaning of the Convention. At that stage the question whether the state is able and willing to afford protection is put directly in issue by a holistic approach to the definition which is based on the principle of surrogacy. I consider that the Tribunal was entitled to hold, on the evidence, that in the appellant's case the requirements of the definition were not satisfied. *I would refuse the appeal.*[15]

There are many examples of discrimination (including those experienced by the First Nations in Canada) that fall short of "persecution" in the UN convention sense of that term.

The evidence suggests that, in Europe particularly, there is a media-promoted and popular prejudice against the growing number of asylum applicants. Government actions to deter, interdict, and deport undocumented travellers have been described as a form of *presumptive refoulement.*[16] A

Table 3: Asylum Applicants in Canada 1999 Major Source Countries

Country	*Finalized**	*Per cent Accepted*
Afghanistan	448	92
Somalia	694	76
Sri Lanka	3,091	76
Yugoslavia	320	75
Iran	942	70
Turkey	320	68
Algeria	735	67
Albania	366	66
DR Congo	1,060	62
Columbia	309	50
Pakistan	1,912	50
Russia	739	48
China	1,757	34
Romania	464	29
India	1,175	25
Argentina	135	22
Mexico	1,347	22
Nigeria	593	20
Costa Rica	371	9
Hungary	955	8
Top 20	17,733	50
All others	10,196	40
Total	27,929	46

*Finalized includes withdrawn, abandoned, and other claims

Source: Canada Immigration and Refugee Board

number of recommendations have been made, designed to establish the right to asylum as a core value, to make the principle of *non-refoulement* absolute, and to protect people from exploitation by unscrupulous criminals involved in people smuggling. It remains to be seen whether any of these recommendations will be implemented.

Conclusion

The UN Convention on the Status of Refugees (1951/1967) was a cold-war instrument that has proved inappropriate to deal with the crises of the late twentieth and early twenty-first centuries. The possibility of a new more humanitarian convention receiving the necessary approval at this time seems unlikely. Ad hoc measures to cope with immediate crises, such as those that have occurred in the former Yugoslavia, are likely to persist. Arguably, the post–cold war global regime uses "humanitarian intervention" as an ideology to justify the use of military force. It uses "the language of human rights to legitimise a range of dubious practises."[17] NATO countries have adopted the doctrines of "humane deterrence," designed to limit the number of asylum seekers arriving, and "instrumental humanitarianism" as a pragmatic response to the militar-ization of refugee camps and other crises. Some refugee flows may even be seen as threats to international security, thereby invoking intervention by the UN Security Council, or by NATO. There is a "clash of norms" in current refugee policies that makes the implementation of an idealistic, ethically based, humanitarian program very difficult.[18]

The question remains, Is the treatment of refugees and asylum seekers in wealthier industrial countries sufficiently negative to be described as racist? Have we created a system of "global apartheid" designed to exclude people simply because of their ethnicity? The answer would seem to be yes and no. Europe and North America appear to be willing to accept "genuine" refugees from Africa and Asia, together with persons of colour, or other religions, as long as the need is dire and the numbers are small enough not to be perceived as a threat to the livelihood, or to the traditional ways of life, of the members of the receiving country. At the same time, the fear of overwhelming numbers has led to draconian measures that have a differential impact on those in peril. As Aiken rightly suggested, in this new millennium "the project of anti-racism" remains a "work in progress."[19] Meanwhile, some comfort may be drawn from the Canadian example where the record of approval of asylum applications is more generous than that of most European countries. (The UNHCR praised Canada for its adoption of a "fast track" procedure for processing

Table 4: Asylum Applications 1997–9
Ratio of Convention Refugee Recognition to Number of Decisions

Origin	*Country of Asylum*	*1997*	*1998*	*1999*
Czech Republic				
	Canada	19:296	739:1,053	120:170
	Germany	0:100	0:67	0:0
	U.K.	0:210	0:180	0:0
Hungary				
	Canada	8:60	153:397	70:450
	Germany	1:33	0:25	0:0
	U.K.	0:0	0:5	0:0
Slovak Republic				
	Canada	0:1	5:25	0:0
	Germany	0:416	0:301	0:240
	U.K.	0:375	0:325	0:0

Source: UNHCR Statistical Review, 1997–9

urgent asylum cases, and for "ground-breaking guidelines" on gender-related persecution.[20] There remain controversial questions about documentation, interdiction, and the involvement of organized crime in people-smuggling. It is hoped that any future legislation and administrative practice will not be retrograde in this respect, although the new Bill C-11 has the potential of making it harder for "genuine" refugees to reach this country and be treated fairly.

Notes

1. Anthony H. Richmond, *Global Apartheid: Refugees, Racism and the New World Order* (Don Mills, Ont.: Oxford University Press, 1994), 208.
2. Sharryn Aiken, "Racism and Canadian Refugee Policy." *Refuge* 18, no. 4 (1999): 7.
3. UNHCR, *Refugees and Others of Concern to the UNHCR: 1999 Statistical Overview* (Geneva: UNHCR, 2000), 15.
4. John Morrison and B. Crosland, *The Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy* (Geneva: UNHCR Policy Unit, 2000).
5. J. C. Hathaway and J. A. Dent, *Refugee Rights: Report of a Comparative Survey* (Toronto: York Lanes Press, 1995).
6. Howard Adelman and C. M. Lanphier, eds., *Refuge or Asylum? A Choice for Canada* (Toronto: York Lanes Press, 1990), 0; Adam Roberts, "More Refugees, Less Asylum: A Regime in Transformation." *Journal of Refugee Studies* 11, no. 4 (1998): 375–95.
7. UNHCR, *Refugees and Others of Concern to the UNHCR: 1999 Statistical Overview* (Geneva: UNHCR, 2000).
8. In the first six months of 2000 there were 186,000 asylum applications filed in the European Union, 20 per cent of which were made in each of Germany and the U.K., and 11 per cent in the Netherlands (UNHCR, *The State of the World's Refugees* [Geneva: UNHCR, 2000]).
9. Anthony H. Richmond, "Refugees and Asylum Seekers in Britain: UK Immigration and Asylum Act, 1999." *Refuge* 19, no. 1 (2000): 35–42.
10. The figures for the U.S. do not take into account the interdiction program, introduced in 1981, that prevented many Haitians from reaching American shores. The Haitian Refugee Act, 1998, allowed those who had arrived in the U.S. before December 31, 1995, to obtain permanent residence, but interdiction at sea continued (UNHCR, *The State of the World's Refugees* [Geneva: UNHCR, 2000], 177).
11. UNHCR, *UNHCR Global Report, 1999* (Geneva: UNHCR, 2000), 163.
12. Holly Cartner, *Destroying Ethnic Identity: The Persecution of Gypsies in Romania* (New York: Helsinki Watch, 1991); David Crowe, *A History of Gypsies in Eastern Europe and Russia* (New York: St. Martin's Press, 1995). European Roma Rights Centre. *Roma Rights.* Vols. 1–3. European Roma Rights Centre, 1998–2000.
13. House of Lords. July 2000. *Horvath* v. *Secretary of State for the Home Department*.
14. Ibid.
15. Ibid.
16. Morrison and Crosland, *The Trafficking and Smuggling of Refugees,* 6.
17. B. S. Chimni, *Globalisation, Humanitarianism and the Erosion of Refugee Protection* (Oxford: Refugee Studies Centre, Queen Elizabeth House, 2000), 2.
18. J. S. Goodwin-Gill and J. Kumin, *Refugees in Limbo and Canada's International Obligations* (Toronto: Caledon Institute of Social Policy, 2000). Myron Weiner, "The Clash of Norms: Dilemmas in Refugee Policies." *Journal of Refugee Studies* 11, no. 4 (1998): 433–53.
19. Aiken, "Racism and Canadian Refugee Policy," 7.
20. UNHCR, *UNHCR Global Report, 1999* (Geneva: UNHCR, 2000), 181.

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Human Trafficking: Canadian Government Policy and Practice

Jacqueline Oxman-Martinez, Andrea Martinez, and Jill Hanley

Abstract

A recent study undertaken by the authors (Oxman-Martinez and Martinez 2000) examined the Canadian government's response to the traffic of human beings. Information from twenty-one government and NGO informants and a thorough review of state agency policies and international conventions revealed that trafficking and refugee movements have many links. The question raised by the Metropolis Project—Is clandestine entry to Canada a crime or a new form of migration?—is important, given that trafficking may be the only option available to legitimate refugees waiting to escape dangerous or oppressive situations.

Rather than seeking to ease the migration of refugees or addressing the structural causes of trafficking or its social implications, however, Canada's response is focused on the prevention of "irregular movements" (through immigration and border control) and prosecution of the few traffickers successfully apprehended. Preliminary evidence suggests that border control will fail to adequately address the exploitation of women, children, and men—often refugees—within our frontiers. The temporarily defunct Bill C-31 (with its measures to control the borders and restrict immigration) threatens the rights of refugees while doing little to prevent human trafficking, protect its victims, or prosecute those who profit from trafficking.

Résumé

Une étude récente faite par les auteurs (Oxman-Martinez et Martinez 2000) s'est penchée sur la réaction du gouvernement canadien au trafic de personnes. Des informations reçues de 21 informateurs se trouvant au gouvernement et dans des ONG, ainsi qu'un réexamen en profondeur des politiques suivies par les agences gouvernementales et des conventions internationales ont révélé qu'il existait des liens multiples entre le flot de réfugiés et le trafic de personnes. La question posée par le Projet Metropolis, c.à-d. « L'entrée clandestine au Canada est-elle un crime ou une nouvelle forme de migration ? » est importante, étant donné que le trafic est possiblement l'une des seules options dont disposent les réfugiés légitimes désirant fuir des situations dangereuses ou abusives.

Cependant, au lieu d'essayer d'atténuer le flot de réfugiés ou de s'attaquer aux causes structurelles du trafic ou à ses implications sociales, la réaction du Canada est consacrée à empêcher les « déplacements irréguliers » (contrôle de l'immigration et contrôle aux frontières), et la poursuite en justice des rares trafiquants qu'on arrive à appréhender. Des indications préliminaires suggèrent que le contrôle aux frontières ne parviendra pas à s'attaquer de façon satisfaisante au problème que constitue l'exploitation, à l'intérieur même de nos frontières, de femmes, d'enfants et d'hommes qui sont souvent des réfugiés. Le projet de loi C-31 — temporairement défunt — avec ses mesures pour contrôler nos frontières et limiter l'immigration, menace les droits des réfugiés, sans pour autant faire beaucoup pour empêcher le trafic humain, protéger ses victimes ou traduire en justice ceux qui en profitent.

Introduction

This article presents the findings of a study completed as part of the Trafficking in Human Beings project, an initiative of the Global Challenges and Opportunities Network (GCON)'s Working Group on Transnational Crime.[1] The goal of the research was to document the nature of human trafficking in Canada and explore the policy issues currently facing federal agencies working in this domain. Hoping to overcome the fragmented and anecdotal nature of most information on human trafficking in Canada,[2] the authors used interviews, questionnaires, official documents, and a review of the literature to explore the efficacy of the government's response to this phenomenon.

The results of this study reveal that the victims of trafficking are often individuals who might be considered refugees but who are unable to enter the country along conventional paths. For refugees unable to secure official identity or travel documents[3] or for those who might have difficulty qualifying for refugee status,[4] smuggling may be the only option to migrate. Unfortunately, individuals who must rely on smuggling to migrate become vulnerable to being trafficked.

Specific government mandates on human trafficking are rare, however, and agency responses to this phenomenon lack coordination. Rather than addressing the structural causes of trafficking or its social implications, Canada's response is focused on the prevention of "irregular movements" (border control) and prosecution of the few traffickers who are actually apprehended. Current approaches to preventing trafficking, protecting its victims, and prosecuting its perpetrators are inadequate. This article will argue that a punitive border control approach, as proposed in the temporarily defunct Bill C-31, threatens the human rights of legitimate refugees and migrants (CCPCYA 2000; Canadian Council for Refugees 2000). Instead, the authors argue for a socio-structural approach for addressing the human rights violations inherent to the traffic of human beings.

Defining Human Trafficking

One reason for the difficulty in preventing human trafficking and protecting its victims is that the international community has yet to come to a consensus on a definition of the phenomenon. In December 2000, the United Nations is adopted a Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. This supplemental protocol to the UN Convention against Transnational Organized Crime operates with the following definition:

> Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by the threat or use of force, by abduction, fraud, deception, coercion or the abuse of power or by the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of . . . sexual exploitation, forced labour or services, slavery or practices similar to slavery.[5]

The authors' research also raised definitional problems among Canadian government agencies, and they argue for further provisions in defining human trafficking. First of all, although the protocol does not mention borders, for the purposes of this research on the Canadian context, trafficking is defined as involving the movement of trafficked individuals across international frontiers. Although there are reasonable arguments for including intranational displacement and forced labour,[6] we would like to stress the connections of human trafficking to trade globalization and transnational organized crime.

Second, the concept of "consent" is irrelevant to defining human trafficking. Some government officials stated in interviews that they took into consideration whether or not individuals gave their consent to their exploitive situation when deciding if a situation constituted human trafficking. As already mentioned, many individuals choose to be smuggled across borders (implying initial consent), but they may have been unaware that they would later become trafficked and that their freedom would be restricted upon their entry to Canada. Also, trafficked individuals may enter Canada on legal visas (implying initial consent) but find themselves "trafficked" upon arrival. Women who come to Canada as mail-order brides (on a fiancée visa), as domestic workers (live-in care giver visa), or as "entertainers" (work visa), for example, sometimes find themselves caught in a trap.[7] Finally, when individuals "choose" to be trafficked as a result of economic, political, or family pressures at home, the authors argue that this does not negate the fact that their human rights are being violated.

Finally, we insist upon the importance of distinguishing between human smuggling and the traffic of human beings across international borders. Smuggling always entails illegal entry into a country, while trafficked individuals may enter with legal documents. As well, people smuggled into a country are free upon their arrival, while trafficked individuals remain under the control of a third party, whether through the use of violence, threats of violence against their families, or other forms of coercion.[8] As mentioned, for some international migrants, smuggling may be the only exit from their own countries and the single means to cross borders. Smuggling is at times the only pos-

sible way to leave the country of origin (especially for refugees), while trafficking exploits individuals for the profit of third parties. Canadian government agencies tend to have mandates that deal exclusively with smuggling rather than trafficking per se.

Methods

To successfully perform this study, a three-stage qualitative analysis was carried out. The analysis of documents (research reports, departmental documents, and reports of groups concerned) gave a better understanding of the issue of trafficking in persons. On the basis of the documentary analysis, a guide for semi-structured interviews and a questionnaire were prepared to be used with a sampling of key informants representing the main federal departments and agencies concerned in the effort to combat trafficking. In total, seventeen face-to-face interviews were conducted, in English or French, between November 1999 and April 2000. The interviews were conducted at each informant's workplace and lasted from one and one-half to three hours, depending on the interest shown by the interviewees and the amount of information they could provide. In some cases, follow-up interviews were conducted to supplement the information gathered. At the same time, four questionnaires were completed by key individuals living outside of the Ottawa and Montreal areas. Finally, Status of Women Canada held a round-table discussion on the topic of human trafficking, and the authors carefully transcribed and analyzed participants' presentations and discussions.

Trafficking in the Context of Globalization

Among the factors that explain the scale of human trafficking are economic globalization, the impact of structural adjustment policies on the feminization of poverty, the lack of laws or non-enforcement of those in effect,[9] armed conflict, and even the complicity of some governments, particularly in economically poor countries, with organized crime. In addition, communications technologies are speeding the expansion of sex tourism, to the point of turning some developing countries into "body fairs."[10]

International Trade and Growing North-South Inequality

The phenomenon of human trafficking cannot be separated from the expansion of economic globalization and growing North-South inequality. Informants for this project described many situations that illustrate this dynamic. Human trafficking is essentially a question of supply and demand of labour on a global level, and a source of wealth. A focus on agribusiness and economic development driven by the multinationals in the Third World has created disenfranchisement that forces many to look outside their home countries for economic opportunities.

Whether we are discussing trafficked farm, domestic, factory, or sex workers in Canada, we are confronting the fact that more profit can be made by paying less than is acceptable to Canadian citizens but is enough to entice individuals living in poverty in economically underdeveloped nations. Conditions are so poor, however, that traffickers must intimidate, threaten, or use violence against their victims in order to ensure their compliance. At the same time, many countries, such as the Philippines and El Salvador, have come to rely on the in-flow of foreign funds from its workers abroad. Developing nations implement programs such as the Philippine Labour Export Program, pushing their citizens to undertake sometimes dangerous and precarious work in order to obtain foreign currency to pay crushing international debts.

In the case of the international trafficking of children for adoption or women and children for the sex trade, we must confront the phenomenon of the commodification of human beings.[11]

Transnational Organized Crime

The role of well-organized transnational crime syndicates in human trafficking is growing.[12] Data from the International Organization for Migration (IOM) suggest that the smuggling of migrants has created a black market for smugglers' services with an annual global monetary value of US$7 billion. Organized crime involvement takes three principal forms: (1) smuggling itself, (2) human trafficking, and (3) smuggling or trafficking with the aim of facilitating other criminal activities (drug trafficking, theft, fraud).[13] In Canada, a study of the impact of organized crime estimated that between 8000 and 16,000 people enter the country each year with the help of smugglers.[14] According to Porteous, the majority of those smuggled subsequently apply for refugee status, and a large proportion can be assumed to be successful in their claims. The data to determine the proportion of those smuggled into Canada who are also trafficked do not exist.

International "Irregular" Migration to Canada

According to the UN Centre for International Crime Prevention, throughout the world 4 million persons are trafficked each year.[15] As stressed by Wichterich, this modern form of slavery has assumed vast proportions, but it is not a recent invention. As early as the 1960s, the global trade in

women was recruiting victims from Southeast Asia (mainly Thailand, Malaysia, and the Philippines), with a second wave of women trafficked from Africa (Kenya, Ghana, Nigeria, and Zaire) in the 1970s. Trafficking from Latin America (Colombia, Venezuela, Ecuador, Panama, and the Dominican Republic) soon followed. Recently, the trade has spread to the People's Republic of China, the Mekong region, and East European countries, with Ukraine becoming the main global source for trafficking in girls and women.[16] The United States Agency for International Development (USAID) statistics from 1998 show that, during the 1990s, some 400,000 Ukrainian women were recruited for trafficking to North America, Western Europe, and Israel.[17] In the United States, where Asian prostitutes may be sold for up to US$20,000 each, Asian organized crime groups are said to control around 70 per cent of the sex industry.[18] It is notable that the sources of trafficking often correspond with areas facing war or serious economic crisis—the usual sources of refugees.

Estimated Incidence and Form of Trafficking in Canada

Interview participants described many Canadian examples of trafficking. Women are trafficked for prostitution, thinking they are coming here for legitimate work under the Immigration Act as exotic dancers or as masseuses. Children are trafficked for illegal adoption, and men are trafficked to work in slavery-like conditions in factories, agrifood or agricultural settings. Other forms of trafficking include the cases of domestic workers or mail-order brides who are deprived of their freedom upon arrival in Canada, or have their passports taken away and their lives controlled by threats against themselves or their families. The fact remains, however, that with the current state of knowledge, it is not always easy to distinguish migrant smuggling from trafficking in persons, as defined by the newly adopted UN protocol.

The problem of trafficking never shows up directly in the context of work performed by study participants in the field. Of the 12,000 refugees who claimed status upon landing in Canada in 1999 (representing 48 per cent of total refugees),[19] however, it can be safely assumed that some of them were smuggled and/or trafficked into Canada. Instead, trafficking is revealed indirectly through operations targeting organized crime, such as goods smuggling, usury, fraud, and illegal gambling. The Montreal Police (SPCUM) Intelligence Division, for example, has been able to identify trafficking cases during raids on unlicensed bars, massage parlours, or beauty salons. Another chance discovery occurred in Vancouver, where immigration officers found that some Malaysian women seeking entry had the proper visas but nothing but lingerie in their luggage!

Questioning at border posts, victims' "confessions," and the anonymous testimony of family witnesses are the most common means for detecting traffickers and their victims. However, the key element in operations to locate traffickers and their victims is a relationship of trust with informants unofficially employed by the RCMP's investigative service. The ethnic communities to which victims or traffickers belong are excellent sources for contacts because they are often the first to suspect trafficking cases in their midst. Examples of this type of partnership are investigations conducted in collaboration with the Toronto Police Service's Combined Forces Asian Investigative Unit (CFAIU), which combats organized crime in the Asian community. Through this type of unofficial cooperation, RCMP investigation heads were able to carry out Project Orphan in Toronto, making it possible to dismantle a network trafficking Malaysian women for prostitution. Once located, the women were repatriated, however, while the traffickers were handed over to the RCMP.

Profile of Traffickers

It is impossible to sketch a physical or even psychological profile of traffickers on the basis of information from intelligence databases of Citizenship and Immigration Canada (CIC), or from the RCMP. The information collected in our interviews and through our questionnaires was scarcely more revealing. For example, according to some accounts, the traffickers involved in facilitating border crossings are usually middle-aged Canadian men of foreign origin. However, no special feature seems to distinguish them: "They are like ordinary citizens," noted one informant. Incidentally, as smugglers continually change their smuggling routes to escape the vigilance of customs inspectors, it is no easier to detect their smuggling "system."

Profile of Victims

The information known about trafficking victims (men, women, and children) is also fragmentary and even confidential. Only the characteristics of apprehended illegal migrants are documented in Canada at the moment; illegal migrants, however, are not necessarily smuggled or trafficked. In this regard, CIC and the RCMP by and large have enough information to trace the country of origin, sex, age, and ethnic origin of illegal migrants. In addition, according to study participants, most illegal migrants are poor, disadvantaged young men (aged twenty-one to twenty-

five), while occasionally there are young mothers who have left their children in their country of origin. Nevertheless, for political or religious reasons (in Iran, for example), some well-to-do people also seek to migrate illegally by turning to the services of a smuggler.

At present, it seems that the favoured targets of smugglers for exploitation are girls and young women aged sixteen to twenty-two, but little or no information about them has been collected in Canada. According to CIC, smugglers usually meet potential victims in hotels and prepare them to answer the questions of immigration officers. If a victim is refused entry, she is sometimes motivated to speak out. When victims can't stand it any longer, they contact CIC because they have nothing to lose.

What Causes Victims to Leave Their Home?

Apart from dreaming the "American dream" fed by the misleading pictures painted of an enticing future, most study participants thought that what prompts "potential" victims (and illegal migrants in general) to leave their country is structural conditions (socio-economic and political) found in some regions of the world. According to participants, illegal movements are directly related to labour market shifts—seasonal or irregular. The socio-political and economic characteristics of countries of origin would thus explain why people head for Canada. Armed conflict and oppressive governments also play a role.

Government complicity in some developing countries hardly eases the task of immigration officers. As one study participant noted, in the small Caribbean island of Dominica, citizenship may be purchased for a payment of between CAN$10,000 and CAN$20,000. Until very recently Dominica citizens needed no visa to enter Canada, and twenty Chinese people used this opportunity to gain entry. When this strategy was discovered, these Dominica "citizens" were repatriated to Dominica, and Canada now requires citizens of the island to have a visitor's visa. The problem, however, exists elsewhere, notably in some islands of the Pacific where authorities see this as a way of quickly filling their coffers.

Routes, Modes of Transportation, and Destinations in Canada

Other than the information acquired on routes and modes of transportation used by illegal migrants, no informant could give details about how trafficking victims enter Canada. CIC did, however, remark that the modes of transportation from the United States were bus or rental car. Smugglers are said to keep the papers of victims, who enter the country first and are joined afterwards by the smugglers.

Once they have arrived in Canada, it is believed by some of the informants that most trafficked individuals are forced to work within their own ethnic communities in large cities (especially the Chinese, Latin American, and Caribbean communities). Toronto is thought to lead (with 46 per cent of cases), followed by Vancouver and Montreal. According to the SPCUM, trafficking in human beings has reached the saturation point in New York City and now is focusing on Canadian border cities.

Payments Required

According to RCMP information, each freighter illegally transporting migrants earns its owner approximately $1.5 million in profits. As for payments required by smugglers or traffickers, study participants believe that these range from $15,000 to $70,000, depending on whether an individual or family is involved. Trafficking victims must continue paying their debts to traffickers for years, at interest rates that are often high and subject to change. Further, victims are often subjected to intimidation and extortion to make them pay their debt. In this situation, victims find it difficult to break out of the vicious circle. A telling example is that of some Asian men and women whose cultures hold that any debt incurred must be paid as a matter of honour. To succeed in paying back the debt, these people become still more vulnerable to exploitation by the traffickers, who incite them to perform criminal acts (drug payments, protection money, etc.). When victims do not pay up, their families are easy prey for these criminal organizations.

Living and Working Conditions in Canada

The exploitation of trafficking victims generally occurs after entry to Canada. Traffickers recover their papers (passport or employment authorization) and keep victims in their debt as long as they wish. Trapped in this way, these people live with the fear of being arrested by the police. The result is a cycle of threats and abuse of all kinds: working for less than minimum wage, forced debt, and violence. They are exploited in sweatshops (in the textile and agrifood industries), restaurants, the sex trade (exotic dancing, prostitution), and domestic work (household help), or else are involved in illegal activities, such as counterfeiting, stolen credit cards, and drug trafficking.

In Vancouver, for example, we were told about farm workers living in slavery-like conditions. Sweatshops have

been identified in abandoned buildings on Spadina Avenue in Toronto and Casgrain Street in Montreal. The people working in these establishments (the majority of whom are women) go unnoticed most of the time. They are forced to work long hours for low pay, with their illegal status making their situation precarious. After acquiring some experience and skill in their field, in principle these individuals should receive a promotion. Instead they are forced to do different work and repeatedly to learn how to do a new job.

The Montreal Police estimate that, in Toronto and Montreal, there are 10,000 to 12,000 Sri Lankan and Cambodian women who have been forced into marriage in order to gain entry to Canada. Further, over the last three years, some women from the Philippines who came to Montreal to work as domestic workers are said to be paid at the rate of $10 a week, while their employers take away their work visas and travel documents.

Often, trafficking in women and children leads to sex work. CIC gives the example of women who, thinking they were coming to Canada to work as hair stylists or beauticians, were finally forced to become erotic dancers in nightclubs. When they agreed to dance at a customer's table they would receive an extra $10, but the money was later taken from them by the bar owner. In addition, the women could not go out alone and, in case of sickness or menstruation, their pay was docked.

Last, Health Canada should be worried about the direct negative impact of poverty, stress, and violence on the health of trafficking victims. Unfortunately, no concrete steps have yet been taken to address the health needs of this vulnerable population. This situation is striking since, when it comes to health, Canada has an enviable international reputation.[20] Of course, when victims are discovered, the RCMP refers them to other bodies such as CIC, the local police, social services, municipal and provincial health services, or action and awareness groups from ethnic communities that can offer them legal recourse. However, there is no federal aid program specifically designed for the benefit of trafficking victims.

Critique of the Current Government Response to Human Trafficking in Canada

With the exception of the Department of Foreign Affairs and International Trade (DFAIT),[21] the departments and agencies contacted have no mandate that refers specifically to trafficking in persons, although they do acknowledge the need to address the problem. In Canada, the legal framework (which does not directly address the trafficking problem) or social policy and humanitarian concerns determine government mandates.

Bill c-31 and Trafficking

Although Bill C-31 died with the election call last fall, the content of the bill reflects what is the general orientation of the government toward trafficking. It can be assumed that although this version of the bill did not pass, a similar version will be reintroduced in the coming years. The bill prohibits "organizing [illegal] entry into Canada," "trafficking in persons," and "disembarking persons at sea." As well, "possession of property obtained by certain offences" is also prohibited. The penalties for engaging in these acts are outlined, yet there are no provisions for the prevention of trafficking or the protection of its victims.[22]

Emphasis elsewhere in the bill is on restricting entrance to Canada and on criminalizing all involvement in smuggling. Advocates have already raised the difficulties this orientation poses to potential refugees.[23] The criminalization of individuals who are smuggled (and possibly trafficked) into the country puts at risk each individual's right to claim refugee status. The automatic detention of smuggled individuals and their ineligibility to make a refugee claim ignores the fact that, for many refugees, smuggling is the only possible route into Canada. And perhaps most disturbing, the criminalization of all forms of illegal entry would make victims of trafficking even less likely to appeal for help than at present.

Overall, punitive legislation such as the defunct Bill C-31 would fail to stop trafficking or protect its victims, would criminalize all involvement in smuggling (putting at risk legitimate refugees), and would violate the basic human rights standards of international human-rights conventions and formally recognized international legal norms.[24] The implications of this type of legislation for refugees who must use these forms of migration are severe.

Need for Specific Mandates on Trafficking

Federal government policies and programs are intended to combat illegal entry into Canada, in accordance with one key objective of Canadian foreign policy: to ensure our security by protecting against international crime and uncontrolled migration. However, it is difficult to distinguish irregular movements (labour force immigration, brain drain, refugees and asylum seekers on various grounds including religion, colour, and ethnic origin) from other, illegal activities, such as trafficking in human beings, arms dealing, drug smuggling, or even terrorism; and the diffi-

culty casts doubts on the efficacy of controls on migratory flows. If controls are ineffective and human rights are not safeguarded, do we not lose more by closing borders than we do by opening them?

Among the many factors facilitating the expansion of international criminal organizations and their control over illegal migration are the demographic and economic conditions in developing countries, the globalization of movements of goods and capital, and the aspiration to similar living conditions around the world. Neither border controls alone nor sustainable development strategies (in particular, managing and funding projects) can halt the trends. But these are the two policies championed by the federal government (as proposed in Bill C-31) to eliminate trafficking in persons.

Basically restrictive in concept, the first policy (border controls) results in the interception of illegal migrants, without offering a genuine solution to the problem of trafficking in persons. To strengthen immigration law and sentences for traffickers, what is needed first is the ability to put into operation the government's existing definition of trafficking.[25] In light of our documentary analysis and interviews, however, there is no guarantee that the definition will be put into effect. Already, the difficulty that border posts experience in differentiating between illegal migrants, smugglers, traffickers, and victims has harmful effects; one is that people come to live in a country without putting down roots.[26] In the long term, far from punishing traffickers, the situation instead strips immigrants and refugees of basic rights, since it leads to the creation of a new category of second-class citizens, who live in fear of being arrested and are thus vulnerable to abuses of all kinds.

The second policy of sustainable development is based on respect for basic rights and humanitarian principles, but it is powerless to deal with the rise of criminal organizations modelled on large conglomerates. For example, Metropolis notes the emergence, in corporate form, of transnational crime networks integrated horizontally and vertically. The horizontal integration can be seen in participation in related criminal activities (arms and drug smuggling), and in making use of transnational transportation and distribution networks. The vertical integration implies control of the entire organized crime network, from production of illegal documents in the phase before migrants' entry, to the exploitation or quasi-slavery to which they are subjected after arrival, in traditionally illegal sectors (the sex trade, drugs, and sweatshops).

It is therefore urgent to base the policies and practices of federal departments and agencies on an operational definition of trafficking in persons.

Need to Operationalize the UN Proposed Definition of Trafficking

With no criteria for identifying traffickers and their victims, asks the CCR with reason, how can the definition in the UN Protocol ensure protection of the victims? The information gathered in the course of this study has shown that some trafficking cases are detected through indirect operations or the experience acquired by officers in border posts. For example, doubts about the truthfulness of the stories told by female refugee claimants sometimes prompt customs inspectors to search their cars, in which they find clothing and documents belonging to the claimants. These actions set in motion a process that leads to identification of smugglers and potential victims.

The findings of our analysis indicate to us the importance of adding indicators to CIC's intelligence database with the aim of drawing up profiles of smugglers, traffickers, and their victims in Canada. However, would introducing more combinations of variables facilitate detection of traffickers and their potential victims? That question must undergo study.

"Victims": A Problematic Concept

Further, the concept of "victim" is ambiguous. Some study participants saw victims as people who enter a country using the services of smugglers or traffickers. Others saw the victim as the receiving country that offers a social system "exploited" by illegal migrants. This ambiguity highlights the importance of examining immigration policy not only from a legal but also from a humanitarian perspective. If the victims of trafficking are not necessarily the illegal migrants, different actions and responsibilities are called for on the part of government.

Protection versus Criminalization of Trafficking Victims

Despite the wording of its title ("to prevent, suppress and punish trafficking in persons"), the protocol seems to give little attention to the issue of prevention.[27] Article 10 (the only one relating to prevention) is brief and extremely general. Much is said about the vulnerability of victims and the need to protect them, but little or no concrete action is being taken to do so in Canada. Some study participants

feel that "victims" should be arrested on entering Canada. This, they, believe, would force the migrants to appear before hearings on their status and to become applicants for official status, which would better protect them from the clutches of their traffickers. In contrast, other participants regard arrest on entry as a violation of human rights. Moreover, Article 14 of the Universal Declaration of Human Rights states that "Everyone has the right to seek and to enjoy in other countries asylum from persecution."[28]

Where action has been taken, it is in criminalizing trafficking in persons, and the adoption of a bill such as C-31 would continue this trend.[29] According to some study participants, criminalization has a twofold impact: it eliminates middlemen and thereby reduces one part of the criminal network, but it has an undesirable effect on victims, since traffickers are not about to take a loss, and simply force their victims to pay still-higher fees. Considerable efforts must therefore be made to identify the range of public responses that should be developed to combat the lucrative industry of trafficking in persons and to distinguish it from other forms of illegal migration.

While punitive measures against traffickers are undoubtedly required, they should be accompanied by actions that would promote national and international cooperation agreements. For this purpose, together with NGOs working in the area of trafficking in Canada, it would be valuable to establish procedures for monitoring potential victims. By participating, NGOs would provide a more reassuring link between victims and the government. Members of ethnic communities find it easier to trust NGOs than federal departments and agencies, which are often perceived as distant bureaucratic organizations. Further, it would be useful to set up an information network linking federal departments and agencies, NGOs, activists, journalists, and lawyers working on the trafficking issue. Drawing on the model of the work of CIDA's Asian partners, Canada could also organize awareness workshops for professionals and the media in order to help them better understand the various aspects of trafficking. Such an approach would call into question the logic of closing borders and would thereby deflect the hostility of media-fed public opinion about illegal migrants.

Need for a Global, Unified Approach

In summary, understanding the problem of trafficking in its entirety is all the harder because illegal entry is only the tip of the iceberg. As Wihtol de Wenden says, "The real challenge for countries of destination lies not in an endless program to combat movements of persons, but rather in learning to 'live together' and in the search for solutions offering all people the freedom to remain in their home countries."[30] This is why Canada should adopt a global perspective rather than an approach that is local or based on countries of destination or temporary transit. Trafficking includes three major space-time dimensions in a chronological order: (1) recruitment and exploitation in the country of origin; (2) migration (legal or illegal) from one country to another; and (3) exploitation in the country of destination. Accordingly, the problem of trafficking should be addressed by collective efforts involving promotion, detection, prevention, and training in countries of origin. These comprehensive efforts would include identification of victims and traffickers in their countries of origin, plus border surveillance, criminal investigation, and protection of victims in countries of destination.

Conclusion

In conclusion, we believe that the effort to combat trafficking will be slowed rather than aided by punitive legislation such as that proposed in the former Bill C-31. The blanket criminalization of refugees who must use smuggling to escape dangerous or oppressive situations or of individuals who are the victims of trafficking will not stop the demand for these activities and will further victimize people whom Canada professes to want to protect.

Instead, Canada needs a twofold approach: First, joint action is needed by all levels of government in Canada, working in collaboration with the NGOs concerned. The government should seek to uncover and prosecute those who smuggle or traffic human beings for profit, but those individuals who are the subjects of these "irregular movements" should be given the opportunity to apply for refugee status, obtain work visas, and/or apply for landed immigrant status.

Second, Canada and countries at risk should develop a joint strategy to eliminate the structural conditions that drive potential victims to look for an illegal way out of their predicament. The first step is to examine Canada's participation in international trade and diplomacy. Supporting strong labour standards, debt reduction, and fair trade on a global scale is essential to reducing the poverty that pushes many people to emigrate illegally. Also, consistency in insisting on the protection of human rights both at home and abroad would lessen the need for people to migrate and their exploitation upon arrival in Canada. Two final key points emerging from our research are the need to implement innovative awareness and action programs to discourage victims from leaving their country of origin,

and the need to find effective means of targeting the heads of international crime organizations involved in trafficking.

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Notes

1. The Trafficking in Human Beings Project is directed by representatives from the following federal departments and agencies: the Department of Foreign Affairs and International Trade (DFAIT), the Canadian International Development Agency (CIDA), Citizenship and Immigration Canada (CIC), Statistics Canada (SC), the Department of the Solicitor General of Canada (SGC), the Department of Justice, the Royal Canadian Mounted Police (RCMP), the Canadian Security Intelligence Service (CSIS), the Metropolis Network, the Secretariat of the Policy Research Initiative, and Status of Women Canada (SWC). SWC's Research Directorate chairs the project steering group and provides project management.
2. Earlier researchers had noted, "Information on trafficking . . . at the federal level in Canada is very limited." Consulting and Audit Canada, "Trafficking in Women: Inventory of Information Needs and Available Information" (Ottawa: Citizenship and Immigration Canada, Strategic Policy, Planning and Research, 2000), 1.
3. For example, in countries where war has collapsed the government (Afghanistan, Somalia) or with oppressive governments that restrict travel (Iran, China).
4. Canada has been reluctant to recognize threats that are not targeted at individuals (i.e., civil war, famine), that involve gender persecution, or are based on economic exploitation (often a result of globalization) as bases for refugee status. Immigration and Refugee Board of Canada, "Civilian Non-Combatants Fearing Persecution in Civil War Situations." Online: <http://www.irb.gc.ca/legal/guidline/civilian/cw_a_e.stm> (date accessed: November 2000); Immigration and Refugee Board of Canada. "Women Refugee Claimants Fearing Gender-Related Persecution: UPDATE." Online: <http://www.irb.gc.ca/legal/guidline/women/gd4_a_e.stm> (date accessed: 20 November 2000).
5. Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, "Revised Draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children: Supplementing the United Nations Convention against Transnational Organized Crime," *Document No. A/AC.254/4/Add.3/Rev.7* (Vienna: United Nations, 2000), 6.

   An important and deplorable exception in Canada has been the forced removal of First Nations children for adoption by white families, as well as Canadian children and women coerced into the sex trade.
6. International Organization for Migration. "Traffickers Make Money through Humanitarian Crises." Geneva: IOM, 1999; Coalition to Abolish Slavery and Trafficking. "Fact Sheet on Trafficking of Women and Children." Online: <http://www.trafficked-women.org/fact.html> (date accessed: 3 September 1999).
7. Philippine Women Centre of B.C., "Canada: The New Frontier for Filipino Mail-Order Brides" (Vancouver: Philippine Women Centre of B.C., 2000).
8. In cases where individuals are smuggled into the country, free upon arrival but nonetheless live in fear as the subject of serious threats, intimidation or violence by those who facilitated migration in order to secure repayment of exorbitant debts, we would consider this also to constitute trafficking. Whether freedom is physically or psychologically curtailed, trafficking contravenes migrants' human rights and dignity.
9. Tenth UN Congress on the Prevention of Crime and the Treatment of Offenders, "New Global Treaty to Combat 'Sex Slavery' of Women and Girls," *Document No. DPI/2098* (Vienna: UN Dept. of Public Information, 2000).
10. Donna M. Hughes, *The Sex Industry and the Internet Industry: Partners in the Globalization of Sexual Exploitation* (New Brunswick, NJ: International Symposium on Technology and Society, Rutgers University, 1999); Christa Wichterich, *La femme mondialisée* (Paris: Solin, Actes Sud, 1999).
11. Philippine Women Centre of B.C., 2000.
12. Coalition to Abolish Slavery and Trafficking, "Fact Sheet on Trafficking of Women and Children." Online: <http://www.trafficked-women.org/fact.html> (date accessed: 3 September 1999).
13. International Organization for Migration, "Traffickers Make Money through Humanitarian Crises" (Geneva: IOM, 1999).
14. Samuel D. Porteous, "Organised Crime Impact Study Highlights," Catalogue No. JS42-83/1998 (Ottawa: Public Works and Government Services Canada, 1998).
15. Centre for International Crime Prevention. "Global Programme against Trafficking in Human Beings: An Outline for Action." Vienna: UN Office for Drug Control and Crime Prevention, 1999.
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18. Tenth UN Congress on the Prevention of Crime and the Treatment of Offenders, "New Global Treaty to Combat 'Sex Slavery' of Women and Girls," *Document No. DPI/2098* (Vienna: UN Dept. of Public Information, 2000).
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20. Federal/Provincial/Territorial Advisory Committee on Population Health, "Statistical Report on the Health of Canadians" (Ottawa: Health Canada, 1999).
21. The Department of Foreign Affairs and International Trade's foreign policy objectives involved it directly in the international negotiations to adopt the anti-trafficking protocol supplementing the UN Convention.
22. *Immigration and Refugee Protection Act.* Government of Canada.

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23. Centre Justice et Foi, Le Groupe de travail sur les réfugiés, and the Canadian Council for Refugees, "Position Paper on Bill C-31 and Refugees")Montreal: Centre Justice et Foi, 2000); CCPCYA, "Response of the Canadian Council of Provincial Child Advocates to Bill C-31 (Proposed Amendments to the Immigration Act)" (Montreal: CCPCYA, 2000).
24. Global Alliance against Traffic in Women/Foundation against Trafficking in Women/ International Human Rights Law Group, "Human Rights Standards for the Treatment of Trafficked Persons" (New York: Global Alliance against Traffic in Women, 1999).
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26. Of course, there are those who would prefer, if we are unable to bar irregular migrants completely from entry to the country, that they remain outside of mainstream society. Wihtol de Wenden, 1999.
27. Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, 2000.
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29. CCPCYA, 2000.
30. Wihtol de Wenden, 1999.
31. Oxman-Martinez, Jacqueline, and Andrea Martinez, "Trafficking in Human Beings in Canada: Summary of Federal Government Practices and Policy Issues" (Ottawa: Status of Women Canada, 2000).

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Benevolent State, Law-Breaking Smugglers, and Deportable and Expendable Women: An Analysis of the Canadian State's Strategy to Address Trafficking in Women

Sunera Thobani

Abstract

The Canadian state undertook a major restructuring of the immigration and refugee program in the 1990s, committing itself to creating a new immigration act as part of this process.[1] Trafficking is one major issue that the new act would concern itself with. In this paper I make the case that the state's proposals for addressing trafficking enable the state to posit itself as responsible for protecting "Canadians" while carefully avoiding any responsibility for the well-being of women who are trafficked; demonize smugglers as the cause of trafficking; and override the concerns and interests of women who are trafficked by making deportation the only "solution" to their presence in Canada. Consequently, these proposals will further penalize the women, while protecting the interests of the Canadian men, women, and employers who profit and benefit from their exploitation. Further, while this approach does nothing to address the root causes of trafficking, the state's enthusiasm for increasing trade liberalization will only exacerbate these very causes.[2]

Résumé

L'État canadien a entrepris une vaste opération de restructuration du programme d'immigration et du droit d'asile dans les années 90, promettant de créer, comme partie intégrante de ce processus, une nouvelle loi sur l'immigration.[1] Le trafic de personnes est l'une des grosses questions visées par la nouvelle loi. Dans le présent article, je soutiens que les propositions de l'état pour s'attaquer au trafic de personnes permettent à l'état :

- *De poser comme fait acquis qu'il a la responsabilité de protéger « les Canadiens » tout en évitant toute responsabilité pour le bien-être des femmes trafiquées ;*
- *De diaboliser les passeurs comme étant la cause du trafic ;*
- *De passer outre les préoccupations et les intérêts des femmes trafiquées en proposant la déportation comme seule « solution » à leur présence au Canada.*

Par conséquent, ces propositions vont pénaliser encore plus ces femmes tout en protégeant les intérêts des Canadiens, des Canadiennes et des employeurs qui tirent profit de leur exploitation. Il faut aussi ajouter qu'alors que cette approche ne fait rien pour s'attaquer aux causes du trafic illicite de migrants, l'enthousiasme de l'état pour étendre encore plus la libéralisation des échanges commerciaux ne fera qu'exacerber ces même causes.[2]

Introduction

On April 6, 2000, the minister of Immigration and Citizenship, Elinor Caplan, tabled Bill C-31, a proposal for a new Immigration and Refugee Protection Act. In discussing C-31, the minister stressed that she was introducing a "tough" bill that would "close the back door to those who would abuse the system."[3] The bill is tough indeed, introducing more restrictive criteria for future immigration into Canada, as well as undermining some of the rights currently allowed to landed immigrants. Its general focus on "abuse" and on measures to curtail "criminality" in effect further the anti-immigrant and refugee political climate prevailing in Canada in the 1990s. Indeed, it tars all immigrants and refugees as potential criminals from whom Canadians need to be protected. The tone of the bill, as that of much of the official discourse on immigration in the 1990s, is based on the assumption that most incoming immigrants and refugees are guilty—of wanting to abuse the system at best, and of being actively engaged in criminality at worst—until they prove themselves innocent, and therefore deserving of the Canadian generosity that would allow them to enter the country.

One significant feature of the bill is the creation of a new offence for the smuggling of human beings, by which the state seeks to tackle the issue of trafficking.[4] The trafficking of women and children has emerged as a major international concern since the First World War.[5] While the migrations of men and women, coerced and "voluntary," have been a central feature of the global integration of economies within the capitalist system of relations for at least the last five hundred years, the current phase of globalization is resulting in an escalation of migrations from the countries of the South into the North. The trafficking of women is a major component of this migration, and Canada, much like other countries in the North, is a receiving country for women who have been trafficked from the countries of the South.

A number of studies have pointed out that factors pulling women into the global trafficking network include poverty, personal histories of violence and abuse, lack of other work options, and responsibility for providing for family and community members.[6] Important as these factors are, however, no less significant a factor in global trafficking are the immigration policies of receiving countries.[7] The women who are trafficked work overwhelmingly in the informal sectors of the economy, and most countries in the North have extremely restrictive immigration policies controlling the labour of workers in these sectors. Thus, women are trafficked through the interplay of the underlying economic and social conditions within the global economy, as well as through the state policies and practices of receiving countries that construct their illegality, and hence their vulnerability to being exploited. There is nothing inherent in the women themselves that makes them prone to being "trafficked women," as the unproblematic use of the category would suggest. The unproblematized use of this category in mainstream discourse "naturalizes" their experience; it defines trafficking as the fault of Third World women and their communities; and it seeks to draw attention to the policies of receiving countries as a *response* to this problem originating elsewhere, and somehow *inherent* in the women themselves. A much more fruitful approach is to examine how women are "made" into trafficked women, by examining state practices and policies, and by examining the underlying social relations within the global economy. This is the framework for my paper, which recognizes the issues involved to be much more complex than the question of the abuse of the women by traffickers, drawing attention instead, in this instance, to the conditions in the receiving countries that create the women's legal, economic, and social vulnerabilities, and that crystallize their status as trafficked women. The analysis in this paper therefore focuses on immigration policies in Canada as a receiving country, and argues that the Canadian state, rather than playing the benevolent role it seeks to construct for itself, shapes immigration policies and practices in myriad ways that make the state complicit in, and responsible for, the very functioning and growth of trafficking in women.

Research into trafficking has been extremely sparse in Canada. The research undertaken by the Global Alliance against Trafficking in Women (GAATW) and the Philippine Women's Centre (PWC) has revealed that women are trafficked into "various sites within the informal and invisible sectors of the economy,"[8] key among which are the sex trade and entertainment industry, and the marriage market and trade in mail-order brides. As both organizations are quick to point out, however, the two sites are not mutually exclusive: these sites often intersect, with women who are brought in for one being forced into the other after their arrival. The PWC and GAATW have identified domestic workers and immigrant mail-order brides[9] as two groups that are "susceptible to situations involving trafficking." In addition, the GAATW has also found trafficked women to be engaged in sex work in "bawdy houses" and massage parlours in Vancouver[10] and Toronto.[11] Based upon GAATW find-

ings, significant numbers of women can be estimated to be working in "bawdy houses" and massage parlours in Vancouver, providing sexual services.

> The women are all Asian, most of them have had their passports taken away, they are in the country illegally, they are made to provide sexual services and there is absolutely nothing there in place to take care of them in case of violence or abuse. We were also told that these women often work under conditions of debt bondage, and have a debt of $30,000—which they have to pay to the brokers who have brought them over. So, if there are 40 massage parlours with an average of 20 women in each, you can get an idea of the number of women working under mostly invisible and possibly coercive situations in Vancouver alone.[12]

Presumably, a similar situation exists in other major cities across the country.

Anecdotal evidence gathered from the experiences of front-line service workers suggests that women who are trafficked enter and reside in the country through both legal routes (for example, as mail-order brides, or on temporary employment authorizations), as well as through extra-legal ones (for example, with forged documents, or by overstaying on a visitor visa or a temporary employment authorization). The notion that all trafficked women enter the country illegally is unwarranted, as a recent research project undertaken in northern British Columbia demonstrates.[13]

Given that women who are trafficked enter the country through whatever channels are available to them, the immigration legislation and practices most relevant would be the family-class and sponsorship regulations (especially for fiancé[e]s and mail-order brides), the legislation affecting temporary workers (for women who work as entertainers and in the sex trade) and domestic workers, as well as the treatment of undocumented or extra-legal migrants.[14]

Under the point system institutionalized by the Immigration Act, 1976-77, the main categories of immigration into Canada are the independent class (which allows the immigration of skilled workers, business investors, entrepreneurs, and the self-employed); the family class (which allows sponsorship of specific family members); and the refugee program (for those meeting the UN Convention definition of *refugee*). Entry into Canada is also allowed for limited periods (i.e., for non-immigrants) under the categories of students, visitors, non-immigrant workers (allowed into the country on temporary employment authorizations), and under the Live-In Care Giver Program (LCP) for domestic workers (who are eligible to apply for landed status after working in domestic service for two years).

Additionally, migrants are known to enter and reside in the country through extra-legal channels, and with undocumented status. Although very little research has been undertaken on this group, and very little is known about the circumstances under which they enter and reside in Canada, this form of migration is internationally acknowledged to be increasing significantly.[15]

Proposed Changes for a New Immigration Act

The proposals for the new immigration act seek to maintain the distinction of the independent/economic class from the family class, with unequal conditions for the entry of each class. The classes of temporary workers and visitors are to be maintained as well. This would mean that the distinction between immigrants (those allowed into the country for permanent settlement, and subsequently eligible to claim citizenship) and migrants (those officially allowed into the country for a temporary period and hence ineligible to claim citizenship) is to be preserved. This distinction is crucial for women who have been trafficked. Women who enter the country to work in informal sectors are rarely granted permanent resident status, which would subsequently allow them to claim citizenship status. Instead, the precarious official status of temporary visas creates the vulnerability of the women who are brought into the country on short-term permits, denying them the greater labour mobility they would have if their status was that of landed immigrants.

The Family Class

An adult Canadian citizen or a landed immigrant can currently sponsor specified family members for immigration into the country, and these include fiancé(e)s and wives. The sponsor is required to demonstrate that he or she will be able to provide financially for the basic needs of the dependent. The sponsor makes a commitment to the government of Canada to provide for all of her or his dependents for a prescribed period of time (up to ten years), and defaulting on this commitment can mean that legal action will be taken against the sponsor. However, in the case of the sponsorship of a spouse, the financial requirement can be eased. In the specific case of the sponsorship of a fiancé(e), the sponsor and fiancé(e) need to prove they are free to marry, and are given ninety days within which the marriage must take place.[16] The permanent-resident status of a sponsored fiancé(e)s is therefore made conditional upon the marriage taking place.

The sponsorship requirement makes the sponsored immigrant dependent upon her sponsor for her entry, and

stay, in Canada for the duration of the sponsorship agreement. In effect, the sponsored immigrant is prohibited from making claims to social-assistance programs for the sponsorship period, because the sponsor is made responsible for providing for her basic needs. Should the sponsorship agreement break down, it is only at the discretion of provincial social-service agencies that social assistance is provided, if any, to the sponsored immigrant. The sponsored immigrant has no official right to claim such assistance, even if employed and paying taxes.

For women who enter the country as sponsored immigrants (as, for example, mail-order brides or fiancées), this circumstance of enforced dependency makes them extremely vulnerable to the power their sponsors have over them by virtue of being able to withdraw sponsorship and threaten to deport them. A pattern of dominance imposed during this ninety-day period could set the power dynamics within the relationship for the future. This threat of deportation by the sponsor has repeatedly been identified by front-line workers as a major factor in trapping sponsored immigrant women into a relationship of powerlessness with their sponsor, making the women vulnerable to violence and abuse.

Women who are sponsored as mail-order/immigrant brides by men would therefore be extremely vulnerable to this power that the state grants the sponsor over "their" women. The GAATW estimates that "mail-order/immigrant brides" come from " . . . Asia and also from the Caribbean and other parts of the world [and] are married to men who live in isolated fishing and forest communities, particularly in the northern communities," and that they are " . . . isolated, atomized in their households, and may not know what their rights are."[17] It should be noted that while migrating to more rural areas and into small towns might compound the isolation experienced by sponsored immigrant women, the sponsorship requirement *in itself* makes the women dependent upon the sponsor, and hence inevitably increases their isolation, while correspondingly increasing the power of the sponsor to control their lives. Other factors, such as the everyday racism these women experience, as well as any language barriers they may face, would also further increase their vulnerability and powerlessness.

The proposed act would reinforce the sponsorship relationship and its requirements.[18] Furthermore, the proposals contain stringent financial obligations for permanent residents, making inadmissible those individuals unable to support themselves or whose sponsors are unable to do so.[19] Given that women who are trafficked are likely to be in the country without the financial means to support themselves, and are likely to be deeply indebted, this requirement would likely bar them from getting permanent resident status. For women who may be in transition, having escaped the control of the men who traffic them, and who may have no immediate means of supporting themselves, this requirement would render them inadmissible. In the case of women who have experienced severe abuse and violence, the restrictions for admissibility on the grounds of "excessive demand on health or social services" could be a severe obstacle to overcome.[20] Mandatory exemptions from these restrictions would best serve these women who have been trafficked. For the women who have been subjected to violence, or who are traumatized by having been trafficked, and may therefore require health and social services, their admissibility needs to be assured, *irrespective* of any financial considerations.

Perhaps more pernicious in the proposals is the introduction of "misrepresentation" as a grounds for inadmissibility. Sections 36 (1) and 36 (2) outline inadmissibility for a period of two years for individuals "directly or indirectly making a misrepresentation or withholding information on a relevant matter" that affects the administration of the legislation. This means that sponsored women making misrepresentations about themselves would become inadmissible. However, this inadmissibility on the grounds of misrepresentation would also be extended to individuals sponsored by someone making the misrepresentation, as laid out in section 36 (1) (b). Therefore if a sponsor makes the misrepresentation, the person sponsored could become inadmissible. Women would become inadmissible even if they did not know that their sponsor had made misrepresentations about his or her status, and/or about their own status. So, for example, if a sponsor has misrepresented his or her status in order to immigrate to Canada, and upon receiving landed status decides to sponsor a fiancé(e) or spouse without revealing the misrepresentation, the fiancé(e) or spouse might become inadmissible through no fault of her own. Likewise, if a married man sponsors a "fiancée" without revealing to her his married status, it is the fiancée who could become inadmissible, again through no fault of her own. Should sponsored women be deliberately misled by their sponsors, the proposed act (section 36 [1] [b]) would penalize these women, who might not have misrepresented themselves in any manner, and might have no prior knowledge about the misrepresentations made by of their sponsors.

One significant change to the sponsorship regulation by Citizenship and Immigration Canada, announced April 6, 2000, is that sponsorship will be denied to individuals convicted of spousal abuse. This is an interesting approach

to the problem of violence against women. The state now requires sponsored immigrant women to become dependent on male sponsors if they are to enter the country, making them more vulnerable to abuse and violence, so there is little likelihood that this change will be of great benefit. Instead of doing away with this vulnerability, which places sponsored immigrant women in potentially abusive relationships, the state intends to demand that abused "dependents" engage with a criminal justice system, and only once a conviction is secured will the abusive men be barred from becoming future sponsors. The criminal justice system has repeatedly failed to protect women, and it is rife with racist and sexist practices, as numerous studies have shown. To demand sponsored women engage with this system is to place responsibility for ending the violence upon them, and not upon the sponsor. The abused spouse might also be relying on the sponsor to sponsor her children, or other dependent family members, especially if she is in a precarious financial situation that would make her ineligible to become a sponsor herself. Indeed, barring future sponsorship to violent sponsors might well make abused women stay with them in order to secure the future sponsorship of other family members by the very sponsors who are abusing them.[21] Additionally, women who have been trafficked might not want to disclose this experience to criminal justice authorities, even if they wished to escape the power of abusive sponsors. Revealing that they have been trafficked, and admitting they had not revealed this to immigration officials earlier, might well make the women inadmissible on the grounds of misrepresentation.

In short, then, the proposals to strengthen sponsorship requirements will serve the interests of Canadian sponsors more than of the women they sponsor. The proposed act seeks to extract the costs for breakdown in sponsorships, for misrepresentation, and for violence in these relationships from women who have been sponsored, and not from their sponsors.

Temporary Employment Authorizations

Temporary employment authorizations are issued to workers for specific jobs, with a particular employer, for a limited period of time (usually for a year or less). In order to acquire a temporary employment authorization, temporary workers are required to have a job offer validation, a letter of support from their employer, and proof of their qualification for the job. They can also be required to present a medical clearance. Temporary workers are made dependent on their employer for their continued stay in the country, because the employment authorization specifies the period and nature of their employment. Should employers terminate the employment contract, temporary workers are officially required to leave the country.

The Philippine Women's Centre and the GAATW have found that some trafficked women enter the country as entertainers.[22] For the women who enter under this category and who overstay the period specified in their employment authorizations, their status in the country becomes an extra-legal one. In cases where women who are trafficked, and have been made to work in the sex trade, are intercepted by the police or by immigration officials, their "criminalization" and deportation "tend to be the customary responses of law enforcers and immigration officials to the bulk of cases."[23]

The proposed changes outline the state's intention to expand the temporary workers program by adopting a "service-oriented approach" for facilitating authorizations for temporary workers, in order to better meet the needs of employers. In-Canada landing of temporary workers will be allowed, and agreements will be made with individual sectors or firms. Expansion of the temporary workers program will likely result in increased numbers of female migrant workers living and working in extremely vulnerable circumstances by making them dependent upon their employers for their continued stay in Canada. The expansion of this program will presumably enable more temporary workers to be brought into Canada to work in the informal sector, including the sex industry, as well as other industries. Employers will be able to maintain their power over the continued stay of these employees. Instead of extending the rights that other categories of workers enjoy by entering Canada as landed immigrants under the independent class, the state will continue structuring the conditions for the super-exploitation of migrant workers, including women, by giving them a precarious and vulnerable legal status in the country.

Domestic Workers and the Live-In Care Giver Program

While the history of the immigration of domestic workers into Canada can be traced to the early twentieth century, the Live-In Care Giver Program (LCP) now in effect was instituted in 1992. Under this program, women (mostly from the Philippines and the Caribbean) enter Canada to work as domestic workers. They are required to meet specific education and training criteria, and upon arrival are required to live in their place of employment. The Live-In Care-Giver Program ties the women to their employers, and after working in domestic service for a period of two years, they become eligible to apply for landed immigrant status.

This program has been much criticized by domestic workers and their advocates. The live-in requirement makes

the women dependent on their employers, not only for their conditions of work but also their living conditions, thus making them vulnerable to harassment and abuse in their private as well as public lives. Living-in also makes the women available to work long hours with little (if any) pay for overtime. Additionally, this program has the (intended?) consequence of deskilling women, for women with higher levels of education and professional training work in Canada as domestic workers. The domestic workers program is often the only means by which many women can immigrate into Canada, and their subsequent deskilling and super-exploitation within their places of employment is the price extracted from these women by Canadian immigration policy. This process of deskilling cheapens their labour in order to serve the childcare needs of affluent Canadian families.[24] The live-in requirement also makes domestic workers vulnerable to being coerced into providing sexual services to their employers. The Philippine Women's Centre has recorded numerous instances of this abuse, as well as of domestic workers "marrying" their employers.

As there is no explicit reference to the Live-In Care Givers Program in the proposed changes, we may presume that current conditions for the program will be maintained for the immediate future. If this is indeed the case, then vigilance is required to ensure that current eligibility of domestic workers for landed immigrant status is not taken away. Indeed, landing domestic workers as permanent residents is immediately required in order to stop the super-exploitation of domestic workers, and particularly to counter the sexual harassment that the live-in requirement enables. Given that other categories of workers are allowed into the country as landed immigrants under the point system, maintaining the Live-In Care Giver Program—which denies domestic workers the right to work in other occupations—works to racialize and feminize the provision of domestic workers' labour.

Extra-legal Migrants

Migrants entering Canada can come to have extra-legal or undocumented status in several ways. The most obvious method is by entering the country with forged travel documents. Other possible routes include overstaying on temporary visas (such as visitor or student visas), or on temporary employment authorizations. Although the treatment of these migrants varies upon their interception, the resolution of the cases they file seem to follow a depressingly similar pattern. The experiences of front-line legal workers indicates that when individual women are intercepted by the police or immigration officials, they are detained until their identity is established. The women are then processed and released while their cases are being dealt with. However, in the case of extra-legal migrants intercepted as a group, they tend to be held in detention, even while their cases are being dealt with.[25] The GAATW has also found that current practice seems to be deportation of trafficked women who are in the country without legal status.[26] Even when the women claim refugee status, their claims are rarely successful, and the result is the same if they apply for landed status on the basis of humanitarian and compassionate grounds.

It is extremely difficult to accurately assess how many undocumented migrants there are, for several reasons. The incredible vulnerability of such migrants makes and keeps them "invisible," and it is understandable that such migrants can be reluctant to make their circumstances public. However, this lack of public visibility changed dramatically with the arrival of approximately 600 migrants from China in the summer of 1999. The treatment of these migrants by the state drew public attention to the presence of this "problem" within Canada, and the moral panic created by the government and the media fostered a political climate of racist hostility towards this group. The Department of Immigration responded to the arrival of the migrants by holding the overwhelming majority of them in detention centres and in jails, and deporting as many of them as possible once their applications for asylum had been turned down. Only a minuscule number of the claims for asylum made by these migrants have been accepted.[27]

The proposed act would give broad powers of detention, including at port of entry, to immigration officers, and also expand the categories of people who can be detained. Detention is to be allowed if a designated officer has "reasonable ground to suspect" an individual is "inadmissible on the grounds of security or for violating human rights," or is a "danger to the public."[28] Given that women who have been trafficked to engage in sex work could well be defined as a "danger to the public" in a political climate hostile to all immigrants, these strengthened powers of detention could very well be used to target the women. The proposed changes also refer explicitly to migrants arriving as part of "criminally organized smuggling operations" as a category for detention. This means that women who are being trafficked, or who have entered the country as a group, with the assistance of smugglers, will be automatically detained. Given that immigration officers already have the power to detain, many refugee-rights groups and refugee lawyers are extremely concerned with the enhancement of this power. They find current provisions quite sufficient. Indeed, as noted in the example of the migrants from China, current powers of detention have resulted in the lengthy

incarcerations of women, men, and children. Strengthening these powers increases the potential for increased abuse and human rights violations in the treatment of migrants.

Human Smuggling and Trafficking

The new immigration act proposes to create a new offence of human trafficking. Penalties for this offence would be harsh indeed, with a proposed fine for a first offence of approximately $500,000 and/or imprisonment for up to ten years. For a subsequent offence, the proposed fine would be $1 million, or imprisonment for up to fourteen years.[29] For those bringing in ten or more persons, the penalty would be a fine of $1 million and/or life imprisonment.[30] Clearly, the government's repeated statements about getting tough on smugglers and traffickers is reflected in this bill. However, the obsession with stronger sentences and heftier fines for smugglers and traffickers does nothing to address the root causes of trafficking and human smuggling, which are the growing poverty, destitution, and environmental devastation in many countries in the South, as well as the sexualized and gendered exploitation of women.

The myopic focus of the proposed act on harsher penalties can be expected to increase the incentives of smugglers and traffickers to more closely control the women they traffic. Stronger measures against traffickers and smugglers, in the face of failure to address the root causes that support the trafficking of women, will increase the women's vulnerability to the power of the smugglers—a power ultimately dependent upon coercion, threats, and the use of violence.

State targeting of smugglers and traffickers also obscures the reality that as trade liberalization has forced open the economies of previously colonized countries to greater penetration by multinational corporations, the conditions that push women into migration in these countries have been exacerbated. The Canadian state is a leading proponent of free trade and greater trade liberalization, playing a highly visible role in negotiations at the World Trade Organization, and in trade agreements like NAFTA, APEC, and the FTAA. So the state has a direct hand in shaping policies at the global level that are pushing increasing numbers of women into migration and into being trafficked. Considered in this light, the state's construction of smugglers and traffickers as primarily and solely responsible for trafficking allows it to carefully avoid any responsibility for the deteriorating economic conditions within the global economy.

There is ostensibly some room in the proposed legislation for provisions to protect women who are trafficked, on humanitarian and compassionate grounds. For example, such a provision allows that "The Minister may, in the Minister's discretion, examine the circumstances concerning a foreign national who is inadmissible or who otherwise does not meet the requirements of this act, and authorize the foreign national to remain in Canada as a permanent resident if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national or by public policy considerations."[31] Likewise, the minister "must take into account the best interests of a child affected by the decision."[32] Two points are pertinent here. First, there is absolutely no commitment to the "best interests" of women who are trafficked in this discretionary measure, and second, even if such a commitment could be secured from the minister, this measure would apply *only* on a discretionary basis, and not become mandatory in every case of trafficking.

The proposed changes also explicitly state, "No person shall knowingly organize the coming into Canada of one or more persons by means of threat, force, abduction, fraud, deception or coercion," and includes the recruitment, transportation, and harbouring of such persons in Canada,[33] specifying penalties for contravening this as "a maximum fine of $1,000,000 or to life imprisonment, or . . . both."[34] Relevant factors to be taken into consideration by the court in such cases include consideration of whether grievous bodily harm or death has occurred, whether the offence was organized by a criminal organization, whether it was undertaken for profit, or whether "a person was subjected to humiliating or degrading treatment, including with respect to work or health conditions or sexual exploitation as a result of the commission of an offence."[35]

We know from the experience of front-line workers that sometimes women who have themselves been trafficked, or who work in the sex trade, "help" to recruit other women from their families and communities into the same type of working and living circumstances as themselves. The motives for such help range from financial gain to compassion in aiding other women to find employment and escape poverty. Provisions in the proposed act would make such women subject to tough sentences, and these women, themselves victimized, could be charged with the same crime and with the same penalties to which organized smuggling rings would be subject. The blanket condemnation of "smugglers" and "traffickers" adopted by the proposed legislation suggests that harsh penalties for them will reduce, if not outright end, trafficking. This approach remains wilfully oblivious to the complexities of trafficking, and to myriad ways in which women express their agency, leading many of them to seek out the services of men and

women who can help them migrate, and to help other women enter into the same forms of migration and work.

As already outlined, the bill stresses stronger sentencing for human smugglers and traffickers, but there is no expressed objective in the proposed act to protect women who have been trafficked and to strengthen their rights. The bill seems based on the misguided assumption that the current practice of deporting women who have been trafficked is the only fair option in dealing with them. As international agencies and local women's organizations who work with trafficked women repeatedly stress, these women often have no family or community support for going back. In fact, quite the opposite is true, as the women can be further stigmatized and ostracized upon return. And often it is family and community pressures that have driven the women into migration and trafficking in the first place. The bill recognizes no such complexities. So, for example, what of family members, who, out of desperation, sell women from their own families? Will they, too, be defined as engaged in "serious criminality" and become inadmissible should they attempt to enter Canada to be reunited with the women who might become landed in Canada? The proposed legislation makes no clear distinction between those who make a clear monetary profit from recruiting, trafficking, and smuggling, and those women, themselves living in vulnerable and desperate circumstances, who decide to "help" other women in their families and communities.

The myopic approach of the proposed changes does, however, enable the Canadian state to deny the reality that the labour of trafficked women serves the interests of certain sectors of the Canadian industry, and benefits individual men and women being served by the women's domestic and sexual labour. The reality is that Canadian interests are served by these women, and recognition of this fact is crucial to accepting that it is the responsibility of the Canadian state to protect the rights of the women, and to offer them this protection, *in this country.* In treating the women instead as an external problem to be repatriated, the Canadian state helps to preserve the interests of *Canadians* and their "right" as *citizens* to benefit from the international trafficking of *migrants*.

And finally, the proposed changes could have severe consequences for women's groups and other advocates for women who have been trafficked. The proposed legislation states, "Every person who knowingly induces, aids, or abets or attempts to induce, aid or abet any person to contravene section 110, 111, 112, 115, 117, 122 or 123, or who counsels a person to do so, commits an offence and is liable to the same penalty as that person."[36] This new offence to be created could have extremely serious repercussions for the women's organizations and activists who work with women who have been trafficked, as well as their family members. These organizations, activists, and family members could all become liable to the same sanctions as the women who have been trafficked. Should this provision be implemented, it is quite conceivable that an individual (for example, a family member who has landed immigrant status) or a women's group (such as a rape crisis centre or transition home) that gives sanctuary to a woman who has been trafficked might be charged with aiding and abetting her for this act. Similarly, a person helping a woman who has used forged documents to enter Canada (knowingly or otherwise), or who has managed to escape a violent employer, could be found guilty of aiding and abetting her. With this change, the state is not only targeting women who are trafficked, but also seeks to erode any support they might garner from politically committed and sympathetic sectors within Canada.

In short, then, by focusing on the crime of smuggling and trafficking, the state has made smugglers and traffickers extremely visible, while making the actual women who are smuggled and trafficked invisible. The interests of these women are made as foreign to Canadians as have been the other cultures and countries from which these women come. That the women should be immediately repatriated is the unquestioned and unshaken resolve underpinning the provisions. And although Canada is signatory to the Convention for the Elimination of All Forms of Discrimination against Women (CEDAW), as well as the Beijing Platform for Action and various ILO conventions, nowhere is any specific commitment made in these proposed provisions to protect the rights of women who have been trafficked.

Conclusion

Trafficking in women is a highly profitable enterprise and serves the Canadian economy and Canadian society. Women who are trafficked, whether entering the country legally or otherwise, are engaged in entertainment and sex industries, as well as in domestic work. These women serve the interests of the employers who hire them, as well as the interests of individual Canadian men and women, by their sexual and domestic labour. Yet, the sanctions and punishments imposed by the state ultimately penalize the women, through deportation, and not the Canadian men, women, and employers who profit and benefit from the women's exploitation.

The current restructuring of the immigration program, which includes the introduction of the new act, will make immigration for permanent settlement (with landed im-

migrant status) from the countries of the South—and in particular, of poor and working women from the South—extremely restrictive. These restrictive measures can be expected to push many would-be immigrant women, who might otherwise have entered the country with landed status, into becoming migrants, whether legal or otherwise. As immigration for legal, permanent settlement into Canada is made more difficult for people from the South, we can expect an increase in extra-legal forms of migration. Likewise, the significant growth of unemployment globally and the expansion of the informal sectors, both of which have become key features of the restructuring of the global economy, will further escalate migrations from the South into the North. Therefore, the current direction of Canadian immigration policy needs to change on the principles of social justice and gender equity if the interests of women who are trafficked are to be served. While such a transformation requires fundamental and far-reaching changes to the workings of the global economy, one immediate step would be to make landed immigrant status mandatory for women who have been trafficked. For ultimately it is women from the South who, as a result of the international division of labour—based on race, gender, and class—pay the heaviest costs of the restrictive immigration policies of the countries of the North, including Canada.

Notes

1. The proposed new act, Bill C-31, was tabled in June 2000. However, a federal election was called before it could be passed. The bill nevertheless outlines the Liberal government's approach to immigration, and for dealing with trafficking. With the Liberal Party having won the federal election of November 2000, we can anticipate a resurrection of the bill during the current mandate of the government.
2. This paper is based, in part, on research I undertook as a research partner in a project for the Global Alliance against Trafficking in Women (GAATW), during the summer of 2000.
3. Francisco Rico-Martinez, "Bolting Back Door Raises Issues," *Windsor Star,* May 23, 2000.
4. Marjan Wijers defines trafficking as follows:
   > "Traffic in women" is a broad category covering various forms of exploitation and violence within a range of (informal) labor sectors that migrant women work in, including prostitution, entertainment industries and domestic work. Trafficking is not limited to prostitution, although this is the popular belief, and not all prostitution involves trafficking. We can define trafficking in the narrow sense as the process in which migrant women are brought into prostitution through the use of coercion, deceit, abuse or violence and in which they are denied fundamental human rights and freedoms such as the right to decide to work as a prostitute or not, the right to decide on the conditions of work, the right to enter and leave the sex industry, the right to refuse certain customers, the right to freedom of movement, the right not to be exploited, and so forth. If trafficking is defined in a broader sense it can apply not only to prostitution, but also to other forms of labor such as those mentioned above (M. Wijers, "Women, Labor, and Migration: The Position of Trafficked Women and Strategies for Support," in *Global Sex Workers: Rights, Resistance, and Redefinition*, eds. K. Kempadoo and J. Doezema (New York: Routledge, 1998), 69–78.
5. For a fuller discussion, see Sietske Altink, *Stolen Lives: Trading Women into Sex and Slavery* (London: Scarlet Press, 1995).
6. See the case studies by Jo Bindman, Amalia Lucia Cabezas, John K. Anarfi, and Coco Fusco, among others, in *Global Sex Workers: Rights, Resistance and Redefinition,* eds. K. Kempadoo and J. Doezema (New York: Routledge, 1998). Also see Yasmin Jiwani, *Trafficking and Sexual Exploitation of Girls and Young Women: A Review of Select Literature and Current Initiatives* (Vancouver: FREDA, June 1999).
7. Altink Sietske has pointed to the "tension between the desire of the Third and Second World peoples to migrate to the First World and the restrictions western countries place on immigration" (Sietske, *Stolen Lives,* 4). It is in this "tension" that traffickers organize their activities, she has argued. In a similar vein, Audrey Macklin states, "Women migrants often embody—literally—the absence, breakdown, or the inequities of the international law regime." See A. Macklin, "Women as Migrants in National and Global Communities," *Canadian Woman Studies* 19, no. 3 (1999), 24.
8. GAATW Project Proposal, *Trafficking in Women: The Canadian Dimension* (Victoria: GAATW, 1999), 1.
9. The PWC and GAATW use the term *immigrant brides,* as the term *mail-order bride* does not adequately capture the circumstances of some of the Filipina women they interviewed. Whereas a mail-order bride is bought for a fee, these Filipina women had often met and married men travelling to Asia looking for wives, or had been introduced by a friend. See appendix 1, in The Philippine Women's Centre and GAATW, *Echoes: Cries for Freedom, Justice and Equality* (Vancouver: GAATW & PWC, 1999).
10. Jyoti Sanghera, "Report from the North American Region," in *Whores, Maids & Wives* (Victoria: GAATW, 1998), 24–8.
11. GAATW Project proposal submitted to Status of Women Canada, *Trafficking in Women: The Canadian Dimension* (Victoria: GAATW, 1999).
12. See Sanghera, "Report," 26.
13. The Philippine Women's Centre (PWC) and GAATW. *Echoes: Cries for Freedom, Justice and Equality* (Vancouver: GAATW & PWC, 1999).
14. The term *illegal migrants* is used most frequently in the public discourse about this particular group of migrants. The distinction between legal and illegal migrants speaks more to the state's strategy of seeking to gain, and maintain, control over immigrants and migrants than it does to the root causes of migration or to the lived experiences of the migrants themselves. I therefore use the term *extra-legal* in order to draw attention to the social construction of legality and illegality through which the state seeks to exercise its control over international migrations.
15. In Canada, the high-profile arrival of several groups of Chinese migrants into British Columbia by boat in the summer of 1999 drew a great deal of public attention to this group. The

arrival of these migrants was thoroughly exploited by the Canadian government to build political support for introducing increasingly restrictive measures for future immigration, as I have discussed elsewhere. See "Forum on Migrants," *Kinesis,* April 2000.

16. Citizenship and Immigration Canada, *Fact Sheet # 7: Sponsorship,* online: <http://canadavisa.com>.
17. Sanghera, "Report," 24–8.
18. Section 11 (2) states specifically, "The designated officer may not issue a visa or document to a foreign national whose sponsor does not meet the sponsorship requirements of this Act." Further, 13 (3) states, "An undertaking relating to sponsorship is binding on the person who gives it."
19. Section 35 states, "A foreign national, other than a permanent resident, is inadmissible for financial reasons if the foreign national is or will be unable or unwilling to support himself or herself or any other person who is dependent on them, and has not satisfied a designated officer that adequate arrangements for care and support, other than those that involve social assistance have been made."
20. Section 34 (c), Bill C-31.
21. For a fuller discussion of this point, see Sunera Thobani, "Sponsoring Immigrant Women's Inequalities," *Canadian Woman Studies* 19, no. 3 (fall 1999): 11–16.
22. PWC and GAATW, *Echoes,* 8.
23. GAATW, *Trafficking in Women.*
24. See PWC and GAATW, *Echoes,* as well as Daiva Stasiulis, "Keynote Address," *Whores, Maids and Wives: Making Links* (Victoria: GAATW, 1998), 29–37.
25. Legal worker, Metro Toronto Chinese and South East Asian Legal Clinic, telephone interview, June 2000.
26. GAATW, *Trafficking in Women.*
27. By January 2000, only 4 per cent of the completed claims for asylum made by the 493 Chinese migrants were actually granted refugee status. The overall acceptance rates for refugee claimants are about 55 per cent overall, and the acceptance rate for claimants from China in 1998–9 was 44 per cent. See Chad Skelton, "Refugee Claim Accepted for Fourth Chinese Migrant," *Vancouver Sun,* January 17, 2000.
28. See Sections 50 (b) and 51 (2) (a)(i) of Bill C-31.
29. See Section 110 (2) (a) and (b) of Bill C-31.
30. See Section 110 (3)
31. Section 22 (1), Bill C-31.
32. Section 22 (2), Bill C-31.
33. Section 111 (1) and (2), Bill C-31.
34. Section 113 and 114, Bill C-31.
35. See Section 114 (1) (d), Bill C-31.
36. Section 124, Bill C-31

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Controlling the Borders: C-31 and Interdiction

Janet Dench

Abstract

This paper examines elements in the Bill C-31 package that relate to interdiction, setting them in the context of the failure of the international human rights to effectively protect the right to seek asylum. The Bill C-31 proposals are shown to be a continuation of longstanding Canadian policies and practices, as well as a reflection of international (particularly Western) preoccupations with migrant smuggling and trafficking in persons, especially as evidenced in the recently negotiated protocols to the UN Convention against Transnational Organized Crime.

Résumé

Cet article examine les elements dans le paquet de législations du projet de loi C-31 reliés à l'interception, les plaçant dans le contexte du manque de protection efficace du droit de chercher asile dans le cadre du système international des droits humains. Il est démontré que le projet de loi C-31 est en fait une continuation de politiques et de pratiques canadiennes bien-établies, qui reflètent en même temps des préoccupations internationales (particulièrement celles des pays Occidentaux) avec le trafic illicite de migrants et la traite de personnes, spécialement comme cela s'est vu dans les Protocoles additionnels récemment négociés à la Convention des Nations Unies contre la Criminalité Transnationale Organisée.

In 1948, the United Nations General Assembly proclaimed, in the Universal Declaration of Human Rights, that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution."[1] The subsequent half-century has made this right to seek asylum an orphan right, since, despite its appearance in the foundational human rights document, it was never adopted by any human rights conventions and covenants that followed. The millions who face persecution have discovered that their right to seek asylum is one that states are not necessarily prepared to protect.

Instead of addressing how people fleeing persecution might seek asylum in other countries, the 1951 Convention relating to the Status of Refugees focused on the obligation of states not to *refoule* a refugee to persecution.[2] The challenge of getting out of the country in which one fears persecution and into (or to the door of) a country of potential asylum is left up to the refugee. States, meanwhile, have emphasized their right to protect their borders and decide who enters their territory.

For many years, Canada, like other states, has been increasing the obstacles facing persecuted people who try to seek asylum in other countries.[3] These endeavours are known as "interdiction," described by Citizenship and Immigration Canada as "activities to prevent the illegal movement of people to Canada, including application of visa requirements, airline training and liaison, systems development, intelligence-sharing with other agencies, and specific interdiction operations."[4] Other measures that can be included under the rubric of interdiction are

- blocking of "suspicious" foreigners in airports or points of departure for the country, by the police of the country of departure, by immigration officials of the interdicting country, or by the staff of the transportation company
- training by the interdicting country for police officers or immigration officials in the countries of de-

parture on how to detect false documents and how to identify "suspicious" foreigners
- applying sanctions against transportation companies for allowing foreigners to arrive in the country without adequate documentation for entry
- blocking and sending back "suspicious" foreigners from the airports of the interdicting country
- "deterring" foreigners on their arrival, no matter what their status (harassment, detention, etc.)
- returning refugee claimants to countries of transit through use of the concepts of "safe third country" or "country of first asylum"
- negotiating with countries of transit so that they take every possible measure to prevent foreigners from passing through their territory en route to the interdicting country
- supporting measures to block flows of refugees in "international security zones" created in the territory of the country they are fleeing from.[5]

In a paper prepared in 2000, the UNHCR has used the term *interception* and defined it more narrowly as "encompassing all measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination."[6]

These measures are aimed against people who may be trying to enter Canada for a range of reasons, but inevitably among those affected are refugees, who very often have no choice but to use illegal means of flight.[7] The higher the fences created by interdiction, the more refugees are forced to turn to smugglers to help them overcome the barriers (and the more the smugglers charge them for their services).

The Bill C-31 package announced by the Minister of Citizenship and Immigration on 6 April 2000 clearly shows a continuing commitment by the Canadian government to reinforcing interdiction. Even if there is a modest attempt to reduce the impact of the measures on refugees, the overwhelming force of the proposed changes runs counter to the basic human right to seek asylum from persecution.

The following are the main elements relevant to interdiction in Bill C-31, in the proposed regulations and in the accompanying announcement.

1. Increases in Penalties for Offences Related to Illegal Entry

Bill C-31 dramatically increases the penalties associated with most offences against the Act. For example, using a false document to enter Canada is currently punishable by a maximum fine of $5,000 or a maximum prison sentence of two years (for a conviction on indictment), or by a $1,000 fine or a six-month sentence (for a summary conviction).[8] Under Bill C-31, simply possessing "a passport, visa or other document, of Canadian or foreign origin, that purports to establish or that could be used to establish a person's identity" in order to contravene the Act brings a term of imprisonment of up to five years (for a conviction on indictment).[9] If the person actually uses the document, the person becomes liable to imprisonment of up to fourteen years.[10]

There are also increased penalties for anyone who organizes a person's illegal entry into Canada. Under the current Act the penalties are fines of up to $100,000 or imprisonment of up to five years (on indictment).[11] For smuggling a group of ten or more persons, the penalties rise to up to $500,000 or imprisonment of up to ten years.[12] Under Bill C-31, the penalties for a first smuggling offence are up to $500,000 in fines and up to ten years in prison (for smuggling fewer than ten people) and up to $1,000,000 in fines and up to life imprisonment (for smuggling a group of ten or more persons).[13]

2. New Offences for Trafficking

Bill C-31 also contains new offences for trafficking in persons, reflecting an increased international preoccupation with this serious human rights problem. Statute 111(1) states, "No person shall knowingly organize the coming into Canada of one or more persons by means of threat, force, abduction, fraud, deception or coercion." The penalty for this offence is up to $1 million in fines and up to life imprisonment.[14]

3. Impact of Lack of Identity Documents in the Refugee Determination System

Under Bill C-31, when Immigration and Refugee Board (IRB) members are determining refugee status and considering a claimant's credibility, they would be required to take into account "the fact that the claimant does not possess documentation establishing identity, has not provided a reasonable explanation for the lack of documentation and has not taken reasonable steps to obtain the documentation."[15] Since the IRB already follows this practice, there is no reason to include this particular point, except as a way of sending a message about the unwelcomeness of refugee claimants who arrive without identity documents (and about Citizenship and Immigration Canada's determination to confuse lack of documentation with lack of credibility). The government's clause-by-clause analysis makes

plain the connection with interdiction: "This provision is one element of the general policy in relation to undocumented and uncooperative arrivals. It broadens the current approach to undocumented claimants which focuses on the destruction or disposal of identity documents without valid reason."[16]

4. Safe Third Country Provisions

A measure of interdiction that has been particularly popular in Europe is the concept of "safe third country," by which refugee claimants can be interdicted at a country's border if they have come from a country deemed "safe" for refugees. The current Canadian Immigration Act already provides for denial of access to the refugee determination system for persons who have come from a country other than the country of origin deemed to be "safe," although the provision has never been put into effect.[17] S. 53(2) specifies that such persons can be removed only to a prescribed safe third country, unless the person has been refused refugee status by the Immigration and Refugee Board. Under Bill C-31, however, it would be possible for a person who had been refused refugee status by a "safe third country" to be sent to any country, including the country of origin, without having access to any assessment by Canadian authorities of the risks to the person.[18] Canada would thus be substituting a determination by another country for a Canadian determination, despite the differences between Canada and other countries' laws, processes, and jurisprudence (and without regard to the length of time that might have passed since the other country determined that the person was not a refugee).

5. Detention

Bill C-31 increases the government's powers of detention, enabling detention for administrative convenience (s. 50) and expanding provisions for detention without warrant (s. 51(2)) and for detention on grounds of identity (s. 51(2)(b)). Detention can be characterized as an interdiction measure, because it acts as a deterrent, and facilitates the eventual removal of those detained. Furthermore, proposals for regulations listing factors for decision makers to consider in relation to grounds for detention specifically refer to mode of arrival: "[t]he definition of warranted fear of flight will include explicit reference to claimants arriving as part of a criminally organized smuggling or trafficking operation."[19]

There is in fact no obvious relationship between arrival with smugglers' help and risk of flight. Experience shows that some people, including refugee claimants, who arrive without recourse to criminal smugglers, never appear, whereas others, including many refugees who have no choice but to use smugglers, can be relied upon to show up for all their immigration proceedings. Mode of arrival is not a relevant factor in determining flight risk. The assumption of such a relationship does, on the other hand, speak to the government's preoccupation with interdicting the "improperly documented."

6. Increasing Resources for Interdiction

The Minister of Citizenship and Immigration's April 6, 2000, announcement of Bill C-31 contained a number of undertakings that did not require legislative change. Among them was a promise to provide "increased overseas interdiction," glossed as "more immigration control officers stationed at our offices abroad," motivated by the desire "to discourage those not in need of protection from coming to Canada through irregular means."[20]

7. Discourse of Abuse

The government's presentation of the proposed new legislation put the accent on tightening enforcement measures in order to combat abuse. The first sentence of the press release set the tone: "Elinor Caplan, Minister of Citizenship and Immigration, today introduced a new Immigration and Refugee Protection Act designed to curb criminal abuse of the immigration and refugee systems while expanding policies to attract the world's best and brightest to Canada."[21] The goal of cracking down on abuse came first and captured most of the reader's attention. Government priorities were confirmed in the arrangement and scope of the backgrounders "Closing the Back Door . . . " (which came first, comprising four pages) and "Opening the Front Door Wider" (which came second, and took up two pages). The Minister's main message was also made clear by her opening remarks in the press conference: "I will not mince words: this is a tough bill."[22]

The emphasis upon enforcement in the bill's packaging set the stage for increased interdiction measures. As François Crépeau has argued, winning over the public is a prerequisite for a successful interdiction program. Reviewing the history of the "illegitimacy transfer" by which refugees became linked with international criminality, he has argued that "[a]ltering public opinion was probably the major challenge facing immigration control administrations during the '80s and, coupled with an economic situation which weakened social consensus and polarized the

fears of many, these administrations succeeded in denigrating the image of the asylum-seeker, associating it to that of the defrauder."[23]

8. Alternatives for Refugees

The Bill C-31 package does contain one small but significant new element: an acknowledgement that refugees are among those interdicted and are in need of protection. The government promises us that duties of the more numerous immigration control officers abroad will include directing "genuine refugees to appropriate missions or international organizations."[24] Anyone at all familiar with the challenges of refugee protection must at least raise an eyebrow at this proposed response to interdicted refugees, since neither Canadian missions, nor international organizations (read UNHCR) are realistically in a position to protect refugees at risk of *refoulement* following interdiction. Still, the door has been opened to a discussion of the impact of interdiction on refugees.

Interdiction in Canada

The interdiction measures proposed in the Bill C-31 package do not come as any surprise: on the contrary, they continue a solid tradition within Canadian immigration policy and practice. Citizenship and Immigration boasts of being "a world leader in developing interdiction strategies against illegal migration."[25] The illegitimacy associated with "illegal migration" has long been transferred by Canadian officials to the refugee claims of those who arrive "illegally." For example, an immigration official wrote in 1992 to the Canadian Council for Refugees explaining that "[o]ur view on transportation company liability, a view which is shared by many countries in the international community, is that sanctions are needed to control illegal migration and to protect the integrity of the visa control system. The uncontrolled movement of migrants has serious implications not only for Canadian taxpayers, but also for legitimate refugee claimants who must join those migrating for strictly economic reasons in the already crowded refugee status determination system."[26] Legitimate refugee claimants, we are to understand, do not come through "illegal migration" and therefore are not affected by interdiction measures. How the "legitimate refugee claimants" get to Canada to make their claim is a question that goes unanswered.

Recent years have seen an increasing focus on criminal aspects of smuggling, representing a raising of the ante. Now refugee claimants who use smugglers to get to Canada are not only associated with "illegality" but also with "criminality."

For example, in August 1998, Solicitor General Andy Scott released highlights of a major study on organized crime. It looked at illicit drugs, environmental crime, contraband, economic crime, migrant trafficking, counterfeit products, motor vehicle theft, and money laundering. Among the key findings of the study was that the costs associated with migrant trafficking to Canada were estimated at between $120 million and $400 million per year (involving approximately 8,000 to 16,000 people arriving each year.)[27] From a review of the study's highlights (the full study was not made public), it is apparent that the figures were based on errors of fact supplied by "experts," and on questionable assumptions.[28] Nevertheless, although the estimated costs were large, they were minuscule compared to the estimated costs of other organized crime covered in the study (for example, estimates of the costs of illicit drugs to Canadians ranged from $1.4 billion per year to $4 billion, just for Canada's three most populous provinces, and it was estimated that $5 billion to $17 billion was laundered in Canada each year). Yet media coverage of the announcement focused not on the most costly forms of organized criminal activity, but on people smuggling. The Canadian Council for Refugees wrote to the Solicitor General about the report, declaring itself "extremely disturbed by the parts relating to refugees, which are very weak in terms of fact and analysis, fail to take account of Canada's international human rights obligations and tend to promote xenophobia against refugees."[29]

Convention against Transnational Organized Crime and Protocols

The increasing focus on the criminal aspects of smuggling is by no means purely a Canadian phenomenon. In 1998 the United Nations General Assembly voted to begin developing a convention against transnational organized crime. The three first protocols to the Convention, drafted simultaneously with the Convention, were on firearms, trafficking in persons, and migrant smuggling.[30] In December 2000, the Convention and the two last protocols were signed in Palermo, Italy.

One may ask why, out of all the kinds of transnational organized crime, the international community decided to put among its first priorities the issues of trafficking in persons and migrant smuggling, investing significant amounts of money to ensure an early completion of negotiations. One reason is undoubtedly a growing international concern about trafficking in women and children.

The rise in trafficking (or in attention paid to it) has led in recent years to the drawing of a distinction between

smuggling and trafficking. The Minister of Citizenship and Immigration of Canada has described the distinction in the following way: "Human smuggling has been around for a while. It is a fee-for-service operation, involving simple payment for passage, and we all know that it is sometimes used by genuine refugees. Human trafficking, however, is more akin to human slavery. Its goal is profit from indentured human servitude."[31]

Trafficking is clearly a very serious human rights problem, involving gross exploitation (often sexual) of its victims. Yet, as mentioned in the preamble to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, "despite the existence of a variety of international instruments containing rules and practical measures to combat the exploitation of persons, especially women and children, there is no universal instrument that addresses all aspects of trafficking in persons."[32]

But is a protocol to the Convention against Transnational Organized Crime the right context for developing such an instrument? The focus of the protocol is necessarily on combating criminal actions rather than on protecting the human rights of the victims. Despite the inclusion within the Protocol of a purpose "to protect and assist the victims of such trafficking, with full respect for their human rights,"[33] the Protocol is framed in such a way that trafficked persons discovered by the authorities may continue to be arrested, detained, and deported back to their home country. References to particular assistance to victims of trafficking are leavened with such weak phrases as "in appropriate cases and to the extent possible," with the result that states signing the protocol commit themselves to no concrete assistance to trafficked persons.

The Bill C-31 package shows us what the Protocol will likely lead to: the criminalization of trafficking, with no measure to give special protection or assistance to the victims of trafficking (or even identify who the victims of trafficking are).

In fact, a person's status as a victim of trafficking can lead to particularly harsh treatment. The notion that trafficked persons should be detained *for their own protection* has been borrowed by Canada from the U.S. It was used against the Chinese refugee claimants who arrived by boat on the Canadian West Coast in the summer of 1999. The Minister of Citizenship and Immigration explained the government's position as follows: "As many of you know, the *Immigration Act* currently permits three grounds for detention: failure to establish identity; reasonable concern for public safety; and warranted fear of flight. This section of the Act has allowed us to detain most of last summer's boat arrivals, and thereby achieve two goals. We have cut the traffickers off from the source of their profits, and offered a measure of protection to their victims, as they receive a fair hearing on their refugee claims."[34]

The latter argument has also been made about minors suspected of being vulnerable to traffickers: in this case it is contended that the state's responsibility for protecting the best interests of the minors necessitates detention. This line of reasoning is incorporated into the Bill C-31 package. Among special factors to be considered in the detention of minors, the proposals for regulations list the "possibility of continuing control of the minors by criminally organized smugglers or traffickers who brought them to Canada." The government explains that this is being done in order to "treat minors in a manner consistent with their best interests, including protection from exploitation, whether by smugglers or other unscrupulous individuals."[35]

The fact that governments of the West could argue that victims of trafficking should be "protected" by being deprived of their fundamental right to liberty is no doubt linked to the fact that the victims are foreign and racialized.

The rhetorical advantage of dealing with trafficking is that governments can take the moral high ground while increasing measures to combat illegal immigration. In the matter of smuggling more generally, the role of victim is assigned to the Western countries that people attempt to enter. The Australians, for example, appear to have persuaded themselves that they are particularly vulnerable to the dangers of invading hordes of foreigners (although as an island in the middle of an ocean, one might have thought Australia one of the least "vulnerable" countries). In June 1999 the *Report of the Prime Minister's Coastal Surveillance Task Force* was finalized: it called for the Australian Defence Force to be involved in the defence of Australia's borders against illegal immigrants. The report uses the language of military threat in discussing possible arrivals of smuggled persons. For example, paragraph 8 states that "[t]he level and geographic location of our representation overseas should be reviewed at regular intervals to meet the ever changing threat."[36] A similar sense of vulnerability is conveyed by a judge of the Federal Court of Australia, speaking at a conference of refugee law judges: "Our geographic position, a large land mass surrounded by water, difficulties of coast line patrol and a high standard of living in a democratic society, make us a prime target for less fortunate people who leave the shores of their native lands, come to Australia and claim refugee status."[37]

Protecting the borders from those people who would try to enter without permission is a priority for many gov-

ernments in addition to the Australian. This is presumably one reason that smuggling and trafficking protocols were so high on the governments' agenda (or at least the governments of the West). It can also explain why the trafficking protocol gives disproportionate attention to the crossing of the border. Trafficking does not necessarily involve illegal border crossing: trafficked persons may enter a country with a valid visitor visa, employment authorization, or even potentially permanent residence (if, for example, a mail-order bride program were used for trafficking purposes). Trafficking need not always even involve crossing a border at all. Victims of trafficking who do cross a border, whether legally or illegally, need to be detected and rescued from inside the country (where they may be kept in illegal detention by their traffickers). Yet the Protocol's enforcement measures are aimed almost exclusively at the border, with articles called "Border Measures," "Security and Control of Documents," and "Legitimacy and Validity of Documents."[38] Even the article dealing with issues of training and exchange of information is largely devoted to border-related issues.

Bill C-31 reflects the same obsession with protecting the border. The increase in penalties for border-related offences makes an assault on the border equivalent to an assault on a person: organizing the entry of ten or more people (punishable by up to life imprisonment) is put on a par with taking a person's life or aggravated sexual assault; using a false passport to enter Canada (punishable by up to fourteen years' imprisonment) is made equivalent to wounding with intent.

Meanwhile, the rights of people trying to get to the border in order to save their lives count for little in the twilight zone between borders.

Notes

1. *Universal Declaration of Human Rights*, UNGA Res. 217 A (III), December 10, 1948, Art. 14 (1).
2. 1951 *Convention Relating to the Status of Refugees*, 189 UNTS 150, entry into force: 22 April 1954 [hereinafter *Refugee Convention*]. Article 33 (1) states, "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."
3. Such efforts have a long history. Consider, for example, the comments of a Canadian immigration official in 1921: "About a year ago we began work at Antwerp with a view to, figuratively speaking, erecting a fence on the other side rather than building a hospital on this side." The fence was needed in part because of "the pressure of conditions in some of the devastated areas of Europe." National Archives of Canada, Immigration Records, RG 76, vol. 611, file 902168, part 3, reel C-10432, F.C. Blair to Sir Edmund Kemp, 13 October 1921.
4. Citizenship and Immigration Canada, *1997–1998 Estimates, Part III* (Ottawa: Minister of Supply and Services Canada, 1997) 23 [hereinafter *1997–1998 Estimates*].
5. Canadian Council for Refugees, *Interdicting Refugees* (May 1998) online: <http://www.web.net/~ccr/Interd.pdf> 4–5.
6. UNHCR, *Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach* (9 June 2000) EC/50/SC/CRP.17.
7. The *Refugee Convention* recognizes that refugees may need to enter countries illegally and prohibits the imposition by states of "penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence." Art. 31(1).
8. *Immigration Act*, R.S.C., 1985, c. I-2, s. 94 (2) listing punishments for offences under subsection (1), which includes at para. 94(1)(b) the offence of coming into Canada or remaining in Canada "by use of a false or improperly obtained passport, visa or other document pertaining to the admission of that person . . . "
9. Bill C-31, s. 116(1)(a), prescribing the penalty for the offence in paragraph 115(1)(a).
10. Bill C-31, s. 116(1)(b), prescribing the penalty for the offence in paragraph 115(1)(b).
11. *Immigration Act*, s. 94.1.
12. *Immigration Act*, s. 94.2.
13. Bill C-31, s. 110(2) and (3).
14. Bill C-31, s. 113.
15. Bill C-31, s. 101.
16. Citizenship and Immigration Canada, *Clause by Clause Analysis of Bill C-31* (15 June 2000) online: <http://www.cic.gc.ca/english/pdffiles/pub/c31cls-e.pdf>: 77.
17. *Immigration Act*, s. 46.01 (1)(b). No countries have ever been prescribed as "safe third countries."
18. Bill C-31, s. 108(3).
19. Citizenship and Immigration Canada, *Caplan Tables New Immigration and Refugee Protection Act*, News Release 00-09, Ottawa, April 6, 2000, with attached backgrounders, online: <http://www.cic.gc.ca/english/press/00/0009-pre.html> [hereinafter *News Release*]. The quotation comes from backgrounder "Detention Provisions Clarified." The same point is also made in the summary backgrounder "Closing the Back Door . . . ," which explains that "the legislation clarifies the grounds for detaining those arriving as part of criminally organized smuggling operations in addition to those who are suspected of being security risks, war criminals and violators of human rights." In answer to the question "Why we are doing it," the backgrounder explains that it is "to maintain the integrity of the refugee determination system for security cases" and "to keep those who pose a security risk off the streets." People who use criminally organized smugglers to get to Canada are thus assimilated to security risks.
20. *Ibid.*, "Closing the Back Door . . . "
21. *Ibid.*

22. Citizenship and Immigration Canada, "Notes for an Address by the Honourable Elinor Caplan, Minister of Citizenship and Immigration, to a Press Conference on the Tabling of the Immigration and Refugee Protection Act," Ottawa, April 6, 2000, online: <http://www.cic.gc.ca/english/press/speech/immact-e.html>.
23. François Crepeau, "International Cooperation on Interdiction of Asylum-Seekers: A Global Perspective" in *Interdicting Refugees* 8. (May 1998) online: <http://www.web.net/~ccr/Interd.pdf>
24. "Closing the Back Door . . . "
25. *1997–1998 Estimates*, 23.
26. André Juneau, executive director, Immigration Policy, Employment and Immigration Canada, letter to Nancy Worsfold, executive director, Canadian Council for Refugees, 10 November 1992.
27. Samuel D. Porteous, *Organized Crime Impact Study: Highlights* (1998) Public Works and Government Services of Canada, online: <http://www.sgc.gc.ca/epub/Pol/e1998orgcrim/e1998orgcrim.htm>
28. For example, the study relied on "experts" who based their comments on an acceptance rate of 70 per cent in the refugee determination system, although anyone could have discovered from official government sources that the acceptance rate was 44 per cent in 1996 and 40 per cent in 1997.
29. Francisco Rico-Martinez, president, Canadian Council for Refugees, letter to Andy Scott, Solicitor General of Canada (10 September 1998), online: <http://www.web.net/~ccr/scott.htm>.
30. United Nations General Assembly, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the Work of Its First to Eleventh Sessions*, A/55/383, 2 November 2000 [hereinafter *Report of Ad Hoc Committee*].
31. Elinor Caplan, "Notes for an Address by the Honourable Elinor Caplan, Minister of Citizenship and Immigration, to the Annual Meeting of the Canadian Council for Refugees" (December 3, 1999), online: <http://www.cic.gc.ca/english/press/speech/ccr-e.html> [hereinafter "Notes for an Address"]. Various definitions of trafficking and smuggling are presented in Canadian Council for Refugees, "Migrant Smuggling and Trafficking in Persons" (2000) online: <http://www.web.net/~ccr/traffick.htm>. See also John Morrison, "The Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy?" (July 2000) online: <http://www.unhcr.ch/evaluate/reports/traffick.pdf>: 9–13.
32. *Report of the Ad Hoc Committee*, Annex II, 53–54.
33. *Ibid.*, Article 2 (b).
34. *Notes for an Address*.
35. Citizenship and Immigration Canada, *Bill C-31, Immigration and Refugee Protection Act, Explanation of Proposed Regulations*, prepared for members of the House of Commons Standing Committee on Citizenship and Immigration (29 September 2000) online: <http://www.cic.gc.ca/english/about/policy/c31regs-e.html>.
36. Commonwealth of Australia, Department of the Prime Minister and Cabinet, *Prime Minister's Coastal Surveillance Task Force Report* (June 1999) online: <http://www.dpmc.gov.au/Int/index.htm>. See also references to "the threat from west" (para. 28) and "the threats involved" (para. 29).
37. John S. Lockhard, "Particular Social Group: A Window of Opportunity or a Particularly Slippery Slope?" in Jordan, Nesbitt and Associates Ltd., eds., *The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary* (Haarlem: International Association of Refugee Law Judges, 1999) 98.
38. *Report of the Ad Hoc Committee*, Annex II, Articles 10–13.

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Defining Due Process Down: Expedited Removal in the United States

Stephen M. Knight

Abstract

Canadians debating the merits of restricting access to the national territory by asylum seekers and others should consider the experience of the United States with its new expedited removal process. Three years after its enactment, U.S. immigration authorities have come to rely on expedited removal. Yet many troubling questions have been raised about the treatment by immigration officers of individuals in expedited removal and about the impact of the mandatory detention of asylum seekers. A particular concern arises from the elimination of the fundamental safeguard of judicial review.

Résumé

Les Canadiens qui débattent la question de savoir s'il faut ou non limiter l'accès au territoire national aux demandeurs d'asile et autres personnes, devraient prendre le temps de considérer l'expérience des États-Unis avec leur procédure de renvoi accéléré. Trois ans après sa promulgation, les officiels du Département américain de l'immigration sont arrivés à dépendre sur le renvoi accéléré. Cependant, beaucoup des questions troublantes ont été soulevées à propos du traitement que reçoivent les personnes en renvoi accéléré aux mains des officiers du Service de l'immigration et à propos de l'impact de la détention obligatoire des demandeurs d'asile. Une raison particulière de s'inquiéter provient de l'élimination de la sauvegarde fondamentale du recours judiciaire.

Canadians debating the methods and merits of restricting access to their national territory by asylum seekers and others should consider lessons from the experience of its southern neighbour. In 1996, through the enactment of "expedited removal," the United States Congress sharply redefined—downward—what process is due an individual who arrives at its border and is deemed not to have proper documents to enter. The laws, first implemented on April 1, 1997, were among the most controversial provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and constitute one of the most fundamental changes in U.S. immigration law and policy in many decades. After more than three years of experience with the expedited removal process, many questions have been raised about the treatment of individuals by officers of the U.S. Immigration and Naturalization Service (USINS), about the mandatory detention of asylum seekers, and particularly about the impact and effect of the elimination of any judicial review. Many immigration officers seem very much aware of the unreviewable finality of their actions, and behave accordingly.

Issues likely to be of particular interest in Canada include problems encountered in efforts to report on or observe the exercise of these unprecedented powers by immigration authorities, the extent to which USINS has come to rely on expedited removal, and the impact of expedited removal on Canadian-bound asylum seekers.

Expedited Removal: Unprecedented Unreviewable Authority

Expedited removal applies to all non-citizens arriving in the United States who do not have valid or suitable travel documents, or who attempt entry through fraud or misrepresentation.[1] Should a question arise about the documents presented by an applicant for admission, the indi-

vidual is referred to "secondary inspection" for an interview. In the vast majority of cases, the final decision on a person's case is made during this interview at the port of entry. With the concurrence of a supervising officer, the individual is issued a five-year bar on entry to the United States, and then promptly—often immediately—removed.[2] The port officers' determination is not subject to review by an administrative immigration judge, federal appeals court, or any other body.[3]

The U.S. Congress did seek to provide a limited amount of additional process to two groups subject to the expedited removal laws: asylum seekers and persons who claim a legal right to remain in the United States.

First, Congress created a procedure to screen the claims of asylum seekers at the border to decide if they will be permitted access to the U.S. asylum determination process. USINS officers conducting secondary inspection interviews are required to ask all individuals being found inadmissible whether they have a fear of return.[4] Those who express such a fear are to be detained and referred to a screening interview. At this interview, which generally takes place within a matter of days after the attempted entry, a USINS asylum officer is to determine if the asylum seeker has a "credible fear" of persecution. Under this standard, an individual must establish that "there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum . . ."[5] There is little role for legal assistance in this process,[6] even if an asylum seeker has sufficient time and money to obtain such assistance.

An individual determined not to have a "credible fear" may request a limited form of administrative review by an immigration judge (IJ). The IJ review generally takes place within a few days of the asylum officer's decision, during which time the applicant remains detained. There is no appeal from this decision.[7] Access to appellate review by the national Board of Immigration Appeals—which normally reviews decisions made by IJs—and, beyond that, to federal court, is barred by law.[8]

Second, persons who claim to have lawful status in the United States—including U.S. citizens, legal permanent residents, and persons with refugee status—are to be detained and referred to an immigration judge for consideration of their claims.[9] The IJs determination of the issue is final; there is no appellate review.[10] Those who fail to establish a "credible fear" during the process, or whose claims to lawful status are not verified by an inspector or immigration judge, are summarily removed from the United States.

As passed by Congress, the expedited removal laws may be applied not only to persons apprehended at ports of entry but also to persons who entered the U.S. without inspection and cannot establish that they have been physically present for two years.[11] USINS has announced a plan to set up a pilot program, aimed at a specific criminal population,[12] to begin the exercise of this authority to extend these broad powers beyond the ports of entry and to use them to remove persons from within the United States.

Efforts to Observe the Process

USINS has resisted efforts to observe and monitor the implementation of its unprecedented new powers. Nongovernmental organizations (NGOs) such as the Lawyers Committee for Human Rights and Amnesty International have been refused access to observe the expedited removal process. The Office of the United Nations High Commissioner for Refugees (UNHCR) has been granted limited access to primary data and on-site observations, but only on the condition that its observations remain confidential.[13] As of October 2000, after two and a half years of expedited removal, the UNHCR had observed a total of two secondary inspections, and the General Accounting Office (GAO) in its recent report witnessed seven.[14] In combination with the unprecedented elimination of judicial review, this amounts to a total absence of independent oversight over a process under which 99 per cent of persons were removed from the U.S. at secondary inspection,[15] often the same day of their arrival.

The Expedited Removal Study was created in 1997 to investigate the implementation of these unprecedented procedures, especially as they apply to asylum seekers. The Study had planned to engage in a comprehensive statistical analysis of data, together with extensive on-site observation at ports of entry. But the Study's ability to report on the process has been restricted by the USINS's denial of access. Instead, the Study collected data from NGOs and attorneys that represented individuals subject to the expedited removal process, building a database of up to 100 variables from 924 individual cases over three years.[16] After filing suit under the Freedom of Information Act together with the Immigrants' Rights Project of the American Civil Liberties Union (ACLU), the Study also obtained and analyzed statistics on expedited removal produced by the USINS.[17] The Study released annual reports on expedited removal in May 1998, 1999, and 2000,[18] and its evaluation

of the GAO's September 2000 report on expedited removal was released in October 2000.[19]

Congress has twice passed legislation asking its investigative arm, the GAO, to report on expedited removal and determine, among other things, if asylum seekers are being incorrectly being sent back to their persecutors.[20] Unfortunately, the GAO's reports have focused on USINS management controls rather than on-site observation and—just as important—did not seek to evaluate the quality or accuracy of decisions made by USINS during the process.[21] As a result, Congress's questions remain largely unanswered, and it remains the case that today, nearly four years after its implementation, the public has been provided with little information on the manner in which expedited removal is being administered.

Expedited Removal in Practice

The central unanswered question about expedited removal remains the conduct of secondary inspection.

The Study and other NGOs have documented many troubling case studies of abuses and mistakes by USINS officers.[22] To summarize a few of the cases:

- A young man from Algeria who had suffered detention and torture in his home country alleges that he was repeatedly threatened with immediate return by an INS official after he requested asylum. He became so desperate at the thought of being sent back that he stabbed himself in the abdomen, requiring emergency treatment.
- Two Chinese asylum seekers—one fleeing religious persecution, the other punishment for violation of family planning laws—were criminally prosecuted for their use of false U.S. passports; convictions could have rendered them ineligible for asylum.
- A native-born U.S. citizen, accused of making a false claim to U.S. citizenship, was threatened with twenty years imprisonment, left to sleep on the floor in a detention area at the airport, and then imprisoned for over six weeks before his claim to citizenship was validated by an immigration judge.
- A mother and daughter from a Peruvian family that had suffered multiple death threats from a guerrilla group arrived in the U.S. and requested asylum. The two were immediately separated, and the mother, who was detained in a criminal facility, made a decision to abandon her claim after she was told that she faced many weeks of detention and continued separation from her daughter. Her husband has since been granted asylum in the United States.
- A Coptic Christian asylum seeker fleeing religious persecution in Egypt alleges that an INS officer expressed hostility and religious bias during secondary inspection, which frightened him into retracting his claim for asylum.[23]

Another troubling aspect of expedited removal is its application to individuals with facially valid travel documents, such as a person with a tourist visa suspected of an intent to work in the United States. The Study has documented cases of refusals to admit persons to the U.S., based on questionable judgment calls or mistaken understandings of the controlling law.[24] One Mexican teenager who was spending the summer in Texas with her sister, her sister's husband, and their baby, before attending college in Mexico, was found inadmissible on the ground that she was helping to care for her infant niece—an activity judged, incorrectly, to be incompatible with a tourist visa.[25]

In addition, widely varying rates in the application of expedited removal at the northern and southern borders and at different ports of entry, noted both by the Study and by the GAO, raise questions about whether uniform legal criteria are being applied in a non-uniform manner. Immigration officers have the discretion to allow individuals they judge inadmissible to withdraw their applications for admission and depart the port of entry without being issued an order of removal and its five-year bar on entry.[26] USINS has reported significant variation in withdrawal rates—from 27 per cent at southern (Mexican) land ports to 95 per cent at northern (Canadian) land ports. The rate at airports was 39 per cent.[27] And the Study has documented striking variations in the percentage of expedited removals for different major nationalities and ports of entry.[28]

Further concerns about expedited removal have been raised because of its impact on individuals other than asylum seekers. There are many reports of U.S. citizens of Hispanic and African-American ethnicity who have been questioned, detained, and even removed from the United States.[29] The actions of USINS officers implementing expedited removal have also raised controversy about the treatment of business travellers and tourists.[30] And of course the most notable impact of expedited removal is on the U.S.-Mexican border and on Mexicans and Mexican-Americans.

One troubling finding is the extent to which expedited removal has quickly become a central pillar of USINS policy. Approximately half of all removals from the U.S. in fiscal years 1999 and 2000 were made under expedited removal's abbreviated procedures.[31] While the legislation to enact expedited removal was proposed, justified, and attacked

almost entirely as a strategy for handling fraudulent asylum claims,[32] in practice, expedited removal appears to be in large part about exercising control over the U.S.-Mexico border. One land port of entry near San Diego, California—San Ysidro—accounted by itself for fully 44 per cent of all expedited removals over the first three years of the law's application.[33] And nine of the ten ports of entry with the highest numbers of expedited removals are land ports on the U.S.-Mexico border; together, these entry points made up over 80 per cent of all expedited removals.[34]

However, the fact that the overwhelming number of individuals subjected to expedited removal are Mexican nationals should not deflect attention from the law's impact on asylum seekers. The GAO found that 19 per cent of those arriving at U.S. airports and placed in expedited removal—one out of every five persons—expressed a fear of being returned to their homeland. And for these asylum seekers, the law's lightening-fast procedures coupled with the absence of any judicial review constitute a troubling new obstacle to be overcome before they may find safety.[35]

Credible Fear

The Study has consistently raised questions about the adequacy of expedited proceedings for making complex determinations in asylum cases, such as whether the claim has a nexus to one of the five grounds for asylum.[36] As noted above, the credible fear interview is an initial screening process to determine whether a person should be permitted to apply for asylum, and it is not intended to be a full asylum hearing.[37] However, "nexus" or "on account of" determinations can involve highly complicated factual and legal issues that may well be aided by fuller factual development than is possible in the expedited removal process.

The percentage of individuals passing their credible fear interviews has risen from 82 per cent in fiscal year 1997 to 98 per cent in 1999.[38] But this fact does not eliminate concerns over the fact that the credible fear regime has no basis in international law and in its implementation may place the U.S. in violation of its responsibilities under the Refugee Convention. On its face, the "significant possibility" requirement[39] is a far higher standard than the "manifestly unfounded" test that the UNHCR has suggested countries may employ; the UNHCR has submitted that such a standard should be used only to screen out claims that are "so obviously without foundation as to not merit full examination at every level of procedure."[40] The high passage rate may indicate that the credible fear regime is currently operating as something like a "manifestly unfounded" test. But it also indicates that the legislation's concern with supposedly large numbers of people abusing the U.S. asylum system was unfounded.

Recently, the USINS drafted regulations that would permit asylum officers to grant asylum after a credible fear interview to persons who have established not only a credible fear of persecution, but also the higher standard of "well-founded fear" required for asylum.[41] Such a rule could move the U.S. still further away from the international "manifestly unfounded" standard by investing further substantive importance to what is supposed to be a screening interview. A few asylum seekers would certainly benefit from an early grant and release from detention. But the holding of an in-depth interview at this early stage of the process—when legal representatives and live interpreters are rarely present and applicants may be hesitant to speak about the trauma they have suffered—could well result in adverse consequences to the great majority of asylum seekers who will not be granted asylum at the credible fear interview.

Canadian-Bound Asylum Seekers

A notable consequence of expedited removal, one that was presumably unintended, is its impact on Canadian-bound asylum seekers who seek to transit through the United States. Many people who seek to travel to Canada through the U.S. have been placed in expedited removal, including a large number of Sri Lankans with relatives in Canada; the irony is that a process designed to screen people out instead may leave them with no option but to attempt to remain in the United States. The resulting transnational migration policy issues have occupied the attention of numerous refugee advocates in Canada and the United States and, to a lesser extent, the immigration authorities in both countries.[42]

Before the enactment of expedited removal, individuals were relatively free to travel through the U.S. by land or air to neighbouring countries. Today, persons seeking refugee status in other countries who transit through the United States may be placed in expedited removal proceedings. In order to avoid immediate removal and return, such a person must immediately identify herself as an asylum seeker, be referred to an asylum officer, and be found to have a credible fear of persecution. Once this hurdle has been passed, the individual will be detained and must apply for release via parole. While USINS parole policies vary in different regions, few if any asylum Canadian-bound individuals appear to have been paroled in the majority of USINS districts. The New York district, through which a great

number of these asylum seekers attempt to transit, is renowned among immigration advocates for its restrictive parole practices.

Those not granted parole must apply for asylum in the United States in order to avoid removal to their country of citizenship or residence. A grant of asylum in the United States is a bar to eligibility for refugee status in Canada,[43] and may preclude a person from reuniting with family and friends or living in a region where he or she has community ties. Thus, the practice of placing Canadian-bound refugees in expedited removal and detaining them raises significant humanitarian and policy concerns.

Refugee advocates point to international law in support of their position that asylum seekers should be permitted to transit through the United States to Canada. The UNHCR has stated that "[t]he intentions of the asylum seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account," and "[r]egard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another State . . ."[44] And UNHCR has observed that "[i]n application of the principle of the unity of the family and for obvious humanitarian reasons, every effort should be made to ensure the reunification of separated refugee families."[45]

This issue has been raised in meetings with Citizenship and Immigration Canada (CIC) and in discussions with the USINS. NGOs suggested that CIC allow asylum seekers detained in the United States to make refugee claims through the Canadian embassy, expedite family sponsorships where the asylum seeker has relatives in Canada, and grant Minister's Permits to allow entrance into Canada. CIC declined to adopt the NGOs suggestions, stating,

> Canada is committed to upholding humanitarian obligations through our protection and selection systems. At the same time, it is important to control the illegal movement and smuggling of people. In these efforts, CIC works closely with other countries, such as the U.S., with which we have a reciprocal arrangement for the exchange of deportees.
>
> As you will recall, NGO's *[sic]* in Canada and the U.S. strongly opposed the now defunct responsibility sharing Memorandum of Agreement which had the dual objective of ensuring access to protection in either territory and curtailing "asylum shopping". Neither is there, at this time, a regional regime in place to manage asylum. In the absence of such arrangements, it is difficult to intervene in cases in process in the U.S. While many cases may deserve empathy, the individuals concerned are in a signatory country of the Geneva Convention.[46]

An alternative strategy to aid Canadian-bound asylum seekers involves seeking withholding of removal, rather than asylum, in cases where asylum seekers would meet the higher standard required. Unlike asylum, withholding is generally not a bar to refugee status in Canada, and upon a grant the person may be released from detention and proceed to the border to submit a refugee status claim.

Conclusion

The expedited removal law has to date been successfully shielded from legal and constitutional challenge. The law as drafted required that any legal action challenging the validity of the expedited removal process had to be filed within sixty days of its April 1, 1997, implementation.[47] Lawsuits were filed within the deadline, arguing among other things that expedited removal violated protections guaranteed by the U.S. Constitution and international law.[48] But the challenges were rejected on narrow jurisdictional grounds,[49] and thus no court has considered the merits of these important arguments. It is difficult to believe that a statute can shield itself from challenge in such a manner, and that no U.S. court will ever address the legality of expedited removal.[50]

Judicial review is a protection generally agreed to be a basic and fundamental check on executive action in order to ensure due process of law, the correction of errors, and the protection of an individual's rights. Unfortunately, the U.S. Supreme Court has ruled that a person seeking admission to the United States has no constitutional rights with respect to her application for admission; the Court has gone so far as to state that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[51] The judicial review-stripping provisions of the expedited removal laws make abundantly clear that the time has come to revisit this troubling precedent.[52] The alternative may be the gradual acceptance of the elimination of judicial review into other areas of administrative law.[53] Before Canada considers going down a similar road, it would do well to consider the experience of the United States—lessons that the U.S. has itself yet to learn.

Acknowledgement

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The opinions expressed in this article are my own.

For Natasha.

Notes

1. Immigration & Nationality Act (INA) § 235(b)(1)(A)(I), 8 U.S.C. § 1225(b)(1)(A)(I); *see also* INA §§ 212(a)(6)(C) & (7), 8 U.S.C. §§ 1182(a)(6)(C) & (7). There are limited exclusions to the application of expedited removal, including Cubans who arrive in the United States by plane, 8 C.F.R. § 235.3(b)(1)(i), and unaccompanied minors. Office of Programs, USINS, Memorandum: *Unaccompanied Minors Subject to Expedited Removal* (Aug. 21, 1997) (on file with author).
2. INA § 212(a)(9)(A)(I), 8 U.S.C. § 1182(a)(9)(A)(I). The immigration officer has discretion to permit persons to withdraw their applications for admission to the United States and thus avoid this bar on reentry.
3. INA § 235(b)(1)(C), 8 U.S.C. § 1225(b)(1)(C) (an order of expedited removal "is not subject to administrative appeal . . . "); INA §§ 242(a)(2)(A)(I), 8 U.S.C. § 1252(a)(2)(A)(I) ("Notwithstanding any other provision of law, no court shall have jurisdiction to review . . . any individual determination or to entertain any other cause or claim arising from or relating to or operation of an order of [expedited] removal . . .") & 242(g), 8 U.S.C. § 1252(g) ("no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.")
4. 8 C.F.R. §§ 235.3(b)(2) & (b)(4).
5. INA § 235(b)(I)(B)(v), 8 U.S.C. § 1225(b)(I)(B)(v).
6. An asylum seeker may have a consultant present, who "may be permitted, in the discretion of the asylum officer, to present a statement at the end of the interview." 8 C.F.R. § 208.30(b).
7. 8 C.F.R. § 208.30(e)(1).
8. INA § 235(b)(1)(C), 8 U.S.C. § 1225(b)(1)(C).
9. 8 C.F.R. § 235.3(b)(5).
10. 8 C.F.R. § 235.3(b)(5)(iv).
11. INA § 235(b)(1)(A)(iii), 8 U.S.C. § 1225(b)(1)(A)(iii).
12. *See* The Expedited Removal Study, "Report on the First Three Years of Implementation of Expedited Removal," *Notre Dame Journal of Law, Ethics & Public Policy*, forthcoming, Winter 2000–01: 26 [hereinafter "Third Year Report"].
13. *Ibid.* at 21 n.34.
14. *Ibid.*; General Accounting Office (GAO), *Illegal Aliens: Opportunities Exist to Improve the Expedited Removal Process* (GAO/GGD-00-176) (September 2000): 21 [hereinafter "GAO Report"] online: <http://www.gao.gov/>. UNHCR has made clear its opinion that USINS should open up the process to national groups. Third Year Report, *supra*, at note 12.
15. Third Year Report, *supra* note 12, at 49.
16. *Ibid.* at 21.
17. *Ibid.* at 48–64.
18. The Expedited Removal Study, *Report on the First Year of Implementation of Expedited Removal* (May 1998), [hereinafter "First Year Report"]; The Expedited Removal Study, "Report on the Second Year of Implementation of Expedited Removal" (May 1999): Part V(A)(1) [hereinafter "Second Year Report"]; Third Year Report, *supra* note 12; online: <http://www.uchastings.edu/ers/reports/reports.htm>.
19. The Expedited Removal Study, *Evaluation of the General Accounting Office's Second Report on Expedited Removal* (October 2000), online: <http://www.uchastings.edu/ers/reports/reports.htm>.
20. Third Year Report, *supra* note 12, at 25.
21. General Accounting Office (GAO), *Illegal Aliens: Changes in the Process of Denying Aliens Entry into the United States* (Washington, DC: GAO, 1998), online: <http://www.gao.gov/daybook/000901.htm>; GAO Report, *supra* note 14, at 31.
22. *See generally* First Year Report, *supra* note 18, Second Year Report, *supra* note 18, Third Year Report, *supra* note 12; Lawyers Committee for Human Rights (LCHR), *Is This America?: The Denial of Due Process to Asylum Seekers in the United States* (October 2000), online: <http://www.lchr.org/refugee/is_this_america_toc.htm>.
23. Third Year Report, *supra* note 12, Part V.
24. *See* First Year Report, *supra* note 18, Part IV (P); Second Year Report, *supra* note 18, Part V(A)(7); Third Year Report, *supra* note 12, Part V(F).
25. Third Year Report, *supra* note 12, Part V(E).
26. INA § 235(a)(3), 8 U.S.C. § 1225(a)(3); Office of Programs, USINS, Memorandum: *Withdrawal of Application for Admission* (December 22, 1997) (Attachment 4 to First Year Report, *supra* note 18).
27. INS, *Fact Sheet: FY 1998 Update on Expedited Removals* (Washington, DC: INS, June 21, 1999), online: <http://www.ins.usdoj.gov/graphics/publicaffairs/factsheets/expedite.htm>.
28. Third Year Report, *supra* note 12, at 53.
29. One such case involved a Jamaican-American woman reported to have the mental capacity of a five-year-old; she was handcuffed and left overnight in a room at the airport with her legs shackled to a chair before being removed to Jamaica. John Moreno Gonzales, "'This Is a Disgrace'; U.S. Citizen Deported to Jamaica, Kin Charge," *Newsday,* June 14, 2000; Martin C. Evans *et al.*, "She's Closer to Home, Officials: Deported Woman May Be Back as Early as Sunday," *Newsday,* June 17, 2000. A Mexican-American man reportedly removed to Mexico without being referred to an immigration judge for a determination of his claim to be a U.S. citizen has filed a tort claim against the United States. *See Diaz* v. *Reno*, 40 F. Supp. 2d 984 (N. D. Ill. 1999).
30. INS officers at the Portland, Oregon, airport were reported to be refusing entry to applicants nine times as often as at Seattle, and a number of Asian businessmen were jailed and mistreated. "Asians Dub American Airport 'Deportland,'" *Chicago Tribune*, April 30, 2000. These incidents received wide coverage throughout Asia.
31. Third Year Report, *supra* note 12, at 53; Office of Policy and Planning, INS, *September 2000 FY Year End Report* (October 31, 2000), online: <http://www.ins.usdoj.gov/graphics/aboutins/statistics/msrsep00/index.htm>.
32. *See generally* Philip G. Schrag, *A Well-Founded Fear: The Congressional Battle to Save Political Asylum in America* (New York: Routledge, 2000).
33. Third Year Report, *supra* note 12, at 54.
34. *Ibid.*
35. There is a similar trend of rising borders across Europe. *See, e.g.*, James Hathaway, *The Emerging Politics of Non-entrée*, 1993

Refugees 91.

36. Third Year Report, *supra* note 12, at 120; Second Year Report, *supra* note 18, at Part V(B).
37. Executive Office for Immigration Review, *Interim Operating Policy and Procedure Memorandum 97-3: Procedures for Credible Fear and Claimed Status Reviews* 7 (March 25, 1997) (Attachment 10 to First Year Report, *supra* note 18).
38. GAO Report, *supra* note 14, at 49.
39. *See supra* note 5 and accompanying text.
40. UNHCR suggests that states may be justified in "dealing in an expeditious manner with applications which are considered to be so obviously without foundation as to not merit full examination at every level of procedure. Such applications have been termed either 'clearly abusive' or 'manifestly unfounded' and are to be defined as those which are clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the 1951 United Nations Convention relating to the Status of Refugees nor to any other criteria justifying the granting of asylum . . . "

    UNHCR Executive Committee, "Conclusion No. 30: The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum," ¶ (d), online: <http://www.unhcr.ch/refworld/unhcr/excom/xconc/excom30.htm>

The European Union is considering establishing minimum standards for swift processing of "manifestly unfounded" asylum claims. Migration News Sheet, No. 211/2000 at 7-8 (October 2000).

41. Third Year Report, *supra* note 12, at 29.
42. Second Year Report, *supra* note 18, at 120-128; Third Year Report, *supra* note 12, at 139-143. NGOs working on this issue include the Canadian Council for Refugees (CCR), and VIVE, a Buffalo, NY, refugee advocacy group.
43. Second Year Report, *supra* note 18, at 121.
44. UNHCR Executive Committee Conclusion 15 (XXX), *Refugees without an Asylum Country*, ¶¶ h(iii), (iv) (1979), online: <http://www.unhcr.ch/refworld/unhcr/excom/xconc/excom15.htm>.
45. UNHCR Executive Committee Conclusion 24 (XXXII) *Family Reunification,* ¶ 1 (1981), online: <http://www.unhcr.ch/refworld/unhcr/excom/xconc/excom24.htm>.
46. Letter from Elizabeth Tromp, director general of Enforcement, CIC, to Janet Dench, executive director, Canadian Council for Refugees (Aug. 16, 1999).
47. INA § 242(e)(3)(B), 8 U.S.C. § 1252(e)(3)(B).
48. *American Immigration Lawyers Association (AILA)* v. *Reno*, 18 F. Supp. 2d 38 (D.D.C. 1998).
49. *Ibid.*, *affirmed*, AILA v. *Reno*, 199 F.3d 1352 (D.C. Cir. 2000); *see also* "District Court Dismissed Expedited Removal Challenges," 75 Interpreter Releases 1403 (October 9, 1998): 1404.
50. *See* Lisa J. Laplante, "Expedited Removal at U.S. Borders: A World without a Constitution," (1999) 25 N.Y.U. Rev. of Law & Social Change 213.
51. U.S. ex. rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).
52. *See*, *e.g.*, Laplante, *supra* note 50.
53. The as-yet unimplemented provision allowing application of expedited removal to persons physically present in the United States may provide the first such example. *See supra* note 12 and accompanying text.

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Refugee Determination Complexity

David Matas

Abstract

Refugee determination systems are complex and unfair. This combination is surprising. Why has government after government in Canada and around the world generated refugee determination systems that are both complex and unfair? The answer is that governments intrude into systems that would otherwise be both simple and fair, in order to assert control. They assert control in order to achieve other, non-refugee protection objectives. These non-refugee protection objectives are inappropriate for the design of a refugee determination system. A refugee determination system should be devised with four objectives in mind: fairness, internal consistency, simplicity, and compliance with international standards. The article examines Bill C-31 and makes recommendations for its improvement with these objectives in mind.

Résumé

Les systèmes pour la détermination du statut de réfugié sont complexes et injustes. Cette combinaison est surprenante. Comment se fait-il que gouvernement après gouvernement au Canada et partout dans le monde aient engendré des systèmes de détermination qui soient complexes et injustes ? La réponse est que les gouvernements s'ingèrent dans des systèmes qui seraient autrement simples et équitables dans le but d'affirmer leur contrôle. Ils affirment leur contrôle afin d'atteindre d'autres fins qui n'ont rien à voir avec la protection des réfugiés. Ces fins non-liés à la protection des réfugiés sont impropres à la création d'un système de détermination du statut de réfugié. Un système de détermination du statut de réfugié devrait être conçu en tenant en ligne de compte quatre objectifs : équité, cohérence interne, simplicité et conformité à des normes internationales. L'article examine le projet de loi C-31 et formule des recommandations pour son amélioration en tenant en ligne de compte ces objectifs.

Refugee determination systems around the world share two common features: complexity and unfairness. These features have bedevilled each form that the Canadian refugee determination procedure has taken through the years.

The old Canadian refugee determination procedure, declared unconstitutional by the Supreme Court of Canada because of its unfairness, was as complex a system as could be imagined. It was a Rube Goldberg device in which the roundabout took precedence over the direct.

Under that old procedure, a person had to violate the Immigration Act to make a refugee claim. By statute, a person could make a claim only if the person was before an adjudication tribunal convened to decide whether a violation of the Immigration Act had taken place.

In order not to create artificial incentives to violate the act, the department, by policy, instituted an in-status refugee determination system. However, the in-status system could not supplant the out-of-status statutory system, only complement it. So once the in-status procedure was in place, a person could make two refugee claims: one in-status, and a second out-of-status.

The immigration inquiry that triggered the out-of-status claim did not conclude with the issuance of a conditional order, as now. Rather, the inquiry just adjourned after the claim and a decision that there was a violation of the Immigration Act. The inquiry had to be reconvened after the refugee determination for a decision whether there would be a removal order or departure notice.

Both in-status and out-of-status refugee claims were made initially by talking into a tape recorder. The claimant would be convened to an interview conducted by a senior immigration officer who would tape the interview and have a transcript prepared. The transcript would be sent to the claimant for comment and then forwarded to Ottawa to a committee for its advice: the Refugee Status Advisory Committee. The committee, after reading the transcript, would advise the minister of Immigration, who would decide the claim.

If the decision of the minister was negative, and it almost always was, the claimant then could apply for redetermination to the old Immigration Appeal Board. The application was on paper only. This paper application was not for a reversal of the decision but for an oral hearing only. The application was akin to a leave application, but the test for success was a good deal higher than for a leave application. The Immigration Appeal Board could grant an oral hearing only if there were reasonable grounds to believe, on the basis of the paper application, that the claimant, at the oral hearing, could succeed in the claim.

If the Immigration Appeal Board rejected the paper application, as was most often the case, or held an oral hearing and then rejected the case, the person then went back to the immigration adjudicator for a decision on whether a removal order or departure notice would issue. Of course, beyond all that there was recourse to the Federal Court.

Most people went through this system without ever appearing in front of anyone who decided their claim—a feature that attracted the attention of the Supreme Court of Canada. In addition, if one totals every step a person took who was rejected at every turn, there were twelve in all, even when there was no attempt to seek a remedy from the Federal Court. They were:

1. an in-status interview
2. a submission on the transcript of that interview
3. the advice of the Refugee Status Advisory Committee on the transcript
4. the decision of the minister on that advice
5. an immigration inquiry at which an out-of-status claim was made
6. an out-of-status interview
7. a submission on the transcript of that out-of-status interview
8. the advice of the Refugee Status Advisory Committee on the second transcript
9. the decision of the minister on that advice
10. an application for redetermination to the Immigration Appeal Board
11. a hearing of the claim by the Immigration Appeal Board, on the assumption that the application for redetermination was granted
12. the resumption of the immigration inquiry before an adjudicator to determine whether there should be a departure notice or deportation order

This system, bizarre as it sounds, is similar to refugee determination systems found elsewhere. Indeed, this earlier Canadian model was inspired by foreign refugee determination systems. There are even some people in Canada today nostalgic for the old system and regretful of the Supreme Court of Canada intrusion into it.

The old system, in addition to all its other faults, suffered from an absence of integration of the overseas and inland refugee determination systems. Overseas refugee determinations, performed at Canadian visa posts abroad, were made by different people using different procedures, standards, and criteria.

The inland system was so long, drawn out, and unfair that virtually everyone was being rejected, but virtually no one was being removed. The system was completely dysfunctional and had to be revamped, even without the decision of the Supreme Court of Canada ruling it unfair.

The system in the present act and regulations is an improvement, but still needlessly complex and needlessly unfair. The present act creates a bifurcated road. The number of steps depends on which of the two roads the claimant is required to take.

Under the present act, first there is a port-of-entry interview, where claimants are interviewed on arrival about the substance of their claims without access to counsel, a procedure the Supreme Court of Canada has decided is constitutionally valid. Second there is eligibility determination, conducted by a senior immigration officer.

A determination of eligibility puts claimants on one of the two roads. If the person is eligible, there is the refugee hearing conducted by the Refugee Division of the Immigration and Refugee Board. If the claim is rejected, the person can apply for membership in the post-claims refugee determination in Canada class. The decision on membership in the post-claims refugee determination in Canada class is made by a specialized corps of officers in the Department of Immigration: the post-claims determinations officers (PCDOS).

A person can make a claim either in-status or at an immigration inquiry. If the claim is made at the inquiry, then the adjudicator issues a conditional removal order. If the claim fails, the order becomes effective without the need to reconvene the inquiry.

Those found not eligible have risk determined differently from those found eligible. One ground of ineligibility is that the person has committed an offence with a maximum punishment of ten years or more and has been determined by the minister to be a public danger. A person found ineligible to make a refugee claim is also ineligible to apply for membership in the post-determination refugee claimants in Canada class. It is this public danger determination procedure that becomes, instead, the risk determination procedure.

The public danger procedure starts with a determination in the local immigration office to seek the advice of the minister that the person is a public danger. The person concerned is notified of this determination with an opportunity to make written submissions that would be forwarded to the minister. The written submissions are sent to headquarters where they are analyzed, and advisory opinion is given. The minister or her delegate decides.

As can be seen, in this process there is never a stand-alone risk assessment. Rather, risk assessment is folded into the public danger determination. The ultimate decision is only that the person is or is not a public danger. Furthermore, the decision on public danger does not involve the department's risk-analysis specialists—the post-claims determination officers.

In order to engage their involvement, the person concerned has to make a second application, this time for permanent residence on humanitarian and compassionate grounds. It is the policy of the department, when an application is made for humanitarian landing and the application has a risk component, to refer the risk component of the application to the post-claims determination officers for their advice.

The Immigration Act, in general, prevents removal of a rejected refugee claimant pending consideration of his or her application to the Federal Court. There are statutory stays of execution of removal orders. However, persons found ineligible to make a refugee claim on the basis that they are public dangers are not granted statutory stays. They must apply for judicial stays. Furthermore, an application for humanitarian landing, in itself, does not prevent execution of a removal order.

In consequence, the application for a judicial stay of execution of a removal order becomes part of the process of risk determination. Recourse to the Federal Court becomes a necessary part of the process rather than a step to be taken after the process is completed. Unless a person can stay in Canada pending his or her humanitarian application, the person never gets recourse to a decision reached on the advice of the post-claims determination officers. The department does not attempt to remove some people pending their humanitarian applications. However, as the docket of the Federal Court shows, for many, it does.

Again, with this system, there is no integration with the overseas system and the inland system. Indeed, though the inland system has changed substantially, the overseas system has remained much the same. There has been a broadening of the risk standards. However, other criteria remain in place, and the procedure is unchanged.

This lack of integration creates its own perversity. It is a policy of the Immigration Act to have applications for immigration processed at visa posts abroad, rather than inland. Yet, the refugee determination system overseas is much more problematic than the system inland.

The system is a good deal less fair. For instance, there is no right to counsel at refugee interviews, and most visa posts, as a matter of policy, prevent counsel from attending, even if they are available at the time of the scheduled interview.

The persons who decide are neither specialized nor expert in refugee matters and have only cursory training in the field. They are not independent from government and its immigration and foreign affairs objectives, but rather part of government and part of that very portion of government that pursues immigration and foreign policy objectives.

The visa posts impose criteria that are not part of the inland determination. Examples are medical admissibility, likelihood of successful establishment, and no durable solution elsewhere.

It is a good deal harder to be recognized as a refugee overseas than inland, and for all the wrong reasons. The system gives an artificial incentive for claimants to come to Canada to make their claims, working at cross-purposes with the overall objective of the system to have applications processed at visa posts abroad.

The present system is fairer than the old one, for at least some people. For those found to be public dangers, the present system is as unfair as the old system, and then some. For those who are found to be eligible, there is a fair hearing before an independent expert tribunal. The system is not completely fair, because of the denial of access to counsel at the initial port of entry interview, the absence of an appeal, and the impossibility of reopening to consider change of circumstances, new evidence, or old evidence not previously available.

As well, the present system is still needlessly complex. It is not as complex as the old system. However, there are still many unnecessary steps, consuming time and money for no apparent purpose.

Superficially, this combination of complexity and unfairness is surprising. It is easy to fathom, if not to commend, a system that is both fair and complex or simple and unfair. In a system that is both fair and complex, the complexity can be justified by the fairness. In a system that is both simple and unfair, there would be at least some who would attempt to justify the unfairness by the simplicity. However, why has government after government in Canada

and around the world generated refugee determination systems that are both complex and unfair?

The reason is the intrusion into these systems of yet another objective besides simplicity and fairness: the objective of control. Governments intrude into a system that would otherwise be both simple and fair, in order to assert control over the system.

The reason for that attempt to assert control is that refugee protection systems impinge upon other government policy objectives. Refugee claimants who get protection get to stay. Those who get to stay become part of the local community. The governments want a say in who gets to stay. So they intrude into refugee determination systems in order to attempt to realize their immigration objectives.

As well, a decision that a person is a refugee is a decision that the country of danger fled is a country of persecution. For some governments, that is a judgment that they would rather not have made of their allies. Refugee determination can conflict with foreign policy objectives.

For Canada, immigration and foreign policy concerns are less than for many others. Canada attempts to promote human rights abroad in a neutral fashion. Canada is a country of immigration. Recognizing refugees can support Canada's foreign affairs and immigration policies rather than contradict them.

As well, it is not that easy to get to Canada. The only country with which Canada has a land border is the United States, which does not produce refugees. Every refugee claimant coming to Canada has to either traverse the United States or arrive by air or sea.

The number of those arriving by air or sea can be controlled by visa requirements and carrier sanctions. Canada has visa requirements on every country producing significant numbers of refugee claimants; denies visas systematically to everyone who wants to come to Canada to make a refugee claim; and penalizes commercial carriers who bring to Canada persons who need visas but do not have them. This interconnected web of visa requirements, visa denials, and carrier sanctions reduces the number of arrivals to Canada to the point where, even if Canada were to accept as a refugee every refugee claimant that got to Canada, the numbers would be manageable.

The Canadian policy concerns about immigration numbers from refugee recognition inland, as a result, are inappropriate. To a large extent, the present design of the inland refugee determination system manages to avoid an unwarranted intrusion of immigration considerations into refugee determinations because, at least for those eligible to make a claim, risk determination is done by an independent tribunal—the Immigration and Refugee Board—and not the Immigration Department.

Immigration concerns intrude more readily into refugee determination overseas because those refugees determinations are done by visa officers who otherwise decide on immigration matters. Many refugees abroad, as well as in Canada, would not qualify for permanent residence if they were not refugees. That should not matter and, in general, does not matter to members of the Refugee Division of the Immigration and Refugee Board. It is, however, something that tugs at the minds of visa officers. It becomes impossible for many, if not most, visa officers to separate their refugee protection tasks from their immigration tasks.

It is this failure to separate refugee determination from immigration that explains the superficial perversity of a system that works with much less success abroad than in Canada. Officials seem not to care that the system creates an incentive to get to Canada, because they know that the web of visa requirements, visa denials, and carrier sanctions will prevent the arrival of most of those who want to come.

The other policy concern that unduly intrudes into Canadian refugee protection is a concern about criminality. International law says that no one, no matter what the crime, should be returned to torture, disappearance, or arbitrary execution. Refugees who are also criminals can be returned to danger, but only if the danger they face on return is less than the danger they pose to the community where they seek protection. For Canadian policy makers, this protection of criminals goes too far. Canadian law intrudes into refugee protection to prevent it from happening.

We should approach the refugee determination system with these objectives in mind: The system should be fair. It should be simple. It should comply with international law standards. It should be consistent and integrated, not working at cross-purposes.

The system proposed in the government's Bill C-31, introduced in the last Parliament, though in some respects an improvement over the present law, is still not quite right. It is still needlessly complex and unnecessarily unfair. It suffers from a lack of integration. And it does not fully comply with standards of international law.

The proposed system, like the old one, creates a bifurcated road. Some claimants will be found eligible and go through one form of risk determination at the level of the Protection Division of the Immigration and Refugee Board.

Other claimants will be found ineligible and go through another form of risk determination—an administrative pre-removal risk assessment.

Perhaps it is more accurate to say that the old system, like the new one, creates a trifurcated road. A third group of claimants go down a third, dead-end, road. At the end of this third road there is removal without any form of risk assessment whatsoever.

The criterion for public danger disappears. Bill C-31, though removing the public danger label, makes matters worse. Rather than a there being a double hurdle for ineligibility, as there is now, of a crime with a high maximum sentence plus a public danger determination, there will be only a single hurdle of a conviction of a crime with a high maximum sentence.

Under the bill, once a person is declared ineligible, the person goes into a different risk determination stream. Risk determination is made not by the Protection Division of the Immigration and Refugee Board, but through pre-removal risk assessment. The bill gives the power to decide on pre-removal risk assessment to the minister of Citizenship and Immigration, but also allows her to delegate that power to decide. Under the bill, the definition of risk that both the Protection Division of the Immigration and Refugee Board and pre-removal risk assessment officials would consider is the same.

So, the bill contemplates two streams of claimants, going into two different determination systems where the risk definition applied would be the same, and where the procedure for application of the definition could be the same. Furthermore, eligible but rejected refugee claimants would be able to go into pre-removal risk assessment, in effect getting two refugee determinations.

As problematic as fragmentation of the refugee determination system is, even more problematic is the situation of those who are unable to squeeze into any one of the fragments. Those rejected as refugees or found ineligible to make a claim, as well as those who have abandoned or withdrawn their claims, cannot apply for refugee determination if they have left Canada and then returned. They cannot apply for pre-removal risk assessment either, where the return is within a year of the departure.

Another gap in protection, both under the present law and the bill, is protection from danger for a person recognized as a convention refugee by another country who can be returned to that country. The gap should be addressed. To do that, we need an amendment to the definition of "a person in need of protection" in the bill.

In addition to the unnecessary steps of ineligibility and pre-removal risk assessment, with roughly parallel steps in the present system, the bill adds a new step not found in the present system. It is the need to apply for a judicial stay of execution of a removal order to keep the person in Canada pending an application for leave and judicial review of a negative refugee determination by the Refugee Appeal Division of the Immigration and Refugee Board.

The bill, like all its predecessors, does little to address the connection between the refugee determination overseas and refugee determination in Canada. Indeed, although the bill provides a common definition for refugee protection, it puts claimants outside Canada through the procedures and provisions of part 1 of the act dealing with immigrants and not through part 2 of the act dealing with refugees.

What follows are specific recommendations about Bill C-31 in line with this general approach, dividing them among the four objectives stated. Some of these recommendations, of course, serve more than one objective.

Simplification

1. Everyone in Canada should be eligible to make a refugee claim. There should be no ineligibility step before refugee determination. The eligibility step is unnecessary for most claimants, since most claimants are eligible. The step just takes up time and money.

People ineligible because of war crimes, crimes against humanity, or serious non-political crimes committed before entry can be denied refugee protection under the convention exclusion clauses. A person ineligible to make a refugee claim if the person has been found to be a convention refugee by another country, and can be returned to that country, can be dealt with under the Refugee Convention clause, excluding from the refugee definition those having the rights and obligations attached to the possession of nationality of another country.

People who have committed serious crimes in Canada and are a danger to Canada, and people who are security risks, can be removed from Canada even if refugees. Refugee determination in this case assists in the decision whether to remove by providing an assessment of the gravity of risk faced on return.

People who have passed through a designated safe third country are ineligible under the present act, but no country has ever been designated, for good reason. None ever should be. Safety should always be determined case by case, for every country of return.

People already recognized or refused as refugees can be dealt with through the doctrine of *res judicata*. The doctrine of *res judicata* does not prevent the examination of new evidence. It does prevent the relitigation of old issues

between the same parties on the same evidence. No tribunal will again hear a case it has already decided simply because a party requests the rehearing.

People who have withdrawn or abandoned claims can be dealt with through the doctrine of abuse of process. Again the doctrine of abuse of process does not prevent reconsideration of a case withdrawn or abandoned, if there is good reason for reinstituting the case. It does prevent coming to court constantly on a whim.

2. There should be no administrative pre-removal risk assessment procedure but instead a re-opening jurisdiction in the Protection Division of the Immigration and Refugee Board paralleling the existing re-opening jurisdiction of the Appeal Division of the Immigration and Refugee Board. That is to say, there should be a power to reopen, on application, where there is a change of circumstances in the country of claim, new evidence in support of the claim, or old evidence not previously available.

3. It should not be necessary to apply for a discretionary stay to the Federal Court. There should be, as now, a statutory stay pending applications for leave.

Fairness

4. There should be a right to counsel at port of entry refugee interviews.

5. If there is an administrative pre-removal risk assessment procedure, there should be an oral hearing under this procedure, at the very least, for those who had no oral hearing from the Protection Division of the Immigration and Refugee Board.

6. Even if there is an administrative pre-removal risk assessment procedure that considers change of country conditions, there should be a reopening jurisdiction in the board to consider new evidence or old evidence not previously available. It is difficult for an instance that has not made the original determination to decide whether or not new evidence or old evidence not previously available would change that determination.

7. In order to ensure a refugee determination procedure that brings to its task no bias, or reasonable apprehension of bias, Parliament should legislate a transparent, professional, and accountable selection procedure for members of the Immigration and Refugee Board.

8. It should be possible to appeal from abandonment decisions. Abandonment can be hotly contested. A claimant may not show up for a prior hearing because he or she never received notice of the hearing. The board must then decide whether what the claimant did to maintain contact with the board in order to receive notice was reasonable in the circumstances. An appeal from a contested abandonment decision where risk is at issue, is as appropriate as an appeal from the risk decision itself.

9. A person should be allowed to make a refugee claim, whether or not the person is under a removal order. Often whether such a claim is made or not depends on the person's awareness of his or rights at the time of removal proceedings. A removal order can be made on arrival, at the port of entry, before the claimant has had access to counsel. The denial of substantive rights should not depend on procedural vagaries.

Compliance with International Law

10. If there is both an eligibility stage and an administrative pre-removal risk assessment stage, everyone who is ineligible for consideration by the Protection Division of the Immigration and Refugee Board should be eligible for consideration under the pre-removal risk assessment procedure. No one at risk should be removed from Canada without assessment of that risk.

11. The bill should grant both the power to prevent removal to generalized risk and to risk that may not be so general as to put everyone at risk, but general enough to be faced "generally by other individuals in or from that country," that is to say those similarly situate to the claimant. The risk may not be faced by the foreign national in every part of the country, but it may be faced in the part of the country to which the department would remove the applicant, the place where the international airport is to be found.

As well, there should be provision to allow for suspension of removals based on the application of individuals. It should be possible for a decision on suspension to be responsive to the testimony that individual refugee claimants have to give.

12. There needs to be mechanism for dealing with danger in a country that has granted the person refugee status and to which the person could be returned, but for that danger. One way of dealing with that danger is through the definition of a person in need of protection. The definition of person in need of protection could read, "A person in need of protection is a foreign national in Canada whose removal to any country to which the person can be removed would subject her personally . . . "

13. For generalized risk, in addition to gaps in protection coverage, there are failings in due process, now and in the proposed bill. The present power to prevent removal to generalized risk has been exercised in an opaque and arbitrary fashion, behind closed doors. Individuals are faced

with a decision that they do not request and to which they do not contribute.

There needs to be an open and fair procedure to invoke the power to prevent removal to generalized risk. This procedure should be part of the refugee determination process. Every claimant should be able to request a determination that the risk the person faces would be faced by the person in every part of that country and is faced generally by other individuals in or from that country.

14. The bill should prohibit the removal of anyone to torture, arbitrary execution, or disappearance. As mentioned earlier, international law prohibits such removal.

Integration with the System Overseas

15. Refugee determinations overseas should be done by the Protection Division of the Immigration and Refugee Board, using the same procedures as in Canada.

16. At the very least, the bill should recognize there is a right to counsel at refugee interviews at visa posts abroad.

17. As long as the refugee determination procedure overseas remains the same as it is now, the bill should provide for eligibility to make an inland claim where the person is rejected overseas.

Conclusion

There was an elaborate policy process leading up to Bill C-31. The bill was preceded by the report of an independent Legislative Review Advisory Group and a ministerial white paper. Both involved extensive cross-Canada consultations.

Yet, the new bill suffered from the same vices as the present legislation: complexity, unfairness, internal inconsistency, and deviance from international standards. It seems that even the most extensive review and consultations could not shake the policy makers from a few strongly held beliefs, though it was those very beliefs that had led to the current impasse.

What is needed now is not just a new bill, but new thinking. Immigration and refugee reform has for so long been mired in the past, it is hard to be optimistic that a new day will dawn.

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Bill C-31: Limited Access to Refugee Determination and Protection

Michael Bossin

Abstract

This article deals with the effect of the proposed Immigration and Refugee Protection Act (Bill C-31) on access to Canada's refugee determination system and its pre-removal risk-assessment procedures. The author examines public statements about government plans for increased overseas interdiction of refugee claimants, provisions that expand the definition of persons ineligible to have their claims heard by the Immigration and Refugee Board (particularly those concerning "serious criminality"), and the proposed new system for pre-removal risk assessment. His conclusion is that, should these proposals come into effect, fewer people will have access to refugee and other protection in Canada.

Résumé

Cet article se penche sur les conséquences qu'aurait la proposition de loi concernant l'immigration et l'asile (projet de loi C-31) sur l'accès au système de détermination du statut de réfugié au Canada et les procédures d'évaluation des risques avant le renvoi qu'elle contient. L'auteur examine les déclarations publiques concernant les plans du gouvernement pour accroître le nombre d'interdictions de demandeurs d'asile à l'étranger, pour étendre la définition de personnes dont les demandes sont considérées irrecevables pour être entendues par la Commission de l'immigration et du statut de réfugié — tout particulièrement celle concernant « la criminalité grave » — et le système préconisé d'évaluation des risques avant le renvoi. Sa conclusion est que si ces propositions sont adoptées, moins de personnes auront accès à l'asile au Canada.

Introduction

The Immigration and Refugee Protection Act (Bill C-31), introduced in April 2000, includes some measures that will improve upon Canada's system of refugee determination. These include an expanded definition of those deserving of protection and an appeal on the merits of rejected claims. That being said, the most specialized and fair procedure is of little value if one does not have access to its processes. And make no mistake, limiting access to refugee protection in Canada is precisely the intent of the Canadian legislators who introduced Bill C-31 into Parliament. Under its provisions, fewer people will be able to benefit from Canada's asylum procedures. This is a consequence of increased overseas interdiction of those seeking to come to Canada to make refugee claims, an expanded definition of who is ineligible to have his or her claim heard by the Immigration and Refugee Board (IRB), and limited access to a new pre-removal risk assessment.

Interdiction

The provisions of Bill C-31 do not mention increased overseas interdiction, but the intent of the government is clear from media releases and statements made around the time of the Bill's introduction. In a press release, the Minister of Citizenship and Immigration declares that one goal of the new legislation is to "close the backdoor to those who would abuse the system."[1] As a way of achieving that goal, the Minister declares that she has secured funding for "stepped-up overseas interdiction."[2]

The same press material notes that increased overseas interdiction means "[m]ore immigration control officers stationed at our offices abroad to direct genuine refugees to appropriate missions or international organizations

while preventing undocumented persons from seeking irregular channels of migration to Canada."[3] The stated purpose of this action is "to discourage those not in need of protection from coming to Canada through irregular means."[4]

The phrase "at our offices" abroad is, I believe, misleading. It suggests a place of meeting and discussion. In fact, most interdiction by Canadian officials occurs at overseas airports, where the documents of persons boarding Canadian-bound planes are checked. "At our offices" suggests an investigatory, even conciliatory, approach. The reality of "at the airport" reveals a much more enforcement-oriented process.

The enforcement mentality is revealed as well in language used by the government to describe its interdiction policy. For example, non-genuine refugee claimants are described as "undocumented persons" and those seeking to come to Canada through "irregular means." As Amnesty International observes in its brief on Bill C-31,

> Sometimes the only way that genuine refugees can escape persecution in their own countries and seek asylum abroad is through "irregular channels" and by means of false documentation. The language in the [press material], however, suggests that "undocumented persons" "seeking irregular channels of migration to Canada" are not "genuine refugees." In our experience, in many cases, nothing could be further from the truth. It is this apparent misconception of what constitutes a "genuine refugee" which raises our concern about the welfare and safety of those interdicted abroad.[5]

The government promises that "genuine refugees" shall be directed to "appropriate missions or international organizations." That, however, should not be confused with actually offering protection to those refugees or even ensuring that they have access to a fair determination. Besides, the proposal is premised on a false assumption—that one can easily distinguish a "genuine refugee" from one who is not genuine. As is evident to anyone who has ever been involved in a refugee hearing, that determination is, as a rule, not simple at all. It is far more complicated than merely confirming the validity of one's passport. Moreover, "immigration control officers," whose very title reveals their primary purpose, are neither suited nor trained to determine who is a "genuine refugee."

Were the Canadian government serious about protecting *bona fide* refugees, it would cease overseas interdiction. As the UNHCR notes, "the most effective way to ensure the integrity of asylum systems is not to erect barriers but rather, to process applications fairly and expeditiously [in the country of asylum]."[6] That involves "consistency in decision-making and the timely removal of rejected asylum-seekers."[7]

At the very least, Canadian officials abroad should be satisfied that persons wishing to claim refugee status in Canada have access to an authority in another country before which they can exercise their right to seek asylum. That country must be a signatory to the 1951 Convention and be recognized as one that upholds its obligations under the Convention, in policy and practice. If such a referral is not possible, asylum-seekers should be allowed to continue their voyage to Canada.[8]

Ineligibility

Restricted Access to the Refugee Board under the Current Legislation

Since 1989, there has been an eligibility screening for all refugee claimants in Canada. That is, not all persons claiming to be refugees are allowed to have their claims heard by the Convention Refugee Determination Division (CRDD) of the IRB. Under the Immigration Act, determinations of eligibility are made by immigration officers.[9] Persons not eligible to have their claims referred to the CRDD include:

- those who have been recognized as Convention refugees by another country, to which they can be returned[10]
- those previously determined not to be Convention refugees, or to have abandoned their claim, or determined not to be eligible to make a claim[11]
- those determined to be Convention refugees, under either the Immigration Act or the regulations[12]
- those determined by an adjudicator to have committed or been convicted of a serious crime, either in Canada or abroad, and who, in the Minister's opinion, constitutes a danger to the public[13]
- those determined by an adjudicator to be inadmissible for reasons of security, involvement with organized crime, war crimes or crimes against humanity, or for holding a senior position in a government complicit in human rights violations and whose claims, in the opinion of the Minister, it would be contrary to the public interest to have heard in Canada.

Under current legislation, those previously determined not to be Convention refugees can overcome this obstacle to eligibility by remaining out of the country for ninety days. After that period, failed refugee claimants returning to Canada will again have access to the CRDD for a determination of their claims.[14]

On a number of occasions, the legislative scheme of limiting access to the CRDD has been challenged for being in

violation of the Canadian Charter of Rights and Freedoms, particularly of sections 7 and 15 (1).[15] In every case, the Federal Court has upheld the constitutionality of the eligibility provisions.[16]

Notwithstanding the Canadian jurisprudence, it is doubtful that the drafters of the 1951 Refugee Convention envisaged a system in which some asylum seekers would be unable to present their claims before the decision-making authority. Certainly, no article of the 1951 Convention specifically bars applicants from access to a refugee determination process. Under the Convention, persons may be *excluded* from refugee protection or may *cease* to be Convention refugees, but these exclusionary and cessation clauses do not envisage the absence of a refugee determination at all. By definition, cessation is an act that occurs after someone first has been determined *to be* a Convention refugee. As for excluding undeserving claimants from refugee protection, this too comes after an initial finding of inclusion. Notes the United Nations High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status,*

> The inclusion clauses define the criteria that a person must satisfy in order to be a refugee. They form the positive basis upon which the determination of refugee status is made. The . . . exclusion clauses . . . enumerate the circumstances in which a person is excluded from the application of the 1951 Convention *although meeting the positive criteria of the inclusion clauses* (emphasis added).[17]

The UNHCR has long been of the view that "*automatic* bars to consideration of asylum claims are not in conformity with the 1951 Convention."[18] Decisions on entitlement to refugee protection are often complex and challenging, and should be made by the authority with expertise and training in refugee law and status determination. In its submission to the House of Commons Standing Committee on Citizenship and Immigration, the UNHCR stated that the right under Article 14 of the Universal Declaration of Human Rights to seek and enjoy asylum from persecution "can only be exercised if the asylum-seeker has the opportunity to have his or her claim heard by an authority competent to do so. Asylum-seekers therefore must have access both to the territory of countries where persecution can be sought, and to the asylum procedures in those countries."[19]

Canada was also criticized for limiting access to its refugee determination process by the Inter-American Commission on Human Rights, in a report issued in February 2000.[20] Basing its analysis on articles of the American Declaration of the Rights and Duties of Man, the Commission, although acknowledging that some claimants may be ineligible to have their claim determined, were concerned that eligibility screenings are conducted by immigration officers and not the Board. In its report, the Commission stated,

> The right to seek asylum necessarily requires that asylum seekers have the opportunity to effectively state their claim before a fully competent decision-maker. While applicable international law leaves the decision as to which procedural means are necessary to accomplish this to the national authorities, the Commission shares the view of the UNHCR that eligibility determinations are best made by those tasked with interpreting and applying refugee law and policy.[21]

As we shall see, the views of the UNHCR and Inter-American Commission on Human Rights are not reflected in the draft legislation, Bill C-31. In fact, access to refugee determination—indeed, to refugee protection—is even more limited under the proposed new law.

Reforms under Bill c-31

In Bill C-31, the proposed Immigration and Protection Act, some of the terminology on refugee claims has changed. The Convention Refugee Determination Division, for example, becomes the Refugee Protection Division (RPD) of the Immigration and Refugee Board.[22] In addition to determining people to be Convention refugees, the Division also has the power to declare applicants to be persons "in need of protection." The latter, with a number of exceptions, include those likely to face torture or cruel and unusual treatment or punishment, if removed from Canada. The system of screening refugee claimants for eligibility to have their claims heard by the Board, however, remains in place in the proposed legislation. In fact, the grounds for prohibiting access to the Board have been expanded.

Pursuant to section 95 (1) of the Bill, the following persons are ineligible to have their refugee claims referred to the RPD:

- those previously granted or refused refugee protection under the Act[23]
- those previously determined to be ineligible to have their claim referred to the PRD, or whose claims have been withdrawn or abandoned[24]
- those recognized as Convention refugees by a country other than Canada, to which they can be returned[25]
- those determined to be inadmissible on the grounds of security, violating human rights, serious criminality, or organized criminality[26]
- those who came directly to Canada from a country prescribed by Cabinet as being "safe," other than their own country of nationality or former habitual residence[27]

It is not my intention to comment on all of these provisions—only those where the most significant changes to the existing legislation have been made. In my view, these also happen to be the amendments likely to have the greatest impact in numerical terms: the sections dealing with serious criminality and previously rejected claims.

Serious Criminality

Under the current legislation, claimants must have been convicted of a "serious offence,"[28] and the Minister must be of the opinion that they constitute a "danger to the public" before they can be found ineligible to have their claims referred to the CRDD.[29] In the proposed Immigration and Refugee Protection Act, the Ministerial opinion is not needed for a finding of ineligibility. The "serious offence" alone constitutes grounds for not referring a claim to be heard by the RPD.[30]

The current practice, of having the Minister label certain refugee claimants a "danger to the public," has been subject to criticism on several fronts. On the government side, the determinations can be difficult and time-consuming. From the perspective of refugee advocates, the exercise of the Minister's discretion has been criticized primarily because, as the Canadian Bar Association has observed, "many, if not most, of those labelled public dangers were not public dangers in the objective sense of likelihood to reoffend."[31] According to the CBA, "The public danger label, rather than a true determination of public danger, is a form of venting anger against foreigners for past crimes. It is a modern form of forfeiture."[32]

Whatever its shortcomings, there is implicit in the ministerial discretion on public danger the acknowledgment that not *all* persons convicted of a serious criminal offence are undeserving of a determination before the Refugee Board or, indeed, of refugee protection. For example, in her determinations of public danger, the Minister may consider such factors as the actual sentence imposed by the court, the age of the offender, whether this was a first offence, indicators of rehabilitation, and change in personal circumstances since the commission of the crime. None of these considerations can be taken into account under the proposed regime. Instead, there is an inflexible and arbitrary standard, one that is overly simplistic and, frankly, insensitive to the complexities that often arise in such cases.

One such complexity involves offences or criminal charges that are politically motivated. Under the 1951 Convention, only those persons who have committed "serious *non-political*" crimes are excluded from refugee protection.[33] A distinction is made between common criminals escaping legitimate prosecution and those whose actions were politically motivated, leading to a flight from persecution. "Serious criminality," as defined in Bill C-31, makes no such distinction. Political and non-political crimes are treated alike.

In fact, in Bill C-31 there is no provision for taking into account the political context in which crimes abroad were "committed," when determining ineligibility by reason of "serious criminality." This is problematic, since, in many countries the criminal justice system is used to suppress dissidents. It has been said that were Nelson Mandela a refugee claimant under the Immigration and Refugee Protection Act, he would be ineligible to have his claim heard by the Refugee Board. A more recent example of the type of person who would be detrimentally affected by the new legislation is James Torh, one of Liberia's most well-known and outspoken human rights defenders. Mr. Torh was arrested in December 1999 for criticizing the Liberian government and his president, while speaking to a group of secondary-school students. He was arrested, stripped naked, beaten, kicked, and charged with sedition. In the eyes of the international community, there is no doubt that the charges against James Torh are politically motivated. In Canada, sedition carries a sentence of up to fourteen years' imprisonment. If convicted in Liberia, where a fair trial is highly unlikely, James Torh would be ineligible to make a refugee claim in Canada.[34]

In the Immigration and Refugee Protection Act, there is an acknowledgment that persons found ineligible due to serious criminality may still be at risk if returned to their country of origin and, as a consequence, in need of protection. Under the Act, those found ineligible for such reason are referred to the Pre-Removal Risk Assessment (PRRA).[35] The assessment includes a weighing of the potential risk to the individual if returned to his or her country of origin, and the risk to the Canadian public or the security of Canada should the person not be returned.[36] Should the risk to the claimant outweigh the risk to the Canadian public, then his or her removal is stayed, subject to further review if circumstances change.[37]

In terms of protection, it is doubtful that referring "serious criminals" to the PRRA will be as effective as referring their claims to the RPD. Under the Immigration and Refugee Protection Act, the definition of risk applied by the RPD and the PRRA is the same.[38] The only difference in the assessment would be that the former tribunal is far better trained and equipped to identify persons in need of protection. Moreover, with respect to the interests of the Canadian public, it is hard to see the advantages of the proposed system for dealing with claims of "serious criminals."

In regard to protecting the public from dangerous criminals, there already are provisions for detaining any asylum-seeker who poses a danger to the public.[39] Moreover, claimants who have committed serious non-political crimes are excluded from refugee protection in any event.[40] Finally, persons who have committed serious offences in Canada and are a danger to the public can still be removed from Canada, even if in need of protection. Such removals are consistent with Article 33 (2) of the 1951 Convention and are provided for both in the current legislation[41] and under Bill C-31, where the danger to the public outweighs the risk to the person concerned.[42] What, then, should be done with cases involving "serious criminality"? Clearly, some discretion needs to be exercised, in balancing the individual's need for protection against the public interest, including danger to the public. The pertinent questions are, Who is best suited to exercise that discretion? And at which stage of the proceedings should the discretion be exercised? One proposal has been to retain a pre-screening of claims, with the "danger to the public" criterion being determined by an adjudicator, instead of the Minister.[43] Although this would result in more independent decision making, it would continue to be a time-consuming and potentially costly exercise.

A better solution, in my view, is simply to refer *all* refugee claims to the RPD.[44] Where the eligibility criteria are met, a hearing on the merits can follow immediately thereafter. This approach would be both expedient and economical. Moreover, as indicated above, the Refugee Board is best suited to make determinations on the need for protection. The practice of denying some people access to refugee determination through a pre-screening mechanism only serves to increase the likelihood that genuine refugees will be removed from Canada, thereby violating Canada's obligations under Article 33 of the 1951 Convention. As the CCR states in its submissions on Bill C-31, "In order to comply with this obligation, Canada must, before removal, be sure that a person being removed is not a refugee. The refugee determination system [meaning consideration of a claim by the specialized, expert tribunal] exists to identify who is a Convention refugee and who is not."[45]

Claimants Previously Refused

At first glance, the provision in Bill C-31 for claimants previously refused refugee protection[46] appears identical to that found in the current legislation.[47] It *is* very similar. The difference is found in another section of the Bill, dealing with how soon a rejected refugee claimant can return to Canada and initiate a subsequent claim. As mentioned above, under the Immigration Act, a period of ninety days outside the country will overcome the prohibition based on a previous refusal. Under Bill C-31, persons whose claims are rejected *forever* lose their right to have a refugee claim heard by the Immigration and Refugee Board again.[47] Rejected claimants who, having spent at least one year outside Canada, return to seek asylum, are referred not to the RPD, but to the PRRA instead.[49]

The rationale for the "ninety-day rule" under the current Act is a recognition that circumstances may change—either in a claimant's country of origin, or in his or her life, or both. Just because one's refugee claim is rejected at one point does not mean that he or she will never meet the definition of Convention refugee, or deserve protection, in the future.

The circumstances that lead to a need for protection, of course, can arise at any time. Under Bill C-31, however, only those failed refugee claimants who have been outside of Canada for one year or more are eligible for PRRA. No mechanism exists to provide protection, let alone a risk assessment, for those who return to Canada seeking asylum within the one-year period. Clearly, the failure to provide *any* assessment of risk for such individuals puts into question Canada's adherence to its obligations both under section 7 of the Charter and Article 33 of the 1951 Convention.[50]

As mentioned above, in terms of identifying persons in need of protection, it is unlikely that a review under PRRA will be as effective as a determination by the PRD. The draft legislation does not mention *who* conducts the former or *how* it is done. Most likely, it will be a paper review carried out by immigration officers, similar to the Post Claim Determination Officers who consider applications for membership in the Post Determination Refugee Claimants in Canada class (PDRCC) under the current legislation. However qualified these officers may be, they are not members of a specialized tribunal dealing with protection issues. Nor can it be said that a paper review is of the same quality as a hearing. Moreover, where a claim for refugee protection has previously been refused, "the only new evidence that may be presented [for PRRA] is new evidence that arose after, or that was not reasonably available at the time of, the rejection." [51] The meaning of the latter phrase is not clear. Does it include evidence that was available at the time of the first hearing, but was not presented due to incompetent counsel or because the claimant was unrepresented? What about evidence not forthcoming because the claimant was suffering from undiagnosed trauma or domestic abuse? Ideally, *any* evidence relevant to the issue of risk

ought to be considered in a risk assessment. Unfortunately, the wording of the proposed *Immigration and Refugee Protection Act* is not open to such a liberal interpretation.

Presumably, the government's intention in changing the "ninety-day rule" into a "one-year rule" was to deter abusive, repeat claims from occurring. However, as the Canadian Bar Association has proposed, "[a]buse through 'revolving claims' can be dealt with expeditiously through the doctrine of *res judicata*, which prevents re-litigation of the same issues on the same evidence."[52] Moreover, it is likely that the number of repeat refugee claims will be reduced under the new legislation because of an appeal on the merits for failed claimants. Presumably, many repeat claims were the consequence of the limited appeal that is available to rejected refugee claimants under the Immigration Act—a judicial review, with leave, based on error of law, excess or lack of jurisdiction, a principle of natural justice, or procedural fairness.[53] Many failed claimants simply returned to Canada after ninety days and tried again, hoping for a more experienced or sympathetic CRDD panel, better counsel, and/or better evidence. With an appeal on the merits, the incentive to leave Canada and institute a subsequent claim is greatly diminished.

Claims Abandoned or Withdrawn

Those persons whose refugee claims were previously rejected are not the only ones with restricted access to the Pre-Removal Risk Assessment. Another category of claimants with limited access to the PRRA are those whose claims have been abandoned or withdrawn. Such persons are not eligible for a risk assessment until one year after their departure from Canada.[54]

There are many reasons that refugee claims are abandoned or withdrawn. In the case of the former, it may be that the individual leaves Canada, or realizes that he or she does not fit the definition of a Convention refugee. In such cases, the "one-year rule" may appear to be appropriate. Other factors, however, may also account for the abandonment of a claim. The claimant may suffer from mental illness and not have understood the notices sent by the Board. He or she may have received wrong advice or information about how to pursue the claim. In some cases, the claimant may be the victim of domestic abuse and not realize that Canada is one of the few countries in the world that recognizes it a ground for refugee protection. Alternatively, the trauma suffered by the abuse, or past incidents of torture or mistreatment, may have impeded the individual from proceeding with the claim. In my view, should the claimant be able to present reasonable grounds for abandoning the refugee claim, he or she should be entitled to a pre-removal risk assessment.

The most common reason for withdrawing a claim is that another means of obtaining status in Canada is available to the claimant, usually through sponsorship. Withdrawing a claim in these circumstances does not necessarily mean that the need for protection disappears. In this example, should the sponsorship break down, a risk assessment before removal would be appropriate. Again, as in the cases of previously rejected claim and abandonment, the provisions of the proposed new legislation are too inflexible. That inflexibility could lead to serious human rights violations being suffered by persons excluded from a pre-removal risk assessment.

Conclusion

There is a tendency for Canadian politicians to appear tough as well as fair in their approach to immigration reform. Ideally, measures meant to curb abuse of the immigration and refugee system should not diminish our country's effectiveness in dealing humanely with those who seek asylum in Canada. In my view, the restrictions in Bill C-31 on access to the refugee determination process, and to refugee protection in general, do just that. The Bill, though dying on the order table of the last Parliament, is likely to re-appear on the new government's agenda. One would hope that in its second incarnation, some of its original toughness will be replaced by a somewhat larger dose of humanity.

Notes

1. Citizenship and Immigration Canada, "Caplan Tables New Immigration and Refugee Protection Act," news release (Ottawa: CIC, April 6, 2000) at 1.
2. *Ibid.*, at 2.
3. *Ibid.*, at 3.
4. *Ibid.*
5. Amnesty International, *Amnesty International and Refugee Issues: A Submission to the Minister of Citizenship and Immigration on Bill C-31* (Ottawa: AI, June 2000) (hereinafter *Amnesty International Brief*), at 2.
6. United Nations High Commissioner for Refugees, "Comments on Bill C-31" (Ottawa: UNHCR, July 11, 2000) (hereinafter referred to as the *UNHCR Brief*), at paragraph 39.
7. *Ibid.*
8. This was a recommendation contained in the *Amnesty International Brief*, at 2.
9. *Immigration Act*, s. 45 (1) (a).
10. *Ibid.*, s. 46.01 (1) (a).
11. *Ibid.*, s. 46.01 (1) (c).
12. *Ibid.*, s. 46.01 (1) (d).

13. *Immigration Act*, s. 46.01 (1) (e) (i) (iii) (iv).
14. *Ibid*., s. 46.01 (5).
15. Section 7 of the Charter states, "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Section 15 (1) states, "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."
16. See, for example, *Nguyen* v. *Canada (Minister of Employment and Immigration)*, [1993] 1 F.C. 696; 100 D.L.R. (4th) 151; 18 Imm. L.R. (2d) 165; 151 N.R. 69 (C.A.); *McCallister* v. *Canada (Minister of Citizenship and Immigration)* [1996] 2 F.C. 190; *Gervasoni* v. *Canada (Minister of Citizenship and Immigration)* [1996], 34 Imm. L.R. (2d) 80.
17. United Nations High Commissioner for Refugees, *Handbook on Procedures for Determining Convention Refugee Status* (Geneva: UNHCR, 1998) at paragraph 31.
18. *UNHCR Brief*, at paragraph 40.
19. *Ibid.*, at paragraph 37.
20. Inter-American Commission on Human Rights, *Report on the Situation of Asylum Seekers within the Canadian Refugee Determination System*, OEA/Ser.L/V/II.106, February 28, 2000.
21. *Ibid.*, at paragraph 68.
22. Bill C-31, *An Act Respecting Immigration to Canada and the Granting of Refugee Protection to Persons Who Are Displaced, Persecuted or in Danger*, Second Session, Thirty-sixth Parliament, 48-49 Elizabeth II, 1999-2000, s. 148.
23. *Ibid*., (1) (a).
24. *Ibid*., (1) (b).
25. *Ibid*., (1) (c).
26. *Ibid*., (1) (d).
27. *Ibid*., (1) (e).
28. "Serious offence" means one for which the potential punishment is ten or more years of imprisonment. If the crime is committed, or if there has been a conviction outside Canada, one considers the potential sentence for the "equivalent" offence in this country.
29. *Immigration Act*, s. 46.01 (e) (i).
30. Bill C-31, s. 32 (2) (b); s. 95 (1) (d).
31. Canadian Bar Association, Citizenship and Immigration Law Section, *Submission on Bill C-31* (Ottawa: CIBA, October 2000) (hereinafter referred to as the *CBA Brief*) at 87.
32. *Ibid.*, at 88.
33. *United Nations Convention relating to the Status of Refugees*, Article 1 (F) (b).
34. The arrest, detention, and charge of sedition against James Torh are described in the *2000 Amnesty International Report,* at 159.
35. Bill C-31, s. 107 (4).
36. *Ibid*.
37. *Ibid*., s. 107 (5), (6).
38. *Ibid*., section 89, 90 (2), 107 (1) and (2).
39. *Ibid*., s. 51 (1).
40. *Ibid*., s. 91.
41. *Immigration Act*, s. 53 (1).
42. Bill C-31, s. 107 (4).
43. See, for example, the *Amnesty International Brief*, at 4.
44. This proposal was made by the Canadian Council for Refugees, *Comments on Bill C-31* (Montreal: CCR, July 4, 2000, (hereinafter *CCR Brief*) at 21, and the Canadian Bar Association, *CBA Brief*, at 92.
45. *CCR Brief*, 21.
46. Bill C-31, s. 95 (1) (a).
47. *Immigration Act*, s. 46.01 (1) (c).
48. The only exceptions would be those who are successful on appeal or judicial review and have their claims sent back for reconsideration.
49. Bill C-31, s. 107 (3) (a).
50. Article 33 of the 1951 Convention states, "No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion."
51. Bill C-31, s. 107 (3) (b).
52. *CBA Brief*, at 95.
53. *Immigration Act*, s. 82.1 (1); *Federal Court Act*, R.S.C. 1985, c. F-7, as amended, s. 18.1 (4).
54. Bill C-31, s.107 (3) (a).

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Analyse multidisciplinaire du processus décisionnel de la CISR

François Crépeau, Patricia Foxen, France Houle et Cécile Rousseau

Résumé

La détermination du statut de réfugié est l'une des tâches décisionnelles les plus difficiles à accomplir dans notre société. Les décideurs qui sont engagés dans ce processus doivent posséder une connaissance adéquate du contexte culturel, social et politique du pays d'origine, avoir la capacité de supporter le fardeau psychologique de l'audience de cas difficiles et de décisions pouvant mettre des vies en danger, et être aptes à examiner des questions juridiques et des éléments de preuve de grande complexité. Au Canada, en dépit d'un taux d'acceptation relativement élevé et d'une interprétation large de la définition internationale des réfugiés, beaucoup d'acteurs engagés dans le processus de détermination ainsi que le public en général ont exprimé leur insatisfaction à la Commission de l'immigration et du statut de réfugié (CISR) quant au mécanisme décisionnel. Le rapport qui suit traite de la nature et de la cause des désaccords qui existent entre les différents acteurs engagés dans le processus, dont font partie d'un côté des membres de la Commission de la CISR et des agents d'évaluation, et de l'autre des professionnels tels que avocats, médecins et témoins experts. Faisant appel à une structure méthodologique qui comprend des approches tant qualitatives que quantitatives, les auteurs de ce projet de recherche pluridisciplinaire ont défini un groupe de paramètres à l'aide desquels ils ont examiné trois dimensions critiques du processus de détermination du statut de réfugié, soit les dimensions culturelles, psychologiques et juridiques. Les données utilisées dans le cadre de cette étude touchent quarante cas problématiques rapportés à l'équipe de recherche par des avocats et d'autres professionnels : dix de ces cas, documentés par des cassettes et des transcriptions d'audiences, furent analysés en profondeur par des experts appartenant aux trois champs d'études respectifs. Les résultats indiquent que le processus décisionnel est affecté par un grand nombre de problèmes liés à des facteurs culturels (connaissance inadéquate de la situation politique dans les pays d'origine, représentations erronées de la vie quotidienne dans les pays en guerre et stéréotypes culturels ou préjugés), psychologiques (difficultés à pouvoir réagir sainement aux traumatismes vicariants et aux réactions émotionnelles) et juridiques (difficultés à évaluer les preuves, à évaluer la crédibilité, à conduire des audiences et à rédiger des décisions). Dans la majorité des cas, ces dimensions culturelles, psychologiques et juridiques interagissent entre elles, renforçant l'incertitude, le cynisme et l'agressivité, et générant des répercussions négatives sur la capacité des membres de la Commission à évaluer correctement la crédibilité et sur le bon déroulement des audiences en général. Le rapport renferme une série de recommandations, dont l'amélioration de la sélection des commissaires et des agents d'audience, ainsi que des programmes de formation et de soutien pour tous les acteurs. Il met aussi en lumière les difficultés inhérentes à un système qui fait usage d'un processus non contradictoire dans des audiences pour déterminer le statut de réfugié. Une version anglaise de ce rapport se trouve à l'adresse suivante : http://www.juris.uqam.ca/cedim/recherches.htm.

Abstract

The refugee determination process is one of the most complex judicial functions in our societies. Decision makers involved in this process require a sufficient knowledge of the cultural, social, and political environment of the country of origin, a capacity to bear the psychological weight of difficult hearings and potentially life-threatening decisions, and an ability to deal with complex legal issues and evidence. In Canada, despite a relatively broad recognition rate and wide interpretation of the international refugee definition, dissatisfaction with the decision-making process

at the Immigration and Refugee Board (IRB) has been expressed by numerous actors as well as by the general public. The following report examines the nature and causes of discord between the different actors involved in this process, including IRB board members and refugee-claim officers on the one hand, and professionals such as lawyers, doctors, and expert witnesses on the other. Using a methodological framework that includes both quantitative and qualitative approaches, the authors of this multi-disciplinary research project define a set of parameters and variables through which three critical dimensions of the refugee determination process—cultural, psychological, and legal—are explored. Data for the study consist of forty problematic cases referred to the research team by lawyers and other professionals; ten of the cases, which include cassettes and transcripts of hearings, were analyzed in depth by experts in the three respective fields of study. The results indicate numerous problems affecting decision-making based on legal factors (difficulties in evaluating evidence, assessing credibility, conducting hearings, and writing decisions), psychological factors (difficulties in coping with vicarious traumatization and emotional reactions), and cultural factors (poor knowledge of the political situation in countries of origin, false representations of daily life in war-torn countries, and cultural misunderstandings or insensitivity). In a majority of cases, these legal, psychological, and cultural dimensions interact, reinforcing uncertainty, cynicism, and aggression, and often negatively affecting the ability of board members to evaluate credibility and the overall conduct of hearings. The report proposes a set of recommendations including revised selection criteria for board members and refugee claim officers, as well as improved training and support for all actors; it highlights as well the difficulties inherent in using a non-adversarial system in refugee hearings. An English version of the report can be found at http://www.juris.uqam.ca/cedim/recherches.htm.

Problématique du projet

Au cours des onze dernières années, le processus de reconnaissance du statut de réfugié canadien a été critiqué par nombre de ses acteurs. On dénonce l'insouciance de certains avocats, l'incompétence de certains commissaires de la Commission de l'immigration et du statut de réfugié[1], l'agressivité de certains agents d'audience, la partialité de certains interprètes, etc.

Beaucoup croient que la CISR est victime de demandeurs d'asile et d'avocats astucieux. Un fonctionnaire du ministère de la Citoyenneté et de l'Immigration est allé jusqu'à dire que seulement 10 % des demandeurs avaient besoin de protection et que seulement 1 % d'entre eux nécessitaient la protection du Canada, ce qui équivaut à cinquante fois moins que le taux d'acceptation moyen de la CISR. Voilà la piètre opinion que certains fonctionnaires peuvent avoir de l'efficacité de la CISR. D'autres personnes estiment que, dans bien des cas, les réfugiés ne sont pas traités équitablement et que des commissaires, incompétents et particulièrement insensibles au sort des demandeurs, ne prêtent souvent que peu d'attention aux risques de torture ou de mauvais traitements en cas de renvoi, ce qui se traduit par de véritables « histoires d'horreur ».

Nous ne pouvons croire d'emblée ces allégations, ne serait-ce que parce qu'elles se contredisent. Mais il existe un sentiment palpable de méfiance envers les résultats du processus. Nous voulions savoir pourquoi.

Nous croyons que la détermination du statut de réfugié est l'une des tâches décisionnelles les plus difficiles à accomplir dans notre société. Nous croyons également que la majorité des acteurs travaillent de bonne foi et avec beaucoup de bonne volonté. Notre but n'est pas de discréditer la CISR auprès des ONG, de la communauté juridique, du Ministère ou des médias, comme certains le souhaiteraient.

En 1998, la ministre de la Citoyenneté et de l'Immigration a tenu des consultations publiques en vue de modifier la *Loi sur l'Immigration*. À la suite de l'invitation de la ministre à participer à ces consultations, les professeurs François Crépeau et France Houle avaient présenté un mémoire dans lequel ils recommandaient notamment de resserrer les critères de sélection des commissaires. On y proposait une liste de connaissances et d'habiletés de base qui nous apparaissaient essentielles pour garantir la compétence de ces dermiers[2]. Cette préoccupation était absente de l'esprit du législateur lorsque, il y a onze ans, il a créé la CISR. Sans qu'une réflexion ait été amorcée sur cette question, le législateur a tout simplement institué un tribunal composé de personnes sans formation particulière. Ce choix, si tant est qu'il y en ait eu un, n'est pas répréhensible en soi, puisque la fonction prédominante des commissaires est d'évaluer la crédibilité des témoins. À la manière d'un jury, les commissaires prennent des décisions fondées sur le sens commun pour tirer des conclusions sur la crédibilité du demandeur de statut. Toutefois, il est problématique de postuler l'existence d'un « sens commun », surtout en matière de détermination du statut de réfugié. Ce postulat est contestable sur deux plans : culturel et psychologique.

D'un point de vue culturel, il est erroné de prétendre que le point d'ancrage de ce « sens commun » correspond

aux représentations et aux normes culturelles des Canadiens. Les demandeurs de statut témoignent d'événements qui comportent peu sinon aucune similarité avec la vie quotidienne des décideurs. Bien souvent ces derniers sont nés au Canada et, même s'ils ont émigré au Canada, ils sont rarement de la même nationalité ou du même groupe ethnique que les demandeurs dont ils doivent écouter les récits. Or, les recherches montrent que les individus de cultures différentes éprouvent plus de difficulté à transmettre et à comprendre les renseignements qu'ils échangent[3]. Outre la barrière linguistique qui est résolue par le moyen d'interprètes à la CISR[4], il faut également mentionner la difficulté potentielle de comprendre la signification du langage non verbal de l'autre[5]. Les différences culturelles se meuvent aussi dans des univers de représentations mutuelles où les préjugés, les stéréotypes et le racisme implicite ou explicite peuvent être présents[6]. Finalement, les contextes sociopolitiques dans lesquels s'insèrent les histoires des demandeurs sont souvent complexes et nuancés, et ne peuvent être transmis dans un cadre narratif cohérent et structuré. La mise en évidence de toutes ces représentations culturelles est très importante, étant donné que celles-ci structurent la compréhension des décideurs du récit du demandeur de statut de réfugié.

Sur le plan psychologique, il faut mentionner deux phénomènes distincts. D'une part, les récits des demandeurs impliquent généralement des tortures, des viols, des détentions arbitraires, des menaces, des attaques armées. Ces événements peuvent engendrer des réactions psychologiques posttraumatiques chez les demandeurs, affectant la qualité de leur témoignage (la difficulté de se remémorer des détails tels que les dates, la description de lieux et le contenu de conversations, ou encore la difficulté de répondre directement et calmement aux questions). D'autre part, le récit des événements peut entraîner une transmission indirecte des traumatismes du demandeur au décideur[7]. Ce dernier peut, pour se protéger, ériger des défenses menant, par exemple, au déni, à l'évitement, à la minimalisation de la gravité de situations, à des réactions émotives incontrôlées comme la colère, le manque d'empathie ou le cynisme. Ces réactions, conséquences directes de l'exposition massive à des récits traumatiques, influent directement sur la perception des décideurs de la crédibilité du demandeur[8].

Par ailleurs, le processus comporte aussi des enjeux purement juridiques qui interagissent avec les dimensions culturelles et psychologiques. Le décideur ne peut pas accomplir sa tâche de manière isolée, il doit pouvoir intégrer son évaluation dans un cadre normatif complexe. En effet, le processus de détermination du statut de réfugié implique divers ordres juridiques. Sur le plan substantiel, le décideur doit posséder des connaissances sur le droit international des réfugiés, le droit canadien de l'immigration et, dans une moindre mesure, le droit du pays d'origine du réfugié. Sur le plan formel, le décideur doit être à même d'appliquer les règles de preuve et de procédure devant les tribunaux administratifs. Il doit notamment veiller au déroulement efficace de l'audience, traiter équitablement la preuve, en donnant la possibilité au demandeur de réfuter tout renseignement qui lui est préjudiciable, et rédiger des motifs rationnels et convaincants de sa décision.

Afin d'examiner si les allégations d'incompétence des divers acteurs du processus sont fondées, nous avons constitué une équipe de recherche multidisciplinaire pour définir les problèmes juridiques, psychologiques et culturels qui alimentent le sentiment de méfiance. Sœur Denise Laîné, du CSAI, a réuni les auteurs de ce rapport pour lancer un projet pilote sur le processus de reconnaissance du statut de réfugié, dans le but de faire une évaluation préliminaire des rôles et des compétences de ses acteurs. Nous connaissions chacun le processus, soit pour l'avoir étudié, soit pour y avoir participé à l'occasion. Nous avons formé une équipe pluridisciplinaire de professionnels de la santé, de juristes et d'anthropologues, certains professeurs dans trois universités montréalaises (McGill, Université de Montréal, UQAM), des étudiants gradués avec une importante expérience de terrain, des professionnels traitant quotidiennement avec des étrangers, y compris des demandeurs d'asile.

Cadre conceptuel du projet

L'objectif général du projet de recherche était de découvrir la nature et les causes des désaccords existant, d'une part, entre des décideurs indépendants et impartiaux spécialisés, comme les commissaires ou des auxiliaires de justice tels les agents d'audience, et, d'autre part, des professionnels experts dans leur champ de pratique comme les avocats, les médecins et les psychologues. De façon plus particulière, nous voulions analyser le processus décisionnel en nous concentrant sur les facteurs culturels, psychologiques et juridiques qui influent sur les différents acteurs. Nous voulions suggérer des solutions effectives, allant au-delà des aménagements *ad hoc* qui sont souvent adoptés lorsque les médias révèlent une situation embarrassante. Notre objectif n'était pas de mesurer l'ampleur du phénomène sur une base quantitative, mais de faire une étude préliminaire et qualitative, qui rendrait possible une étude subséquente de la prévalence de ces problèmes.

Nous avons limité notre étude à des dossiers où des décisions ont été rendues par des commissaires du bureau de Montréal. Quatre-vingt-quatre dossiers nous ont été trans-

mis par des avocats (60 %) et par des intervenants professionnels et communautaires (40 %). À ce stade, nous avons demandé aux autorités de la CISR de s'associer à nos travaux, comme partenaire clé. Nous leur avons demandé de participer à la conception du cadre conceptuel et méthodologique de la recherche et de fournir des dossiers dans lesquels, à leur avis, certains acteurs auraient pu avoir un comportement problématique. La présidente d'alors a décliné notre invitation. Pour diverses raisons (impossibilité de contacter le réfugié pour obtenir un consentement, refus de celui-ci, absence de documents importants, etc.), nous avons exclu quarante-quatre dossiers, pour n'en conserver que quarante. Un profil sociodémographique de ces quarante dossiers est disponible, mais ne sera pas exposé en détail ici. Notons seulement que 87,5 % de l'échantillon est arrivé au Canada entre 1995 et 1998. Ces dossiers ont été préalablement considérés par les professionnels impliqués comme problématiques relativement à deux critères. Le premier critère est que la demande de statut de réfugié a été refusée parce que le témoignage du demandeur a été jugé non crédible. Le deuxième critère est que l'évaluation de la crédibilité qui a été faite par les commissaires dans leurs décisions écrites révélait des manques importants sur le plan d'au moins une des catégories de facteurs étudiés : juridiques, psychologiques et culturels.

Dans un premier temps, nous avons établi les facteurs caractéristiques du rôle des acteurs, susceptibles d'expliquer les divergences dans leur perception et leur évaluation. La liste a été validée et complétée lors de l'analyse qualitative. Nous les avons divisés en trois catégories :

1. Facteurs juridiques

- Pour tous les acteurs, les difficultés à travailler dans le cadre d'une procédure de nature inquisitoire.
- Pour les commissaires et les agents d'audience, les difficultés à évaluer la recevabilité (preuve d'expert, preuve documentaire, etc.) et le poids de la preuve (l'importance des contradictions entre la *Fiche de renseignements personnels* et le témoignage oral des demandeurs; l'utilisation de la connaissance d'office; la compréhension de la situation sociale et politique dans le pays d'origine du demandeur; etc.).
- Pour les commissaires, les difficultés relatives à la conduite d'une audience (l'interrogatoire des demandeurs, le respect de la déontologie et de l'étiquette qui sied lors d'un processus décisionnel menant à la détermination de demandes de statut de réfugié).
- Pour les commissaires, les difficultés à rédiger les motifs de la décision.
- Pour les avocats représentant les demandeurs, les manques de préparation pour l'audience.
- Pour les interprètes, les difficultés à traduire correctement le témoignage du demandeur à cause des barrières interculturelles, comme les dialectes, le comportement verbal et non verbal, etc.

2. Facteurs psychologiques

- Pour tous les acteurs, mais tout spécialement pour les commissaires et les agents d'audience, les difficultés à transiger avec la transmission traumatique, telles que :
  - les réactions massives d'évitement (évitement direct, déni, normalisation de situations extrêmes, pouvant prendre la forme de cynisme, etc.);
  - les réactions émotives incontrôlées lors d'une confrontation à des expériences traumatisantes (colère, victimes perçues comme les agresseurs, manque d'empathie, formation réactionnelle, etc.);
  - le manque de connaissance sur les conséquences psychologiques des traumatismes (symptôme et effets à court, à moyen et à long termes; relation victime/bourreau; etc.);
  - l'utilisation inadéquate des rapports d'experts médecins et de psychologues (préjugés ou ignorance, statut de l'expert, tendance à prendre la place de l'expert, etc.).
- Pour les avocats, une tendance à exposer leur client à une retraumatisation, de manière à présenter un témoignage plus convaincant.
- Pour les professionnels de la santé :
  - la tendance à prédire le comportement du demandeur devant le tribunal, sur le fondement des entrevues thérapeutiques (même si l'audition devant le tribunal est un environnement de survie radicalement différent de la relation sécurisante entre le patient et le professionnel);
  - le manque de clarté dans l'évaluation : l'évaluation de la capacité de témoigner n'est souvent pas distinguée de l'évaluation du récit du patient comme explication des symptômes.

3. Facteurs culturels

- Pour tous les acteurs, mais tout spécialement pour les commissaires et les agents d'audience :
  - le manque de connaissances sur la situation politique et sociale dans les pays d'origine;
  - les représentations erronées de la vie quotidienne dans un pays en guerre ou en conflit;

- les représentations simplistes de la cohérence sociale (stéréotypes);
- les malentendus culturels, l'insensibilité et les préjugés fondés sur le sexe, l'origine ethnique, la religion et l'orientation sexuelle;
- l'incompréhension des problèmes de temporalité et de cohérence narrative dans les récits de guerre et de fuite.

La détermination des facteurs adéquats a été une tâche continue, fondée sur les connaissances pratiques multidisciplinaires des chercheurs de l'équipe, puisque l'objectif visé était de mettre au point des outils de mesure (par la validation des facteurs) pour une évaluation significative des habiletés des acteurs impliqués dans le processus de détermination du statut de réfugié.

L'analyse des dossiers comprenait deux volets : 1) une analyse en profondeur de dix dossiers pour raffiner et compléter les facteurs définis, 2) une analyse complémentaire de trente autres dossiers.

Pour sélectionner les dix dossiers qui ont fait l'objet d'une analyse en profondeur, nous avons retenu plusieurs critères afin de constituer un échantillon varié. Nous avons tenu compte de pays d'origine comportant des risques pour la sécurité des personnes (Congo, Cameroun, Birmanie, Inde, Mexique, Kazakhstan, Rwanda, Honduras), du sexe des demandeurs, de leur âge, de leur orientation sexuelle et de leur situation de famille. Pour chaque analyse en profondeur, nous avons obtenu les cassettes et souvent les transcriptions des audiences, et nous les avons distribuées à l'une des trois équipes multidisciplinaires, chacune composée de trois analystes (juridique, psychologique et culturel).

Notre méthode analytique nous permet de faire des recommandations pour chaque catégorie d'acteurs du système, de même que des recommandations sur la structure et le fonctionnement du système. À notre connaissance, il s'agit de la première analyse multidisciplinaire en profondeur de la procédure de détermination du statut de réfugié.

Résultats

Nous présenterons en premier lieu quelques-uns des résultats décrivant l'état de la situation pour l'ensemble des dossiers considérés. Puis, nous exposerons les aspects saillants de l'analyse qualitative en utilisant des exemples précis pour illustrer les problèmes rencontrés dans chaque catégorie de facteurs.

Les résultats de l'analyse quantitative révèlent que seulement 20 % des dossiers ne présentent qu'un type de problème (juridique, culturel ou psychologique), alors que 27,5 % présentent des problèmes dans deux domaines et que 52,5 % présentent des problèmes dans les trois champs étudiés. Ceci indique d'emblée un chevauchement très important entre les problèmes soulevés et peut permettre de comprendre pourquoi des efforts purement juridiques d'amélioration du système ont pu échouer.

En ce qui concerne les problèmes d'ordre juridique, ceux qui prévalent sont les problèmes d'administration de la preuve (87,5 %), la méconnaissance de certaines problématiques (85 %) et des conditions politiques du pays d'origine (62,5 %). Les problèmes d'interprétation du droit administratif et international sont également fréquents (40 %). Enfin, dans plus du quart des dossiers (27,5 %), les règles de conduite et de politesse ont été enfreintes.

Pour ce qui est des problèmes d'ordre psychologique, on relève des problèmes massifs d'évitement du matériel traumatique, manifestation habituelle du traumatisme transmis (75 %) et d'empathie (75 %). L'expression de préjugés (67,5 %) et les comportements pouvant dénoter un certain cynisme (50 %) sont également très présents. Enfin, dans plus du tiers des cas (35 %), il est possible de déceler des signes de troubles émotionnels secondaires au traumatisme transmis chez les différents acteurs.

Dans le domaine culturel, la méconnaissance du contexte culturel, social et politique d'origine du réfugié s'avère un facteur principal (72,5 %). Une difficulté à apprécier justement les liens sociaux du requérant est également importante (52,5 %). Dans le cadre de l'audience et de la décision, les préjugés, les stéréotypes et les difficultés de communication jouent un rôle dans 42,5 % des dossiers.

Pour illustrer ces résultats, nous présentons quelques exemples dans chaque catégorie de facteurs.

1. Résultats juridiques

Plusieurs acteurs, mais tout spécialement les commissaires et les agents d'audience, éprouvent des difficultés à évaluer la preuve.

- Les rapports d'experts et les témoignages d'experts :
  - Dans un cas, un rapport d'expert en psychologie a été produit en preuve, faisant état du syndrome de stress posttraumatique dont souffre le demandeur depuis qu'il a été torturé. Des photographies prises immédiatement après son arrivée au Canada ont été déposées en preuve, montrant son corps couvert de brûlures de cigarettes. Le psychologue avait conduit six entrevues consécutives du demandeur, faisant une évaluation complète de sa condition et établissant les liens avec son récit. La demande a été rejetée. Un des commissaires a dit, durant l'audience, qu'il prenait toujours les rap-

ports d'experts « avec un grain de sel », et il a été découvert durant l'audience qu'il n'avait pas lu le rapport. La présidente a alors ajourné l'audience pour permettre à ce commissaire de lire le rapport. La présidente d'audience a également fait des remarques déplacées sur le fait qu'elle-même fumait, voulant sans doute dire qu'elle n'accordait pas beaucoup de poids aux marques de brûlures de cigarettes ou au rapport d'expert. Cela montre un important manque de compréhension de l'utilité et du poids de la preuve d'expert.

  - Dans un autre cas, l'agent d'audience agit comme expert sur les fins d'un *Thematic Apperception Test* contenu dans un rapport d'expert (« Ce n'est pas un test d'appréciation thématique, ce sont des images que le client doit apprécier de façon subjective. ») et fait par la suite des commentaires dédaigneux sur la subjectivité de la psychologie et en particulier de la psychanalyse. Ni les com-missaires ni l'agent d'audience ne font un examen sérieux du statut d'expert de la psychologue concernée, et ils déclarent globalement le rapport et le témoignage non crédibles, sans autre explication.
  - Dans un cas du Kazakhstan, la requérante n'avait pas mentionné dans le *Formulaire de ren-seignements personnels* l'agression de son fils au cocktail Molotov. Durant l'audience, elle explique qu'elle ne voulait pas que l'on interroge l'enfant, dans le but de le protéger. Un rapport psychiatrique produit en preuve met en évidence les sentiments d'impuissance et de désarroi vécus par les parents lors de l'incident où leur fils a été brûlé par le cocktail Molotov : la mère, qui présentait également des symptômes traumatiques, a voulu épargner son fils de son mieux, en lui évitant une exposition à des stimuli pouvant rappeler le traumatisme. Les commissaires déterminent que la demande n'est pas crédible à cause de deux omissions, dont celle de ne pas avoir dévoilé l'agression du fils. Cette décision met en évidence une méconnaissance des mécanismes d'évitement qui se mettent en place après une situation traumatique, dans le cadre d'un désir maternel de protéger son enfant.

- Dans plusieurs cas, les commissaires montrent peu d'intérêt envers la preuve documentaire qui a été produite par l'avocat du demandeur, cette preuve n'étant souvent pas même mentionnée dans les motifs justifiant le rejet de la demande. Dans un cas, les commissaires ont affirmé dans la décision que la preuve documentaire ne démontre aucunement une situation d'oppression à l'égard d'un groupe minoritaire auquel appartient le demandeur, ce qui contredit manifestement et sans explication le contenu des pièces déposées à l'audience.
- Plusieurs commissaires font un usage inadéquat de la connaissance d'office. Dans un cas, le président de l'audience a opposé sa connaissance d'office à la demanderesse relativement à la manière dont, dans les pays musulmans comme celui dont venait la demanderesse, lequel jouxte le pays de naissance du commissaire en question, les groupes d'étudiants qui voyagent à l'étranger, et particulièrement les filles, sont surveillés par des adultes : il conclut qu'il serait impossible que la demanderesse ait pu dormir chez la responsable du groupe hôte, alors que les parents de la demanderesse ne connaissaient pas cette responsable. Durant l'interrogatoire de la requérante par le président, l'avocate intervient pour lui demander des précisions sur la provenance de ces connaissances. Sur la bande enregistrée, cet échange entre le président et l'avocate est empreint d'un grand malaise. Le président interrompt l'avocate et ne lui laisse pas le temps de poser ses questions. Par peur d'avoir importuné le président, elle s'excuse à deux reprises auprès de ce dernier pour son « audace » pour finalement se taire. Pourtant, l'article 68(5) de la *Loi sur l'immigration* stipule qu'un commissaire doit non seulement informer le requérant de son intention d'admettre des faits d'office, mais également lui donner la possibilité de présenter ses observations. De plus, le président tente de faire une distinction inappropriée entre connaissance d'office « juridique » et connaissance d'office « culturelle ».
- Les décisions de rejet sont souvent fondées sur le manque de crédibilité du demandeur. Ce manque de crédibilité est souvent fondé sur les contradictions entre les notes prises par le fonctionnaire d'immigration au point d'entrée au Canada, la *Fiche de renseignements personnels* que doit remplir le demandeur et son témoignage oral donné lors de l'audience. Dans plusieurs cas, ces « contradictions » sont minimes, ou ont été expliquées durant l'audience, ou auraient pu être expliquées si les commissaires avaient posé les questions appropriées.
  - Dans un cas, la revendicatrice explique oralement que la personne chez qui elle habitait était l'une des dirigeantes d'un groupe culturel, mais précise que cette information manque à sa *Fiche de rensei-*

gnements personnels, et que le problème proviendrait d'une confusion de la part de l'avocat ou d'une mauvaise traduction. Les commissaires refusent cette explication, parce qu'au début de l'audience la revendicatrice avait affirmé solennellement avoir eu une parfaite connaissance de sa *Fiche de renseignements personnels*, et que celle-ci lui fut traduite.

- Dans un cas de la Birmanie, l'interrogatoire de la requérante a duré cinq heures et a été effectué de manière désordonnée. On peut noter d'incessants retours sur des questions déjà posées et auxquelles la requérante a donné des réponses satisfaisantes. Ces retours ne sont pas justifiés par les commissaires et témoignent d'une attitude contradictoire qui frôle le harcèlement. De façon générale, ces retours créent une atmosphère tendue et laissent penser que les commissaires ne croient pas la requérante, sans qu'il soit possible de préciser quels sont les faits qui leur apparaissent non crédibles. De fait, la décision montre que les commissaires ne savent pas trop sur quel point attaquer la demande. Ce dossier dénote un manque de préparation préliminaire important qui se fait sentir tout au long de l'audience.

Les commissaires éprouvent des difficultés à conduire une audience :

- Dans un cas, la présidente a déclaré dès le début de l'audience qu'elle ne voulait pas entendre le récit du demandeur, puisqu'elle était d'avis que le demandeur raconterait la même histoire que celle qu'elle avait lue dans la *Fiche de renseignements personnels*. Elle rejette la requête de l'avocat qui voulait poser des questions de clarification au demandeur pour ensuite demander à l'agent d'audience de procéder à l'interrogatoire du demandeur et, finalement, rejeter la demande en raison d'un manque de crédibilité du récit. Ceci démontre une sérieuse méconnaissance du rôle d'une audience dans un processus décisionnel.
- Dans plusieurs cas, les commissaires et les agents d'audience débattent le sujet sans ménagement avec l'avocat ou le demandeur, ce qui dégénère parfois en de véritables altercations, indicatrices de conflits interpersonnels non maîtrisés. Dans d'autres cas, les commissaires montrent clairement qu'ils ne croient pas le récit, font des commentaires inadéquats ou montrent du cynisme. Tous ces cas indiquent des contraventions certaines au décorum et à l'étiquette desquels on attend le respect de la part de commissaires d'un tribunal administratif. Ces règles déontologiques existent pour que la justice soit rendue avec sérénité, en vertu du vieil adage selon lequel « la justice doit non seulement être rendue, mais il faut qu'il y ait apparence qu'elle a été rendue ».

  Les motifs écrits des décisions montrent souvent des lacunes flagrantes, soit qu'ils contiennent seulement une liste de contradictions entre la *Fiche de renseignements personnels* et le témoignage oral, soit qu'ils soient simplement constitués d'une déclaration laconique disant que le demandeur n'est pas crédible, soit encore que les pièces déposées en preuve, et tout spécialement la preuve documentaire, n'y soient pas mentionnées.
- Dans un cas, les motifs débutent par une déclaration selon laquelle le témoignage du demandeur était très vague et manquait de précision, alors que l'écoute des enregistrements de l'audience révèle au contraire que le témoignage fut clair, articulé, précis, et que le demandeur a répondu aux questions calmement, précisément et complètement.
- Dans un cas du Congo, l'audience a porté sur des événements qui se sont déroulés après un viol qui est l'événement central pour fonder la demande de statut. La question du viol n'est pas abordée durant l'audience. La demande est rejetée sur des aspects mineurs de la demande. Les commissaires basent leurs décisions sur des contradictions entre la *Fiche de renseignements personnels* et le témoignage oral, comme la question de savoir quand exactement elle aurait pris conscience de la présence du beau-frère dans le véhicule qui a servi à son évasion. Cette « contradiction » suffit à elle seule, aux yeux des commissaires, non seulement pour rejeter la demande, mais pour conclure que cette demande n'a pas de minimum de fondement. Toute la question du viol par les militaires, y compris l'existence d'un certificat médical l'attestant, n'a pas été soupesée par les commissaires, alors qu'il s'agissait d'éléments fondamentaux de la demande.
- Dans un cas de la Birmanie, la demanderesse n'a pas expliqué dans sa *Fiche de renseignements personnels* ce qu'elle a fait au Pakistan, où elle a demeuré six ans, car son avocat lui avait dit que cela n'était pas pertinent. Durant l'audience, les commissaires lui ont demandé d'expliquer pourquoi ce renseignement n'avait pas été mentionné dans sa fiche. L'avocat a répondu que cela n'avait rien à voir avec l'affaire. Néanmoins, la demanderesse a expliqué ce qu'elle avait fait au Pakistan. Dans la décision, les commissaires ont rejeté cette explication en déclarant que la demande-

resse est une « personne instruite qui a la responsabilité de se décharger de son fardeau de preuve ». En fait, les commissaires sous-entendent que son témoignage n'est pas crédible, car elle n'a pas dévoilé dans sa fiche tous les renseignements qu'ils estiment qu'elle aurait dû dévoiler.

- Les deux décisions où la demande est déclarée n'avoir pas de minimum de fondement sont très mal rédigées, alors qu'elles entraînent des conséquences désastreuses pour le demandeur qui ne peut plus exercer de recours judiciaires. Le raisonnement de ces dures décisions est faible et peu convaincant.

2. Résultats psychologiques

Tous les acteurs, mais tout spécialement les commissaires et les agents d'audience, ont des difficultés à transiger avec les effets de la transmission traumatiques.

- Réactions massives d'évitement : évitement direct, déni, normalisation de situations extrêmes (attitudes parfois cyniques).
  - Dans un cas, la présidente d'audience répète à plusieurs reprises qu'elle ne veut pas entendre la description des tortures et du viol, et que la *Fiche de renseignements personnels* constitue une preuve suffisante sur ce point. Cependant, la demande est rejetée pour manque de crédibilité.
  - Dans un autre cas, un jeune latino-américain homosexuel a été attaqué et violé par des soldats. Après avoir déposé une plainte, il fut cambriolé, menacé au téléphone et agressé de nouveau. Après son départ pour le Canada, son conjoint est assassiné avant de pouvoir le rejoindre. Dans son résumé oral des faits importants de la cause, l'agent d'audience omet de signaler le meurtre du conjoint, et ce fait essentiel n'a suscité à peu près aucune question.
  - Dans un cas de Birmanie, les commissaires mettent l'emphase sur les renseignements factuels qui sont des détails de peu d'intérêt (détails géographiques, rôle de l'agent dans le renouvellement des passeports, etc.). Les commissaires passent rapidement sur l'arrestation, le viol et les mauvais traitements infligés à la requérante, les séquelles physiques et psychologiques (la honte, la peur, la façon de cacher ses blessures), le harcèlement et les insultes dus au racisme dans le pays d'origine et les conditions de survie difficiles dans un pays voisin. Après une seule question, ils changent rapidement de thème, abordant des informations plus factuelles (par exemple, le type de bâtiment où elle a été enfermée ou encore l'existence d'un permis pour manifester). Cela constitue non seulement un manque d'empathie de la part des commissaires, mais également une façon d'éviter ou de nier la souffrance de la requérante, en y accordant peu d'importance.
- Réactions émotives incontrôlées lorsque les acteurs sont confrontés aux expériences traumatiques (colère, victimes perçues comme agresseur, manque d'empathie, formation réactionnelle).
  - Dans un cas, des militaires avaient attaqué deux hommes, laissant un d'entre eux en état de choc ou de coma. L'autre a demandé aux militaires agresseurs (seules personnes présentes) de l'aide pour son compagnon. Les militaires lui ont dit brutalement qu'ils s'en occupaient et qu'il devait quitter les lieux, ce qu'il a finalement fait : le corps du compagnon a été découvert quelques jours plus tard. Durant l'audience, un des commissaires a montré clairement qu'il ne croyait pas ce récit et a demandé avec colère, au revendicateur, à cinq minutes d'intervalle, d'abord comment il se faisait qu'il ait demandé de l'aide à ses tortionnaires, puis comment il se faisait qu'il ait pu laisser son compagnon entre les mains de ces derniers. Ces réactions montrent une réaction émotive très forte, un manque d'empathie et une association de la victime aux agresseurs, tous ces symptômes montrant une difficulté à transiger avec le fardeau psychologique engendré par le récit traumatique.
  - Dans un cas de la Birmanie, le ton général est courtois au début de l'audience, mais monte progressivement. Les commissaires se montrent même parfois provocants, en reprenant les paroles de la requérante, en faisant preuve d'ironie, ou en riant entre eux. Par exemple, un commissaire demande à la requérante si elle est habituée à désobéir à ses parents. Ainsi, les commissaires semblent ainsi réaliser psychiquement une coupure par rapport à l'intensité émotive des problèmes vécus par la requérante, au point qu'ils ne sont pas disponibles pour une écoute empathique. En se protégeant psychiquement, ils se placent progressivement dans une position d'adversité, puis de mépris par rapport à la requérante, ce qui influe sur les réactions de celle-ci allant de l'anxiété (intonation, rythme d'élocution), à l'impatience (non-respect des règles de l'audience), puis à l'impuissance (pleurs).

- Parfois, les conflits interpersonnels entre les acteurs (souvent l'avocat et les commissaires ou l'agent d'audience) se transforment en lutte ouverte pour le contrôle du déroulement de l'audience, au détriment de la décision à prendre qui devient l'enjeu de cette lutte.

Pour les avocats, une tendance à exposer leurs clients au risque d'une retraumatisation, afin de présenter un témoignage plus convaincant. Dans un cas, un avocat a accepté la suggestion de la présidente d'audience que le torse d'un enfant de onze ans soit dénudé durant l'audience de façon à montrer ses cicatrices, ce qui était totalement inutile puisqu'il y avait au dossier un rapport d'expertise médicale complet et des photos du corps de l'enfant. L'enfant a été sévèrement retraumatisé par cet incident, et les acteurs l'ont même noté au cours de l'audience.

Pour les professionnels de la santé :

- La tendance à prédire le comportement du demandeur devant le tribunal, en se fondant sur les entrevues thérapeutiques, alors que l'audition devant le tribunal est un environnement de survie radicalement différent de la relation sécurisante entre le patient et le professionnel. Si la prédiction ne se vérifie pas lors du témoignage, c'est tout le contenu de rapport d'expert qui peut être mis en cause au détriment de la crédibilité du demandeur.
- Le manque de clarté dans l'évaluation : l'évaluation de la capacité de témoigner n'est souvent pas distinguée de l'évaluation du récit du patient comme explication des symptômes.

3. Résultats culturels

Pour tous les acteurs, mais tout spécialement pour les commissaires et les agents d'audience, un manque de compréhension ou de sensibilité interculturelle qui se traduit souvent dans des manifestations claires de suspicion ou de cynisme envers le témoignage présenté par le demandeur, les témoins experts ou la preuve introduite par l'avocat. Ces malentendus culturels peuvent parfois conduire à des comportements agressifs de la part des commissaires, dans leur manière de rejeter la validité des témoignages ou de la preuve d'expert. Par exemple :

Une méconnaissance de la situation politique et sociale dans le pays d'origine du demandeur :

- Dans un cas du Rwanda, les commissaires montrent une méconnaissance flagrante et font des représentations simplistes de la situation génocidaire/post-génocidaire au Rwanda, des changements temporels et des transformations de la violence interethnique dans ce pays et des multiples formes de violence localisée entre les divers groupes, sous-groupes et milices. Par exemple, les commissaires estiment que la preuve montre que les différences entre les ethnies Hutu et Tutsi sont difficiles à établir, que les deux groupes sont également en danger, et que la violence actuelle est principalement fondée sur des considérations économiques. Pourtant, même s'il est vrai qu'il y a absence de marques distinctives entre ces deux groupes d'un point de vue strictement physique, le demandeur a clairement expliqué que dans les communautés, chacun sait en fait qui est Tutsi ou Hutu et que la persécution est basée sur cette connaissance.
- Dans un cas mexicain, la compréhension des commissaires du conflit au Chiapas est faible : ils semblent se le représenter comme un cas clair de guerre civile entre l'armée et des paysans sans terres révolutionnaires, expliquant qu'ils savent que les Indiens sont en lutte pour leurs terres depuis des décennies et que l'armée a été répressive, comme ils ont pu le lire dans les journaux. Ils prétendent ainsi qu'il est impossible que l'oncle du demandeur, un gradé de l'armée, ait pu acheter une terre au Chiapas en 1995, disant « Ça me semble complètement hors de contexte et inimaginable. » En fait, la plus grande partie du Chiapas est lourdement militarisée, malgré des poches de résistance du EZLN, et il n'est pas du tout inimaginable qu'un officier ait pu y acheter une terre.
- Dans un cas indien, la requérante explique l'absence de certificat médical mentionnant son viol. Elle invoque comme raison qu'en demandant cette preuve, son père aurait éprouvé une honte qui l'aurait forcée à courber la tête bien bas. Les commissaires n'apprécient pas cet argument à sa juste valeur et disent que la requérante a omis de présenter une preuve fondamentale que d'autres victimes originaires de cette région ont présenté spontanément pour passer l'examen d'acceptation à la CISR. On peut en déduire que les commissaires exigent que tous les demandeurs soient capables de transgresser les normes culturelles, quels que soient leur statut social ou familial, leur âge, l'influence paternelle et les tabous reliés à certaines valeurs.

Des représentations fausses de la vie quotidienne dans un pays en guerre ou en conflit, une présomption que toute normalité ou vie quotidienne est interrompue en temps de guerre et une perception de « contradiction » lorsque les récits des demandeurs ne correspondent pas à cette présomption.

- Dans un cas du Kazakhstan, les commissaires se demandent comment la famille a pu continuer à vivre une vie relativement normale avant de finalement quitter le pays, c'est-à-dire en continuant de faire des affaires et en ne déménageant que lorsque la situation est devenue à ce point difficile, que quitter le pays était inévitable.
- Suivant une logique opposée, les commissaires demandent aux revendicateurs comment ils ont pu, en conscience, abandonner leur propre famille durant un temps de violence. Dans un cas mexicain, les commissaires mettent en doute la « désertion » de l'oncle du demandeur, après qu'il ait été visé par l'armée, tout comme le fait que le demandeur ne soit pas rentré chez lui après avoir subi des tortures pour s'enquérir de la situation de ses sœurs. L'idée ne semble pas effleurer les commissaires que, lorsqu'on a été étiqueté « subversif », le maintien de contacts avec la famille peut mettre celle-ci en grave danger, particulièrement lorsque l'armée a pour stratégie de s'attaquer aux familles plus qu'aux individus, et que la seule option est de « disparaître ».
- Dans le cas du Kazakhstan, un manque de compréhension sur l'implantation locale de la violence est manifeste. Un des arguments centraux pour rejeter la demande est que les demandeurs n'ont pas été persécutés par les nationalistes kazakhs en raison de leur ethnie, mais avaient peur d'un individu en particulier. Dans la plupart des situations de violence ethnique, toutefois, les disputes locales préexistantes et la structure de pouvoir (entre individus, famille et groupe) sont interreliées dans la dynamique de la violence. Durant les périodes de querelles ethniques, alors que des populations particulières – les commissaires d'une ethnie particulière – sont la cible des autres, il arrive souvent que la différence ethnique soit utilisée par des personnes puissantes dans la communauté comme justification de la persécution, de l'oppression ou de la vengeance.
- Dans un cas rwandais, les commissaires déclarent que les Tutsis sont en sécurité au Rwanda, puisque le gouvernement rwandais est majoritairement composé de Tutsis et que ce gouvernement est démocratique, car il a relâché des prisonniers hutus. Ils rejettent le témoignage de l'expert qui décrit une situation beaucoup plus complexe et mouvante, parce qu'ils le jugent partial.

Des représentations simplistes de la cohérence culturelle (stéréotypes, etc.) :

- Dans un cas mexicain, les commissaires ne peuvent pas croire qu'une famille de classe moyenne au Chiapas n'a pas le téléphone, même si cela est commun dans cette région.
- Dans un autre cas d'Amérique latine, l'avocat présente des données et des articles montrant un nombre important de meurtres d'homosexuels. Les commissaires s'objectent à la pertinence de cette preuve en disant que les exemples portent sur des travestis et, dans l'intérêt de l'objectivité et de l'équité envers le demandeur, lui demandent s'il est un travesti, même si l'avocat explique que cette preuve révèle un climat généralisé de violence envers les homosexuels, les travestis étant particulièrement victimisés du fait de leur visibilité. Les commissaires déclarent que l'homophobie ne doit pas être si grave au Mexique, puisqu'un parlementaire est ouvertement gai et qu'il existe des communautés homosexuelles dans les grandes villes.
- Dans un cas rwandais, le commissaire ne peut comprendre comment un réfugié au Canada ne se souviendrait pas de l'adresse de son église à Montréal, alors que cela est fréquent parmi les réfugiés ou immigrants récents en provenance de pays dans lesquels l'orientation se fait par des marqueurs physiques et non par des adresses abstraites.

Malentendus culturels, insensibilité et préjugés fondés sur le sexe, l'origine ethnique, la religion et l'orientation sexuelle :

- Dans un cas impliquant un homosexuel, l'interprète a parlé de son partenaire en disant « *este muchacho* » (« ce garçon »), ce qui est une façon condescendante de décrire une personne très importante pour le demandeur, personne qui fut assassinée à cause de lui. Dans le même cas, l'interprète interrompt le demandeur en lui disant de se tenir tranquille.
- Dans un cas indien, les commissaires considèrent comme étrange le comportement du père de la demanderesse : son attitude calme lorsqu'on lui annonce que sa fille a disparu (comme l'explique la demanderesse, il tentait de sauver sa réputation en tentant de faire croire que son absence n'était pas inconvenante) ou le fait qu'il ait encouragé sa fille à participer à un événement culturel et religieux dans une communauté voisine moins de un mois après son enlèvement et son viol (alors qu'il est clair, dans le contexte culturel et religieux de la famille, qu'il tentait de redonner à sa fille un certain équilibre). Ils ne paraissent pas comprendre à quel point un père de cette région doit

protéger la réputation de sa fille et de sa famille, et quelle force de caractère cela requiert de cacher ainsi ses émotions aux étrangers.

- Dans un cas rwandais, les commissaires font une généralisation injustifiée lorsqu'ils affirment que, puisque le demandeur est un Adventiste et que les églises adventistes aident les réfugiés, il est étonnant qu'elles n'aient pas pu aider davantage le demandeur à quitter le pays.

4. Résultats systémiques

Même si l'objectif de notre recherche n'était pas de nature systémique, nous avons relevé et documenté des éléments dynamiques qui paraissent, au-delà des caractéristiques individuelles des acteurs, avoir une influence importante sur le processus.

Le caractère non contradictoire du processus semble créer beaucoup de confusion sur les rôles respectifs des acteurs. L'attitude interventionniste de nombreux commissaires crée souvent un climat tendu, fait de réactions émotives et parfois de comportements agressifs de la part de tous les acteurs. Cette situation a un impact négatif certain sur la sérénité de l'audience et ajoute à la confusion de nombreux revendicateurs qui ne savent plus qui ils doivent convaincre et contre qui ils doivent se défendre. En l'absence d'un « adversaire officiel », l'avocat ne sait souvent pas quelle attitude adopter envers les commissaires, lesquels, souvent simultanément, se présentent comme les protecteurs des réfugiés et adoptent des attitudes agressives envers les revendicateurs. Si l'avocat se montre conciliant, il risque de paraître peu convaincant ou d'approuver des demandes inacceptables, comme le déshabillage du petit garçon en cours d'audience pour montrer ses cicatrices. S'il se montre agressif, il risque par contre de s'aliéner les commissaires.

Selon l'attitude des commissaires, les agents d'audience font souvent preuve de trop de prudence, posant des questions très générales ou proposant des conclusions inutiles. Dans un cas, l'agent d'audience s'est contenté d'affirmer que les commissaires devraient déterminer la crédibilité du revendicateur. Mais l'agent d'audience, surtout lorsque les commissaires interviennent peu, peut aussi se transformer en procureur public, procédant au contre-interrogatoire en règle du revendicateur, insistant sur chaque détail susceptible de révéler l'existence d'une « contradiction ». Dans bien des cas, l'agent d'audience est l'acteur le plus mal à l'aise dans le système : son rôle devrait être réévalué, quelles que soient les autres modifications adoptées.

Les interprètes eux-mêmes peuvent être affectés par des conflits interpersonnels non apparents entre les acteurs et peuvent avoir tendance à se ranger, pour des raisons émotives, du côté de l'un ou l'autre des acteurs, ce que leurs attitudes pourraient laisser paraître.

Ce climat général de tension se concrétise dans des conflits directs, ou il est déplacé à l'encontre d'un autre acteur.

De toute cette confusion résulte, pour plusieurs, un malaise dans lequel interagissent les acteurs. Non seulement y a-t-il confusion dans le rôle juridique de chaque acteur, mais en plus cette confusion a un impact énorme sur les dimensions psychologiques et culturelles, ces dernières ayant déjà été reconnues comme renforçant le sentiment généralisé d'incertitude.

Recommandations

Cette étude nous amène à trois séries de recommandations :

1. La sélection des commissaires et des agents d'audience doit être améliorée et fondée sur leurs compétences et leur expérience dans le domaine juridique, psychologique et culturel.

2. La formation de tous les acteurs doit être améliorée dans son ensemble et se poursuivre tout au long de leur carrière.

3. La nature inquisitoire du système pourrait être remise en question.

1. Amélioration de la sélection des commissaires et des agents d'audience

La fonction d'un commissaire est très souvent comparable à celle d'un juge, en ce sens que les conséquences de la décision (détention, mort, etc.) et les méthodes utilisées (audiences longues et émotives, preuve d'expert, etc.) sont similaires. On peut aussi trouver des similarités avec le travail d'une infirmière dans une unité de soins palliatifs, puisque tous deux ont à traiter constamment avec la douleur et la souffrance d'êtres humains et de leur famille. Écouter des histoires horribles sur une base quotidienne et prendre des décisions en se disant que toute erreur peut avoir des conséquences tragiques constituent de lourdes responsabilités professionnelles qui pèsent de tout leur poids dans l'équilibre psychologique de chacun. Dans les sessions de formation, certains commissaires expriment d'ailleurs parfois leur difficulté à assumer le poids des responsabilités de leur fonction et de leurs conséquences sur leur vie professionnelle.

1.1 Par conséquent, les commissaires devraient être sélectionnés (et devraient paraître avoir été sélection-

nés) en fonction de leurs aptitudes et de leur expérience. Ces aptitudes et cette expérience devraient couvrir trois domaines :

- Connaissances juridiques : droit des réfugiés; droit de l'immigration; droits de la personne; conduite d'audiences; gestion des interactions avec les avocats et les revendicateurs; appréciation de la preuve; rédaction des décisions; etc.
- Expérience sur le terrain : travail dans des pays déchirés par la guerre ou par un conflit interne, travail au contact des réfugiés ou des personnes déplacées, sensibilité aux dynamiques particulières du travail avec des personnes issues d'autres cultures, en termes de communication et de compréhension; etc.
- Aptitudes psychologiques : capacité à supporter la souffrance de tous les acteurs, y compris la leur; expérience dans l'interaction avec des personnes traumatisées; etc.

Il ne serait pas nécessaire que les candidats retenus soient excellents dans ces trois domaines, mais il serait important qu'ils puissent faire preuve d'expérience et démontrer leurs habiletés dans les trois domaines, avec un certain degré d'excellence dans au moins un ou deux d'entre eux.

De cette manière, ils bénéficieront d'assez de confiance en eux-mêmes et de suffisamment de respect des autres acteurs du processus pour pouvoir utiliser, au besoin, leur position d'autorité afin d'imposer des standards de qualité dans la conduite de tous et chacun.

1.2 Compte tenu de l'importance de leur rôle dans la présente procédure, les agents d'audience devraient être sélectionnés, *mutatis mutandis*, en fonction de critères similaires à ceux des commissaires.

2. Amélioration de la formation de tous les acteurs

2.1 On devrait offrir à tous les acteurs un programme de formation permanent, bien conçu et cherchant à développer tant la sensibilité culturelle qu'un cadre conceptuel général de sciences sociales qui permette d'appréhender des enjeux comme la guerre, les inégalités et la détermination du statut de réfugié, les conséquences psychologiques de la violence organisée. Il ne faudrait pas que cette formation se limite à une simple énonciation des « différences » entre les autres normes culturelles ou modes de communication, ni qu'elle soit une simple liste des différentes crises politiques à travers le monde ou de leurs conséquences sur les personnes et les communautés. La formation devrait plutôt proposer une plus large discussion concernant 1) la construction, la perception et l'expérience de la différence culturelle; 2) les complexités et les nuances liées aux situations de violence politique, de conflits de faible intensité, de conflits ethniques, d'analphabétisme, de cultures rurales, etc.; 3) l'expérience vécue par les réfugiés.

2.2 Ce programme devrait inclure une formation continue en petits groupes, autour d'études de cas. Cela impliquerait une discussion autour d'anciens cas problématiques d'audiences et de décisions de la CISR, car il s'agirait d'analyser de façon critique ce qui est arrivé, et pourquoi, afin que les participants soient en mesure d'effectuer une remise en question de certaines hypothèses simplistes ou malencontreuses. La formation devrait mener à une réflexion sur la façon dont les trois dimensions, juridique, psychologique et culturelle, interagissent et ont un impact sur tous les acteurs du processus de détermination. Cette formation ne devrait pas être perçue comme une mise en cause de l'autorité des acteurs dans les cas discutés, mais comme une occasion offerte à ceux qui les étudient d'apprendre grâce aux expériences et aux erreurs des autres.

2.3 Une formation spéciale devrait être offerte à tous les acteurs sur l'utilisation et la valeur d'une expertise ou contre-expertise médicale, psychologique, culturelle ou politique, et sur le statut des experts.

2.4 Une formation spéciale devrait être offerte à tous les acteurs, ainsi qu'aux interprètes eux-mêmes, sur l'utilisation des interprètes davantage comme « médiateurs culturels » *(cultural brokers)* que comme simples traducteurs. Ils pourraient alors expliquer des situations, des histoires ou des expressions qui paraissent insensées au Canada, ce qui contribuerait à une meilleure interaction entre tous les acteurs dans la salle d'audience.

2.5 Une formation spéciale devrait être offerte à tous les acteurs sur un code de procédure et d'éthique dans le traitement des personnes victimes de torture ou sévèrement traumatisées, tel que celui développé par le Réseau d'intervention auprès des personnes ayant subi la violence organisée (RIVO), au nom du Réseau canadien pour la santé des survivants de la torture et de la violence organisée (ResCan).

2.6 Des groupes de soutien confidentiels devraient être constitués au sein de la CISR, afin de permettre aux

commissaires et aux agents d'audience de relever, de partager et d'extérioriser les émotions et le stress reliés aux cas : peur, tristesse, impuissance, cynisme, etc. Ce support devrait aider les acteurs à gérer les effets de la transmission traumatique et à travailler dans une atmosphère plus sereine durant les audiences, ainsi qu'à faire preuve de plus d'empathie à l'égard des demandeurs de statut, quelle que soit la décision finale.

2.7 Des consultations individuelles avec une personne-ressource (psychologue ou autre professionnel compétent) devraient être offertes au sein de la CISR et même ouvertement encouragées, sans que puisse s'y attacher une connotation négative, puisque l'usage de telles consultations ne serait en aucun cas un signe de faiblesse ou d'incompétence, bien au contraire.

2.8 La CISR devrait collaborer avec des organisations professionnelles comme l'Association du Barreau canadien, afin d'offrir aux avocats une formation spéciale sur la façon d'éviter la retraumatisation de leurs clients, et sur la manière de reconnaître et de nommer les émotions présentes à l'intérieur de la salle d'audience, au lieu de les laisser dominer la scène.

2.9 La CISR devrait collaborer avec des institutions professionnelles, des organismes communautaires et des experts du domaine, afin de fournir aux médecins, aux psychologues et autres professionnels agissant à titre d'experts une formation sur la façon d'écrire leurs rapports d'expertise :

- dans un langage simple et accessible;
- dans une forme didactique, séparant clairement du reste les difficultés que le revendicateur pourrait avoir à affronter dans son explication des événements traumatiques qu'il a endurés;
- avec toute la sensibilité nécessaire en cas d'enjeux transculturels : ils devraient être en mesure (et formés au besoin) de nommer et d'expliquer toutes les situations dans lesquelles des différences de présentation, d'interprétation ou de réaction à des situations extrêmes, comparées avec celles des citoyens canadiens, pourraient affecter l'évaluation de la crédibilité du témoignage du revendicateur.

2.10 Dans toutes les modalités de formation proposées, une place importante devra être faite à la compréhension des enjeux du caractère non contradictoire de la procédure et du rôle de tous les acteurs dans un tel contexte.

3. Remise en question de la nature inquisitoire du système

3.1 Si les deux premières séries de recommandations ne sont pas mises en œuvre et si l'insatisfaction envers le système persiste, il sera probablement nécessaire de remettre en question la nature inquisitoire de la procédure.

3.2 Dans tous les cas, le rôle de l'agent d'audience dans un processus non contradictoire doit être clarifié.

Conclusion

Les résultats susmentionnés doivent être interprétés en tenant compte des limites de ce projet pilote : le caractère local des dossiers considérés, l'absence d'un calcul de fidélité interjuges lors de la codification, la taille relativement restreinte de l'échantillon. Ces limites invitent à la prudence quant à la possibilité de généraliser les résultats et suggèrent la nécessité d'études subséquentes. Celles-ci devraient idéalement se réaliser dans plusieurs lieux, compléter la perspective qualitative par un devis épidémiologique et permettre d'évaluer la prévalence des problèmes détectés. La participation directe de la CISR à la conception et à la réalisation d'une telle recherche serait un atout certain.

Dans le cadre de ces limites, nos résultats suggèrent cependant que des approches radicalement différentes sont nécessaires pour comprendre et résoudre les problèmes auxquels fait face la CISR. Il apparaît qu'une perspective multidisciplinaire est essentielle à la compréhension des facteurs personnels et systémiques qui ressortent comme problématiques : les lacunes soulevées montrent une interaction des aspects culturels, psychologiques et légaux des problèmes de perception et d'interprétation des différents acteurs qui ne peuvent être appréhendés dans une perspective purement administrative ou légale.

L'intégration des dimensions légale, culturelle et psychologique devrait non seulement être présente dans des recherches futures, mais également se refléter dans les critères de sélection et de formation continue des différents acteurs. Les commissaires, les agents d'audience et les autres professionnels associés au processus ont une lourde responsabilité d'assurer le droit d'asile et la protection des réfugiés au nom de la société canadienne. Seule une vision à la fois critique et créative du rôle de chacun et du système dans son ensemble peut nous permettre de mieux assumer ce mandat.

Notes

1. Les membres de la Commission de l'immigration et du statut de réfugié sont ici appelés « commissaires », et la Commission est désignée par son acronyme CISR.

2. Crépeau, François, et France Houle. *Compétence et Indépendance – Clefs de la crédibilité de l'Agence de protection*, mémoire déposé auprès de la ministre de la Citoyenneté et de l'Immigration, 6 mars 1998, 34 p.
3. Bibeau, 1992.
4. Le travail des interprètes est délicat, puisqu'il s'agit de traduire non seulement les mots, mais aussi ce qu'ils signifient dans un contexte particulier (Jalbert, 1998). L'interprète est un intermédiaire qui peut faciliter la relation entre les autres acteurs ou, au contraire, générer des problèmes (Westermeyer, 1990). Pour la CISR, cela est particulièrement crucial lorsqu'il y a incompatibilité entre le demandeur et l'interprète pour des raisons de genre, d'appartenance sociale, religieuse ou ethnique.
5. L'expression des émotions en particulier est contenue dans certaines cultures, alors qu'elle peut être plus dramatisée dans d'autres. Le registre de ce qui peut être exprimé dépend aussi de l'interlocuteur et du contexte, amenant des variations qui peuvent paraître paradoxales voire contradictoires pour des observateurs informés.
6. Beiser, 1998.
7. Les commissaires sont soumis à des stress psychologiques importants, à cause, d'une part, de la teneur des histoires traumatiques qu'ils doivent écouter et, d'autre part, du poids psychologique des décisions qu'ils doivent rendre, lesquelles peuvent avoir des répercussions dramatiques sur la sécurité des demandeurs de statut. Les travaux sur les traumatismes de guerre après la Deuxième Guerre mondiale et la guerre du Vietnam ont mis en évidence que ceux-ci n'affectent pas uniquement ceux qui les vivent directement, mais aussi leurs proches et l'ensemble des réseaux sociaux auxquels ils appartiennent (Daniéli, 1998; Rousseau, 1998). La transmission indirecte des traumatismes, par un récit, a été particulièrement bien documentée chez les thérapeutes traitant des patients traumatisés. Dans la situation thérapeutique, c'est l'empathie des thérapeutes pour les victimes qui les rend particulièrement vulnérables, car ils ne peuvent plus utiliser les défenses habituelles d'évitement et de déni pour se protéger contre les représentations associées à l'histoire entendue.
8. Kleinman, 1997; Rousseau, 1992.

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Current Trends and New Challenges for Canada's Resettlement Program

Michael Casasola

Abstract

References to resettlement in the C-31 legislative package reflected changes that were already underway as part of the Refugee Resettlement Model (RRM). While these changes result in visible improvements to Canada's refugee resettlement program, new challenges are surfacing, as Canada's program attempts to be responsive to global resettlement needs.

This article follows the development of Canadian and international contemporary resettlement policy and identifies trends for the future. It argues that Canada must continue to make policy and procedural changes to its resettlement program so that it can respond to current and future resettlement challenges.

Résumé

Les références faites à la réinstallation dans le paquet de mesures législatives du projet de loi C-31, reflétaient en fait des changements déjà en voie d'exécution en tant qu'éléments du Modèle de Réinstallation de Réfugiés (MRR). Alors que ces changements apportent des améliorations bien visibles au programme du Canada pour la réinstallation des réfugiés, d'autres défis ont surgi pour confronter les efforts de ce même programme de répondre aux besoins en matière de réinstallation sur le plan global.

Cet article suit le développement de la politique contemporaine internationale et celle du Canada en matière de réinstallation, et essaye d'identifier les tendances pour l'avenir. Il soutient que le Canada doit continuer à apporter des changements à son programme de réinstallation tant au niveau de la politique d'ensemble que dans les procédures suivies, affin de pouvoir répondre aux défis courants et les défis à venir dans le domaine de la réinstallation.

Introduction

C-31, the Canadian government's most recent legislative package, devoted little attention to the overseas selection of refugees for resettlement. The proposals were predictable, a continuation of the direction Citizenship and Immigration Canada (CIC) has set out for Canadian resettlement. Over the last few years, Canada's resettlement program has been slowly shifting from one described, at its worst, as an immigration program with a humanitarian label, to a program that emphasizes protection in the selection of refugees for resettlement. While many of the changes being made are welcome, Canada's resettlement program has difficulty keeping pace with international resettlement needs. If Canada is to be responsive to existing and future needs, it will have to continue to adapt and change its resettlement policies and procedures.

Refugee realities and global resettlement needs have changed significantly since the introduction of the 1976 Immigration Act. Thousands of refugees from a variety of ethnic groups have been resettled in response to a number of refugee crises. The experience of resettling these refugees and changing realities forced all players to reassess their policies and programs. In the mid-90s, following an internal evaluation of the United Nations High Commissioner for Refugee's (UNHCR) resettlement program, the UNHCR revamped its resettlement efforts. It updated the *UNHCR Resettlement Handbook,* started a resettlement staff-training drive, made a more concerted effort at international cooperation, actively promoted UNHCR's resettlement policy among existing resettlement countries, and sought out new countries with which to become involved in resettlement.

Not long after the UNHCR started overhauling its resettlement program, Canada also began to work on improving its resettlement program. Yet while it makes alterations to its existing programs, new challenges emerge. Certain

barriers have been reduced: greater emphasis is now placed on resettling de facto families, reuniting refugee families, and evaluating refugees' protection needs rather than their ability to settle quickly in Canada. Unfortunately, Canadian security and medical requirements are beginning to replace these problems as the obsessions and obstacles for the future. These new barriers will also need to be addressed. Thus, if Canada's program is going to assist the people it intends to help, it must continue to adjust its policy and procedures through a series of new measures beyond those outlined in C-31.

Resettlement as a Tool of Protection and a Durable Solution

Resettlement is offered for a number of reasons:

- Sharing the international burden and responsibility, as a way to partially relieve countries already providing asylum to many refugees
- Protecting refugees from repatriation when they are threatened with removal to the country of persecution
- Protecting refugees who are detained, in danger, or vulnerable in their country of asylum
- Providing a durable solution for refugees who face no likely possibility of returning home or of being able to integrate into their country of asylum
- Providing medical treatment to refugees because they require medical treatment that is unavailable in the country of asylum.[1]

From the late 1970s onward, the Indochinese resettlement movement in many ways defined the international resettlement experience. As a result, two schools of thought developed. The ability of the Indochinese to integrate and achieve independence in new countries demonstrated to many the value of resettlement as a durable solution. At the same time, the Indochinese movement led to concerns in some quarters about a "pull-factor"—that the availability of resettlement was allegedly encouraging people to flee. As a result, some suggested that resettlement should be left to only those in need of protection.

Emphasizing resettlement as a durable solution recognizes the ability of resettlement to provide a solution for the many refugees unable to benefit from the other two durable solutions—to voluntarily repatriate and receive protection in their country of origin or receive effective and ongoing protection in their country of asylum through local integration.

While all refugees have protection concerns, and many refugees are vulnerable, promoting resettlement solely as a tool for protection limits its use for refugees who face imminent legal or physical protection threats in their country of asylum, such as involuntary repatriation, detention, or physical harm. While the UNHCR is certainly not aware of all refugees who face such impending danger, the reality is that the number of refugees facing urgent or emergency protection concerns is actually quite small. In 1999 there were 114 urgent and emergency submissions by the UNHCR to resettlement countries. For the first five months of 2000, the UNHCR submitted seventy-six cases. As a result, a resettlement program, which emphasizes protection solely, is ultimately a very small program.

The UNHCR has resolved this debate by recognizing that resettlement is simultaneously a tool of protection and a durable solution. In determining refugees' need for resettlement, their need for protection must be considered, along with their need for a durable solution, and any special considerations that relate to the individuals or to their families. Whenever circumstances permit, the UNHCR promotes and facilitates the voluntary return of refugees to their countries of origin. Nevertheless, there is no hierarchy among durable solutions.

Realistically, the number of refugees in need of a durable solution vastly exceeds the number of resettlement places available globally. In determining who among those refugees in need of a durable solution are resettled, the UNHCR has encouraged countries to base resettlement selection decisions on the "hierarchy of needs" approach taken in the UNHCR's *Resettlement Handbook.* Among the many refugees who are neither able to return to their home countries nor to settle locally in their initial countries of asylum, the *Resettlement Handbook* tries to identify those with the most acute need for resettlement. These are:

First, refugees with legal and physical protection needs

Then, refugees with special needs, which include:

- medical needs
- survivors of violence and torture
- women at risk
- family reunification
- children and adolescents
- elderly refugees

Last, other refugees without a durable solution[2]

Within these categories, the highest resettlement priority is given to refugees with legal and physical protection needs. As the *Resettlement Handbook* notes, " . . . in cases not related to immediate protection concerns, particularly those falling under the criteria of lack of local integration prospects, a decision to refer for resettlement may be influenced by the availability of spaces."[3]

Determining whether a refugee needs resettlement, or whether another durable solution is available, must be done individually. Even when a given solution may be available for other members of a group to which the applicant belongs, the durable solution may not be available for the individual applicant.

Canadian Legislative Development

Canada's resettlement program has offered protection and a durable solution to thousands of refugees. Its current approach originated with the 1976 Immigration Act. Over the years, this approach has scarcely changed. Basically, the act and regulations set out that all resettled refugees must be found to be eligible, meaning they must be either a convention refugee seeking resettlement or a member of a Humanitarian Designated Class, have no possibility of a durable solution, demonstrate an ability to become independent upon arrival in Canada, and meet Canada's immigration admissibility criteria (criminal, security, and medical restrictions—not pose a danger to public health or have a disability that will pose an excessive medical demand or cost for Canada.) Eligibility and admissibility is determined by Canadian visa officers at Canadian missions throughout the world.

This approach worked well in the era of the resettlement of Indochinese refugees, during which refugees were primarily based in accessible refugee camps. Refugees waited in a sort of resettlement queue until resettlement spaces became available in resettlement countries. Since that time, many new refugee movements and challenges have developed, spanning the entire globe. Canada has attempted to respond to many of these movements, with varying degrees of success.

While hundreds of thousands of refugees have been resettled under Canada's resettlement program, serious weaknesses have been evident. Canada's lengthy and slow processing has generally meant that its resettlement program has been unable to respond to those refugees with urgent protection needs. In its efforts to ensure that refugees integrated in Canada, it effectively barred those who were seen as likely to have difficulty integrating through "ability to successfully establish" criteria, or who might present "excessive" medical demands. Canada's efforts to separate family reunification concerns from refugee protection concerns resulted in situations where members of separated refugee families found themselves ineligible for either program. Finally, Canadian visa posts, which are responsible for refugee admission, were often located in areas far removed from refugee populations. It was recognized that Canada's resettlement program was not responding to these challenges.

Refugee Resettlement Model (RRM)

The development of the Refugee Resettlement Model (RRM) began in September 1997. At that time Citizenship and Immigration Canada faced great difficulty in meeting its resettlement quota. This crisis helped CIC recognize the need to re-examine its resettlement processing. Through a series of consultations, workshops, and working groups involving operational partners, an operational model was developed known as the RRM.

The RRM attempts to address the problems within Canada's resettlement program by making adjustments to the refugee resettlement system. The RRM emphasizes concrete practical proposals within budgetary constraints. The adjustments include legislative, policy, and operational proposals. Instead of approaching the tasks of resettlement in isolation, the RRM looks at refugee resettlement as an integrated continuum through the six components of identification, locating, selection, destining, orienting, and finally settling in Canada.

Within the RRM's numerous recommendations are a number of overall themes. As previously noted, resettlement is to be viewed as a continuum. In order for it to take place, effective communication and feedback need to be established among all the partners involved in the processing stages. Improved training has been identified as a need by government and NGOs. Partnerships are to be strengthened, through existing and new operational partnerships.

Parallel to the development of the RRM, the legislative review was taking place. The report of the Legislative Review Advisory Group, *Not Just Numbers,* proposed a new legislative and policy foundation for refugee selection, including refugee resettlement. Unlike the RRM, it focused on policy and avoided operational issues. The Legislative Review Advisory Group emphasized protection of those most needy and most vulnerable at first opportunity. While there was little likelihood that some of its more dramatic recommendations would be put into place, the report's significance was that it acknowledged the existence of barriers that had long been identified by NGOs in Canada.

The federal government's responses to *Not Just Numbers* was *Building a Strong Foundation for the 21st Century: New Directions for Immigration and Refugee Policy and Legislation*. It also recognized the barriers identified by the Legislative Review Advisory Group and in response pro-

posed a "more responsive overseas resettlement program."[4]

It proposed four policy measures that were adopted by the RRM:

- Shift the balance toward protection rather than the ability to settle successfully in selecting refugees
- Make a more concerted effort to facilitate the unity and reunion of refugee families
- Develop a closer relationship with non-governmental partners
- Ensure the immediate entry of urgent protection cases.

C-31

C-31, the legislative follow-up to *Building a Strong Foundation,* included little about resettlement. Instead, the C-31 legislative package relegated to regulations most areas of Canadian immigration law that related to resettlement. These regulatory proposals mirrored proposals in the RRM and *Building a Strong Foundation*.

Overall, the initiatives on resettlement promised in the C-31 legislative package were positive. It would provide a stronger legal foundation for the policy changes proposed under the RRM and *Building a Strong Foundation* by putting them into regulations. It also included a commitment to remove the excessive medical demand provision for resettled refugees, thus eliminating this barrier for refugees with physical disabilities in need of resettlement. However, there were negative provisions included as well. The Federal Court "leave" requirement would have limited a refugee applicant's appeal rights, and the introduction of admission ceilings could be applied to resettled refugees.

Unfortunately the most negative aspect of the legislative package was that the many positive resettlement initiatives were presented as a counter to some of the more punitive actions the government planned in order to limit access to the refugee determination system in Canada. In fact, the resettlement initiatives became an important part of the selling of the bill to the Canadian public. The urgent protection pilot and the policy commitment to ensure the immediate entry of urgent protection cases were presented in response to questions about limitations that C-31 would present for refugees seeking asylum in Canada. Resettled refugees were presented as part of the refugees using the "front door." And by providing such refugees greater access, Canada suggested it had the moral authority to limit access to those refugees described as using the "back door."

This approach pitted the needs of two refugee groups against each other. Pitting refugee populations against each other is not new. Resettlement has often been threatened by arguments about the cost of asylum-seekers. The argument usually begins with the recognition that resources are finite. If the number of asylum seekers increases, then costs increase. Thus the money available for refugee resettlement decreases, and fewer refugees are resettled. Of course, if these arguments were indeed genuine, then refugee resettlement would increase when the number of asylum seekers diminished. However, this never happens. In the case of the humanitarian evacuation of Kosovars in 1999, some Nordic countries reduced their resettlement numbers to accommodate this new emergency, in effect denying a durable solution to one group while increasing temporary protection for another.

International Context

Historically there have been two groups among resettlement countries.[5] One is the group of countries with immigration programs who process applications at their embassies throughout the world. As countries of immigration, they introduce immigration-related criteria and restrictions. They tend to take relatively large numbers, process slowly, and be stereotyped as "taking the cream of the crop" among the refugee population. In contrast, those in the other group are smaller European countries, mostly Nordic, which take relatively smaller numbers, process them quickly through their headquarters, take only referrals from the UNHCR with few restrictions, and are believed to be taking the most difficult cases.

This simplification of resettlement countries' programs has become dated. It is true that most of the world's resettled refugees end up in countries of traditional immigration. Of the approximate 100,000 refugees resettled throughout the world, over three-quarters will end up in the United States. While the Nordic countries are still willing to receive refugees refused by other countries or refugees who cannot await lengthy processing, the stereotype that countries with immigration programs take refugees who are the "cream of the crop" is somewhat outdated. The U.S. has made serious changes to its resettlement program over the last few years. It places priority upon refugees identified by the UNHCR or American embassies. In selecting the 76,000 to 80,000 refugees to be resettled next year, the United States will not consider a refugee's integration potential.

The number of resettlement countries has also changed. New countries have become involved in resettlement. The new countries include Argentina, Benin, Brazil, Burkina Faso, Chile, Iceland, Ireland, and Spain. Most recently the United Kingdom has also expressed its intention of becoming an official resettlement country. While these countries

have introduced relatively small programs, collectively they expand the range of possible resettlement destinations.

Among the new resettlement countries, Benin and Burkina Faso have provoked significant discussion. The involvement of these two developing countries underlines the notion that resettlement should not be understood as a euphemism for resettlement to the U.S.A. and an expected improved quality of life, but that resettlement genuinely comprises finding an alternative durable solution to a refugee's current circumstance. Benin and Burkina Faso's involvement has been by no means token. Indeed, they have played an important role in responding to resettlement needs. While the two countries have taken only a small number of refugees each, the refugees being resettled include refugees with serious protection concerns who were not accepted by other countries. For example, traditional resettlement countries prohibit polygamy, making the resettlement of polygamous families difficult. However, the fact that Benin does not prohibit such practice has made it possible for it to respond to this resettlement need. In this way, new resettlement countries expand the range of resettlement possibilities.

Nevertheless, the involvement of many of the Nordic countries remains important because of their responsiveness to UNHCR criteria and their ability to resettle cases quickly. These countries also remain willing to take refugees who may have serious settlement difficulty. For example, of the approximately 500 "quota refugees" or resettled refugees Denmark will select, 20 or more will be "medical cases"—cases selected because of their need for medical treatment, which countries with medical restrictions, such as Canada, would not admit.

While in recent times the aggregate number of refugees being resettled has not increased, refugee resettlement is being offered to refugees in more countries. Until now, there has been substantial resettlement out of Europe. From the beginning of 1997 through the end of 1999, more than 40,000 Bosnian refugees were resettled to Australia, Canada, and the United States.[6] Though this resettlement movement has been declining, a substantial increase has been taking place in the Middle East, South Asia, and Africa. The United States has been selecting refugees in significantly larger numbers in Africa. In fiscal year 2001 the United States will select 20,000 refugees from Africa. In fiscal year 1998 it was resettling only 7,000.[7] This amounts to an almost 300 per cent increase in three years. Despite this increase, some in the United States view this as inadequately responsive to the need.[8]

The pattern of resettlement activities in Africa has also changed over the last few years. As recently as 1997, more than three-quarters of the refugees resettled from Africa were Somalis in Kenya. In 1999 Somalis still remained the largest group of African refugees with identified resettlement needs, but resettlement benefited thirty other African nationalities as well that year.[9]

How Has Canada Changed?

While the number of refugees resettled has remained at about 10,000 each year, whom Canada selects has changed. Canada has dramatically increased the number of "special needs" refugees resettled to Canada, from 89 people in 1996 to over 550 in 2000, not including the large number of resettled Kosovars. These "special needs" refugees are individuals who have particular difficulty resettling, including women at risk, the elderly, and those with medical needs.

While Canadian regulations have not changed, in practice visa posts have already begun following the policy directions set out in *Building a Strong Foundation,* by diminishing the application of "ability to establish" criteria. It seems quite likely that with future legislation Canada will remove the application of this requirement from refugees with urgent protection concerns or from "vulnerable persons."[10]

Canada is also changing where it selects refugees for resettlement. While Canada selected a disproportionate number of refugees from Europe in the 1990s,[11] one of Canada's unsung successes has been the shift it has been making each successive year in selecting increasing numbers of refugees from Africa and the Middle East, to be more in keeping with the areas of the world where refugees are located. Though the numbers have not yet been finalized at the time of writing, it is expected that in 2001, Africa will finally overtake Europe as the largest source of refugees to be resettled to Canada. While the targets for most of the posts in Africa will increase slightly, the numbers to be selected out of West Africa are expected to double from 225 persons to 450 persons.

Canada has also begun taking some urgent cases more quickly. In 2000, it established the Urgent Protection Pilot (UPP) running in three sites: Ankara, Nairobi, and Islamabad. The UPP will result in the resettlement of over thirty people with urgent protection needs, most en route to Canada in a three-to-five-day time frame set out in the UPP.[12] The Canadian initiative has apparently inspired the United States to attempt to develop its own urgent protection program.

All these changes have been significant accomplishments for Canada, given that many of them were completed at a time when Canada and its partners were experiencing significant fiscal restraint. While the direction in which Canada

has been moving is encouraging, it is likely to face greater operational challenges as it pursues the goals it has set out.

The Future

It is ironic that the Refugee Resettlement Model was originally entitled the Integrated Operational Delivery Model, because in fact it is at the policy level that the RRM has had its greatest success. The guidelines for diminishing "ability to establish" criteria and refugee family reunification have been universally endorsed. Furthermore, while the UPP is still subject to evaluation, there has been little or no criticism of the policy guidelines, outside of general concerns about Canada's security restrictions.

While policy should come before operational change, on the operational side, Canada is slow to alter its refugee processing in response to new realities. This is not to say that new measures have not been taken, but that these measures may not be able to keep pace with new demands.

Canada has made significant progress in diminishing its "ability to establish" criteria, in developing policy on refugee family reunification, and establishing at least a model for urgent resettlement. However, for the vast majority of refugees, Canadian processing remains slow.

The Urgent Protection Pilot raises questions about how this project could be more universally available, since refugees with protection concerns are not limited to the three sites in which the participating visa offices are located. While during the pilot some innovation has been shown, it was difficult to have cases considered that were not in the same location as Canadian missions. In order to process urgent cases, waiving interviews should be the norm (based on the submission of the UNHCR's Refugee Resettlement Form), with interviews being conducted only if there are particular concerns surrounding a submission. The Canadian visa office in Ankara waived virtually every interview. At the other missions, visa officers still required interviews (some extremely lengthy despite the urgency of the submission). This might raise questions about the quality of UNHCR submissions. Nevertheless, for urgent processing to work, it requires substantial trust between the UNHCR and the Canadian mission, in which the mission is confident in the quality of the submissions, and the UNHCR is certain that the mission will respond to urgent requests quickly and without lengthy scrutiny.

The issues for the future for Canada will not likely be "ability to establish" criteria, since visa officers are already diminishing its application (though its continued presence is an annoyance in the face of protection concerns). Instead, medical and security restrictions are likely to be the new obsessions. Unfortunately, these problems will be far more difficult to overcome than diminishing "ability to establish" criteria.

Canada's medical requirements are a problem on two levels. Until Canada amends its Immigration Regulations, Canada continues to be able to refuse individuals on the basis of excessive medical demand. The irony is that a refugee's medical disability that Canada views as costly, may be the basis upon which the individual was viewed as needing resettlement. One hopes that if future legislation mirrors the policy commitments stated in the C-31 legislative package, this barrier will be removed for refugees and family-class applicants.

The second issue is that medical restrictions mean that medical examinations must be conducted. However, in parts of the developing world where refugees needing resettlement are located, there is a lack of available medical facilities and weak infrastructures, making the completion of medical exams logistically difficult.

In addition, there has been a recent surge of reports in the media about newcomers and health problems (tuberculosis, malaria, HIV). While these issues are yet to be resolved, and the true impact of these health concerns are not yet evaluated, it will be important that the goal of screening out those who pose a genuine risk to Canadian health is not used as a way to bar the admission of those in need of resettlement.

Security is a growing preoccupation for Canada, demonstrated within the current act and regulations and made more severe in Bill C-31. This is increasingly problematic for resettlement. The UNHCR screens individuals on exclusion grounds, yet it is having increasing difficulty working with Canada because of its security restrictions. What has been frustrating is that while Canada has refused individuals on security grounds, the UNHCR has found other countries such as the United States and the Netherlands willing to resettle these same individuals. Furthermore, in addition to its security preoccupations, Canada can also be slow in conducting security reviews, causing frustration for visa officers as well.

In Africa, where some of these medical and security problems are greatest, there is also the danger that Canada's program will be lost in the shadow of the American program. Canada's resettlement program in Africa in 2001 is likely to be just over one-tenth the size of the American program. If other countries are perceived to have fewer barriers than Canada, particularly for urgent cases, which are often high-profile cases that may be perceived as security concerns, it is likely that in the interest of the safety of the refugee involved, the UNHCR will not approach Canada because it will likely face refusal and risk wasting valuable

time. As a result, Canada will not be able to achieve its policy objective of urgent processing. Instead, we will be back to the days when it was true that "if the case is urgent, don't approach Canada."

Despite these new challenges, Canada continues to process refugees for resettlement in the same manner it has for the past two decades. While it is impossible to predict the refugee emergencies of the future, it is quite predictable that the trend for refugee selection over the next few years will be continued growth in Africa, the Middle East, and South Asia—the very places that Canada faces its greatest operational challenges. Canada's resettlement program must continue to evolve if it is going to be responsive to these resettlement needs and meet the policy objectives it has set for itself.

Canada might consider several initiatives in order to respond to these challenges:

1. Implement the C-31 Legislative Package resettlement proposals As part of any new legislation, Canada should reintroduce the proposed C-31 measures of removing or diminishing the regulatory requirements to consider a refugee's "ability to establish" as an admissibility factor, and removing the excessive medical cost barrier for refugees.

2. Devise a resettlement system based on priorities In keeping with its resettlement initiatives and the efforts it has made to improve selection processing, Canada needs to develop a system of resettlement priorities that are in keeping with those of the UNHCR. The UPP has provided some groundwork and has demonstrated what can be done.

3. Increase coordination "Contact groups"—regular gatherings of all the active resettlement countries in the field with relevant partners—have been promoted as an approach, but they been slow to get off the ground in some areas. Improved coordination is one of the few ways Canada and other resettlement countries may help to overcome the logistical difficulties they face. In this vein, increased efficiencies should be pursued. Canada already does so through the development of Overseas Service Partners, which ideally will increase efficiency.

4. Share processing Given the difficulties of accessing refugee populations, shared processing among the three largest resettlement countries (Australia, Canada, and the United States) needs to be strengthened. This approach can prevent problems of dual processing—two countries attempting to process the same case—as well as ensuring that priority cases are dealt with first. Similarly, the development of common resettlement criteria based on UNHCR criteria is needed so that the UNHCR can find a solution for those needing resettlement.

5. Introduce common medical examinations In the same vein as shared processing, one obvious area where countries could begin to ensure greater efficiency is the development of common medical criteria and the use of the same designated medical practitioners and panel physicians. It is obviously inefficient when a case is refused by one country, then is forced to complete a new medical exam for another country, especially when it is difficult to organize medical exams. Some movement may begin on this area in East Africa.

6. Waive interviews for urgent cases During the UPP an increasing source of frustration has been the difficulty of responding to cases that were outside of the location in which a Canadian visa officer was present. Waiving interviews, based on the content of the UNHCR's Refugee Resettlement Form when urgency is involved, should be the norm and must be pursued. A program intended to respond to urgent submissions must be built on a strong relationship of trust and quality submissions. This model has worked well in Turkey, where the UNHCR and the Canadian embassy developed a strong relationship of trust and confidence, which has allowed interviews to be waived in urgent cases based on the information contained in the UNHCR's Refugee Resettlement Form (RRF). In the same vein, when urgent submissions are made, the content of the submission cannot be subject to scrupulous examination if the urgency of the case is to be respected.

7. Introduce screening of RRF submissions by UNHCR regional resettlement officers before they are submitted to resettlement countries for consideration If countries are to waive interviews of UNHCR cases when appropriate, they must be confident in the quality of UNHCR submissions. In turn, the UNHCR must ensure that staff selecting refugees for resettlement are knowledgeable about its own criteria and those of resettlement countries. Regional Resettlement Officers need to review and screen resettlement submissions before they are submitted to resettlement countries, so that accuracy and high quality are ensured.

8. Develop a Headquarters Referral System Given the few places where Canadian visa officers are stationed, new systems must be developed in order to respond to urgent cases that are far removed from visa offices. The solution should include a "headquarters referral system." This would mean that in areas where Canada has no active or accessible Canadian mission with a resettlement program, UNHCR headquarters should be able to directly submit urgent protection cases to CIC headquarters in Ottawa. For this system to work, CIC headquarters would need to have the ability to admit such individuals if they meet Canadian criteria.

While such an approach would be extraordinary for Canada, restricting headquarter submission to urgent protection cases submitted by UNHCR headquarters, would ensure that the cases submitted are genuinely urgent.

None of these ideas are particularly innovative. However, it may take a great deal of innovation for Canada to ensure that its resettlement program will be a tool of protection and a durable solution, and be responsive to refugees in need of resettlement, today and tomorrow.

Notes

1. Canadian Council for Refugees, "Background: 7,300 Government-Assisted Refugees to Arrive in 1998—What's in a Number?" (Montreal: CIC, February 1998).
2. UNHCR, *Resettlement Handbook* (Geneva: UNHCR, 1998 rev.), chapter 4.
3. UNHCR, *Resettlement Handbook* (Geneva: UNHCR, 1998 rev.), IV/2.
4. Citizenship and Immigration Canada, *Building a Strong Foundation for the 21st Century: New Directions for Immigration and Refugee Policy and Legislation* (Ottawa: CIC, 1999), 43.
5. The countries that have an annual refugee resettlement "quota" are Australia, Canada, Denmark, Finland, The Netherlands, New Zealand, Norway, Sweden, Switzerland, and the U.S.A.
6. UNHCR, *Report on UNHCR Resettlement Activities* (Geneva: UNHCR, June 2000), 4.
7. UNHCR, *Evolution of Resettlement Policy and Refocusing of Operations Worldwide (Background note for the agenda item Reflection on the Changing Nature of Resettlement and the Impact upon the Operational Environment)* for the Annual Tripartite Consultation on Resettlement (Geneva: UNHCR, 3 July 2000), 4.
8. Associated Press, "U.S. Policy toward African Refugees Flawed, Critics Charge," November 13, 2000.
9. UNHCR, *Report on UNHCR Resettlement Activities,* 6.
10. Citizenship and Immigration Canada, "Refugee Resettlement Eligibility and Selection Criteria: Implementation of Policy," discussion paper (Ottawa: CIC, 2000), 3–4.
11. Canadian Council for Refugees, "Refugees Worldwide, Assessment of Global Resettlement Needs and Resettlement in Canada, Statistical Overview 1993–1996" (Montreal: CCR, February 1997).
12. CIC, Urgent Protection Pilot, OM 4655 –5-10/UPP, December 1999.

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An Essay on the Free Movement of Peoples

Robert F. Barsky

Abstract

This article argues that debate on Bill C-31 should, in fact, focus upon the fact that it is impossible to determine the veracity of refugee claims using current methods of adjudication, that Canadian refugee and immigration legislation is incompatible with the international conventions, declarations, and norms upon which it is said to be based, and the absurdity of restricting the free movement of peoples. Arguing that the immigration and refugee system already favours free movement for the rich and the well-connected, and that the proposed legislation will further punish those who already suffer greatly from current restrictions, the author suggests that Canada should work to assist those who desire to move by eliminating obstacles such as third-country clauses, visa restrictions, and prohibitively priced airline tickets, and that rather than penalize those who assist in people's natural desire to move around, Canadian officials should help find ways to encourage the movement of peoples on whatever grounds they themselves think appropriate.

Résumé

Cet article maintient que le débat autour du projet de loi C-31 devrait en fait être dirigé sur les questions suivantes : l'impossibilité de déterminer la véracité des demandes d'asile en utilisant les méthodes actuelles de détermination, l'incompatibilité qui existe entre, d'une part, la loi canadienne sur l'immigration et le droit d'asile et, de l'autre, les Conventions, Déclarations et normes internationales sur lesquelles elle est sensée être basée, et, par ailleurs, l'absurdité d'essayer de limiter la libre circulation des peuples. Arguant que le système de l'immigration et du droit d'asile favorise déjà la libre circulation des gens riches ayant de bonnes relations, et que la nouvelle législation va punir encore plus ceux qui souffrent déjà beaucoup sous les restrictions existantes, l'auteur suggère que le Canada devrait travailler à aider ceux qui désirent se déplacer en éliminant les obstacles tels que les clauses des pays tiers, les restrictions sur les visas et les billets d'avion à prix exorbitants, et qu'au lieu de pénaliser ceux qui facilitent la réalisation du désir naturel des gens de se déplacer, les officiels canadiens devraient plutôt aider à trouver des moyens d'encourager la circulation des gens quelles que soient les raisons que ces derniers considèrent comme appropriées.

Debates about immigration policy often focus upon the relationship between proposed laws and what came before, as opposed to more useful analysis of what is really at stake: the movement of peoples within and across artificial national and international boundaries; the lines between public and private property; and the enforced divisions between areas where human beings are allowed to be free, and areas in which they are, for whatever reason, trapped against their will. Along the way, it would be useful to analyze the relationship between peoples occupying different kinds of marginal spaces within and beyond our own country, notably transitional spaces like airports, judicial spaces like courtrooms, and privileged spaces like private homes. To think in these terms forces us to ponder fundamental issues underwriting proposed bills such as C-31, and should lead us to consider the perversity upholding laws designed to deny free movement to some people—the poor, the suffering, the "other"—while considering it a fundamental right for others—the rich, the well-connected, the powerful, and the "not-other." As presently construed, the current migration system treats the "others" as charity cases; we are made to believe that Canada benevolently assists people who have been made to suffer in their own countries. This makes us very generous and very tolerant; we feel pretty good about ourselves and about our country, and by extension we are led to support C-31, which proposes to regulate how people can come into "our"

space, our country. As we read in the outset of this bill, "The objectives for the refugee program recognize that refugee protection is, in the first instance, about saving lives and that providing fair consideration to those who come to Canada claiming persecution is a fundamental expression of Canada's humanitarian ideals."

A second look at our benevolence and the noble efforts aimed at "saving lives" demonstrates the wrong-headedness of such views by the purely legalistic standards employed to consider their cases, or even in the economic terms generally favoured by those on both sides of this argument. For the sake of those who think that our economy ought to regulate our ethics, it's worth pointing out that refugees arrive in our country generally as a last resort, and although they are in desperate need of assistance, they are essential not only for our economy, but for the diversity upon which contemporary society thrives. Furthermore, a look at global economics demonstrates that our standard of living is partially dependant upon the types of corporate forays into the cheap labour wells and the unregulated environmental buffets of the Third World that create refugee problems. Our national system is built upon the erection of barriers that affect migration well beyond our borders. And our very social structure is built upon the fruits of First World control over distant lands. This doesn't mean that we ought to have more liberal laws about migration to compensate for our illiberal economic system; instead, we should really question what it means to legitimize barriers, like Bill C-31, which are aimed at limiting fundamental human rights, such as freedom of movement.

It could be argued that to condemn refugee policy is a poor choice to make in a country as generous to refugees as Canada is perceived to be. And granted, the procedure to adjudicate refugee claims is superior to the one used in the United States and (with a few exceptions) in Europe. Unfortunately, this isn't saying much. Knowledge of the international refugee situation should incite persons in the First World to throw open their borders, rather than fall for the false arguments that sell measures such as the Third Country clause that C-31 takes for granted, the hardened airline and visa rules that ensure that those most in need will never see the light of a Canadian hearing room, and the preposterous penalties proposed to halt the "illegal" transportation of people seeking assistance. For, as serious research demonstrates, refugee claimants don't simply move to Europe or America to gather up the gold that lines the streets (a look at domestic poverty should be enough to diffuse that argument). Indeed, the resistance of even the most heavily persecuted claimants to the idea of leaving their home, their family, and their friends is in the vast majority of cases monumental, and their knowledge of Canada (or other host countries) tends to be extremely sparse. This only makes sense; why come and freeze in a Canadian winter, in some small apartment in a crummy area of a big unwelcoming city? Because our society hands out free money to foreigners? Hardly. Because some people might wish to come to our country to have a life, to make a buck, to raise a family? Sounds pretty much like everyone else to me.

My own studies have shown that people suffer considerably before making the move to another country, like Canada, and that once here they suffer again, but they work hard to make the next generation survive. This is indeed a kind of principle that is inscribed into a primary text for refugee determination, the UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status*, which suggests in chapter 1, article 39, "It may be assumed that, unless he seeks adventure or just wishes to see the world, a person would not normally abandon his home and country without some compelling reason." My experience confirms this point; most of the claimants I've interviewed over the years took a decided financial loss when they came to Canada, for the most part willingly, in exchange for safety and protection for themselves and their families. This is not to say that those granted refugee status in Canada don't strive to succeed. Quite the contrary. Studies over the years by federal and provincial agencies have consistently shown that in virtually every respect refugees make for better Canadians than Canadians do, by all the normal criteria of measurement (less likely to go to prison, less likely to be unemployed, more likely to educate their children, and to a higher degree, less inclined to use social services, and more likely to employ other Canadians). In short, the number of restrictions on necessary migration is unnecessarily high, and indeed the arguments generally employed to erect or bolster the kinds of restrictions outlined in Bill-C-31 tend to be founded upon phony premises, as opposed to concrete research that the government itself commissions.

But I don't wish to make an argument for softening Bill C-31, even as I nod in agreement with the effort it makes to facilitate the claiming process for some "categories" of refugees. I don't even wish to promote a liberal policy towards immigrants and refugees, even though it would certainly be of some solace for a small number of persons considered eligible to benefit from such a remedy. My real interest is elsewhere, and it leads me to one underlying hypothesis, one idea, one proposal, which is on the one hand so obvious that it doesn't even deserve mention, and on the

other hand so radical that it cannot even be uttered in discussions about refugee policy without scornful or dismissive rebuttals: *People have the inalienable right to move around as they wish, for whatever reason they think appropriate.* Period. Borders between states are an aberration, the idea of the nation is reprehensible in its consequences, and restrictions imposed upon people who wish to travel from one region of their world to another are absurd and hurtful. Bill C-31 is wrong because it is built upon a premise that simply makes no sense, that the "state" should exist because it is in some way a natural form of organization for human beings. In fact, as Chomsky points out,

> The state system is a very artificial system. In its modern form it developed in Europe, and you can see how artificial it is by just looking at European history for the last hundreds of years, a history of massacre, violence, terror, destruction, most of which has to do with trying to impose a state system on a society to which it has very little relation. As Europe expanded over the rest of the world, pretty much the same thing happened—you look at Africa, India, Asia, any place you go, they've got these boundaries which are the result of coloring different colors on the map that usually have to do with European colonization. They cut across all kinds of communities and interests and they bring people together who have nothing to do with each other.

The result of this state system, as Chomsky points out, is violence, warfare, struggle, oppression, and some

> very sharply skewed distribution of power internally. The concentration of power inside usually takes over the state for its own good. It suppresses other people, suppresses people outside, etc. So we're stuck with this state system, for a while, at least. But we shouldn't expect it to be permanent. In fact, if it's a permanent condition, it isn't going to last very long because it's a lethal system. It's a miracle that it has survived as long as it did . . . From every point of view the state system looks artificial in the sense that it's unrelated to human needs and imposed by certain interests and power distribution (*Language and Politics* 745).

From this perspective, the problem of refugee studies is a secondary one, because it grows out of a more fundamental issue, relating to the distribution of power and the organization of peoples in contemporary society. For this reason, I would simply suggest that the domain of refugee studies shouldn't exist, the category "refugee" shouldn't exist, and people employed to limit the movement of persons from one place to another should be occupied with other matters, such as the problem of assisting those who would like to move to another region but cannot on account of limited resources.

A related hypothesis, clearly demonstrated once again by any number of research projects, not to mention experience or common sense, is that any attempt to adjudicate claims is not only inappropriate, but necessarily flawed, and this for a whole host of reasons that, if we think about it, hardly deserve mention. First, we couldn't possibly tell whether claimants "deserve" status according to the set of laws in place to determine such things, because it isn't possible to apply the existing criteria to all cases in a consistent or justifiable manner. Second, we cannot employ the tools of discourse analysis, no matter how sophisticated, to distinguish between truthful and untruthful statements in refugee hearings except at a very superficial level (contradictions, inconsistencies). Third, there are too many conflicting interests involved in groups that include a claimant, an interpreter, an adjudicator, and a lawyer for there to be much more than a mutual display of efforts aimed at legitimizing the positions of each person involved. And fourth, the obstacles placed before those who don't replicate the image we have of ourselves are so vast and insurmountable as to render moot any discussion about ways of determining such silly categories as the "truth" of a claim. Do contradictions in testimonies offered by people who have had their genitals electrocuted by government employees in their country of origin prove that they are "lying" to government authorities in the host country?

Granted, laws do exist to establish legal categories in the present-day system, but does abiding by the laws of the land mean that governments can disregard international conventions and treaties to which they are signatories? If we were to take certain international conventions and treaties seriously, conventions to which most countries of the world are party, then we should be looking for ways to facilitate rather than impede free movement, as we shall see. Finally, and this returns us to the initial hypothesis, people simply don't have any business restricting other people from moving around, even if the motivation to do so is crass economic gain, because the fact is, free movement is good for individuals and good for societies in every discernible way. This being the case, I'd also suggest that the road to radical change—that is, the movement towards what is conveniently regarded as "idealist" or "utopian" and therefore not worth pursuing—is my sense that we can and should do better than we're doing, and that eliminating barriers from persons who would move if they could might be one small step in that direction. It would be a significant improvement, if only because it would mean that populations wouldn't necessarily have to be subjected to the lunatic ideas of power mongers or hurtful economic systems, because

they would have the knowledge required and the resources needed to move to another more comfortable space. This article should be a short one, therefore, and debate about Bill C-31 should be similarly constrained, because the very idea that persecuted peoples should have to justify their flight from persecution before our legal or administrative systems is, by any reasonable measure, hurtful to all people, especially of course the poor, and counter-productive for all members of society except for those who do the oppressing.

Simplifying and Clarifying Migration Procedures

This type of approach won't be sufficient for those in search of "protection" from people in flight, or those who hope to "protect" the jobs of "ordinary Canadians" from "illegal" migration, because no matter how obvious it is that people ought to move around as they wish, there remains a whole range of people and organizations who have interests, ultimately power interests, that will demand protection against those who have legitimate claims against them; the people who work to protect these interests do so by resorting to a series of false or hypocritical arguments, like the ones we find in Bill C-31. For this reason, it's worth identifying a few of the really nefarious passages of this bill and then to show—again for those who prefer to support arguments with reference to, say, legal documents—that even according to the refugee laws and conventions employed to legitimize our own refugee determination system, Bill C-31, like all bills and acts that have preceded it in this country, don't meet their own criteria. As such, they really aren't much more than purveyors and upholders of a status quo that turns out to be extremely oppressive for all but a small proportion of the earth's inhabitants.

In the document "CIC Canada—Bill C-31: What is New in the Proposed Immigration and Refugee Protection Act" we are treated at the very outset to the idea—implicit in the fact that we need to replace the current act because it "dates back to the 1970s"—that laws get worn out, somehow, and need to be "updated." This is interesting when one considers laws about fundamental human rights, say, the Canadian Charter of Rights, the American Bill of Rights, or even our own constitution, because it suggests that fundamental human rights aren't so "fundamental" after all, and that even though the Immigration Act exists to fulfill our obligations under previous conventions, it can somehow get worn out. How can we legitimize building a society upon the authority granted by a constitution, even as we challenge the legitimacy of historical documents like constitutions on the grounds that laws wear out? Bill C-31 doesn't have any answers, but it does seem to suggest that laws get worn out because they get too complicated over time, on account of all the amendments and changes brought to them, which leads to the "the need for immigration policy and legislative reforms expressed in a clearer, simpler and more coherent Act." Let's pursue this line for a moment, because it's more promising than most.

Bill C-31 runs 150 or so pages, so it doesn't seem to qualify according to its own criteria of clarity or simplicity; but there are other legal instruments that do, such as the Universal Declaration of Human Rights, which, I imagine, most Canadians support, or would support, if its ideas were diffused. There are a few articles in here that apply to the Bill C-31 terrain, such as article 5, which simply states, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Most people would agree with that, and it's simple enough, so we could scrap our immigration act and simply uphold that principle, which would save many people from a lot of suffering, and might even help change the political systems that create oppression and persecution, because everybody would know take that principle as fundamental and necessary, so they'd expect it, or demand it, from those empowered to act on their behalf.

Perhaps this clause isn't precise enough, however, since we are also talking in C-31 about movement of peoples who have been affected by abusive treatment, so let's look to my personal favourite, article 13, which upholds the very clear, simple and coherent idea that: "(1) Everyone has the right to freedom of movement and residence within the borders of each state. (2) Everyone has the right to leave any country, including his own, and to return to his country." For further precision, we might also add article 14, which, once again, is as clear as can be on the issue of asylum: "(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution." To ensure that this is properly applied, we could end the act with article 2, which states, "This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."

Some legalistic soul might claim that the declaration doesn't have any more than a moral hold over our society, that even though we apparently support it, we also have to have specific legislation to make it work, such as the international treaties and conventions to which we are signatories. Luckily, these legal instruments tend to be rather simple and clear, so they are indeed worth a look. Since the framework and indeed the very legitimacy of our Immi-

gration Act is based upon the 1951 UNHCR Convention relating to the Status of Refugees and its 1967 protocol, then we certainly aren't resorting to an irrelevant text if we choose this one as a point of reference.

Article 1 of that convention says that a refugee is someone who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it." If, against my personal will, someone were to insist that free movement is not an inherent right, and that states do and should exist, then this definition could apply, which means that someone should only have to claim to fear persecution, which couldn't really be questioned (how can you question if someone has, according to his or her experience, suffered? How could you prove it one way or the other?), and this person should be granted asylum. Again, I don't favour this route, because it suggests that we ought to adjudicate things, but since those who support laws like C-31 like to be legalistic, then they should at least be reading the legal texts that underwrite the laws that they are choosing to support.

There might be other grounds for opposing the approach I'm setting forth here. For instance, I would grant that if Canada alone decided to promote free movement, we'd likely have a few more citizens next year than had been expected, and there would be some infrastructure problems in the short term, at least. As for the elimination of states and the organization of society around other principals, this would have to be part of a larger effort, which is worth working towards, in my opinion, if only in terms of our attacking organizations and instruments of repression. It is also true that if we were to follow the more legal route suggested by the letter of the convention, then there's the problem that we're not accounting for Canadian racism, xenophobia, or the many wrong-headed ideas that are thrown about, describing how "others" steal "our" jobs, for example, and it doesn't pander to government efforts to blame the countries' woes, or union efforts to blame the companies' woes, or lawmakers' efforts to blame the municipalities' woes, upon the "other." To address the real issues of this hypothetical "other" would require that we face the consequences of the innate inequality of the current economic system—unemployment, unequal distribution of wealth, a growing distance between the rich and the poor, and between rich and poor nations—which is not addressed in C-31, even though it is at the root of the problem that it tries to address. Instead, C-31 suggests that the solution lies in reducing the "flows" of "illegal" migrants, in impeding our international (not to mention moral) obligation to assist those in need, and in halting things that we law-abiding citizens so loathe, like "queue jumping." The fact that it's kind of hard to jump when you're starving, tortured, raped, and denied fundamental rights for some reason doesn't really matter.

Violations of International Principles at Every Level

It's interesting to look at some of the details of C-31 to see how it proposes to act on these "problems," because over and above its blatant efforts aimed at ensuring that Canada doesn't even live up to international standards for refugee adjudication, it also puts into effect a range of policies aimed at violating international law on a larger scale. For example, C-31 distinguishes between refugees on the basis of such ideas as how they came to Canada, and who helped them succeed in this aim. This is interesting in terms of the convention's article 7, which insists, "Except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally," and article 16, which insists, "1. A refugee shall have free access to the courts of law on the territory of all Contracting States; 2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from cautio judicatem solvi; and 3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence." This article makes it clear that anyone making a claim should have a proper hearing, and no mention here is made of how she managed to make it to Canadian territory, since this really shouldn't be an issue. Indeed, since it's unlikely that someone who has had difficulty in his country of origin will be able to follow "normal" channels to come to Canada to benefit from an internationally recognized right, then any attempt to distinguish between refugees, or, for that matter, immigrants, in terms of limiting or denying them access to a hearing, is illegitimate.

This is not the line taken by the proposed law, of course. Indeed, the "law-abiding" spirit of C-31 has some terrific legislation that aims to send out the real message of how Canada considers poor people who try to move around;

they are criminals, unless proven otherwise, and therefore should be incarcerated at the whim and will of the bureaucrats. "Reasonable" grounds for incarcerating people, which are the present criteria, tend to be easy to find in the case of refugees, as we saw with the Chinese who were incarcerated en masse in Vancouver last year. Bill C-31 also adds that "persons inside Canada, with the exception of persons on whom refugee protection has been conferred and permanent residents, who fail to establish their identity for the purpose of a proceeding under the Act may be subject to arrest." The potential for abuse is breathtaking, given the problem of procuring documents if one has been persecuted in a country of origin. For some reason, C-31 insists very heavily upon this point:

> IRB required to take into account a claimant's lack of identification when assessing credibility. Under the current Immigration Act, lack of identification only becomes a factor in the event of a split decision by the IRB panel. It is a published practice of the IRB, however, that lack of documentation is a factor in the assessment of a refugee's credibility. Bill C-31 increases transparency by expressly stating that lack of documentation, absence of a reasonable explanation for lacking documentation, and failure to take reasonable steps to obtain documentation are factors that must be considered by the IRB when assessing credibility.

This is one of the many areas in which a very simple hypothesis applies, and should always be borne in mind when considering treatment of those judged by some group or another to be a suffering other: *To the degree that someone is really in need of assistance, our system will act to ensure that such a person is refused.*

It's already hard to believe that under the current Immigration Act it is illegal to use fraudulent documents, but consider that Bill C-31 expands this to also make it an offence to possess fraudulent documents. It is only obvious that if you're resorting to fraudulent documents you may be following (bad) advice from someone who saved your life, or you may be doing so because you couldn't procure authentic documents, a fact that wouldn't be terribly surprising if you'd been subjected to torture in the country of origin. The fact is, if you have identification, you probably left the country of origin by a simpler route than if you were forced to procure false documents, or if you were advised to destroy your documents en route to Canada. If you came by illegal means, then chances are you couldn't come by legal means, because illegal means tend to cost more, are more dangerous, and are far less reliable. And if you've given false testimony, you probably have received faulty information about the adjudication process, perhaps from somebody who was well-meaning and who otherwise helped out considerably with some element of the claim, like travel, which made his or her advice seem acceptable.

Instead of taking this obvious point into account, the proposed law becomes even more draconian: "Under Bill C-31 the offence of making misleading statements will include the withholding of material facts in regard to any decision-making. This clarifies that the withholding of material facts is a form of misrepresentation. Additionally, the offence of counselling misrepresentation, currently limited to the making of refugee claims, is broadened under Bill C-31 to apply to all immigration matters." Who are claimants supposed to believe: those people who tortured them, or refused them permission to leave their country, or the non-official people who actually helped them? These people who help persecuted peoples to fulfill their dream of escaping persecution, since official channels are so limited as to help but a tiny proportion of those in need, are by our standards criminals on par with murderers, according to the new proposals, which include the possibility of life in prison for persons caught "smuggling" ten or more persons.

The obscenity of this idea is blatant: what are people who are ineligible for legitimate travel but eligible for refugee status in Canada supposed to do? What if they can't get a passport, a visa, or the money required to leave the country? What if they are "wanted" for some crime in their country, like fighting against a dictatorship? Do we seriously think they'll be allowed to pass through the airport in the nation's capital unnoticed? Or through a border crossing?

The convention doesn't talk much about the problem of finding a safe haven in the first place, but it does offer standards regulating related issues, such as the rights of those who make claims in signatory countries, in article 28, which sets out the principle that

> (1) The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence; and (2) Travel documents issued to refugees under previous international agreements by parties thereto shall be recognized and treated by the Contracting States in the same way as if they had been issued pursuant to this article.

The message here is clear: people aren't criminals just because they're exercising their internationally recognized right to free movement, and they aren't to be treated as such. And people who help them exercise their right to make a claim ought not be punished, necessarily. Instead, they should perhaps be hired by the Canadian government, or by aid organizations concerned with helping those in need, to find a way to travel to their destination. It is taken for granted that we ought to adopt a policy similar to the one whereby municipalities allow people to drink, allow people to stay out late in bars, and then either close down, or don't operate, the late-night public transportation that is essential to ensure that they can get home safely. Instead, police are stationed near bars to catch those who have chosen the logical way home, their own vehicle. Rather than putting an effort into assisting with the transportation of those in need of help, punitive, expensive policies are enacted that catch people and fine them, or don't catch people but later have to clean up the mess caused by ensuing traffic accidents. The point is, people wouldn't have to resort to "illegal smugglers"—who in some cases render a very valuable service, by the way—if visa restrictions, airline penalties, and inordinately expensive travel costs from the Third to the First World weren't the norm.

All of this is rather hard to fathom, perhaps, but one must consider that the very idea of "illegal entry," or coming to another place by illegal means, is logically inconsistent if we are dealing with refugees, and the convention recognizes this clearly. Article 31 states that

> (1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. (2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

The ideas of "penalties" deserves pause. First, it ought in my sense to include user fees; while we're mistreating those who exercise their right to move around, it seems acceptable to most that we might as well add user fees, that is, we should add debt to the list of woes from which refugee claimants have suffered. And for those who don't obey the rules, things get even worse:

> Bill C-31 increases fines for general offences such as failure to comply with a term or condition imposed under the Act, escaping lawful custody or detention, and employing persons not authorized to work (on indictment from $5000 to a maximum of $50,000; on summary conviction from $1000 to a maximum of $10,000).

The convention is, once again, clear on this: article 29 states, "(1) the Contracting States shall not impose upon refugee duties, charges or taxes, of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations." There seems to be the belief, not unreasonable, that to help people integrate into our society, they may as well get used to the idea of crushing debts.

Keeping the System Transparent

There are two hopes for those who have been subjected to the abuse regularly heaped upon those we consider marginal, such as refugees: one is to erect a solid appeal procedure that can overturn some of the misguided decisions regularly handed down, and the other is to make the public aware of what goes on in these hearings by allowing some access to documents if the claimant is in agreement. As to the first, the way that C-31, and other bills of its kind, ensure that it'll be the poor who will suffer is to limit the rights refugee claimants have to appeals, and then limit the rights they have even if they are granted an appeal. For instance, there is a new proposal in C-31 suggesting that there should no longer be automatic stay of removal for judicial review of refugee decisions: "The current Immigration Act provides a stay of removal in most cases when judicial review is initiated following unsuccessful refugee applications. Although there is no automatic stay in Bill C-31, the new regulations will provide such a stay subject to a two-year sunset clause." This comes in addition to all sorts of ways of limiting appeal rights to claimants and to sponsors, already threatened under the current system. The potential for abuse, and the spectre of misused discretion, grows when vague passages are added to the collection of ways to discourage or rule out people; to take but one example from C-31: "No appeal by sponsors in cases of misrepresentation except in respect to a sponsor's spouse, common-law partner or child." Or, worse still, "Currently, the IAD can reopen an appeal at any time to hear new evidence. There has been an increase in requests for re-openings and there is concern that this is often a tactic to delay removal. Under Bill C-31 the reopening of appeals may only be granted on the basis that the IAD failed to observe a principle of natural justice and only if the appellant is still in Canada. This

provides some finality to the appeal process." Does it ever! And it even applies to overseas visa refusals, which, in my experience, is as unpredictable and inconsistent a procedure as could be imagined: "New leave requirement for judicial review of overseas visa refusals. This makes judicial review for overseas cases consistent with in-Canada cases which all require leave. This will also help to ease resource requirements and Federal Court backlogs as the number of overseas applications for judicial review has risen substantially over the last few years." The problem with this is that when the rate of appeals goes up, it's often because decisions are erroneous. And the fact that repeat claims will no longer be allowed, and that claims will be eligible for termination in light of "new information" brought forward, again heightens insecurity and makes it such that people who have received inaccurate information about the claiming process will be penalized and will be left without recourse. Obviously, recourse for flawed decisions isn't necessary if original decisions make sense, but in so many cases they simply don't, and this despite the presence of two members of whom only one needs to see the validity of the case. To make matters worse now, C-31 is proposing single-member panels, which "would be the norm for all IRB divisions with ability for the Chairperson to appoint three-member panels (except for the Immigration Division) where appropriate." Given the studies that have turned up overt racism, errors of law, errors of judgment, and a range of game-playing inside the hearings, the combination of too much discretion, one doesn't have to work hard to imagine the potential for abuse in a system that relies upon single-panel hearings and limited possibilities for appealing asinine decisions.

On the second issue, ensuring that people have access to information about what goes on in IRB hearings, so that they can understand some of the errors of judgment and law that occur therein, or so that they can themselves prepare for a hearing, is to make information about what goes on in these hearings accessible. C-31 proposes to curb this, by offering

> new provisions for non-disclosure of information at IRB hearings. Currently, the Minister may apply to the Federal Court to protect information with respect to appeal hearings. There are no provisions to protect sensitive security information during immigration inquiries for determining admissibility. Under Bill C-31, the Minister may apply for non-disclosure of information at an appeal or admissibility hearing. The presiding IRB member would make a determination on such requests by following the same rules followed by the Federal Court when reviewing security certificate cases. The new provisions expand the ability to protect information and provide a simpler process that eliminates the need, at IRB hearings, to seek recourse to the Federal Court. In the interests of natural justice, the person will receive a summary of the information or evidence as well as an opportunity to be heard regarding their case.

Once again, the potential for abuse of this power is vast, and this problem is probably heightened by the new *in camera* rules proposed in this bill, which are to apply to all four divisions of the IRB.

Safe Third Country

The next area that Bill C-31 takes for granted concerns an idea that previously surfaced in another twisted bill known as C-55. This area deserves special mention because it is one of a growing range of weapons (prohibitive costs of tickets for travel from the Third to the First worlds, visa restrictions, fear mongering) used against those who would dare try to set foot upon our soil to effect their internationally recognized right to claim status. C-55, adopted into C-31, legalizes the category of the "safe third country," a notion that violates the fundamental principle of the convention, article 33, concerning the prohibition of expulsion or return *(refoulement):* "(1) No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Practising sneaky *refoulement,* already widespread, will get worse with C-31. For instance, "Airlines to be able to provide prescribed passenger information to CIC. This provision will be used to identify passengers who are inadmissible to Canada or for whom there is a warrant for arrest. Passenger information will only be used in the administration or enforcement of the Act." There is no such provision under the current Immigration Act.

As far as the convention is concerned, the "safe third country" clause is illegitimate because claimants have rights to make claims where they wish, subject to a small number of guidelines. Goodwin-Gill (*The Refugee in International Law,* 1996) notes that article 31 comes closest to dealing with this issue: "Refugees are not required to have come directly from their country of origin, but other countries or territories passed through should also have constituted actual or potential threats to life or freedom." What is unclear in section 31 "is whether the refugee is entitled to invoke article 31 when continued flight has been dictated more by the refusal of other countries to grant asylum, or by the operation of exclusionary provisions such as those on safe third country, safe country of origin or time limits" (152), all of

which is of special concern for the countries in question. The "safe third country" clause has been the subject of much contestation, and the description of this clause takes many forms, depending upon the country in question. In Canada, legislation covering this issue came into effect in 1993 with the passage of Bill C-86, which states,

> 46.01 (1) A person who claims to be a Convention refugee is not eligible to have the claim determined by the Refugee Division if the person
> (a) . . .
> (b) came to Canada, directly or indirectly, from a country other than a country of the person's nationality or, where the person has no country of nationality, the country of the person's habitual residence, that is a prescribed country under paragraph 114(1)(s).

As Goodwin-Gill notes, however, the "safe country" provisions of the Immigration Act have existed since 1988, but "were not implemented for a variety of practical and political reasons" (ibid. 336). Nevertheless, agreements have been made (or are under negotiation) between countries, including Canada and the U.S., and Canada and Europe, to move in this direction. Already the Dublin and Schengen conventions have as objectives "to determine which participating State is responsible for deciding the asylum claim of an individual within the area of application; to provide in appropriate cases for the readmission of the individual, and for the exchange of information; and to confirm the responsibility of the State for the removal of unsuccessful applicants from the European Union or Schengen territory, as the case may be" (337). And Loescher notes that

> by the end of 1992, EC government ministers had proposed sending prospective asylum seekers back to the first "safe" country they transited on their way to Western Europe. Germany has separately negotiated agreements with Romania and Bulgaria to return rejected asylum seekers in exchange for financial incentives and has indicated its intention to reach similar agreements with Poland, Czechoslovakia, and Hungary (*Beyond Charity: International Cooperation and the Global Refugee Crisis,* 1993, 126).

Previously in Canada there had been vague reference to the need for a committee to advise the Minister on proscribing countries that would be "safe" (the Immigration Act 1976-77, c. 52, s. 114(5)). In C-86 the legislators have been more forthright, "prescribing, for the purpose of sharing responsibility for the examination of persons who claim to be Convention refugees, countries that comply with Article 33 ["Prohibition of expulsion or return - Refoulement"] of the Convention" (R.S. c.28, 4th supp., ss. 29(3),(4)). This could be interpreted to mean that if you leave your country of origin, whatever the circumstances, and you stop over in one or several "safe" countries while en route, then you will be returned to one of those countries through which you passed. As a result, many asylum seekers would be stopped en route through a transit country because of visa requirements—another barrier to safe transit, particularly for countries (like Canada) that are far afield from many claim countries and therefore less likely to be on direct flight routes. So once again, although in apparent violation of the spirit (if not the letter) of the Universal Declaration of Human Rights, the Convention relating to the Status of Refugees, the Protocol to the Convention, and the Declaration on Territorial Asylum, this clause (and others like it) has been invoked and utilized with a high degree of success to limit the flow of refugees, in particular those moving from the Third to the First World. These clauses are particularly nefarious in Europe, given the number of flights that necessarily stop there, and it seems to violate a number of Council of Europe recommendations, including Recommendation 434 (1965), article 11 (ii and iii); Resolution 14 (1967), articles 1 and 2; Recommendation 773 (1976), section 11; Recommendation 817 (1977), article 14; the Declaration on Territorial Asylum (1977); and Recommendation R (1981), sections 1 to 6. If the tenets of such a clause were to be invoked, particularly in a systematic fashion by important "turnstile" airports such as Amsterdam-Schiphol, London-Heathrow, Geneva-Cointrin, and Zürich-Kloten, then the possibility that persons could flee from persecution with the hope of asylum in a safe country that is far from the country of origin would be significantly diminished, particularly for the poor and the disenfranchised.

Conclusion

It would be pointless to reiterate the obvious, that Bill C-31 is simply further evidence of a quest for power and a hatred of any other that doesn't provide a positive reflection of what we are sending off as Canadian standards to everyone who comes knocking at our door. What is wrong with "safe third country" clauses is what is wrong with immigration acts generally speaking: they are designed to keep out the people we are supposed to be helping. Examples abound, but a few might show just how our immigration-resistant walls are erected. Persecuted persons rarely have the material means, the documentation, or the connections needed to make direct flights abroad. Members of the People's Party of Pakistan fleeing persecution from the sympathizers of the Muslim-League Party in the Punjab, for example, are forced to take overland routes to (say) India to flee their oppressors, just as persons fleeing government

agents in (say) Togo, take overland routes to Ghana (and vice-versa), Russian Jews fleeing the long arm of Pamyat (the notorious anti-Semitic organization that emerged in the mid-1980s) could take overland routes to Europe, and so forth. But persecution seldom ends in neighbouring countries, for the arm of persecuting authorities is often long enough to extend beyond its borders; it is often the case that the source of persecution in a country of origin continues to be a source of persecution in a neighbouring country (Ahmadi Muslims in Pakistan will not find India any more welcoming, Jews in Kazakhstan will not find Russia any less anti-Semitic, Russian half-Jews in Israel will not find much comfort in Syria, and so forth). The "third country" clause, by acting against persecuted persons who don't have the means to seek asylum in the First World, keeps the results of First World intervention, Third World dictatorial practices, regional conflicts, and home-grown oppression within the confines of the state in question, or at least restricts its spread much beyond neighbouring countries.

As is always the case, the exceptions to the "third country" rule apply to those who can afford intercontinental travel documents and tickets with the proper (i.e., the most expensive) routing, just as the exceptions to the rule that it's hard to tell one's story in a way that we like to hear it, without the assistance of a hotshot lawyer, apply to those who can afford to shell out the big bucks. We shouldn't be surprised by any of this, given the nature of the economic system within which we live, but we ought perhaps to be, at least, disgusted.

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Refugees, Rights, and Human Security

Colin J. Harvey

Abstract

This essay explores the connection between discourses of membership, and refugee and human rights law. The argument is that state practice is often anchored in conceptions of democracy that refugee advocates must challenge at a fundamental level. I am particularly interested in the idea of human security. In addition, it is suggested that although human rights law has an essential role to play, we should not neglect the importance of refugee law as a status-granting mechanism. In the end, specific problems in refugee law call for progressive reform. For example, the essay calls for serious engagement with the idea of international or regional regulatory mechanisms to monitor state practice in this area. Many of the ideas applied in domestic contexts, such as the Canadian, come from international discussions. These discussions are often removed from effective participation. If states now function—and construct policy—at this level, then why should we not strongly advocate the creation of systems of accountability that operate at this level also?

Résumé

Cet article explore la relation entre les discours sur l'appartenance et la loi sur le droit d'asile et les droits de l'homme. Le raisonnement utilisé est que la pratique des états est souvent ancrée dans des concepts de démocratie que les défenseurs du droit d'asile se doivent de remettre en question. Je fais cela en relation avec l'idée de la sécurité humaine. Additionellement, il est suggéré que bien que la loi sur les droits de l'homme ait un rôle essentiel à jouer, nous ne devrions pas négliger l'importance que la loi sur le droit d'asile a à jouer en tant que mécanisme octroyant un statut. En fin de compte, il faudra apporter des réformes progressives touchant aux problèmes spécifiques de la loi sur le droit d'asile. Par exemple, l'article réclame que soit examinée sérieusement l'idée de mécanismes régulateurs au niveau international ou régional pour faire le suivi de la pratique des états dans ce domaine. Un grand nombre d'idées appliquées dans un contexte local – par exemple, dans le contexte canadien – émanent en fait de discussions qui ont eu lieu au niveau international, sans participation effective de ceux qui en sont finalement affectés. Si, à présent, les états fonctionnent et formulent des politiques à ce niveau-là, pourquoi ne devrions-nous pas préconiser vigoureusement la création de systèmes de responsabilité opérant également à ce même niveau.

Introduction

There is a tendency in refugee law to look hopefully to Canada as a model of best practice. To many people in Canada, I have no doubt this might seem odd. There is strong criticism of Canadian law and practice and concern about current proposals. What this optimistic external gaze reflects, I suspect, is a level of desperation among those in Europe who are appalled by state responses to refugees and asylum seekers. Within the European Union (EU), in particular, there exists a culture of the lowest common denominator based on the idea that "If everyone else in Europe is doing it, so can we," or, "We are doing this because it is the European norm." In other words, the focus is limited to other European states only. Anyone who has practical experience of lobbying governments in Europe on asylum law and policy (as I have with the Irish government) will be able to relate to this. In despair one looks for "life beyond Europe," and Canada is usually cited as the place to examine.

In a world still divided into states, the issue of how to address forced displacement is a troubling one. For those who are displaced, legal and political niceties take second place to the immediate need for protection. At the core of this protection is what I term in this essay "human security." The introduction of this term is not a tool to displace rights discourse from refugee protection. Rather it is to forward other values as important in the current debate about the future of refugee law. This has become significant at a time when refugees and asylum seekers, particularly in

Europe, are being denied basic socio-economic rights. These rights are still not accorded the recognition they deserve. In the United Kingdom (U.K.), the context from which I am writing, this has become a pressing issue, as governments have been willing to erode basic socio-economic entitlements in a rather crude attempt to discourage asylum seeking. This has included the withdrawal of welfare benefits and now the construction of what can only be described as an experiment in "social engineering" to address the needs of destitute asylum seekers.[1] The process of asylum seeking has been regarded by many governments as problematic. Asylum seekers are "criminalized" and routinely constructed as threats to the internal security of the polity. This is now being supplemented with welfare schemes that aim to make asylum-seeking appear as an increasingly unattractive option.

The institution of asylum, as presently understood, is centred upon those who have managed to cross a border. The focus is primarily on external displacement. This is the main concern of this essay. My aim here is to examine the relationship between refugee and human rights law in the U.K. context. It is now of more general interest, given the decision of the Labour government to incorporate the European Convention on Human Rights 1950 into domestic law. The Human Rights Act 1998 entered into force throughout the U.K. on October 2, 2000. Asylum law is one of those areas where significant case-law is likely to emerge. My intention in this essay is not simply to applaud this overdue development; rather, I want to stress that we require values to assess the impact of human rights law. This is equally applicable in the Canadian context. In refugee law we can talk of refugee protection principles, but I suggest that the concept of human security is significant in not only alerting us to the broad range of values that must be respected, but also the continuing importance of refugee law as a status-granting mechanism. In our understandable rush to embrace what human rights law has to offer, there is reason to remain committed to the core values of refugee protection anchored in an inclusive vision of the 1951 convention. Therefore, while the essay draws upon the U.K. experience, it speaks also to more general debates in refugee law and policy.

Refugee Law, Inclusion/Exclusion, and the Construction of Membership and Belonging

The world may now be a smaller place for many people. Globalization does not respect borders, and technological developments have radically transformed our understanding of time and space. But can we say this is a development that brings universal benefit to all? We cannot. In practice, the world has in fact become a more tightly regulated public space for the marginalized. For those who do not possess the means, and who do not have the skills required by affluent states, movement is far from free. Refugees and asylum seekers wishing to enter the EU, for example, must overcome ever higher hurdles. These containment practices can all be cloaked in the discourses of root causes and prevention, but the fact remains: for many individuals and groups, movement has never been so difficult as it is now. This cannot be probed in any great depth here. But one might speculate that as loss of autonomy becomes a major anxiety of states, internal security and the regulation of certain types of entry become more important. In a world of risk this is an area where states perhaps believe they can, either individually or collectively, continue to be assertive.

At a time when there is much optimistic talk of a new cosmopolitan world order, or postnational forms of membership and belonging, the response to asylum seekers appears all very familiar. The reason for this goes much deeper than the political will of states. It is tied fundamentally to the principles that are constitutive of democratic polities. While it is easy at the international level to focus on the sheer political will of individual states, one must remain aware of the reasons that states function in this way. There is in fact a basis in understandings of democratic citizenship for state practice. In other words, categories that have progressive implications for some at the national level, notably citizens, can have a negative impact on the treatment of refugees and asylum seekers.

The idea of democratic citizenship remains connected in many societies to the notion of self-determination. In other words, that a political community has the right to dictate the terms of its own governance. There is a long history of republican thought that traces the whole idea of democracy to its core in the right of a community to determine its own future. Rules on membership are a consequence. A political community seeks not only the terms of its own governance, but also to determine who will be included. Rules that regulate membership spring from the concept of internal self-determination.

There are, however, principles that some claim transcend democratic citizenship. In earlier times it was to theology that people looked for a "higher law" above and beyond the state. In our pluralist and secular times, this will no longer do as a rational explanation for values that are centred on personhood and not status. God may well be dead, but now we have international law. International law reflects an expansive vision of human rights that attach to

the person and not solely to the citizen. This focus can also be found within some systems of constitutional rights protection.

The treatment of asylum seekers brings to the fore a tension between notions of democratic citizenship and "borderless" strains of liberalism that are anchored in the idea that rights attach to the person. One is a vision of a world of states with flourishing democratic polities and membership rules; the other is a blurred vision of free movement and open borders. Many who work in refugee law are understandably tempted by the latter model. It seems to hold out the possibility of a more humane approach to asylum, but it can be illusive. In an international community still largely divided into states, "borderless liberalism" can appear out of touch with the realities of life in democratic societies. And more troubling, it fails to answer the complex issues that arise. My own view is that scholars of refugee law need to engage with work in deliberative democracy in order to sketch an approach that would present a real challenge to the current practices of states.[2] It would not be anchored solely in arguments about universal human rights and would be prepared to take the idea of a political democracy seriously. Viewed in this way, refugee law continues to be an impressive tool for achieving humanitarian objectives when dealing with the plight of some of the forcibly displaced.

Complementing Refugee Protection?

The previous section ended with rather an upbeat assessment of the continuing potential of refugee law. This view is not universally shared. In fact, one is more likely to hear reference today to human rights law "coming to the rescue" of refugee law. As is well known, refugee law reflects a particular approach to the idea of protecting the displaced. It is a limited and partial response to a severe international problem. The 1951 Convention relating to the Status of Refugees reflects a compromise between the state imperative of migration control and humanitarian concerns. One can present this rather melodramatically as a legalistic exercise in exclusion, but this is only a partial account.

There are few areas of law that do not include and exclude at precisely the same time. Refugee law would not be the expression of a commitment to an exception to general migration control concerns if it was not in an important sense exclusionary. There are, however, more substantial criticisms of refugee law. I will deal with two here. First, refugee law confines protection to those with a "well-founded fear of persecution for a Convention reason." As we will see below, human rights law (in the form of the European Convention on Human Rights) does not limit protection to ill-treatment for a particular convention reason. An extensive jurisprudence has evolved in refugee law around what precisely it means to come within a convention reason. The debates are in essence familiar ones to legal scholars. Some see little reason why refugee law should not be progressively developed and constructively interpreted, while others (more attached to the intention of the drafters) fear that states will simply abandon refugee law entirely if pushed too far. The difficulty for the human rights lawyer is that refugee law has clear limits inscribed in the text of the convention. Creativity can take us far, but often not as far as many would wish to go. The result is the coexistence of a delimited understanding of refugee protection and a body of human rights law that on some occasions goes beyond the protection offered by refugee law.

The second aspect of refugee law often criticized is its exceptions, even to the most vital protections. The obvious example of this is article 33(2), but the exclusion clauses in article 1 can be presented in a similar way. Refugee law contains a concept of the deserving and undeserving person,[3] of which human rights lawyers tend to be suspicious (although one can question such an approach after the recent response of the human rights community to the General Pinochet case in the U.K.). It is with the exclusion clauses that we can run into difficulties with arguments about constructive interpretation. States now seem prepared to be creative in their application of the exclusion clauses in refugee law, in a way that departs from the specific aims of the provisions. As states become increasingly concerned about their internal security, it is tempting for them to make excessive use of these clauses. Human rights law again can be presented as the solution by prohibiting return in circumstances where it would be permissible in refugee law.

Human rights law clearly has a role to play in complementing refugee protection. But one should also recognize the limitations. The standards that need to be met in human rights law are often higher than in refugee law. In addition, rules that prohibit return seldom deal with the crucial issue of status. The reality is that many individuals and groups are left in a form of legal limbo. The rise of the informal status is one of the key features of the European response to forced displacement. What this does in practice is promote human insecurity. Human rights lawyers should be careful not to promote this culture of deformalization in refugee protection. Status matters to the displaced, and refugee law has the advantage of providing it, with specific entitlements that attach to it. We should not

abandon the struggle to ensure that full and effective use is made of refugee law as it presently exists. There is much unfinished business in refugee protection.

Refugees, Asylum Seekers, and the U.K.'s Human Rights Act 1998

If there are lessons from the U.K. context for Canada, then they are primarily warnings about what can go wrong. Problems with the system raise fundamental questions about its practical operation. The latest legislative measure, the Immigration and Asylum Act 1999, follows a line of similar legislation that has fostered a highly distinctive approach to an area that until the 1990s had received little attention from legislators. The other major event, and the focus of this section, is the enactment of the Human Rights Act 1998. This legislation incorporates significant aspects of the European Convention on Human Rights into the domestic law of the U.K.[4] There was extensive debate on which model of rights enforcement should be adopted. The Canadian model was in the end rejected, and the government opted for a more robust version of the New Zealand model of rights protection. Courts and tribunals in the U.K. are now under an obligation to interpret primary and subordinate legislation, as far as it is possible to do so compatibly with convention rights.[5] While subordinate legislation can be struck down, the government decided not to give to the courts the same power over primary legislation. On primary legislation the struggles will be over finding interpretations that are compatible with convention rights. There will be occasions, however, when this is impossible. In such circumstances, designated courts are permitted to make a declaration of incompatibility.[6] A declaration of incompatibility does not render the relevant provision invalid,[7] but it may trigger a remedial order procedure whereby Parliament can address the offending provision.[8] While the government has stated that this is the likely result of a declaration of incompatibility, there is no guarantee that the government will act. What the legislation effectively achieves is a delicate balance between parliamentary democracy and the protection of human rights. The suspicion is that designated courts will strain to find an interpretation that fits with convention rights rather than indulge excessively in declarations of incompatibility. However, at this stage it is difficult to predict how this will map out in practice.

Asylum law is an area where much is expected of the Human Rights Act. The European convention institutions have shown a willingness to develop convention rights to embrace the protection of refugees and asylum seekers. When interpreting convention rights, courts and tribunals in the U.K. are now obliged to consider the case-law of the convention institutions.[9] While they are not obliged to follow it, the past approach is likely to be significant. Some of the more important cases are worth considering here, for they demonstrate precisely how human rights law can have an impact on the protection of the displaced, but they also indicate the limits of this area of law and policy.

The case of *Soering* v. *UK*[10] is regarded as one of the more important judgments of the European Court of Human Rights. While this was an extradition case, the implications of the judgment were clear for those seeking to protect asylum seekers. The court held that the U.K. would violate article 3 if it returned the applicant to face the "death row phenomenon" in the U.S. The court, in this case, was only following what was the established jurisprudence of the European Commission of Human Rights. Although the court extended the protection to include asylum seekers, it has always made clear that the state has a right, as a matter of well-established international law, to regulate the entry and deportation of migrants subject to its convention obligations. The court, while prepared to extend the protection to a group not directly referred to in the convention, has been cautious nevertheless. An individual must demonstrate substantial grounds for believing that there is a real risk of article 3 ill-treatment upon return.

The test is a stricter one than that applied in the context of refugee law. This is evident in *Vilvarajah* v. *UK,*[11] where the difficulties of bringing a successful article 3 claim were demonstrated. In this case the applicants were Sri Lankan Tamils who had been returned. Their article 3 claim was unsuccessful, even though they had been ill-treated again when sent back. The court held that this was not reasonably foreseeable at the time the U.K. decided to return the applicants. It relied to some extent on the experience of the U.K. authorities in this area and on objective evidence of an improvement in conditions. As to the plight of the applicants, the court concluded that there was nothing to distinguish their cases from others. In addition, the court adopted a generous interpretation of judicial review in the U.K. context in relation to the applicants' article 13 claim. This is not to argue that the court has been unwilling to work at the boundaries of article 3. In *Ahmed* v. *Austria,*[12] the court appeared to have little difficulty with the idea that persecution could emanate from non-state agents, and *Chahal* v. *UK*[13] demonstrated the absolute nature of the article 3 protection. At a time when many states were showing concern about the political activities of asylum seekers, the court made an important intervention by stressing that

the behaviour of the individual is not a material factor; the exclusive focus is on the risk of ill-treatment upon return. In assessing this risk, the court has emphasized the importance of a rigorous and independent determination process. In *Jabari* v. *Turkey,*[14] the court held that a strict time-limit for excluding asylum claims effectively denied access to a rigorous determination process. This point is also evident in the rather different case of *Amuur* v. *France,*[15] where the court stated that confinement should not "deprive the asylum seeker of the right to gain effective access to the procedure for determining refugee status."[16] The court held in this case that confinement of the applicants in the international zone, and at an airport hotel, constituted a violation of article 5(1). French law at the time was inadequate, and the guidelines did not permit the domestic courts to intervene effectively.

Article 8 is also relevant to the plight of refugees and asylum seekers. Although there is much discussion of globalization, states continue to be assertive in this area. The state is alive and well in the areas of asylum and immigration law. Human rights law thus assumes an important place in shaping and directing this instinct in humane directions and in some cases preventing the state from acting in the way it wishes to. Article 8 guarantees the right to private and family life. It is often raised in deportation cases where an individual has established family connections.[17] Deportation becomes an option for states when the individual has been involved in criminal activity, or other action that triggers the process in domestic law.[18] The European convention has been used to raise rights-based issues in this process; in particular, whether the deportation action is proportionate to the legitimate aim that is pursued by the state. These cases involve difficult balancing exercises, and the jurisprudence of the court is open to some criticism for its lack of clarity. Nevertheless what it reveals is that human rights law can have an impact in an area that many states regard as central to the self-definition of the modern state. In other words, the case-law of the European convention reveals that human rights law can have a practical impact on the treatment of asylum seekers. It is thus a valuable tool in the general struggle to secure refugee protection principles.

The courts in the U.K. have an obligation to take the jurisprudence into account, but there is no requirement that they must follow it. This allows room for the progressive development of convention rights. In the U.K. context, this is likely to have a significant impact on asylum law. The jurisprudence of the convention institutions reveals the impact that human rights law can have. However, it also shows the gap in monitoring at the heart of refugee and asylum law. While there is little doubt that the existing human rights bodies can fulfill a useful function in providing an international form of redress for asylum seekers, it is worth considering a dedicated monitoring mechanism for refugee law. As the UNHCR embarks on a global consultation, it is now time to introduce the idea of international forms of regulation of state practice (I would put it as strongly as that) into the area of refugee law. Human rights law and institutions can, as I have noted, play their part. However, this should not become an excuse to avoid the difficult task of renewing refugee law and practice. In this process of renewal we should not exclude the idea of substantial institutional reform at the international level.

Conclusion

This is an important time in the debate on refugee law. It is generally accepted that states are pursuing an agenda of restriction. Canada, so often looked to as an example of good practice, seems to be following this depressing international trend. How do we counter this? The challenge is to make use of the existing tools to struggle to secure decent treatment for refugees and asylum seekers, while presenting an alternative narrative to the dominant logic in the international community at present. Human rights law can play a part. The European Convention on Human Rights has been an important tool for asylum seekers in Europe. However, refugee lawyers must fundamentally rethink their own subject in order to ensure not only that it is revitalized but that it is relevant to the changing dynamics of the international community and international forms of regulation. There is a need for sustained dialogue about how this can be achieved. In this dialogue we must be careful to protect what we as refugee lawyers have achieved already, but we should not be afraid to advance models of protection that would guarantee better treatment for the displaced. In particular, there is a pressing need for a form of regulation of national practices that operates at the international or regional level. If anything, this would take the pressure off the human rights mechanisms and ease concerns about the current lack of uniformity in application. Refugee law can be made to work. However, we should not rule out progressive reform. The struggle is to find those willing to act as advocates for a different vision of refugee protection and then to make sure that their voices are heard. The UNHCR has a leading role to play in ensuring that this happens at the national, regional, and international levels.

Notes

1. See Colin Harvey, *Seeking Asylum in the UK: Problems and Prospects* (London: Butterworths, 2000).
2. This point is developed further in Colin Harvey, "Dissident Voices: Refugees, Human Rights and Asylum in Europe," *Social and Legal Studies* 9 (2000): 367–96.
3. *Convention relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137, Article 1D-F.
4. *Human Rights Act* 1998 s. 1(1). Articles 2-12 and 14 of the Convention; Articles 1-3 of the First Protocol; and Articles 1-2 of the Sixth Protocol; as read with Articles 16-18 of the Convention.
5. *Ibid.*, s. 3.
6. *Ibid.*, s. 4.
7. *Ibid.*, s. 4(6).
8. *Ibid.*, s. 10.
9. *Ibid.*, s. 2(1).
10. (1989) 11 EHRR 439.
11. (1992) 14 EHRR 1.
12. (1996) 24 EHRR 278.
13. (1996) 23 EHRR 413.
14. Judgment of 11 July 2000.
15. (1996) 22 EHRR 533.
16. Para. 43.
17. See, for example, *Beljoudi* v. *France* (1992) 14 EHRR 803; *Nasri* v. *France* (1995) 21 EHRR 458; *Boughanemi* v. *France* (1996) 22 EHRR 228.
18. It has also been raised in entry cases. See, for example, *Gul* v. *Switzerland* (1996) 22 EHRR 93.

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Access, Asylum and Atrocities: An Unholy Alliance?

Joseph Rikhof

Abstract

This article explores the international and Canadian dimensions of the crossroads between criminal law on one hand and the immigration and refugee law on the other, with special emphasis on the regulation and jurisprudence regarding criminal activities such as terrorism, organized crime, genocide, war crimes, and crimes against humanity. In addition to examining the context of international policy and the international criminal law in this area, the article also describes in detail the Canadian case-law in relation to the sections in the Immigration Act that address these types of serious criminality, such as the admissibility provisions and the exclusion clauses. At the same time, the policy of the Canadian government is coming to grips with its international obligations when dealing with persons involved in such criminal activities.

Résumé

Cet article explore les dimensions canadiennes et internationales du carrefour où se croisent d'une part la loi criminelle, et de l'autre, la loi sur l'immigration et le droit d'asile, avec une emphase toute particulière sur les règlements et la jurisprudence concernant les activités criminelles, comme le terrorisme, la criminalité organisée, le génocide, les crimes de guerre et les crimes contre l'humanité. En sus d'un examen du contexte politique international et du droit criminel international dans ce domaine, l'article décrit aussi dans les détails la jurisprudence canadienne concernant les sections de la Loi sur l'immigration qui s'adressent à ce type de criminalité grave, telles que les provisions sur l'admissibilité et les clauses d'exclusion. Par la même occasion, l'article discute de la politique du gouvernement canadien face à ses obligations internationales en ce qu'il s'agit de personnes impliquées dans de telles activités criminelles.

Introduction

Canada is, on the whole, a welcoming place for refugees and immigrants, and many deserve this welcome. Many, but not all. Among the people who want to come to Canada because of their genuine fear of persecution in the country of origin or to seek a better life, there are some whose backgrounds are suspect because they are serious criminals. Their number is not high; only a small percentage of them are investigated because of a possible criminal past.[1] However, because of the seriousness of the allegations (war crimes, genocide, crimes against humanity, terrorism, organized crime) and the high-profile, emotionally charged nature of the proceedings dealing with these allegations, the impact of cases involving criminal refugee claimants and immigrants goes far beyond their small number.

While immigration policy has always been international in outlook, the law underlying this policy has until recently been much more parochial, regulating access and asylum primarily from a domestic perspective. This has changed in the last decade, especially when dealing with criminals. More and more aspects of international criminal law have found their way into the Immigration Act, either directly by reference to international law concepts in its provisions or indirectly as a result of the jurisprudence of the Federal Court. This article intends to comprehensively examine the aspects of international criminal law that have had or will have an important impact on immigration and refugee law: the regulation of war crimes, crimes against humanity, genocide, terrorism, and organized crime.

There exists a vast discrepancy, internationally and in Canada, in the amount of attention given to the crimes discussed in this article. The approach taken to war crimes and crimes against humanity has progressed the furthest in that the prohibition of these crimes has been the subject

of a comprehensive legal regime and of widespread international and national enforcement. In contrast, the regulation of terrorist activities has been piecemeal and in response to specific crises, with no possibility at the moment for international adjudication,[2] while legally targeting organized crime internationally is still in its infancy. This discrepancy, which extends in Canada also to the policy level, finds its reflection in this article, where most of the discussion will be about war crimes and crimes against humanity.

International Crimes: An International Context

War Crimes and Crimes against Humanity

There have always been war criminals; there have been war criminals as long as human beings have settled their political differences violently rather than peacefully.[3] However, the manner in which society and the international community have dealt with persons who violated rules established for the conduct of war have differed over time.[4] The last century, and especially the last couple of decades, have seen a remarkable change in attitudes and approaches towards people who commit atrocities such as war crimes and crimes against humanity.

While this is not the place for detailed discussion of the varied responses to war criminals (a term used here also for persons who were involved in genocide and crimes against humanity, and not only those who violated the rules of war), it is still useful to point out that since the Nuremberg trials after the Second World War, the international community and individual countries have developed a number of means to address the terrible turmoil caused by serious violations of human rights.

Persons who committed war crimes during the Second World War were initially criminally prosecuted by both the international military tribunals in Nuremberg and Tokyo, and by courts in Europe and Asia. This effort essentially ended by the early sixties, and little more was done until the eighties, when countries such as Canada, Australia, the United States, and the United Kingdom renewed their efforts to bring war criminals from that era to justice. Australia and the United Kingdom chose the route of criminal prosecution, while the United States placed its trust in revocation of citizenship and deportation for those who had gained their citizenship by misrepresenting their activities during the Second World War. In 1987 Canada decided to use both approaches.

On the whole it has become clear that in recent times prosecution of war criminals of the Second War has been less successful than the remedy of revocation and deportation. Of the fewer than ten prosecutions attempted in Canada, Australia, and the United Kingdom in the last fifteen years, only one was successful, in the United Kingdom in 1999.[5] The success rate for the revocation/deportation approach has been much higher,[6] especially in the United States.

The response to war crimes committed since the Second World War covers an even larger spectrum. There have been criminal investigations or prosecutions in Europe against the perpetrators of war crimes in Yugoslavia and the genocide in Rwanda; countries such as Switzerland, Germany, Denmark, Belgium, France, and the Netherlands come to mind. Other countries have started criminal proceedings against their own nationals who had been involved in crimes against humanity against fellow citizens during earlier regimes; Ethiopia has established the office of the special prosecutor for crimes committed during the Mengistu regime; Rwanda is trying tens of thousands of persons involved in the 1994 genocide; and in Chile the way has been cleared to prosecute Augusto Pinochet.

Internationally, the atrocities committed in Yugoslavia and Rwanda resulted in action by the United Nations Security Council, which set up specialized tribunals to apportion justice to the principal actors in these conflicts. These tribunals are the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). There have been calls for other international tribunals to address crimes against humanity committed in places such as Cambodia, East Timor, and Sierra Leone.

A major step internationally in pursuing war criminals has been the Statute of the International Criminal Court of July 17, 1998,[7] which gives the International Criminal Court jurisdiction to hear cases involving genocide, war crimes, and crimes against humanity without the territorial limitations now associated with the ICTY and ICTR. The Statute will come into force when sixty countries have ratified it, likely within the next couple of years.[8]

Still within the realm of criminal remedies have been two important developments in extradition law, both of which have to do with immunity for heads of state. Traditionally, heads or ex-heads of state cannot be prosecuted or extradited anywhere for any crime committed while functioning as head of state. An exception has now been made by the British House of Lords in the Pinochet case,[9] and by the ICTY when it indicted Yugoslav President Milosevic.[10] In both situations—that of former head of state Pinochet and of Milosovic, who was head of state at the time of indictment—it has now been accepted that immunity cannot be invoked when the crime is genocide, a war crime, or a crime against humanity. The result of these two

developments has been that some (ex-) heads of state have considered it prudent not to leave their countries for fear of extradition requests.[11] As well, in the Pinochet situation, Argentina and a number of European states, apart from Spain which initiated the original request for his extradition, also wanted him for trial in their countries.

A number of other, non-criminal, remedies are being employed to make life difficult for war criminals. Provisions in the immigration and refugee laws of European countries, Canada, Australia, and the United States are good examples of resorting to civil means to obtain some vindication for the victims of human rights abuses. However, these provisions and their effectiveness vary widely from country to country. Another course of action is pursued in the United States where perpetrators of atrocities must pay compensation to their victims.[12]

Last, a number of countries have confronted the past using an entirely different means: the route of truth and reconciliation commissions. They preferred a more contextual approach as opposed to bringing to justice a limited number of individuals. The best known are such commissions in South America (Bolivia, Uruguay, and Argentina in the eighties, and Chile in the nineties), Latin America (El Salvador and Guatemala in the nineties) and Africa (Uganda and Zimbabwe in the eighties, Chad, South Africa, and Rwanda in the nineties, and even more recently in Nigeria and possibly Sierra Leone), although there has also been such work done in the Philippines and Germany.[13]

Finally, sometimes more than one remedy has been employed to deal with atrocities. The Rwandan genocide resulted in the establishment of an international tribunal, prosecutions of its own nationals by Rwanda, prosecutions by other countries, deportations, transfers to the ICTR tribunal, and a truth and reconciliation commission. At the moment there are discussions about creating a mixed international/domestic tribunal in Sierra Leone, while also examining the possibility of a truth and reconciliation commission as well.

Genocide

While the international community has been the most active since the Second World War in dealing with war criminals,[14] other serious criminal activities have also been the subject of international regulation and enforcement. The most important of these are the crimes of genocide, terrorism, organized crime, and torture.[15]

While the crime of genocide has been the subject of an international convention since 1948 and found to be part of customary international law by the International Court of Justice in 1951,[16] no prosecutions of perpetrators of this crime occurred until 1996 when the ICTR charged Mr. Akeyesu[17] with this crime in the context of the 1994 genocide in Rwanda. Both the ICTY and ICTR have now used the genocide provision to lay charges against individuals involved in the Bosnian and Rwandan conflicts,[18] as have a number of European countries. Germany has been particularly successful, with four convictions so far.

Terrorism

Terrorism has been used as a political tool to change the behaviour of governments for over a century, but only in the last couple of decades has it become the subject of treaties that held individuals liable under international law. Since 1968, several forms of terrorism have been prohibited by widely accepted international conventions: hijacking;[19] unlawful acts of violence at airports;[20] crimes against internationally protected persons;[21] hostage taking;[22] criminals acts in relation to the physical protection of nuclear materials;[23] and unlawful acts against the safety of maritime navigation, including fixed platforms located on the Continental Shelf.[24] The United Nations General Assembly approved a resolution on December 15, 1997, to adopt the International Convention for the Suppression of Terrorist Bombings,[25] which penalizes bombing (which is defined) outside the state of which the perpetrator is a national. Most recently, the United Nations General Assembly also approved a resolution on December 9, 1999, to adopt the International Convention for the Suppression of Terrorist Financing.[26]

All these activities are considered terrorism, no matter who committed them, and no matter whether the acts were committed against a person's own government, a foreign government, or even against persons without connection to any government. The acts themselves are considered so reprehensible that they should be forbidden no matter what the context. Apart from these specific activities it has been impossible to agree on a definition of terrorism acceptable to the entire international community.[27]

In 1991 the International Law Commission of the United Nations unsuccessfully attempted to define terrorism ("acts against another state directed at persons or property and of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public").[28]

As well, a resolution of the General Assembly of the United Nations[29] states the following, which could be a useful and contemporary description of terrorism (in paragraph 1 and 2):

> 1. Strongly condemns all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whom-

ever committed; 2. Reiterates that criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them;

There is no international body to prosecute persons who have been involved in terrorist activities. Only individual states take legal action against alleged terrorists, by prosecuting them, extraditing them, or applying immigration remedies against them.[30]

Organized Crime

In addition to a number of international and regional political initiatives undertaken by many countries to combat organized crime, there have also been major inroads made on the international legislative front. As a result of the 1994 World Ministerial Conference on Organized Transnational Crime in Naples,[31] the General Assembly of the United Nations adopted on November 15, 2000, the United Nations Convention against Transnational Organized Crime and its two protocols, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea and Air.[32]

As with terrorism, only national enforcement action is possible.

Serious Criminality: The Canadian Immigration Legislation

The main provisions in the present Immigration Act for the types of serious criminality that have been the subject of consideration in the international community—genocide, war crimes, crimes against humanity, terrorism, and organized crime—can be found in the portion that regulates the admissibility of persons to Canada.

The prohibition against persons involved in organized crime is set out in subparagraph 19(1)(c.2) of the Act and indicates that membership in an organization that has a pattern of criminality leads to a finding of inadmissibility; both present and past membership is covered by this section.[33]

The inadmissibility provisions for terrorism can be found in four subparagraphs, which together make a wide range of terrorist activity subject to scrutiny: any commission of terrorist activities carried out personally or as a member of a terrorist organization, whether these activities were done in the past or the present or will happen in the future. The operative sections are 19(1)(e)(iii), 19(1)(e)(iv)(C), 19(1)(f)(ii), and 19(1)(f)(iii)(B).[34]

Ensuring that persons who have been involved in genocide, war crimes, and crimes against humanity cannot enter Canada or, if they are in Canada, will be removed, is the subject of three provisions in the Act: subsections 19(1)(j), 19(1)(l), and 19(1.1). Subsection 19(1)(j) deals with persons who have been involved in such crimes directly or indirectly,[35] while the combination of subsections 19(1)(l)[36] and 19(1.1)[37] goes further and makes inadmissible any high official of a regime that the Minister of Citizenship and Immigration has designated as a regime that was or is engaged in terrorism, genocide, war crimes, or crimes against humanity. So far, seven regimes have been designated:

- the Bosnian Serb regime between March 27, 1992, and October 10, 1996 (designated June 16, 1993, later extended on August 15, 1997)
- the Siad Barré regime in Somalia between 1969 and 1991 (designated October 12, 1993)
- the military governments in Haiti between 1971 and 1986, and between 1991 and 1994, except the period August–December 1993 (designated April 8, 1994)
- the former Marxist regimes of Afghanistan between 1978 and 1992 (designated October 21, 1994)
- the governments of Ahmed Hassan Al-Bakr and Saddam Hussein in power in Iraq since 1968 (designated September 3, 1996)
- the government of Rwanda under President Habyarimana between October 1990 and April 1994, as well as the interim government in power between April and July 1994 (designated April 27, 1998)
- the governments of the Federal Republic of Yugoslavia and the Republic of Serbia (under Milosevic) since February 28, 1998 (designated June 30,1999)[38]

It is not necessary to show that the persons were involved in all the activities described above, but only that there are reasonable grounds to believe that they were. The standard of proof of reasonable grounds is low: between mere suspicion and balance of probabilities.[39] On the other hand, in order not to cast the net so wide that persons who have been on the periphery of organizations involved in nefarious activities are caught, all of these provisions, except subsection 19(1)(j), contain so-called exemption clauses that allow the Minister of Citizenship and Immigration to overcome the inadmissibility and allow landing or entry if the Minister judges it not to be detrimental to the national interest.

The Immigration Act does not address only terrorism, organized crime, genocide, war crimes, and crime against humanity in the context of admissibility. These concepts permeate all aspects of the processes set out in the Act.[40] They can be found in the provisions dealing with eligibil-

ity to refer a claim to the Convention Refugee Determination Division (CRDD) of the Immigration and Refugee Board,[41] appeal rights to the Immigration Appeal Division (IAD),[42] landing of refugees,[43] access to the Post-Determination Refugee Claimant in Canada (PDRCC) process,[44] removal from Canada,[45] and the provisions regulating the special security proceedings and protection of information.[46] They also play a role in the humanitarian and compassionate (H&C) process.[47]

Serious criminality is also a factor for refugee determination as a result of the Schedule to the Immigration Act that incorporates exclusion clauses E and F of the 1951 Refugee Convention. Exclusion ground F, which deals with criminality, does not allow persons who have been involved in crimes against peace, war crimes, crimes against humanity, serious non-political crimes, and acts against the principles and purposes of the United Nations to obtain refugee status.

Serious Criminality: The Canadian Immigration Jurisprudence

Terrorism

The courts in Canada have been as reluctant as the international community to define the term *terrorism,* which is used in subparagraphs 19(1)(e)(iii), 19(1)(e)(iv)(C), 19(1)(f)(ii), and 19(1)(f)(iii)(B)[48] of the present Immigration Act. Instead of providing a definition, both the Appeal and the Trial Divisions of the Federal Court, in the *Suresh* case, and the Federal Court of Appeal in the *Ahani*[49] case, make a number of propositions about terrorism:

- There is no need to define the term. "When one sees a 'terrorist act,' one is able to define the word."
- The term in not vague or imprecise. The term is defined in a dictionary as "using terror and violence to intimidate, subjugate, etc. especially as a political weapon or policy."
- The term *terrorism* or *terrorist act* must receive a wide and unrestricted interpretation.
- In general, attacks on civilians are terrorist attacks.
- Those who freely choose to raise funds to sustain terrorist organizations bear the same guilt and responsibility as those who actually carry out the terrorist acts. Persons who raise funds for the purchase of weapons, which they know will be used to kill civilians, are as blameworthy as those who actually pull the triggers.
- Terrorism includes the act of assassination directed at silencing political dissidents who seek to bring about change through the exercise of free expression.[50]

Membership

The notion of "membership," which is used not only in some sections of the Immigration Act described above,[51] but has also received judicial interpretation in the context of exclusion ground F(a),[52] has been given the following parameters:

- To be a member of an organization, formal membership is not required. Simply belonging to such an organization is sufficient.
- An individual is a member of an organization if one devotes oneself full time or almost full time to the organization, or if one is associated with members of the organization, especially for a lengthy period of time.
- Belonging to an organization is assumed when people join voluntarily and remain in the group for the common purpose of actively adding their personal efforts to the group's cause.[53]
- There is no need to identify the specific acts in which the individual has been involved because of the notoriety and singular purpose of the group.
- Knowledge of the purpose of the organization can be imputed from the activities one is involved in and is presumed if one belongs to this type of organization. This presumption can be rebutted.[54]

Organized Crime

The section dealing with organized crime has not yet received any judicial interpretation with respect to the substantive terms used in section 19(1)(c.2)[55] although several judicial review applications that challenged the refusal or removal based on this section have been dealt with by the court on other grounds.[56]

Genocide, War Crimes, and Crimes against Humanity

General

The vast majority of the case-law that the Federal Court developed in the area of serious criminality has been in the area of complicity for crimes against humanity for exclusion ground F(a). The court has decided over eighty cases dealing with F(a) matters since 1992, primarily to determine where to lay the boundaries for liability of persons who had not personally committed such atrocities.[57]

Apart from the contribution by the Federal Court to international law in war crimes and crimes against humanity in the area of complicity, most substantive law dealing with the crimes of genocide, war crimes, and crimes against humanity has been generated by the ICTY, the ICTR,[58] and the negotiations surrounding the Statute of the Interna-

tional Criminal Court.

The development of crimes under international law has not always taken place consistently. As a result, there is overlap between a number of crimes, such as between genocide and crimes against humanity; war crimes and crimes against humanity; crimes against humanity and terrorism; and war crimes and terrorism.

These crimes can be described as follows:

- *Genocide:* the deliberate and systematic destruction, in whole or in part, of a national, ethnic, racial, or religious group, whether committed in times of peace or in times of war, by state officials or by private individuals.
- *Crimes against humanity:* murder, extermination, enslavement, torture, and any other inhumane acts committed against civilians, in a widespread or systematic manner, whether or not the country is in a state of war, and regardless whether the act is in violation of the territorial law in force at the time. The acts may have been committed by state officials or private individuals, and against their own nationals or nationals of other states.
- *War crimes:* criminal acts committed during international armed conflicts (war between states) and civil wars, which violate the rules of war as defined by international law. These acts include the ill-treatment of civilian populations within occupied territories, the violation and exploitation of individuals and private property, and the torture and execution of prisoners.

Differences between genocide and crimes against humanity

Historically, genocide was considered a particularly reprehensible crime against humanity, and as a result every genocide is still also a crime against humanity; the reverse is not true, however. The difference between genocide and crimes against humanity is as follows:

- The intention for genocide is narrower, namely an "intent to destroy," while for crime against humanity it is "knowledge of an attack."
- The behaviour targeted for genocide is more reprehensible, namely the destruction "in whole or in part, of a group," while for crimes against humanity, it is "widespread or systematic attack."
- The circle of victims for genocide is narrower, namely "a national, ethnical, racial, or religious group," as opposed to "any civilian population" for crimes against humanity.[59]

Differences between war crimes and crimes against humanity

Traditionally, the difference between these two crimes was easier to identify.

War crimes could be committed only during a time of war between two countries. They could be committed only against persons who were nationals of the opposite side of the conflict. On the other hand, someone could commit a war crime even it was done as an isolated incident and even if the perpetrator was acting in an individual (and not based on state authority) capacity.

Crimes against humanity could be committed against any national but only as part of a widespread or systematic policy, action, or plan, and only if connected to the commission of a war crime by individuals acting on behalf of a state.

As a result of the fact that international law now includes as war crimes acts committed during non-international armed conflicts, and the fact that the requirements of the connection to a war and acting on behalf of a state have been eliminated in the concept of crimes against humanity, the lines between those crimes have become blurred. There are still some differences, however:

- Isolated reprehensible acts do not amount to crimes against humanity, while even one atrocity can result in the commission of a war crime. This does not mean that a single act can never be a crime against humanity, but it has to be shown that this one act was the result of the implementation of widespread or systematic policy.
- War crimes, even committed in a civil war, can occur only when a certain threshold of intensity has been reached between the two parties in this conflict. For instance, the actions of police officers conducting themselves violently during riots do not amount to war crimes. Crimes against humanity can occur in any setting: international wars, civil wars, and even in times of peace. This would mean that a particular activity, for instance a killing of a civilian during a civil war, could be both a war crime and a crime against humanity if the other requirements of each crime were fulfilled.
- While some of the enumerated prohibited acts can be both war crimes and crimes against humanity, other acts fall under one category only. For example, destruction of certain types of property can be a war crime but can never be a crime against humanity, while persecution is a crime against humanity but not a war crime.

Differences between crimes against humanity/war crimes and terrorist acts

International law has determined that only certain narrowly defined activities amount to terrorism, although a recent agreement, the International Convention for the Suppression of Terrorist Bombings, has a wider application and penalizes bombings in public places, government facilities, public transportation systems, or infrastructure facilities. War crimes and crimes against humanity cover most of these terrorist activities but also include others that are not considered terrorism.

On the other hand, terrorist acts can occur in a context wider than crimes against humanity, since they need not be committed in a widespread or systematic manner and can be committed against persons and property. They are also wider in this context than war crimes because they can be committed both in time of war and peace. As with the overlap between war crimes and crimes against humanity, it is possible that one activity can fit the description of all three crimes at the same time, for instance where a person belongs to a group that has conducted a bombing campaign during a civil war.

War Crimes, Genocide, and Crimes against Humanity: The Canadian Policy

The Canadian policy is based on two distinct but related elements. The first one is that Canada will not be a safe haven for persons who have been involved in atrocities abroad. The second element is that in pursuing such persons, Canada will abide by its international obligations.

The no safe haven policy was most recently articulated as follows: "The message is clear. Those individuals who have committed a war crime, a crime against humanity or any other reprehensible act during times of conflict, regardless of when or where these crimes occurred, are not welcome in Canada."[60]

In international law, states incur obligations from the operation of conventional or customary international law. In conventional international law, the instruments that are applicable are the 1949 Geneva Conventions and Additional Protocols, the Genocide Convention, Torture Convention, and the "terrorism" conventions, the last two insofar as the activities mentioned in these conventions can also amount to war crimes or crimes against humanity. Crimes against humanity finds its source in customary international law.

The four Geneva Conventions[61] are primarily directed towards international armed conflict, that is, armed conflict between two High Contracting Parties or situations of occupation of territories. The Conventions can also apply to non-international armed conflicts where the parties to the conflict have agreed to apply the provisions of the Conventions.

The four Geneva Conventions contain similar definitions of grave breaches or war crimes, that is, serious breaches of the obligations under the Conventions, and require High Contracting Parties to take the following measures with respect to grave breaches:

- enact legislation to provide penal sanctions for persons committing (or ordering to be committed) any of the grave breaches of the Convention
- search for persons alleged to have committed such grave breaches
- bring such persons, regardless of their nationality, before their own courts

On the last point, if the state prefers, it may, "in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting party has made out a *prima facie* case." This is the basis for what is known as the prosecute or extradite provision of the Geneva Conventions.

Additional Protocol 1, Article 88, imposes on High Contracting Parties the obligation to provide the greatest measure of assistance in connection with criminal proceeding brought in relation to grave breaches of the Conventions or of the Protocol. States are required to co-operate in extradition and consider the extradition request of the State in whose territory the alleged offence has occurred.

While there is no positive obligation on State Parties to the Genocide Convention to prosecute persons accused of committing genocide unless the genocide was committed in the State's territory, there is a positive obligation on States Parties to grant an extradition request "in accordance with their laws and treaties."

In addition to being covered by the grave breaches provisions of the Geneva Conventions, the prohibition against torture is also covered by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This convention applies during times of armed conflict, as well as during times of peace.

The convention places an obligation on State Parties to make acts of torture offences under their criminal law and, if persons alleged to have committed such offences are found on the State's territory, without exception and whether or not the offence was committed in its territory, must submit the case to its competent authorities for prosecution or extradition.

At the moment, there are eleven conventions that regulate terrorism and to which Canada is a party.[62] They all contain a duty to extradite or prosecute, of which the latter

is expressed as follows: "The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State."

Although it is argued that there is a general duty to prosecute or extradite those accused of crimes against humanity, there is no convention that covers crimes against humanity stating this. Therefore, one must look to customary international law to determine whether there exists an obligation to extradite or prosecute persons who have committed crimes against humanity.

Although Canada is not party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity,[63] this Convention could be considered, in some respects, to be an expression of customary international law. The Convention does not contain a prosecute or extradite provision but reflects the general obligation on States to extradite those accused of war crimes in accordance with international law. There are also two United Nations General Assembly Resolutions that deal with the issue of war crimes and crimes against humanity in this context. The first one is the 1970 UN Resolution on War Criminals,[64] which refers only to extradition in the same general terms as the convention mentioned in the preceding paragraph. The second is the 1973 UN Resolution on Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity.[65] This resolution states that war crimes or crimes against humanity, wherever committed, are subject to investigation and prosecution. Although it states that, as a general rule, prosecution should occur in the countries in which the offences were committed, it does not exclude prosecution in other countries. There is no explicit prosecute or extradite provision, but there is a call for cooperation among states in the prosecution of such crimes. Furthermore, whether UN General Assembly resolutions constitute customary international law is a controversial issue among international legal scholars and not free from doubt by any means.

The statutes of the two International Criminal Tribunals, established by the UN Security Council and thus binding on all states, do not contain prosecute or extradite provisions for alleged criminals within their jurisdiction. There are, however, obligations on States to cooperate with the Tribunals in the investigation and prosecution of accused persons, as well as the obligation to transfer accused persons to the Tribunals.[66] The same will apply to the International Criminal Court when its Statute comes into force.[67]

The following conclusions that underlie Canada's policy on international obligations can be drawn from the above:

- There is a duty to extradite or prosecute persons who have committed war crimes during international armed conflicts.
- There is also a duty to extradite persons who have committed genocide.
- Likewise, there is a duty to transfer persons who committed war crimes or crimes against humanity in the former Yugoslavia since 1991, or in Rwanda in 1994, to the International Criminals Tribunals established for this purpose.
- There is at the moment no positive legal obligation to prosecute or extradite people who have committed war crimes during non-international armed conflicts or who have committed crimes against humanity unless:
  - these same acts also amount to torture
  - these acts fall within the definitions of the "terrorism" conventions

In order to implement the two elements of the Canadian policy, three departments have created war crimes sections. The RCMP and the Department of Justice have had such sections since 1987 but have dealt primarily with alleged war criminals from the Second World War era, until recently when they also expanded into the investigation for possible prosecution of persons involved in modern-day war crimes—those atrocities committed since WWII. The Department of Citizenship and Immigration established a war crimes section only in 1996, and its mandate is limited to applying immigration remedies, such as overseas refusal, exclusion, refusal of landing and deportation to modern-day war criminals.[68]

The war crimes sections of the three departments have developed a *modus operandum* that brings together efficiently and coherently the two elements of the Canadian war crimes policy. All allegations received by the three departments are examined by an operations group with members of these three sections. This operations group has been and will be making an assessment of each individual allegation to determine whether the allegation should be investigated by the RCMP/Justice for possible prosecution, or by the Department of Citizenship and Immigration in order to apply immigration remedies. If the allegation discloses a possible war crime, genocide, a terrorist activity, or torture, the file is automatically referred to the RCMP/Justice. If the allegation discloses a crime against human-

ity the file is not automatically referred, but a further examination is conducted to assess the seriousness of the crimes against humanity and only for the most serious ones the RCMP/Justice will open their own file. So far, over 800 allegations of atrocities have been examined by the interdepartmental operations group, of which about 10 per cent were referred to the RCMP/Justice.[69]

Referral of an allegation is only one step in the cooperative effort of the three war crimes sections to implement the war crimes policy. If a file has been referred from CIC, CIC will continue processing the file up to the point of removal; if a person can be removed but is also the subject of a RCMP/Justice investigation, the operations group will make an *ad hoc* decision on how to proceed with that particular file at that time, taking into account such factors as the state of the criminal investigation versus allowing a person who has been determined to be a war criminal under the immigration system to remain in Canada. On the other hand, a referral to the RCMP/Justice will not necessarily result in the laying of criminal charges; most cases that are referred arise out of allegations or evidence that are not admissible in criminal court, so that other corroborative evidence needs to be found to support the case. If diligent investigative efforts have been made and there is still insufficient evidence to lay charges, the file is referred to CIC in order to use immigration remedies against the subject of these allegations.

This system ensures that Canada's international obligations to investigate and prosecute persons who have been involved in atrocities are respected without compromising the policy of zero tolerance for war criminals, by using other immigration remedies if it is not possible or necessary to utilize the extradition or prosecution option, thereby preventing Canada from becoming an attractive place for human rights abusers to hide.[70]

Bill c-31 and Its Impact

On April 6, 2000, the government introduced Bill C-31 to replace the present Immigration Act entirely and permit the immigration and refugee system to be more responsive to the needs and challenges of the future.[71] The underlying premise of the Bill was to open the front door to genuine immigrants and refugees but close the back door to persons who do not need or who abuse Canada's immigrant and refugee system.

The Bill did not contain any additional provisions that specifically deal with war criminals.[72] For the most part, all the provisions that deal with war criminals, which have been effective in the present Immigration Act, were been transferred to the Bill. In a number of instances, the Bill contained sections that had application to suspected war criminals as well as to other categories of persons involved in very serious criminality, such as organized crime or terrorism. The purpose of these sections was to streamline some of the processes that are often cumbersome and lengthy, as well as to eliminate the distinctions in the immigration processes that now exist between organized crime, terrorism, and war crimes.[73]

Some of these new provisions ensured that:

- access to the IAD was prohibited entirely for all serious criminals[74]
- exclusion was extended from the notion of refugees to the new concept in the Bill of persons in need of protection[75]
- persons whose refugee claim had been refused by the CRDD could not enter the refugee stream again; this would have included persons who had been excluded for the commission of war crimes and crimes against humanity. At the moment, it is possible for persons who have been rejected to make subsequent claims[76]
- it would no longer have been necessary to have the Minister of Citizenship and Immigration declare that it is contrary to the national interest to deny access to the CRDD to people involved in very serious criminality; an inadmissibility finding that a person belonged to such a category would have been is sufficient for this purpose[77]
- the threshold for removing persons to their country of origin who have been found to be refugees but also have committed very serious criminal activities was changed from "danger to security of Canada" to either "danger to the security of Canada or "contrary to the national interest"[78]
- for the Pre-Removal Risk Assessment, the Minister would have taken into account (when considering an application for protection from persons who were serious criminals or who were excludable) whether such persons would pose a "danger to the security of Canada" or if it would be contrary to the national interest to allow such an application[79]

Conclusion

The last decade has seen a trend towards international criminalization of a number of activities that the global community has come to view as reprehensible from a moral point of view while at the same time politically highly destabilizing. A concerted effort has taken place to address these activities by developing international legal instruments as well as enforcement mechanisms. The result is

uneven. On the war crimes front, which includes genocide and crimes against humanity, there has been real progress in bringing the law into accordance with the political reality of civil wars and the wide abuse of human rights, at the same time as the international community and individual states have started to enforce those legal norms. The situation with terrorism and organized crime is different, for now there are a number of international treaties of which the most recent ones against terrorism and the ones pertaining to organized crime could have a large impact, but for the moment have limited application, namely only when individual states are willing to act. It has not yet been possible to develop an international enforcement mechanism to deal with these two types of crimes.

Canada's experience mirrors the international one. In the area of war crimes and crimes against humanity, both the judiciary and the Canadian government have developed a sophisticated model for dealing with persons involved in such crimes. The Federal Court jurisprudence in the area of complicity for crimes against humanity gave a wide interpretation to exclusion ground F(a)[80] and was ahead of—although not at odds with—international law,[81] while the government has developed a method of ensuring that all allegations of war crimes are dealt with appropriately, either by prosecution or immigration remedies.

The Federal Court has also been willing to freely interpret certain concepts related to terrorism and organized crime but has avoided tackling the most vexing issue—a definition of the term *terrorism* itself. And it has not been necessary for the government to determine which law to apply—criminal or civil—for such activities, since the conventions with the most impact—the latest two terrorist conventions and the organized crime convention—have not yet been ratified by Canada.

It would appear that when taking together all the serious criminal activities discussed, the major sources of investigations are persons applying abroad and refugee claimants in Canada. In Canada a number of processes are used for refugee claimants or refugees against whom there are allegations of serious criminality. In the immigration context, not only is exclusion clause F used but also the non-eligibility provisions, if they are claimants, while refusal of landing, denial of appeal rights, and reliance on the *refoulement* provisions are levelled against them if they have obtained refugee status. Some of them are also investigated for criminal purposes if they had a connection to genocide, war crimes, and torture, or if their activities related to crimes against humanity have been particularly heinous.

In using immigration remedies to bring war criminals to justice, Canada is trying to adhere to all its international obligations, which sometimes are not easy to reconcile. A good example is the double obligation in the Torture Convention, one that contains a positive duty to prosecute or extradite a person who might have been involved in acts of torture,[82] while the second, a negative one, prohibits *refoulement* to torture.[83] Both provisions could very well apply to a refugee claimant who is excluded because of involvement in torture, and who is then investigated unsuccessfully by the RCMP/Justice for possible criminal charges because there is not sufficient evidence to meet the much higher burden in a criminal trial. A decision needs then to be made whether this person should be removed to his country of origin while he has raised the prospect of being tortured upon his return there. These are the cases for which there is no easy answer but where the government, academics, and non-governmental organizations can work together to bring about an acceptable solution for all concerned, but especially for the victims of such a person who might also be living in Canada and whose past agony will revive if they come eye to eye with their torturer.[84]

It will become necessary to ensure that persons involved in very serious criminality are taught that their crimes do not pay. One way of doing this is to have a system in which similar to national criminal law systems, perpetrators are investigated and then taken to justice. Whether they are brought to justice by the international community or by the courts and tribunals of individual countries matters less than the fact that perpetrators know that at some point in the future their actions will have consequences and that they will not be able to continue to do their deeds with impunity. What does matter in this war against impunity is the effectiveness of the remedies employed. Although is quite arguable that deporting a serious criminal to his or her country of origin might not be seen as a real solution in the bigger question of providing a deterrent, exacting retribution, or compensating the victims, like other efforts made in this area in the last decade, it is a first and important step to show possible perpetrators that their lives will not be made easy when trying to come to Canada.

If Canada's example of a combination of immigration remedies with the likelihood of criminal prosecution for cases with sufficient evidence to prosecute—as is now the case for persons involved in war crimes or crimes against humanity—will have resonance in the future in other countries and will result in similar action taken elsewhere, one hopes that the world will become a smaller place for human rights abusers and other serious criminals to commit their reprehensible activities unchecked.

Notes

1. See *Canada's War Crimes Program, Annual Report 1999-2000,* Appendix F (see CIC website at <http://www.cic.gc.ca/english/pub/war2000-e.html>). The number of refugee claimants investigated between 1992 and 2000 for atrocities is 2940; intervention for exclusion F(a) was sought by the Minister of Citizenship and Immigration in 356 cases; of these cases in which the Minister intervened, the Convention Refugee Determination Division of the Immigration and Refugee Board excluded a person 225 times. While this number is only in relation to exclusion clause F(a), this clause is used by far the most of all the exclusion clauses. For instance, at the Federal Court level, there have been over 80 cases decided in respect to F(a) (or F(c) cases dealing with crimes against humanity) between 1992 and 2001, while there have only been only 7 F(b) and 6 other F(c) cases at that level.
2. An attempt was made to include this crime in the Statute of the International Criminal Court but it was unsuccessful; see note 30 for more details.
3. See for instance Roy Gutman and David Rieff, eds., *Crimes of War, What the Public Should Know* (New York & London: W.W. Norton & Company, 1999).
4. See Christopher Greenwood, "Historical Development and Legal Basis" in Dieter Fleck, ed., *The Handbook of Humanitarian Law in Armed Conflict* (New York: Oxford University Press, 1999) 12-23.
5. Namely the Sawoniuk case. For a commentary, see Ian Bryan and Peter Rowe, "Role of Evidence in War Crimes Trial: The Sawoniuk Case" in *Yearbook of International Humanitarian Law* 2, 1999: 307-323. Another case, Serafimovich, was not successful. Canada launched four cases between 1985 and 1990; they were the cases of Finta, Pawlowski, Reistetter, and Grujicic. Only the Finta case was completed at trial where he was acquitted, and the decision was upheld by both the Ontario Court of Appeal and the Supreme Court of Canada. (For trial decision, see 69 O.R. (2nd) 557 (Ont. H.C.); for the pre-trial motions, see 50 C.C.C. (3d) 236 (Ont. H.C.); for the Ontario Court of Appeal decision, see 73 C.C.C. (3d) 65 (O.C.A.); for the Supreme Court decision, see [1994] 1 S.C.R. 701 (S.C.C.)). There have been three criminal prosecutions in Australia, namely the cases of Berezovsky, Wagner, and Polyukhovich, none of which resulted in a conviction; the decision of the High Court of Australia on pre-trial motions in the last case can be found in 101 Australian Law Reports 545 and 91 International Law Reports 1.
6. For Canada, see *Canada's War Crimes Program, Annual Report 1999-2000* at 8-9; for the U.S., see <http://www.us-israel.org/jsource/holocaust/rosenbaum.html>.
7. See <http://www.un.org/law/icc/statute/romefra.htm>.
8. Canada ratified the ICC Statute on July 7, 2000, as the fourteenth country to do so (see <http://www.un.org/law/icc/statute/status.htm>).
9. See Colin Warbrick, Elena Martin Salgado, and Nicholas Goodwin, "The Pinochet Cases in the United Kingdom" in *Yearbook of International Humanitarian Law* 2, 1999: 91-117.
10. See <http://www.un.org/ICTY/indictment/english/mil-ii990524e.htm>.
11. As well, the Pinochet case is cited as inspiration to attempt to bring the ex-dictator of Chad, Hissene Habre, to trial in Senegal where he is living at the moment; see the *Washington Post,* November 27, 2000, 3.
12. For instance by the Center for Justice & Accountability in San Francisco, <http://www.impunity.org>.
13. For an overview of the various means of bringing war criminals to justice see Yves Beigbeder, *Judging War Criminals* (New York & London: MacMillan Press, 1999); for truth commissions, see *Human Rights Quarterly* 16, 4: 597-675, articles by Priscilla B. Hayner, "Fifteen Truth Commissions—1974 to 1994: A Comparative Study," and Mark Ensalaco, "Truth Commissions for Chile and El Salvador: A Report and Assessment."
14. Apart from the Statutes of the Nuremberg and Tokyo Tribunals after the World War II and the more recent Statutes of the ICTY (see <http://www.un.org/ICTY>), ICTR (<http://www.ictr.org>) and ICC (<http://un.org/law/icc>), there have also been a number of international treaties that regulate the conduct during a war, including the prohibition against war crimes, namely the 1949 Geneva Conventions and their Additional Protocols of 1977; there are four Geneva Conventions: the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva I); the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva II); the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva III); and the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva IV). The text of the four Conventions can be found in Schedules I to IV to the Geneva Conventions Act, R.S.C. 1985, Chapter G-3. The articles dealing with war crimes are articles 50 (Geneva I), 51 (Geneva II), 130 (Geneva III), and 147 (Geneva IV) which is the most encompassing. The war crimes provisions of the 1949 Geneva Conventions have been supplemented by the 1977 Additional Protocol I, articles 11 and 85. For a discussion of the post–World War II case-law, see Rikhof, "War Crimes, Crimes against Humanity and Immigration Law," (1993) 19 Imm.L.R. (2nd) 18, at 30-46.
15. A number of other activities have also been the subject of international treaties that ask parties who have signed these treaties to criminalize the described behaviour in their national legislation and to ensure that persons who have been involved in that behaviour are either prosecuted or extradited to a country that is willing to prosecute those persons. Examples of such activities are the unlawful use of chemical weapons; incitement of hate, based on racial discrimination; slavery; drug trafficking on a large scale or with an international dimension; severe pollution of coastlines; interference with submarine cables; mercenarism; and acts against the safety of United Nations and associated personnel. See Cheriff Bassiouni, *Aut Dedere, Aut Judicare* (The Hague: Kluwer Law International, 1995), who sets out twenty-four categories of such crimes in the table of contents and on page 73. The difference is that genocide, terrorism, organized crime, and torture have a higher profile internationally in that they are either the subject of an enforcement mecha-

nism (such as for genocide where the ICTY and ICTR have put perpetrators of this crime on trial), a monitoring system (such as for torture where the UNCAT, the United Nations Committee against Torture, is active) or of international co-operation, often under the auspices of the United Nations (terrorism and organized crime). As both the Torture Convention and UNCAT system are well known, they will not be further discussed in this article.

16. The *Convention on the Prevention and Suppression of the Crime of Genocide* was adopted by General Assembly Resolution and opened for ratification in 1948. It came into force on January 12, 1951; Advisory Opinion of the International Court of Justice of May 28, 1951, on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, International Court of Justice Reports (1951), at page 23.
17. Case ICTR-96-4-I
18. The ICTY has issued one judgment so far in which genocide had been charged (Jelisic, Case IT-95-10-T, December 14, 1999) and the ICTR four judgments, namely in the Akayesu case (Case ICTR-96-4-T, September 2, 1998); the Kayishema/Ruzindana case (Case No. ICTR-95-1-T, May 21, 1999); the Rutaganda case (ICTR-96-3-T, December 6, 1999); and the Musema case (Case ICTR-96-13-T, January 27, 2000).
19. The *Convention for the Suppression of Unlawful Seizure of Aircraft* (860 UNTS 105) and the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* (974 UNTS 178).
20. The *Protocol for the Suppression of Unlawful Acts at Airports Serving International Civil Aviation* (ILM, Volume XXVII, 627).
21. The *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Including Diplomats* (1035 UNTS 168; ILM, Volume VIII, 41).
22. The *International Convention against the Taking of Hostages* (1316 UNTS 206; ILM, Volume XVIII, 1456).
23. The *Convention on the Physical Protection of Nuclear Material* (ILM, Volume XVIII, 1422).
24. The *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* (ILM, Volume XXVII, 668) and the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf* (ILM, Volume XXVII, 685).
25. UN Doc. A/52/653, Annex; article 2 provides that "any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility: (a) with the intent to cause death or serious bodily injury; or (b) with the intent to cause extensive destruction of such a place, facility or system, where such destruction results or is likely to result in major economic loss." The terms *State or government facility, infrastructure facility, explosive or other lethal device,* and *place of public use* are defined in article 1.
26. UNGA Resolution 54/109. At the moment, work is being done to prepare a *Convention on the Suppression of Acts of Nuclear Terrorism* (see A/AC.252/L3) and a comprehensive convention on international terrorism (see UN Doc. A/C.6/55/L.2).
27. There have been some attempts in Europe and the United States. The *European Convention on the Suppression of Terrorism* of 1977 defines terrorism in article 1 as follows (<http://conventions.coe.int/treaty/en/treaties/html/090.htm>):

    > For the purposes of extradition between Contracting States, none of the following offences shall be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives:
    >
    > a. an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970;
    > b. an offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971;
    > c. a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents;
    > d. an offence involving kidnapping, the taking of a hostage or serious unlawful detention;
    > e. an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons;
    > f. an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.

    In the U.K., the *Terrorism Act,* which came into force February 19, 2001 (<http://www.parliament.the-stationery-office.co.uk/pa/pabills.htm>) defines terrorism in section 1 as:

    > (1) The use or threat of action where (a) the action falls within subsection (2), (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.
    > (2) Action falls within this subsection if it (a) involves serious violence against a person, (b) involves serious damage to property, (c) endangers a person's life, (d) creates a serious risk to the health or safety of the public or a section of the public, or (e) is designed seriously to interfere with or seriously to disrupt an electronic system.
    > (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

    The U.S. defines this term in section 212(a)(3)(B)(ii) of the *Immigration and Nationality Act* (<http://www.ins.usdoj.gov/graphics/lawsregs/ina.htm>) thus:

    > As used in this Act, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:
    >
    > (I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).
    > (II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in or-

der to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(iii) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18, United States Code) or upon the liberty of such a person.

(iv) An assassination.

(v) The use of any-

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive or firearm (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(vi) A threat, attempt, or conspiracy to do any of the foregoing.

28. ILM, volume XXX, page 1592/3.
29. A/RES/51/120 of January 16, 1997.
30. Although the Rome Statute or ICC Statute was adopted on July 17, 1998, an Ad Hoc Committee on the Establishment of an International Criminal Court had already been operating in 1995, followed by a Preparatory Committee on the Establishment of an International Criminal Court between 1996 and 1998. This latter Committee included in its 1996 report the following crimes under the jurisdiction of an ICC: international terrorism, apartheid, torture, hostage taking, illicit drug trafficking, attacks against United Nations and associated personnel and serious threats against the environment, apart from genocide, war crimes and crimes against humanity (UN Doc. A/51/22). A report by this Committee during its meeting from March 16 to April 3, 1998, still included other crimes such as terrorism, crimes against United Nations and associated personnel and drug trafficking (see UN Doc. A/AC. 249/1998/CRP.8, pages 17/18). Even before the two special committees started their work, the International Law Commission had already been asked by the General Assembly of the United Nations in 1991 to work on a draft statute for an International Criminal Court. The ILC obliged in 1994 and included in its draft an article 20, which purported to give the court jurisdiction over two types of crimes, the first being inherent jurisdiction crimes over existing crimes under international law (such as genocide, aggression, serious violations of law and customs in armed conflict, and crimes against humanity), the second being jurisdiction over a number of exceptionally serious crimes of international concern, namely terrorist activities, war crimes, torture, apartheid, and drug trafficking (See UN Doc. A/CN.4/L.491/Rev.2 and General Assembly Official Records, 49th Session, Supplement No. 10, pages 66/79, 145/146 and 439). Eventually only three crimes remained within the ICC's jurisdiction: genocide, crimes against humanity and war crimes (articles 6-8 of the ICC Statute), while the door is left open to add the crime of aggression when a definition for that crime has been agreed upon (article 5.2 of the ICC Statute). The trial of two Libyan nationals in the Netherlands is not being conducted by an international criminal court but by a Scottish court, which has been transplanted to the Netherlands as result of an international compromise; it applies Scottish law and procedure before Scottish judges (see <http://www.law.gla.ac.uk/lockerbie/index.cfm>).
31. UN Doc. E/Conf/88.
32. UN Doc. GA/9822, which is the press release announcing it; UN Doc. A/RES/55/25 is the General Assembly Resolution; UN Doc. A/55/383 contains the Convention and its Protocols as appendices.
33. Section 19(1)(c.2) reads, "persons who there are reasonable grounds to believe are or were members of an organization that there are reasonable grounds to believe is or was engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of any offence under the *Criminal Code* or *Controlled Drugs and Substances Act* that may be punishable by way of indictment or in the commission outside Canada of an act or omission that, if committed in Canada, would constitute such an offence, except persons who have satisfied the Minister that their admission would not be detrimental to the national interest."
34. Section 19(1)(e) says, "persons who there are reasonable grounds to believe . . . (iii) will engage in terrorism, or (iv) are members of an organization that there are reasonable grounds to believe will . . . (C) engage in terrorism," while section 19(1)(f) reads, "(*f*) persons who there are reasonable grounds to believe . . . (ii) have engaged in terrorism, or (iii) are or were members of an organization that there are reasonable grounds to believe is or was engaged in . . . (B) terrorism."
35. Section 19(1)(j) states, "persons who there are reasonable grounds to believe have committed an offence referred to in any of sections 4 to 7 of the *Crimes against Humanity and War Crimes Act*." The *Crimes against Humanity and War Crimes Act* (SC 2000, Ch. 24) was assented to on June 29, 2000, and came into force on October 23, 2000; section 55 of this Act contains the consequential amendments to the *Immigration Act*, subsection 55(1) for paragraph 19(1)(j), and subsection 55(2) for paragraph 19(1)(l). As a result of this Act, the crime of committing genocide is a crime in Canada for the first time (as opposed to the crime of *advocating* genocide, which can be found in section 318(1) of the *Criminal Code*).
36. "[P]ersons who are or were senior members of or senior officials in the service of a government that is or was, in the opinion of the Minister, engaged in terrorism, systematic or gross human rights violations, or any act or omission that would be an offence under any of sections 4 to 7 of the *Crimes against Humanity and War Crimes Act*, except persons who have satisfied the Minister that their admission would not be detrimental to the national interest."
37. "For the purposes of paragraph (1)(*l*), 'senior members of or senior officials in the service of a government' means persons who, by virtue of the position they hold or have held, are or were able to exert a significant influence on the exercise of government power and, without limiting its generality, includes
(*a*) heads of state or government;

(*b*) members of the cabinet or governing council;
(*c*) senior advisors to persons described in paragraph (*a*) or (*b*);
(*d*) senior members of the public service;
(*e*) senior members of the military and of the intelligence and internal security apparatus;
(*f*) ambassadors and senior diplomatic officials; and
(*g*) members of the judiciary."

The federal court held in the case of *Adam* (F.C.T.D., IMM-3380-96, August 29, 1997; upheld on appeal by F.C.A, A-19-98, January 11, 2001) that this subsection contains a non-rebuttable presumption, meaning that if a person is found to have occupied the position mentioned, that fact in itself will result in inadmissibility even if there is nothing to show that the person actually exercised influence on the regime in question. The only other decision that has examined sections 19(1)(l)/19(1.1) has been *Esse* (F.C.T.D., IMM-4523-96, January 16, 1998), which dealt with the 19(1)(l) exemption clause and the process required when using it.

38. *Canada's War Crimes Program, Annual Report 1999-2000*, Appendix C.
39. See *Sivakumar* [1994] 1 F.C. 433 (F.C.A) and *Owens* (IMM-5668-99, October 11, 2000).
40. See Van Kessel, "Canada's Approach towards Exclusion Ground 1F" in Peter J. van Krieken, ed., *Refugee Law in Context: The Exclusion Clause* (The Hague: T.M.C. Asser Press, 1999) 287-293.
41. Section 46.01(1)(e)(ii), which prevents persons involved in terrorists activities, genocide, war crimes, and crimes against humanity from having access to the refugee determination process if the Minister of Citizenship and Immigration is of the opinion that it would be contrary to the public interest. This section does not apply to organized crime.
42. Sections 70(4)(b), 70(5), 70(6), and 77(3.01)(b), which prevent access to the Immigration Appeal Division of the Immigration and Refugee Board completely for organized crime reasons, but allows limited access, namely on fact and law but not with regard to all circumstances of the case, for reasons related to security and war crimes (unless indirectly as a result of the issuance of a section 40.1 certificate that has been approved by the Federal Court, in which case no appeal to the IAD is allowed).
43. Section 46.04(3), which prevents landing of persons who have been found to be refugees if they or any of their dependants have been involved in any type of serious criminality.
44. The PDRCC process can be accessed by persons who have been found not to be refugees by the CRDD, and it uses a wider definition of risk than the *1951 Refugee Convention,* which is applied by the CRDD. Section (a)(vi) of the definition of "member of the post-determination refugee claimants in Canada class" of the *Immigration Regulations* prevents a person from accessing this program if (s)he has been excluded for 1F reasons or has been involved in serious criminality (except organized crime); section 11.4 of the *Immigration Regulations* provides the process for landing under this program.
45. Section 53(1)(b), if the Minister is of the opinion that the refugee constitutes a danger to the security of Canada. This section does not apply to organized crime. The Minister balances the risk that the person faces upon return to the country of origin versus the danger to the security of Canada. Apart from this section in the *Immigration Act*, persons can also invoke article 3 of the *Torture Convention* to prevent removal to their country of origin. The process used in assessing such a claim is one of the issues before the Supreme Court in the *Suresh* and *Ahani* cases (see note 47).
46. Sections 39(2), 39(4), 40(1), 40.1(1), 40.1(7), 81(2)(a), and 81(2)(b). The protection of information provisions (sections 39(5), 40.1(5.1), 77(3.2), 81(1)(4), and 82.1(10)) are all congruent with the substantive provisions re inadmissibility to which they refer with the exception of section 82.1(10), of which section 19(1)(j) is not a part.
47. See the Inland Processing (IP) Manual, ch. 5, paras. 3.3, 6.5, 9.1, 9.7, and 9.12. Serious criminality is to be balanced against humanitarian and compassionate considerations.
48. Terrorism is only one of the several other concepts related to inadmissibility based on security grounds in the present *Immigration Act*, such as 19(1)(e)(i), (ii), 19(1)(f)(i), 19(1)(g), or 19(1)(k), but this paper will not discuss these concepts, although there is case-law regarding those provisions. Some of these cases, such as *Al Yamani* ([1996] 1 F.C. 174 and IMM-1919-98, March 9, 2000, and *Moumdjian*, A-1065-88, July 19, 1999), discuss primarily whether the term *subversion* in 19(1)(e) and section 19(1)(g) as a whole are constitutional. The term *subversion* was found to violate the Charter by being too vague constitutionally, but the judge then found that section 1 of the Charter could be used to save the provision so that in the final analysis this term was found to be constitutional (*Al Yamani,* IMM-1919-98, March 9, 2000). Section 19(1)(g) was found to be constitutional except for one portion: the part that makes members of an organization that is likely to engage in acts of violence inadmissible (*Al Yamani* [1996], 1 F.C. 174, and *Moumdjian*). Incidentally, all aspects of section 19(1)(f) have been found to be constitutional (*McAllister* v. *Canada* (108 F.T.R 1); *Singh*, IMM-1647-98, May 6, 1998; *Suresh*, IMM-117-98, June 11, 1999; and *Suresh*, A-415-99, January 18, 2000). Section 19(1)(f)(i) was also discussed in the *Qu* case (IMM-5114-98, April 20, 2000; case is under appeal), specifically the meaning of the term *espionage or subversion against democratic government, institutions or processes.* The court found that *espionage* means "gathering of information in a surreptitious manner," while *subversion* means "accomplishing change by illicit means or for improper purposes related to an organization." The court found that a person who reports on the activities of a Chinese student organization at an university in Canada is, while engaging in espionage and subversion, not inadmissible, because a student organization is not included in the term *democratic government institutions and processes.* Similarly, this paper will not discuss procedural or evidentiary issues such as the burden of proof; the case of *Davinder Singh*, IMM-1490-99, December 24, 1999, provides some guidance in this matter. Last, section 19(1)(f) contains a clause that allows the Minister to provide an exemption to the application of this section if the admission of the person would not be detrimental to the national interest. This clause has been

judicially reviewed twice, in the *Kashmiri* (37 C.R.R. (2d) 264) and the *Kishavarz* (IMM-1692-99, August 20, 2000) cases.

49. *Suresh*, FCTD, DES-3-95, November 14, 1997, page 14-16; *Suresh*, FCA, A-415-99, January 18, 2000, paragraph 43; *Ahani*, FCA, A-413-99, January 18, 2000, paragraph 18; the Supreme Court of Canada granted leave to hear both cases on May 25, 2000.
50. See also for some of these propositions *Baroud* v. *Canada* (98 F.T.R. 99) and *McAllister* v. *Canada* (108 F.T.R 1). In the *Ali Noor* case (FCTD, IMM-1814-95) terrorism is not defined, but the judge is of the opinion on pages 2 and 3 of the decision that an attack on the person of a diplomat is clearly an act of terrorism.
51. Section 19(1)(c.2), 19(1)(e)(IV)(C), and 19(1)(1)(f)(III)(B).
52. This is a result of the fact that the Federal Court has distinguished between two types of complicity, depending to which kind of organization a person belonged. If a person belonged to an organization with the single and brutal purpose of violating human rights, the threshold to attract liability for being complicit is low, namely only membership with a knowledge of the purpose of that organization. If, on the other hand, the organization was only incidentally involved in the commission of atrocities, a more active role is required in order to be complicit. For an analysis of the case-law in this area, see Rikhof, "Exclusion Clauses: The First Hundred Cases in the Federal Court" (1996) 24 Imm.L.R. (2nd) 137, 152-158. Since the publication of that article, another forty-one cases have examined the issue of complicity for 1F(a) applying the same principles, although the court has expanded and clarified the case-law with respect to **hybrid organizations**, which have both legitimate and nefarious purposes (see *Mehmoud* (F.C.T.D., IMM-1734-97, July 7, 1998); *Cardenas* (1994) 23 Imm. L.R.(2d) 244, 74 F.T.R. 214 (F.C.T.D.), *Kudjoe* (F.C.T.D., IMM-5129-97, December 4, 1998), and (in the context of organized crime) *Chiau* (F.C.A, A-75-98, December 12, 2000, paragraph 59). For case-law regarding the parameters of **brutal, single purpose organizations** see *Nejad* (1994) 85 F.T.R. 312 (F.C.T.D.); *Saridag* (1994) 85 F.T.R. 307 (F.C.T.D.); *Diaz* (1995) 94 F.T.R. 237 (F.C.T.D.); *Demiye* (F.C.A, September 6, 1995); *Aden* (F.C.T.D., IMM-2912-95, August 14, 1996); *Shakarabi* (F.C.T.D., IMM-1371-97, April 1, 1998); *Hajialakhani* (F.C.T.D., IMM-3105-97, September 11, 1998) and *Zoya* (F.C.T.D., IMM-5256-99, November 20, 2000). The **other cases since 1996** are (all by the FCTD, unless indicated): *Cabrera*, IMM-1991-95, February 9, 1996; *Alza,* IMM-3657-94, March 26, 1996; *Aden*, IMM-2912-95, August 14, 1996; *Bazargan*, A-400-95, September 18, 1996 (FCA); *Rasuli*, IMM-3119-95, October 25, 1996; *Siad*, A-226-94, December 3, 1996 (FCA); *Liu*, IMM-1304-96, December 5, 1996; *Say*, IMM-2547-96, May 16, 1997; S*uliman*, IMM-2829-96, June 13, 1997; *Berko*, IMM-4462-96, September 29, 1997; *Ledezma*, IMM-3785-96, December 1, 1997; *Bamlaku*, IMM-846-97, December 30, 1997; *Cortez Cordon*, IMM-1889-97, April 14, 1998; *Ofuq*, IMM-1828-97, May 29, 1998; *Guardado*, IMM-2344-97, June 2, 1998; *Kiared*, IMM-3172-97, August 24, 1998; *Cabrera*, IMM-4657-97, December 23, 1998; *Paz*, IMM-226-98, January 6, 1999; *Quinonez*, IMM-2590-97, January 12, 1999; *Yang*, IMM-1372-98, February 9, 1999; *Saavedra*, IMM-4742-98, April 7, 1999; *Salazar*, IMM-977-98, April 16, 1999; *Khera*, IMM-4009-98, July 8, 199,; *Grewal*, IMM-4674-98, July 23, 1999; *Nagra,* IMM-5534-98, October 27, 1999; *Szekely*, IMM-6032-98, December 15, 1999; *Sumaida*, A-800-95, January 7, 2000 (FCA); *Wajid*, IMM-1706-99, May 25, 2000; *Bermudez*, IMM-1139-99, June 13, 2000; *Osagie*, IMM-3394-99, July 13, 2000; *Mohsen*, IMM-3246-99, August 15, 2000; *Rivera Aguilar*, IMM-4491-99, August 16, 2000; *Ordonez,* IMM-2821-99, August 30, 2000; *Albuja*, IMM-3562-99, October 23, 2000; *Musansi,* IMM-5470-99, January 21, 2001; and *Kennedy Loordu,* IMM-1258, January 25, 2001.
53. *Saridag* (1994) 85 F.T.R. 307 (F.C.T.D.); *Shakarabi* (F.C.T.D., IMM-1371-97, April 1, 1998); *Suresh* (F.C.T.D., DES-3-95, November 14, 1997, page 12); *Chiau* (F.C.T.D., IMM-1441-96, February 23, 1998, page 17/18, upheld by F.C.A, A-75-98, December 12, 2000); and *Owens* (F.C.T.D., IMM-5668-99, October 11, 2000).
54. *Saridag* (1994) 85 F.T.R. 307 (F.C.T.D.); *Aden* (F.C.T.D., IMM-2912-95, August 14, 1996).
55. Except the notion of "membership" in the *Chiau* case, see footnote 54.
56. In the *Dolly Shuk Ching Chan* case, at issue were the notions of *functus,* the fettering of discretion by the visa officer and the constitutionality of section 82.1(10), which was used to protect information (F.C.T.D., IMM-6477-93, June 17, 1996), all of which were decided in favour of the government. In the *Kwong Yau Yuen* case, section 19(1)(c.2) was found to be constitutional (F.C.T.D., IMM-5272-97, February 4, 1999; upheld by the F.C.A, December 21, 2000, A-152-99); in the *Miranda Yuen* case, the decision revolved around the issue of what constituted a valid marriage (F.C.T.D., IMM-916-97, November 13, 1997); in the *Chun Wai Lam* case (F.C.T.D., IMM-2842-97, July 31, 1998) where the procedure with respect to a section 70(5) Minister's opinion was examined; and in the *Kwong Kwok Kin* case (F.C.T.D., IMM-3804-99, December 15, 2000), where the level of procedural fairness during a visa application involving section 19(1)(c.2) was found to have been appropriate.
57. See note 53. The court also defined what distinguished crimes against humanity from domestic crimes in the *Sivakumar* case in accordance with international law, see footnote 28. For a commentary, see Rikhof, "Crimes against Humanity, Customary International Law and the International Tribunals for Bosna and Rwanda" (1996) National Journal of Constitutional Law (NJCL), Volume 6.2, pages 233-269. The court has not been so successful in coming to grips with the nature of war crimes, which it has examined four times in the last eight years in the cases of *Gonzalez* (FCA, A-48-91; for commentary see Rikhof, "The Treatment of the Exclusion Clauses in Canadian Refugee Law" (1995) 24 Imm.L.R. (2nd), 31 at 49-52); *Balta* (F.C.T.D., IMM-2459-94, January 27, 1995); *Cibaric* (1995, 105 F.T.R. 304; for a commentary see Rikhof, "Exclusion Clauses: The First Hundred Cases in the Federal Court" (1996) 24 Imm.L.R. (2nd) 137, at 145-146; and most recently the *Bermudez* case (F.C.T.D., IMM-1139-99, June 13, 2000, under appeal) where the judge held that war crimes cannot be committed during a civil war, which is contrary to international jurisprudence in this area, namely the Appeal Chamber's Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, paragraphs 128-134 (Case IT-94-1).
58. There have been eight judgments on substantive matters by the ICTY Trial Chamber (Erdomovic, Tadic, Celebici, Furundzija,

Aleksovski, Jelisic, Kupreskic, and Blaskic) and five by the Appeal Chamber (Erdemovic, Tadic, Aleksovski, Furundzija, and Celebici); at the ICTR there have been seven final decisions, all by the Trial Chamber, four that were judgments and sentences (Akayesu, Kayishema/Ruzindana, Rutaganda, and Musema), while three were sentences after a guilty plea (Kambanda, Serushago, and Ruggiu).

59. Compare articles 6 and 7 of the *Statute of the International Criminal Court*, see note 4.
60. *Canada's War Crimes Program, Annual Report 1999-2000,* 2.
61. See note 4.
62. See notes 9-16.
63. This Convention was adopted by the United Nations General Assembly Resolution and opened for ratification on November 26, 1968 (Resolution 2391 [XXIII]) and came into force on November 11, 1970.
64. UNGA Resolution 2712 (XXV).
65. UNGA Resolution 3074 (XXVIII).
66. Article 29 of the ICTY Statute; Article 28 of the ICTR Statute; transfer to the international tribunals from Canada is now possible thanks to amendments to the *Extradition Act* SC 1999, ch. 18, section 1, part (d) of the definition of *State or entity.*
67. Articles 87 and 89 of the ICC Statute.
68. *Canada's War Crimes Program, Annual Report 19992000,* 3-6 and 10-12.
69. *Ibid.,* 7-8.
70. This approach was commented upon favourably by the Committee against Torture in its consideration of the third periodic report of Canada (UN Doc. CAT/C/XXV/Concl.4, paragraph 4(c), 22 November, 2000) while the Committee recommends that Canada "prosecute every case of an alleged torturer in a territory under its jurisdiction where it does not extradite that person and the evidence warrants it, and prior to any deportation" (paragraph 6(c)).
71. As a result of the fact that a federal election was called on October 22, 2000, the Bill died on the order paper of the House of Commons, but has been tabled on February 21 as Bill C-11.
72. The provisions dealing with inadmissibility based on organized crime, terrorism, genocide, war crimes, and crimes against humanity could be found respectively in sections 33(1)(a) (while 33(1)(b) added the specific crimes of people smuggling, trafficking in persons, and money laundering, to the already existing general concept of organized crime); 30(1)(c)/30(1)(f); and 31(1)(a) (for what is now section 19(1)(j)); and 31(1)(b) (for what is now section 19(1)(l)).
73. *Canada's War Crimes Program, Annual Report 1999-2000,* 20-21.
74. Section 59(1).
75. Section 91.
76. Section 95(1)(a).
77. Section 95(1)(d).
78. Section 108(2)(b).
79. Section 107(4)(b).
80. The interpretation of F(b) and F(c) by the courts has been narrower than that of F(a). For **F(b)**, the Federal Court has indicated that it has to be a capital crime or a very grave punishable act. There is a strong presumption that any crime, the equivalent of which carries a maximum penalty of more than ten years, is a serious crime. So far, only drug trafficking in cocaine or heroine, sexual assault, bombing, and coups d'état (including activities such as delivering weapons and seizing radio and TV stations) have been held to be serious crimes for the purposes of article 1F(b). Shoplifting, even when committed in a habitual fashion, is not a serious F(b) crime. See *Malouf* (1994) 26 Imm. L.R.(2d) 20, 86 F.T.R. (F.C.T.D.), overturned (1995) 190 N.R. 230 (F.C.A); *Shamlou* (1995) 32 Imm. L.R. (2d) 135, 103 F.T.R. 241 (F.C.T.D.); *Gil* (1994) 174 N.R. 292 (F.C.A) at 309; *Brzezinski* (F.C.T.D., IMM-1333-97, July 8, 1998); *Moreno* (F.C.T.D., IMM-1447-98, February 5, 1999); *Chan* (F.C.A, A-294-99, July 24, 2000). As well, this exclusion clause does not apply in a situation where a person has already been convicted of the crimes under consideration and has already served his sentence *(Chan).* The only part where the court gives an element of F(b) a wide interpretation is in the notion of what constitutes a political crime *(Gil).* The situation is even more pronounced for **F(c)**, where as a result of the decision by the Supreme Court of Canada in *Pushpanathan* ([1998] 1 S.C.R. 982), at the moment only five types of activities can be considered contrary to the purposes and principles of the United Nations: terrorism, forced disappearance, torture, apartheid, and hostage taking. For an analysis and commentary on the judgment, see Rikhof, "Purposes, Principles and Pushpanathan: The Parameters of Exclusion Ground 1F(c) of the 1951 Refugee Convention as Seen by the Supreme Court of Canada" (1999) 37. (46) AWR (Association for the Study of the World Refugee Problem), No. 4/1999, 182.
81. As can be seen by the statement of the ICTY Appeals Chamber on the issue of aiding and abetting in the *Tadic* case, paragraph 229, July 15, 1999, (Case IT-94-1).
82. Article 7.
83. Article 3.
84. This is not an academic situation. There have been instances where victims of persons who were involved in atrocities have come forward and demanded action by the government. The best known case is that of Leon Mugesera who has been accused and found inadmissible for incitement to genocide in Rwanda. For more details on the immigration case, see William A. Schabas, "Mugesera v. Minister of Citizenship and Immigration, Canadian Immigration and Refugee Board Appellate Decision on Expulsion of Alien for Inciting Genocide in Rwanda" (2000) 93 American Journal of American Law (AJIL) 529–533.

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Manufacturing "Terrorists": Refugees, National Security and Canadian Law

Part 2

Sharryn J. Aiken

Abstract

The overarching objective of this paper is to provide a critical appraisal of the anti-terrorism provisions of Canada's Immigration Act. The impact of these measures on refugees is the primary concern of this inquiry, but the author's observations are relevant to the situation of other categories of non-citizens as well. Part 1 of the essay, published in the previous issue of Refuge, *began by considering international efforts to address "terrorism," the relevance of international humanitarian law to an assessment of acts of "terror," and the nature of contemporary discourse on terrorism. The evolution of the current "admissibility" provisions in Canadian immigration law was examined with particular reference to national security threats and "terrorism."*

In part 2, the author focuses on the role played by Canada's Federal Court in legitimizing the national security scheme. The tensions in the current jurisprudence are considered with a more in-depth analysis of Suresh *v.* Minister of Citizenship and Immigration, *a case pending before the Canadian Supreme Court. The paper concludes with suggestions for restoring human rights for refugees while safeguarding a genuine public interest in security.*

Résumé

Le but suprême de cet article est de proposer une évaluation critique des provisions antiterroristes de la Loi sur l'immigration du Canada. L'enquête porte principalement sur l'impact de ces mesures sur les réfugiés, mais les remarques de l'auteur sont également pertinentes à la situation d'autres catégories de non-citoyens. La première partie de l'article, parue dans le dernier numéro de Refuge, *avait commencé par examiner les efforts déployés sur le plan international pour s'occuper du « terrorisme », la pertinence de la loi humanitaire internationale dans l'évaluation des actes de « terreur », et la nature du discours contemporain sur le terrorisme. Fut ensuite considérée la façon dont ont évolué les dispositions courantes concernant la notion d'admissibilité dans la loi canadienne sur l'immigration, avec référence particulière aux menaces à la sécurité nationale et au « terrorisme ».*

Dans la deuxième partie, l'auteur se penche sur le rôle joué par la Cour fédérale du Canada dans la légitimation du plan de sécurité nationale. Les tensions qui existent dans la jurisprudence en cours sont examinées à travers une analyse détaillée de Suresh *contre* le Ministre de l'immigration et de la citoyenneté, *un cas qui est présentement en instance devant la Cour suprême du Canada. L'article conclut avec des suggestions pour le rétablissement des droits de l'homme des réfugiés, tout en sauvegardant l'intérêt public légitime dans les questions touchant à la sécurité.*

> *Have not horrors enough been perpetrated in the name of national security, and in the very countries from which many asylees come to North America these days? Are the persecutors going to win by making us like them?*
>
> *—C.B. Keely and S.S. Russell*[1]

Judging National Security

The Federal Court is the most active forum for adjudicating immigration matters,[2] with jurisdiction to consider judicial review applications of refused refugee claims, the reasonableness (but not the merits) of inadmissibility decisions of adjudicators and visa officers, as well as ministerial security certificates, "danger opinions," and reports by the Security Intelligence Review Committee (SIRC). The Court also may consider the constitutionality of the Immigration Act, either in the context of a separate "declaratory action" or in relation to a judicial review application.[3] In the eight years since the "terrorism" provisions of Bill C-86 were first implemented, both the Trial Division and Court of Appeal have had occasion to apply them as well as to consider their constitutionality. With few exceptions, the legislative scheme, the advice provided by the Canadian Security Intelligence Service (CSIS) on alleged members of "terrorist" organizations, and the practices of government administrators in response have not been subjected to serious scrutiny; constitutional as well as international legal standards have been deemed largely irrelevant. When the spectre of "terrorism" is conjured, government action tends to be endorsed in decisions that would otherwise be without legal foundation.[4] Judicial deference in this regard can be viewed in terms of the judiciary's traditional reluctance to interfere in legislative or executive decisions when matters of national security are involved.

In a classic British decision, Lord Denning emphasized that "[t]he balance between [national security and individual freedom] is not for a court of law. It is for the Home Secretary."[5] This judgment reflects the view that the judiciary lacks the institutional competence and expertise to intervene in matters of national security.[6] Implicit in such a view is that questions of national security are inherently political, as opposed to legal, and are therefore not appropriate for adjudication.[7] In Canada the Federal Court has adopted this deferential view in cases of crown privilege under the Canada Evidence Act. Despite the Act's implicit invitation for such claims to be balanced against the public interest in the administration of justice, where claims of privilege are asserted on the ground of national security, Canadian courts consistently treat such claims as conclusive.[8] "[T]here can be no public interest greater than national security . . . ", the Federal Court has held, asserting that judges must consider the fact that they "lack expertise in matters of national defence and international relations."[9] Similarly, in the immigration context, the Federal Court had been unwilling to apply a human rights lens to the government's strategy of deporting "terrorists" who are deemed to pose a danger to the security of the country. The judicial approach typically reflects an unwillingness to scrutinize the interests of national security against the competing values intrinsic to the rule of law and constitutional democracy. It also belies a clear contradiction. The denial of institutional competence suggests that the appropriate response would require that courts decline to entertain these cases at all, identifying them as non-justiciable. Rather than following this course, Hanks notes that "the courts have accepted that, when invoked by the government, this undifferentiated term is the solution to the legal issues before them."[10] He suggests that the judiciary's failure to give the concept of national security firm boundaries, and to insist that if it is to have legal consequences, it must have a meaning, has placed other societal values at substantial risk. Hanks indicates that these values include freedom of expression, association, and political activity.[11] As we will see in the following sections of this paper, in the immigration context, the additional value at stake includes the most basic right of human security.[12]

The general proclivity of the courts to defer to administrative decision makers in matters of national security has been reinforced in immigration cases with a Supreme Court ruling in 1992. In *Chiarelli* v. *Canada* the Court found that a long-term permanent resident was in Canada on a "contractual" basis, that committing a crime breached that contract and therefore justified deportation.[13] Mr. Justice Sopinka noted that "non-citizens do not have an unqualified right to enter or remain in the country."[14] This comment represents the nadir of judicial recognition of immigrant and refugee rights during the last decade and has served to justify a range of measures that accord non-citizens fewer rights than citizens.[15] The discussion that follows exposes the extent to which such reasoning, applied in the context of immigration security and refugee exclusion, has produced decisions that are replete with inconsistencies and compromise the basic tenets of justice. After reviewing a representative selection of Federal Court cases decided after the anti-terrorism amendments were implemented, we will proceed to a more in-depth analysis of *Suresh* v. *Minister of Citizenship and Immigration*,[16] a case currently pending before the Supreme Court of Canada.

"Terrorism": The Play of Meaning and Confusion

In 1996 the Federal Court considered *McAllister* v. *Minister of Citizenship and Immigration*, one of the few occasions in which a definition of "terrorism" was attempted. Malachy McAllister was a member of the Irish National Liberation Army (INLA), an organization with a record of violence in

Northern Ireland. In 1988 he came to Canada seeking protection as a refugee. Pursuant to the access criteria that were in effect by the time his case was processed, the Minister determined that it "would be contrary to the public interest" to have McAllister's refugee claim determined and thus he was barred from proceeding with his claim. His application for judicial review of these decisions was dismissed with the following explanation:

> . . . it is to be noted that the *Immigration Act* . . . does not make membership in an organization unlawful in Canada. It does preclude admission to Canada of those who are found to be members of an organization that on reasonable grounds is found to have been or is engaged in terrorism. It applies in the case of foreign nationals, who have no right to enter or remain in Canada except as the Act permits.[17]

Mr. Justice McKay referred to a dictionary definition of *terrorism* and suggested that the term referred to all forms of terror and violence to intimidate in order to achieve a political objective. Borricand would not have approved, given the tautology inherent in defining *terrorism* by the terror it causes.[18] The Court commented further,

> In an era when much attention on the international level, and within many countries, has been and continues to be given to containing, restricting and punishing acts of terrorism, I am not persuaded that the word can be considered so vague as to be devoid of sufficient certainty of meaning, or that application of the provision would present uncertainty. The word is recognizable to individuals, as it apparently was to Mr. McAllister in this case, and to those concerned with applying the Act.[19]

McAllister, himself, had accepted that his organization had committed "terrorist" acts but contested the Act's inclusion of such vague and imprecise terminology as a bar to claiming refugee status. It is interesting to contrast this decision with the Supreme Court's ruling a few years earlier in *R.* v. *Morales* on the Criminal Code's use of the term *public interest* as a criterion for denying bail in pre-trial detention.[20] The Court found a clause in the Code unconstitutional because it authorized detention using terms that were vague and imprecise and thus resulted in a denial of bail without just cause. While agreeing that preventing crime and interference with the administration of justice were important, the means adopted by the government had to be proportional and rationally connected to the legislative objective. Applying the term *public interest* would authorize pre-trial detention in many cases unrelated to the objectives of the measure. The Supreme Court emphasized that statutory terms must be capable of framing the legal debate in a meaningful manner and structuring discretion. In *McAllister*, the Federal Court refused to apply these principles, suggesting that a statute applicable to a criminal accused who faced a prospect of a serious penalty and denial of liberty, was distinguishable from provisions in the Immigration Act that applied to persons who had no right to remain in Canada and were seeking the benefit of a discretionary remedy. In such circumstances, the Court asserted that greater "caution" was appropriate. It is notable that a few months earlier, Mr. Justice McKay employed a very different conceptual lens in *Al Yamani* v. *Canada*, a judicial review application brought by a stateless man of Palestinian origin who had been living in Canada as a permanent resident since 1985.[21]

Counsel for Issam Al Yamani raised a number of constitutional issues with regard to a SIRC report and the resulting security certificate that was issued against him. The report was based on CSIS allegations that Al Yamani was a member of the Popular Front for the Liberation of Palestine (PFLP), a "terrorist" organization, likely to engage in acts of violence that might endanger the lives or safety of persons in Canada. Mr. Justice MacKay agreed with one of Al Yamani's arguments, namely that proscribing mere membership in an organization that is likely to engage in violence, regardless of the obligations of membership, the range of the organization's other activities, or the influence the individual may exercise in the organization, directly violates freedom of association. The Court noted that "the freedoms assured by section 2 of the Charter are for 'everyone,' for the permanent resident as for the citizen in Canada."[22] The Court found that the SIRC report could not stand in view of this constitutional violation, and consequently the matter was remitted for reconsideration.[23] In contrast to the case of *McAllister*, the Court emphasized the need for personal involvement.

The *Al Yamani* decision is consistent with American Supreme Court cases dealing with anti-Communist legislation of the 1950s. In *Apethekar* v. *Secretary of State*, for example, the Court found that a law prohibiting members of "Communist-action organizations" from applying for passports was unconstitutional because it deprived members of their constitutional right to travel, without considering whether or not they were active members or were engaging in unlawful activities.[24] Similarly in *Robel*, the Court struck down a law prohibiting any member of a Communist-action organization from working in a government defence facility, because it swept indiscriminately across all types of association, without regard for the quality and degree of membership.[25] In *Al Yamani* the issue was membership in an organization "likely to engage in vio-

lence." The same logic has not been applied, however, in subsequent cases dealing with membership in organizations likely to engage in "terrorism."

In *Re Baroud*, for example, the Federal Court considered the reasonableness of a security certificate issued against a Palestinian refugee claimant who had acknowledged that he was a former intelligence officer in the Palestine Liberation Organization (PLO), an organization that the Minister characterized as having engaged in "terrorism." In upholding the Minister's certificate, the designated judge indicated that the term *terrorist* is one that need not be defined. Mr. Justice Denault agreed that there were no reasonable grounds to believe Wahid Khalil Baroud himself actually engaged in "terrorism." It was noted that Baroud had participated in "armed activities"—which did not constitute "terrorism." However, in light of intelligence information about other practices carried out by Fatah and Force 17, the specific groups to which CSIS alleged Baroud belonged, the security certificate was reasonable.

The Court commented,

> I am mindful of the fact that the terms "terrorism" and "terrorist" are not defined in the *Act*. Counsel for the Ministers affirms in her written memorandum that 'Like beauty, the image of a terrorist is, to some extent, in the eye of the beholder.' While I accept this statement in general terms, it cannot prevent this court from examining whether, in the circumstances of this case, there are reasonable grounds to believe that a person or organizations have engaged in terrorism.[26]

It deserves mention that Baroud's reason for seeking asylum in Canada was that, as a PLO renegade, he feared for his life in the Middle East. He had disobeyed an order from the PLO hierarchy to proceed to Iraqi-occupied Kuwait during the Gulf War to assist Iraqi authorities. His disobedience of the official order resulted in his immediate dismissal from the PLO. As Whitaker reports, his stated reason was principled: as a Palestinian, a man whose homeland was under foreign occupation, he would not help another occupying power.[27] When his case was considered by the Federal Court, no evidence was presented that Baroud himself posed a specific threat to *any* nation. Furthermore, the PLO was no longer considered a "terrorist" organization, even by the Israeli government. From this judgment we can infer that the Court is defending an almost unlimited right of the government to define the scope of national security, in the absence of any connection between the impact of a refugee's conduct and the welfare of either the host country or other nations.[28] After a lengthy detention in a Toronto jail, Baroud was deported to Sudan.

In a similar vein, in *Husein* v. *Canada* the Court upheld an adjudicator's order that the applicant was inadmissible based on his membership in the Oromo Liberation Front (OLF). The Court's reasons disclose no analysis of the degree and nature of Fahmi Husein's personal involvement in the organization, referring only to the adjudicator's findings that OLF was an organization engaged in "terrorism" because its leaders had set fire to a village, killing 144 individuals, and had attacked another location, forcing individuals to jump off cliffs. These two incidents resulted in the deaths of several hundred people and therefore provided sufficient basis to characterize the OLF as an organization engaged in "terrorism." The Court stated,

> Terrorist organizations are not organized states or corporations where the niceties of agency law are applicable. Terrorist organizations are loosely structured groups. Even if I were to accept that an act carried out by an individual might not be attributed to an organization, where there is evidence that the leaders of an organization are involved in the acts of terrorism, I have no doubt that for purposes of subparagraph 19(1)(f)(iii)(B), there are reasonable grounds to believe that the organization itself is involved in acts of terrorism.[29]

The case of *Canada* v. *Iqbal Singh* concerned an Indian national who had been the organizing secretary of a Sikh student federation and spoke out against injustices perpetrated against the Sikh population by the Indian government.[30] He had been arrested and tortured by Indian authorities and ultimately fled to Canada in 1991, where he was recognized as a Convention refugee. Singh was subject to a security certificate on the basis of his involvement with the Babar Khalsa (BK) and Babar Khalsa International (BKI), which the Court noted originated as Sikh organizations engaged in "activism against the Indian government," were involved in a range of humanitarian activities, but were also responsible for setting off bombs and killing innocent people. All of the open evidence against Singh dealt with his "close association" with leaders of the BK and his acknowledged financial assistance to a number of its representatives, including a person known to have been involved in a previous hijacking.

The Court upheld the security certificate on the basis that there were reasonable grounds to believe that the BK and BKI have engaged in "terrorism" and that Singh was a member of these groups. Mr. Justice Rothstein referred to testimony provided by the Director of Internal Policy for the Department of Employment and Immigration given in 1992 before a parliamentary committee, to the effect that the intent in drafting the subsections was to define membership broadly, leaving a discretion with the Minister to provide an exemption in circumstances where, in the Min-

ister's opinion, it would not be detrimental to the national interest. He concludes,

> The provisions deal with subversion and terrorism. The context in immigration legislation is public safety and national security, the most serious concerns of government. It is trite to say that terrorist organizations do not issue membership cards. There is no formal test for membership and members are not therefore easily identifiable . . . I think it is obvious that Parliament intended the term "member" to be given an unrestricted and broad interpretation. I find no support for the view that a person is not a member as contemplated by the provision if he or she became a member after the organization stopped engaging in terrorism. If such membership is benign, the Minister has discretion to exclude the individual from the operation of the provision.[31]

The Court's discussion of membership is very much at odds with the interpretive principles that inform refugee status determination and the application of the criminality related "exclusion clauses." In that context, the Federal Court has recognized that mere association with—or membership in—a group that commits acts of the type contemplated by sections 19(1)(e) and (f) is not in itself sufficient to warrant exclusion. One of the leading exclusion cases is *Ramirez* v. *Minister of Employment and Immigration*, which involved a sergeant in the Salvadoran army during the 1980s.[32] The Federal Court of Appeal upheld the decision of the Refugee Board that Ramirez should be excluded, based on his "personal and knowing" involvement in a military force that routinely tortured prisoners to extract information.[33] However, the Court emphasized that mere presence at the scene of an offence is insufficient to qualify as personal and knowing participation. Only "where an organization is principally directed to a limited brutal purpose, such as a secret police activity, mere membership may by necessity involve personal and knowing participation in persecutorial acts."[34] Applying the same logic in the case of *Moreno* v. *Canada*, the Court found that a young man who had been forcibly conscripted and had deserted at the first possible opportunity after learning that the army practiced torture, should not be subject to exclusion.[35] In the circumstances of this case the Court identified the key issue as whether José Rodolfo Moreno's membership in the Salvadoran army—an organization responsible for inhumane acts against members of the civilian population—in and of itself, was sufficient justification for invoking the exclusion clause. Citing *Ramirez*, Mr. Justice Robertson noted,

> [I]t is well settled that mere membership in an organization involved in international offences is not sufficient basis on which to invoke the exclusion clause . . . An exception to this general rule arises where the organization is one whose very existence is premised on achieving political or social ends by any means deemed necessary. Membership in a secret police force may be deemed sufficient grounds for invoking the exclusion clause . . . Membership in a military organization involved in armed conflict with guerrilla forces comes within the ambit of the general rule and not the exception.[36]

Both cases made extensive reference to domestic and international criminal law standards for the purposes of "direction." In *Moreno*, the Federal Court of Appeal cited the Supreme Court's majority judgment in a sexual assault case in which the offence of aiding and abetting was considered, underscoring the need for evidence of "prior knowledge of the principal offender's intention to commit the offence . . . and a positive act or omission to facilitate the unlawful purpose."[37]

In *Balta* v. *Minister of Citizenship and Immigration,* the Federal Court reviewed a decision of the Refugee Board that had described the Serbian army as a "terrorist" organization. The Court questioned whether the Board could reasonably draw such a conclusion and whether the applicant was a personal and knowing participant. Mr. Justice Rothstein elaborated:

> In *Ramirez*, Mr. Justice MacGuigan recognized that some groups might be established or operated with the sole intent and purpose of violently and brutally bringing about a course of events. Is the particular goal of the Serbian army the commission of international crimes? While I do not dispute that atrocities are being committed in Bosnia by Serbian forces, I cannot agree, that based on the evidence before them, the Board correctly characterized a national army as a 'terrorist organization.' While the Serbian army may be utilizing terrorist means to achieve political ends, I think it is significant that there are political ends, namely Serbian control of Bosnia.[38]

The Court's analysis suggests there should be a distinction made between an organization that may engage in "terrorist" practices *versus* an organization that is "terrorist"—and that a relevant factor in this regard is the organization's overall purpose.[39] Implicit in this brief passage is an inference that any national army, regardless of its character, would be exempt from proscription. Mr. Justice Rothstein's reasons appear to contradict *Ramirez* and *Moreno* by justifying differential treatment for state and non-state actors. On the specific questions of complicity and membership, however, all three cases are fully consistent with UNHCR Guidelines on Exclusion.[40] Although State practice is not uniform, most countries have recognized that mere membership in an organization is not sufficient basis on which to exclude.[41] A recent House of Lords deci-

sion in the United Kingdom, for example, held that persons may not be excluded from the Convention merely because they or their acts or their organizations have been labelled "terrorist."[42] The judgment emphasized the importance of assessing personal responsibility for excludable crimes. For Iqbal Singh, however, Mr. Justice Rothstein chose not to follow his own reasoning in *Balta*. Perhaps the Court viewed the rights-based underpinnings of refugee law, in which the exclusion clauses represent a narrow exception to protection, as incompatible with the broader exclusion criteria in section 19, which are rooted in the characterization of immigration as a privilege rather than a right. In any event, questions about Singh's actual knowledge and involvement in the acts alleged to constitute "terrorism" were deemed irrelevant. Indeed, based on Justice Rothstein's analysis, we see that the "terrorism" provisions apply equally to the person who ceased his or her membership before the acts occurred or became a member after the acts occurred but without knowledge of their occurrence. Recourse to the principles developed in the exclusion jurisprudence would have provided the Court with a much more coherent framework within which to analyze both the nature of the BK and BKI, as well as the degree of Singh's involvement. Singh's financial contributions would be assessed from the standpoint that the organizations at issue had political objectives, were engaged in a range of activities, and could not be characterized as groups with a "single brutal purpose"—all facts that can be inferred from the Court's decision.

Aynur Saygili, a Kurdish refugee claimant, was a political activist whom CSIS alleged had been sent to Canada by the Kurdistan Worker's Party (PKK) to "gain control of the general Canadian Kurdish community."[43] Saygili was deported because the Federal Court upheld the Ministers' opinion that she was a member of the PKK—a "terrorist" organization. In his brief reasons, Mr. Justice Cullen justified his ruling on two grounds: that Saygili had lied about her real name and itinerary to Canada and that her involvement in the Kurdish Community Association of Montreal was " . . . more than that of a passive person, even to delivering speeches apparently prepared by one of her hosts."[44] The Court cited evidence of conditions in Turkey and the nature of the PKK, referring specifically to an expert's testimony on the cultural genocide perpetrated against the Kurds by the Turkish state, the 4,000 Kurdish villages that had been levelled in the previous three to four years, and the sympathy for the nationalist struggle shared by all Kurds. What the Court would not consider was whether the conditions in Turkey gave rise to a right to armed resistance on the part of the PKK. Nor was there was any discussion of the PKK's command structure and the presence of a distinct political wing that had as its mandate the promotion of Kurdish nationalism through political means. The nature and degree of personal and knowing participation in unlawful acts on the part of other members of the Kurdish Community Association and Saygili herself, either in Canada or abroad, was not relevant. In this regard, it was not alleged that Saygili's role within the PKK was as an executive member or senior leader. Saygili's speeches at the community centre were sufficient to establish her culpability—effectively "guilt by association."[45]

Courts have legitimately recognized that certain forms of speech do not deserve constitutional protection because of the harm they engender, that there may be some limit on expressive rights when, for example, expression involves direct physical harm.[46] The application of this standard has not prevented citizens in Canada from expressing support for NATO's high-altitude bombing campaign in Yugoslavia in 1999 or, more recently, the violence that has accompanied the Al Aqsa Intifada in Israel/Palestine. Apparently, pure political speech, a sacrosanct freedom in Canada, is a right that must be exercised with extreme caution by refugees and other non-citizens. Mr. Justice Cullen cited an Amnesty International report as evidence that the PKK was responsible for politically motivated violence in Turkey, but no attempt was made to establish any connection between Saygili and PKK-sponsored violence. The nature of the Court's limited jurisdiction in reviewing whether or not it was reasonable for the security certificate to be issued, rather than the actual merits of doing so, meant that Turkey's abysmal human rights record on its Kurdish minority, reported in the same Amnesty document, and what would happen to Saygili if she was returned there, were beyond the Court's purview.

In *Re Ahani,* the designated judge considered the reasonableness of a security certificate that had been issued against a Convention refugee from Iran.[47] Mr. Justice Denault upheld the certificate, agreeing with the CSIS allegations that there were reasonable grounds to believe, *inter alia*, that Mansour Ahani was a member of the Iranian Ministry of Intelligence Security (MOIS), an agency that sponsors assassinations of political dissidents worldwide. The Court found that the case, at its heart, turned on Ahani's credibility, which, according to Mr. Justice Denault, was completely lacking. Without access to the intelligence reports on which the Court's assessment of credibility was based, it is impossible for an observer to assess the merits of the decision. In common with most security cases, the

judgments themselves never disclose a detailed analysis of the allegations and evidence, because that information has been received in secret, in the absence of the person concerned and his or her lawyer, on the grounds that it would be injurious to national security or persons (*i.e.,* the informants). Nevertheless, critical examination of the premises upon which the credibility determination rests is possible. In this respect, the Court's statements on the interpretation of the language in section 19 of the Act are worth reproducing:

> In my view, since Parliament has decided not to define these terms, it is not incumbent upon this Court to define them . . . I do not share the view that the word ["member"] must be narrowly interpreted. I am rather of the view that it must receive a broad and unrestricted interpretation. As to the word "terrorism," while I agree with counsel for the Respondent that the word is not capable of a legal definition that would be neutral and non-discriminatory in its application, I am still of the opinion that the word must receive an unrestricted interpretation.[48]

Mr. Justice Denault's conclusion that a word not capable of legal definition and non-discriminatory application should nevertheless be applied, and further, applied expansively, is inconsistent with the equality guarantees of the Charter of Rights, and the rule of law more broadly.[49] In other contexts, the Supreme Court has recognized that while legislatures inevitably draw distinctions among the governed, "such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others."[50] Following the Court's ruling, Ahani was ordered deported, and the Minister issued a "danger opinion," which indicated that he could be returned to Iran, a country where he faced only "minimal risk." Ahani is in his seventh year of detention in Canada and has continued his efforts to have his deportation order rescinded.[51] Ahani's case is currently pending before the Supreme Court and will be heard in May 2001, along with *Suresh* v. *Canada*, considered below.

The Suresh Case: Human Rights or Comity and Complicity?

The case of Manickavasagam Suresh engages all of the themes addressed in this paper concerning the role of the law in constructing refugees as "terrorists." For this reason, the proceedings in *Suresh* will be examined in somewhat greater depth—albeit with a discrete focus on "terrorism"—rather than the broader constitutional questions that will be canvassed before the Supreme Court.[52]

Suresh is a Tamil man of Sri Lankan origin who was recognized as a Convention refugee in Canada in 1991. During his time in Canada he worked as a co-ordinator for the Federation of Associations of Canadian Tamils (FACT), a non-profit corporation registered in Ontario, and as fundraising co-ordinator with the World Tamil Movement (WTM). FACT is engaged in advocacy in support of Tamil self-determination in Sri Lanka as well as a range of community activities and government-funded settlement services. WTM is a member agency of FACT and supports a community centre, library, educational program in Tamil culture and language, and vocational training. WTM also publishes a weekly newspaper. Suresh's involvement in these organizations resulted in the filing of a security certificate against him alleging that he was described in three of the inadmissible classes within section 19: persons who have engaged in "terrorism" as well as past and present members of organizations engaging in "terrorism."

Mr. Justice Teitelbaum upheld the reasonableness of the security certificate, finding that Suresh was a long-time member of the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka, became part of its executive, and continues to be a member in Canada; that he obtained refugee status by "wilful misrepresentation of the facts"; that the WTM is part of the LTTE or "at least an organization that supports the LTTE"; and finally, that there were reasonable grounds to believe the LTTE has engaged in "terrorist" acts.[53] In the course of the hearing, counsel for Suresh called a series of witnesses and international legal experts to address the character of the ongoing conflict in Sri Lanka, the human rights situation in that country with respect to the Tamil minority, whether the Tamils were a "People" for the purposes of international humanitarian law, and whether their character as a group, as well as the conditions they faced in Sri Lanka, gave them a right to resort to force. Evidence was provided by Dr. Richard Falk, and Professors Jordan Paust and Craig Scott, among others. Much of the testimony elaborated on themes considered in part 1 of this paper.

In a nutshell, there was a consensus among the experts who had been called for Suresh that the Tamil minority in Sri Lanka fulfill the criteria for recognition as a "People" with a right to self-determination. The experts supported the conclusion that the LTTE is a national liberation movement within the meaning of international humanitarian law and that the treatment of the Tamils by the national government in Sri Lanka gave rise to the right to armed resistance against a "racist regime," as a matter of customary international law.[54] Based on the foregoing principles,

counsel for Suresh argued that the list of "terrorist" incidents that CSIS alleged were committed by the LTTE have to be viewed as allegations of violations of the laws of war (not "terrorism"); and that the evidence provided by CSIS, primarily press reports, disclosed insufficient information from which to draw conclusions about the nature of the acts committed—including whether the acts constituted reprisals, and whether civilian casualties were incidental to a military attack or not. Submissions were made with regard on the definitional problems associated with "terrorism," "engaged or engaging," and "membership," and the application of constitutional norms to these issues.[55]

In a relatively brief judgment, the security certificate issued against Suresh was upheld. The Court dispensed with all the arguments on the relevance of international humanitarian law to an assessment of the Sri Lankan conflict and the characterization of the LTTE, by deeming these issues irrelevant. In a brief remark, Mr. Justice Teitelbaum stated,

> witnesses called by Suresh denied most of these incidents as being "terrorist" in nature as, it is alleged, the LTTE can be considered freedom fighters, and therefore have the "right" to shoot at soldiers or persons who do not support the LTTE and their aims. With respect, I disagree.[56]

The Court supported this perspective by reference to incidents of violent attacks on political representatives, police, and civilians that had been attributed to the LTTE, but it failed to address any of the contextual issues that an assessment of violations in the midst of an ongoing conflict would necessarily require. In contrast to the Court's judgment in *Re Baroud,* which found that all forms of personal involvement in violence were not necessarily "terrorism," Mr. Justice Teitelbaum made no distinction between attacks on military sites *versus* those that target civilians. In a classic invocation of the limits of judicial competence in political questions, he suggested that such an analysis would require the Court to resolve "political issues that exist between groups of peoples in another country" and that

> . . . [i]t is not my function as a judge of the Federal Court . . . to determine, based on the evidence before me, whether the Tamil people in Sri Lanka should or should not be granted their own homeland or even to express an opinion on that subject. That is a political question to be determined by the people of Sri Lanka, together with the help of the United Nations and other nations of goodwill.[57]

Yet an assessment of conduct in the course of a liberation or secessionist struggle is very much a legal issue. As discussed earlier, such an assessment involves questions that should be guided by the comprehensive scheme of IHL, which has been directly incorporated into Canadian law. Arguably it is precisely the failure to apply legal norms to an analysis of the nature of particular non-state actors and their conduct that politicizes the judicial role in these cases. While it must be acknowledged that the application of IHL standards may have political *consequences*, the Courts are frequently involved in balancing competing interests with explicit political, economic, and social dimensions.[58] From foreign policy, missile testing, abortion, and the Secession Reference, to the language of signs, the funding of education and pay equity, the right to life and the right to death, Canadian courts directly engage with a broad spectrum of political issues and have attempted, albeit with varying degrees of success, to resolve these questions within the rubric of law and principle.[59] Viewed in this light, judicial deference in the name of protecting Canada from "terrorism" reinforces the dominant discourses that have cast the refugee as a threat to order, and as Whitaker suggests, the "focal point for countermeasures to 'stem the tide.'"[60] The Court's surrender becomes a political act of state legitimation, compromising the very tenets judges are entrusted to uphold.

In the absence of statutory criteria defining *membership* and *terrorism,* Mr. Justice Teitelbaum could have ensured that those terms were interpreted in a manner consistent with the Geneva Conventions Act as well as the Charter and international human rights law. The Court could have read into the law the presumption that Parliament did not intend those terms to be interpreted by either ministers or judges in an unconstitutional manner, in a way that would sweep within its ambit advocacy and fundraising efforts in support of lawful activities and, indeed, fundamental human rights.[61]

Another reasonable course of action could have been to find that the absence of definitional criteria renders non-discriminatory application of the law impossible (as Mr. Justice Denault noted in *Ahani*) and that therefore the Minister's decision could not be upheld. In other contexts, the courts have recognized the disadvantage suffered by non-citizens in Canada.[62] The courts have also held that seemingly neutral laws that affect a person or group in a manner related to their personal characteristics is an affront to the values of equality and human dignity.[63] Indeed, the right to equality enshrined in the Charter has been described as the "broadest of all guarantees" that applies to and supports all other rights.[64] In *Re Suresh* we are advised instead that the law must be interpreted through the "eyes of a Canadian" and that ministerial discretion to interpret "membership in a terrorist organization" should be unre-

stricted. The irony is that the refugees and immigrants most affected by the law are very often from countries with the worst records on human rights. In this case we can see how the Court's judgment lends legitimacy to the efforts of the Sri Lankan government to suppress a secessionist struggle borne of fundamental deprivations and human rights abuse. Mr. Justice Teitelbaum stated,

> I am satisfied that there is no need to define the word "terrorism." When one sees a "terrorist act" one is able to define the word. When one sees a bomb placed in a public market frequented by civilians and the bomb causes death and injury, one is able to see a "terrorist act" or what is referred to as "terrorism." The word need not be defined. As I have stated, one can see a "terrorist act" and, I am satisfied, the "act" must be seen through the eyes of a Canadian . . . [t]he term "terrorism" or a "terrorist act," I am satisfied must receive a wide and unrestricted interpretation . . . [65]

In contrast to the decisions on complicity in the context of refugee exclusion (*Ramirez*, *Moreno,* and *Balta*) and the judgment in *Al Yamani,* which distinguished between support activities and personal involvement, in *Re Suresh* we see that all forms of conduct in support of an organization deemed to be engaging in "terrorism," in the absence of any nexus between the support activities and acts of violence, is "terrorism." The Court need not have found that the LTTE was a national liberation movement for the purposes of absolving Suresh (although the preponderance of evidence suggests otherwise). Further, the Court need not have discounted evidence of serious human rights violations that have been committed by members of the LTTE during the seventeen-year conflict in Sri Lanka. Indeed, Amnesty International has consistently documented violations of international humanitarian principles by both sides in the conflict.[66] Rather, the Court could have relied on evidence of the organization's conventional combat activity as well as its humanitarian and relief activities in support of internally displaced Tamils and its status as a *de facto* government in areas of the country within its control, to conclude that the LTTE was not an organization with a "limited brutal purpose," such that someone engaged in fundraising and political advocacy should be effectively criminalized for whatever acts of violence members of the group may initiate.[67]

Subsequent to the Court's decision upholding the reasonableness of the security certificate, the Minister gave notice that she was considering the option of declaring Suresh a danger to the security of Canada and that she would be assessing the risk that he represented for the Canadian public and the possible risks to which he would be exposed if returned to Sri Lanka. Pursuant to the procedures set out in the Act, Suresh had fifteen days to respond to the Minster's notice. Documentation submitted on his behalf included extensive evidence of human rights abuses, including torture in detention and extra-judicial executions, committed by Sri Lankan security forces against Tamils. The human rights reports confirmed that most of the torture victims were "Tamils suspected of being LTTE-insurgent collaborators." There was evidence submitted confirming that Suresh personally would be at serious risk if returned to Sri Lanka, in particular as a Canadian-certified "terrorist." A letter from Amnesty International emphasized the non-derogable nature of Canada's obligations under the CAT and indicated that "[a]pplying the language of article 3 to Mr. Suresh, Amnesty International believes 'there are substantial grounds for believing that he would be in danger of torture' if he were returned to Sri Lanka."[68] The department analyst who reviewed the case recommended that the Minister issue a danger opinion against Suresh, noting,

> . . . on balance there are insufficient humanitarian and compassionate considerations present to warrant extraordinary consideration. It is difficult, however to assess the treatment reserved for Mr. Suresh upon his return to Sri Lanka. Given his high profile in the Canadian Tamil Community and international media, we feel that this will likely mitigate any harsh sanctions taken against him by Sri Lankan authorities. Furthermore, while we acknowledge that there is a risk to Mr. Suresh on his return to Sri Lanka, this is counterbalanced by the serious terrorist activities to which he is a party, committed while abusing Canada's protection and freedom.[69]

The Minister issued the danger opinion and took steps to arrange for his deportation. A judicial review application in the Trial Division and a subsequent appeal, challenging the constitutionality of the terrorism and *refoulement* subsections as well as the Minister's exercise of discretion in the circumstances of the case, were both unsuccessful.[70] From the wide-ranging legal and constitutional issues arising from the judgment by the Federal Court of Appeal, a few points warrant particular mention for our inquiry.

First, none of the human rights reports available at the time the analyst wrote his report or today lend any support to his contention that a "high profile" would mitigate against harsh treatment.[71] It is notable that just a few months after the analyst completed his memorandum, the Canadian government was involved in a sophisticated interdiction action involving a boat of 192 Tamil asylum-seekers bound for Europe. Canadian interdiction policies are the

mirror image of anti-terrorist laws: both serve to control access to asylum. In this case a boat was tracked and intercepted off the coast of Senegal. None of the passengers were properly interviewed to determine whether they would be at any risk if returned to Sri Lanka.[72] Summarily described as "economic migrants," they were encouraged to consent to "voluntary" repatriation under the watchful eyes of Canadian officials. All of the Tamils were arrested upon arrival back to Sri Lanka and held in detention for several weeks. One of these individuals was rearrested one month later and brutally tortured on the pretext of his alleged involvement in the LTTE.[73] Two years later, representatives for the Canadian government still speak of their "success" in safeguarding Canada from illegal migration.[74] Neither the attention the case attracted (two bulletins by Amnesty International), nor the direct involvement of the Canadian government in the operation and subsequent monitoring in Sri Lanka, prevented this atrocity from happening. The most recent human rights reports confirm that "[d]espite legal prohibitions, the security forces and police continue to torture and mistreat persons in police custody and prisons, particularly Tamils suspected of supporting the LTTE," and that "torture continues with relative impunity."[75] The U.S. State Department report for 2000 indicates that

> [m]ethods of torture included electric shock, beatings (especially on the soles of the feet), suspension by the wrists or feet in contorted positions, burning, slamming testicles in desk drawers, and near drownings. In other cases, victims must remain in unnatural positions for extended periods, or they have bags laced with insecticide, chilli powder, or gasoline placed over their heads. Detainees have reported broken bones and other serious injuries as a result of their mistreatment.[76]

A second observation concerns the Court of Appeal's textual analysis of the relevant international human rights treaties. In dismissing Suresh's appeal, the Court engaged in interpretive gymnastics with regard to the requirements of the applicable treaties. As emphasized in the Supreme Court ruling in *Pushpanathan*, provisions that disentitle a person to human rights protection should be read narrowly.[77] The Federal Court did precisely the opposite by attempting to find support for the proposed deportation, where none actually existed, in the text of the treaties. Mr. Justice Robertson suggested that the International Covenant on Civil and Political Rights enunciates a non-derogable prohibition on torture that is geographically restricted to conduct within a state's jurisdiction; that its ambit does not extend to expulsion or extradition.[78] The fact that the UN Human Rights Committee's own guidelines directly contradict such an interpretation did not dissuade the Court from this view.[79] The Court proceeded to infer that derogation from the Convention against Torture's prohibition against *refoulement* to torture was contemplated because article 3 contained no reference to a non-derogation requirement (although the plain language is mandatory: "no State Party shall expel, return . . . "). The next leap was to article 16 of the Convention, which addresses the circumstances where references to torture can be read to include "cruel, inhuman or degrading treatment or punishment" and to provide broader protection by explicitly indicating that the Convention's provisions are without prejudice to guarantees afforded in other international instruments. The Court inferred from this article that since the Refugee Convention permits *refoulement* pursuant to the security exception of article 33.2, the Convention against Torture should be interpreted to include the very same exception. Yet this reading directly contradicts the Convention's own preamble as well as decisions of the Committee Against Torture and the European Court of Human Rights.[80]

The Court agreed that a breach of fundamental justice had been occasioned by procedures that permitted the Minister to deport "a suspected terrorist" where there were substantial grounds for believing that *refoulement* would expose the person to a risk of torture. However, this was a reasonable limitation in view of the security interests at stake. One might legitimately wonder how such action can be reconciled with the Court's conclusion that Suresh himself had not committed any crimes in Canada, nor had he engaged in any "terrorist" activity in Sri Lanka. Indeed, in reasons granting an earlier interlocutory order, Mr. Justice Robertson stated,

> What is clear is that Mr. Suresh has not committed any acts of violence in Canada. He is being deported largely because he is the leader of a Canadian organization which raises financial aid for a terrorist organization, namely, the LTTE. In short, there is no evidence to support a valid concern that Mr. Suresh's presence in Canada represents a threat to the personal safety of Canadians.[81]

Even if one were to accept that the human rights treaties permit states to balance competing interests in cases of *refoulement* to torture (which they do not), there is an utter lack of proportionality between the law's legislative purpose of general deterrence—ensuring that Canada does not become "a safe haven for terrorists," and the means invoked, when a person who poses no threat is *refouled* to a risk of torture. When the constitutional rights of citizens are at stake, the government is held to a more rigorous test in order to defend the proposed action.[82] For a non-citizen, the most basic right to security of the person will be com-

promised in the name of safeguarding the "security of Canada." Perversely, the Court appeals to the need to foster comity among nations—to ensure that Canada "lives up to its international commitment to fight terrorism," as an additional benefit of the law, while rejecting the very same internationalism to promote human rights.[83] It is noteworthy that the government itself is on record suggesting that the fight against "terrorism" must be consistent with the broader commitments to human rights and the rule of law; that the institutions entrusted to fight "terrorism" would attract public support by respecting those principles.[84]

Third, the Court's judgment conflates "terrorism" with crimes against humanity. It is suggested that "[n]o one questions the right to use force in seeking political independence so long as the struggle is between two combatants." However, we are told,

> . . . a line separating acceptable means of protest from unacceptable means must be drawn somewhere. In my view terrorism is an unacceptable means of attempting to effect political change… I accept that nations may be unable to reach a consensus as to the exact definition of terrorism. But this cannot be taken to mean that there is common ground with respect to certain types of conduct. At the very least, I cannot conceive of anyone seriously challenging the belief that killing innocent civilians, that is crimes against humanity, does not constitute terrorism.[85]

The terrorist is now reconceived as the criminal against humanity—a term that actually has legal content and meaning, from its codification in the Charter of Nuremberg to its more recent applications by the *ad hoc* tribunals for Yugoslavia and Rwanda, and in the Rome Statute.[86] It may indeed be the case that members of the LTTE have committed such crimes, but justice would not tolerate a trial *in absentia*—nor would it implicate everyone in a leadership position without reference to the context of the conflict or degree of personal responsibility.[87] Apart from decisions of the Federal Court, none of the ill-fated efforts to define "terrorism" have ever suggested an equivalence with crimes against humanity. Such a suggestion is offensive in the context of the Sri Lankan conflict, where daily reports of human rights violations committed by the state as part of a systemic, deliberate policy of race-based persecution far outstrip the crimes of the Tamil Tigers, whose fundamental objective concerns a legitimate right of self-determination.[88] While we share the same horror as the Court over atrocities committed against innocent people, the suggestion that Suresh's conduct could ever be equated with crimes against humanity trivializes the massive brutalities of the past century—from the Nazi Holocaust to the killing fields of Cambodia and Rwanda.

The United Nations Human Rights Committee has expressed concern that "Canada takes the position that compelling security interests may be invoked to justify the removal of aliens to countries where they may face a substantial risk of torture or cruel, inhuman or degrading treatment."[89] In November 2000, the Committee against Torture expressed a similar concern and recommended that Canada "comply fully with article 3(1) of the Convention prohibiting return of a person to another state where there are substantial grounds for believing that the individual would be subjected to torture, whether or not the individual is a serious criminal or security risk."[90] In its more wide-ranging study also released last year, the Inter-American Commission on Human Rights commented that "[t]he fact that a person is suspected of or deemed to have some relation to terrorism does not modify the obligation of the State to refrain from return where substantial grounds of a real risk of inhuman treatment are at issue."[91] The Commission gave particular attention to the procedural inadequacies inherent in the immigration security scheme.

What should be clear from the foregoing review is that a parochial discourse of anti-terrorism has been a substitute for conceptual consistency, coherence, and justice. Non-citizens have been subjected to standards that fall far short of the guarantees afforded citizens, and the most basic entitlements to equality and security of the person have been sacrificed on the altar of national security. In most cases, once an adverse CSIS report has been issued, even the most compelling testimony by the person concerned and Herculean efforts by counsel have been unable to persuade the Federal Court that the advice should be discounted. With each security certificate that the Court has upheld on the basis of "terrorism" allegations, the government's strategy of selective refugee deflection and deterrence, of closing the borders for some while extending a welcome mat to others, has been reinforced.

Conclusion

It was a security-conscious, "law and order" Conservative government that developed the "terrorism" clauses ultimately included in Bill C-86. This was the same government that moved the entire Immigration bureaucracy to a newly created Department of Public Security. Once elected, the Liberal government swiftly reconfigured the department as "Citizenship and Immigration" but endorsed and sustained the measures introduced in C-86. In his submission to the Special Committee of the Senate on Security

and Intelligence (Kelly Committee) in 1998, Ward Elcock, the director of CSIS, warned that "the terrorist threat to Canada—and Canadians—has not diminished."[92] Mr. Elcock indicated that with perhaps the singular exception of the United States, there were more international terrorist groups active in Canada than in any other country in the world and that "Canada's counter-terrorism effort will never succeed if we allow our borders to become mere sieves . . . "[93] Reporting in January 1999, the Kelly Committee agreed that

> Canada remains . . . a "venue of opportunity" for terrorist groups: a place where they may raise funds, purchase arms and conduct other activities to support their organizations and their terrorist activities elsewhere. Most of the major terrorist organizations have a presence in Canada. Our geographic location also makes Canada a favourite conduit for terrorists wishing to enter the United States, which remains the principal target for terrorist attacks world-wide.[94]

It is interesting to note that government does not actually maintain a reliable record of "terrorist" incidents in Canada, but CSIS confirms that there are approximately fifty organizations and 350 individuals who are "targets" of ongoing intelligence investigations.[95] Ironically, even CSIS accepts that during the past ten years the number of reported incidents of politically motivated violence internationally has declined "notably."[96] More people continue to be killed and injured every year in traffic and workplace accidents—and as one observer recently remarked, even by bee stings[97]—than by "terrorism" under any definition of the term. Yet legal and policy discourse on "terrorism" continues to be informed by a moral panic.[98] The anti-terrorism measures in Canadian immigration law, much like the draconian anti-mugging reforms adopted in the United Kingdom in the 1970s (which focused on members of the Black community as scapegoats) are the result of the manner in which the state and the media have constructed and distorted social reality. As Lohrmann indicates, the overall impact of immigration on the internal security of receiving countries "tends to be misjudged and overestimated. Public debates on this issue are often marked by prejudicial stereotyping of the proneness of immigrants toward crime and deviant behaviour."[99] In the Canadian context statistics firmly establish that refugees and other immigrants commit crimes at rates far below the Canadian-born population.[100] Yet in the past year the isolated incident of failed refugee claimant Ahmed Ressam crossing the United States from Canada with explosives in his car became a flashpoint for concern by the media and government alike and renewed criticism that the refugee program was to blame for Canada's becoming a "safe haven for terrorists."[101] Similarly, in the lead-up to the Supreme Court's hearing of the *Suresh* case later this spring, national media have repeatedly rehashed the story of federal Cabinet ministers attending a community event organized by FACT in Toronto, giving voice to concerns that federal politicians were dining with "terrorists."[102] It is acknowledged that there have been some serious incidents in Canada, and in this regard the role of the state in maintaining national as well as international security is important. Most people remember the 1985 Air India flight that originated in Vancouver and ended in the skies over Ireland with an explosion that killed all 329 passengers on board—becoming the biggest mass murder case in Canadian history. However, "counter-terrorism" must not become a blanket justification for victimizing innocent people. As Keely and Russell imply, the perpetrators must not win by making us like them.

The cold-war efforts of the House Un-American Activities Committee and Senator Joseph McCarthy to uncover members of the Communist Party in Hollywood and the U.S. State Department are widely regarded as witch hunts. In Canada, more than fifty years later, in the face of increasing concerns about the activities of biker gangs, certain politicians have demanded that the federal government declare an outright ban on membership in organized crime groups. Both the federal Justice Minister and national media appropriately urged caution.[103] The solution wasn't to make new laws that trenched on important civil liberties, but rather to do a better job of enforcing the laws that already exist.[104] That as a society we are unable to marshal the same logic in support of refugees and other non-citizens in this country is shameful.

As for concrete reforms, the following recommendations represent a modest attempt. The relatively recent amendments targeting "terrorists" and members of "terrorist" organizations should be removed from the Immigration Act. The Federal Court's jurisprudence in the aftermath of the C-86 amendments provides ample illustration of the extent to which application of the term permits an unacceptably wide margin for decisions based on stereotype and other biases. The Court's cliché, that "one knows a terrorist act when one sees one," is symptomatic of the lack of rigour and principle that attempts to apply "terrorism" in the legal arena necessarily engender. Even if it were possible, as Chadwick might assert, for Parliament to develop a more even-handed definition of the term, one that would provide meaningful and non-discriminatory guidance for decision makers, there is no need for it. The admissibility provisions already included in section 19 of the Immigration

Act are fully adequate to address genuine security concerns by including within their ambit persons who have committed unlawful acts in the past as well as those who are considered likely to engage in acts of violence or unlawful activities in the future.[105]

It deserves mention that the Minister has authority pursuant to existing legislation to initiate revocation proceedings if information surfaces later to suggest that residence or citizenship status was conferred improperly.[106] A focus on acts and offences, rather than support for causes, is consistent with international treaty obligations and should go some way to ensuring that political activists are not caught in the net. However, for the law to be truly non-discriminatory, its treatment of refugees and immigrants from conflict-ravaged countries should be explicitly guided by international humanitarian law. The Immigration Act should be amended to include reference to the Geneva Conventions Act so that people who have engaged in violent acts in the context of a legitimate conflict are no longer criminalized for the mere fact of having been in engaged in the conflict, either as combatants or civilians. A further amendment should provide a specific definition for the term *security of Canada*, with reference to international legal standards as well as the definition of threat in the CSIS Act. While the government seeks to promote international cooperation in the eradication of violence, the Courts have an important role in ensuring that comity does not become an all-purpose justification for riding roughshod over individual rights and undermining legitimate political dissent, at home and abroad. The norms developed in refugee and criminal law concerning membership, complicity, and conspiracy should inform all security-related decisions. Clear policy guidelines articulating these principles would provide critical assistance to both administrative decision makers and judges. Under no circumstances should deportation be authorized in circumstances where an individual is at risk of torture or other serious human rights violations. In this regard, the Act should be amended to fully incorporate the obligations of the Convention against Torture. Finally, the government should redouble genuine efforts to end impunity for international crimes through recourse to the criminal justice system. Canada's role in promoting international justice would be immeasurably enhanced if the small number of refugees and other non-citizens who have committed war crimes or crimes against humanity were prosecuted in Canada, rather than subject to expulsion. Meaningful implementation of the Crimes against Humanity and War Crimes Act means there is no longer an excuse for inaction. Implementation of any of these recommendations would require a degree of political will that appears to be lacking at present. In the coming months, however, the Supreme Court will be uniquely positioned to address some of these issues. May the Court be guided by wisdom and justice.

Notes

1. C.B. Keely and S.S. Russell, "Asylum Policies in Developed Countries: National Security Concerns and Regional Issues" in A. Simmons, ed., *International Migration, Refugee Flows and Human Rights in North America*: *The Impact of Free Trade and Restructuring* (Staten Island, N.Y.: Center for Migration Studies, 1992) 229 at 241.
2. Although provincial superior courts may address immigration matters in the context of their inherent jurisdiction over constitutional matters, the Federal Court has primary jurisdiction in the review of ministerial security certificates and admissibility decisions. See *Reza* v. *Canada*, [1994] 2 S.C.R. 394; *Baroud* v. *The Queen* (1995) 22 O.R. (3d) 255 (O.C.A.); *Suresh* v. *The Queen* (1998) 38 O.R. (3d) 267, aff'd on appeal [1999] O.J. No. 28 (Ont. Div. Ct.).
3. Note, however, that a designated judge does not have jurisdiction to consider constitutional challenges in the context of a review of the reasonableness of a security certificate pursuant to s. 40.1 of the Immigration Act. See, *e.g., Canada* v. *Mahjoub* [2001] F.C.J. No. 79 (T.D.), online: QL (FCJ). For a detailed study of the broader legislative scheme and applicable procedures, see D. Galloway, *Immigration Law* (Concord, Ont.: Irwin Law, 1997).
4. See B. Gorlick, "The Exclusion of 'Security Risks' as a Form of Immigration Control: Law and Process in Canada" (1991) 5:3 Immigration and Nationality Law and Practice 76 at 78. A comment on the use of national security doctrine by the British Courts and equally apt for Canada: "[A]s soon as national security is mentioned, the courts quake." I.A. Macdonald and N.J. Blake, *Immigration Law and Practice in the United Kingdom,* 4th ed. (London: Butterworths, 1995) at 501. See *ibid*., at 499-502 for an overview of the national security procedures in the U.K.
5. *R.* v. *Secretary of State for Home Affairs, Ex Parte Hosenball*, [1977] 1 W.L.R. 766 at 783(C.A.).
6. For a more recent endorsement of this view, see *Rehman* v. *Secretary of State for the Home Department* [2000] E.W.J. No. 2830 at para. 43 (C.A.), online: QL (EWJ), regarding a deportation order against a man suspected of links with a "terrorist" group operating in Pakistan. The British Court of Appeal observed, "The Executive is bound to be in a better position to determine what should be the policy on national security than any tribunal no matter how eminent." The Court of Appeal did suggest, however, that British security could be threatened only by promotion of violence abroad where there is evidence of "adverse repercussions on the security of this country" (at para. 39).
7. The common law "political questions doctrine" stipulates that the judge "should decide not to decide" in cases where the issues do not present clear legal questions susceptible to "judi-

cially discoverable or manageable standards." See *Baker* v. *Carr* 369 U.S. 186 (1962). In Canada, the doctrine was considered in *Operation Dismantle Inc.* v. *The Queen*, [1985] 1 S.C.R. 441, and most recently, in the *Secession Reference*, where the Court chose not to invoke it [1998] 2 S.C.R. 21. See L. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Carswell,1999).

8. P. Hanks, "National Security: A Political Concept" (1988)14 Monash U.L.Rev. 114 at 116.
9. *Re Goguen and Albert and Gibson* (1984) 7 D.L.R. (4th) 144 at 156.
10. P. Hanks, *supra* note 8 at 133.
11. *Ibid*., at 119.
12. As defined by the United Nations Development Programme (UNDP), *human security* means, first, "safety from such chronic threats as hunger and repression," and second, "protection from sudden disruptions in the patterns of daily life"—whether in homes, jobs, or communities. UNDP, *Human Development Report* (Oxford: Oxford University Press, 1994) at 23. In this regard, Lohrmann reminds us that "the most important security implications of some population flows are felt by the refugees and migrants themselves . . . the concept 'human security' as developed by the UNDP, underlines the significance of the individual-level analysis in any discussion on the international migration-security nexus." R. Lohrmann, "Migrants, Refugees and Insecurity. Current Threats to Peace?" (2000) 38:4 *International Migration* 2 at 6. See also, J. Milner, "Sharing the Security Burden: Toward the Convergence of Refugee Protection and State Security," Refugee Studies Centre Working Paper No. 4, University of Oxford, May 2000 at 11.
13. See Canadian Council for Refugees, *Submission to the UN Committee on Human Rights in Preparation for the Examination of Canada on Its Compliance with the International Covenant on Civil and Political Rights,* online: <http://www.web.net/~ccr/iccpr.htm> March 1999.
14. *Chiarelli* v. *Canada* [1992] 1 S.C.R. 711; 16 Imm. L.R.(2d) 1 at 20.
15. See P. Eliadis, "The Swing from Singh: The Narrowing Application of the Charter in Immigration Law" (1995) 26 Imm.L.R. (2d) at 130.
16. *Suresh* v. *Minister of Citizenship and Immigration* (1998), 160 F.T.R. 152, aff'd [2000] 2 F.C. 592 (C.A.), leave to appeal to S.C.C. granted [2000] [hereinafter *Suresh* (C.A.)].
17. *McAllister* v. *Minister of Citizenship and Immigration,* [1996] 2 F.C. 190 (T.D.) [hereinafter *McAllister*].
18. See J. Borricand, "France's Reponses to Terrorism" in R. Higgins and M. Flory, eds., *Terrorism and International Law* (London: Routledge, 1997) at 145.
19. *McAllister, supra* note 17.
20. *R.* v. *Morales* [1992] 3 S.C.R. 711; see also *R.* v. *Nova Scotia Pharmaceutical Society* [1992] 2 S.C.R. 606. In the more recent decision of *City of Chicago* v. *Jesus Morales*, the United States Supreme Court found an anti-gang ordinance unconstitutionally vague because it did not provide adequate notice of the proscribed conduct. 527 U.S. 41 (1999).
21. *Al Yamani* v. *Canada (Solicitor General)* [1996] 1 F.C. 174 (T.D.).
22. *Ibid.*
23. Last year the Trial Division set aside SIRC's second report concerning Al Yamani on the evidence that the Committee had ignored crucial evidence on the current nature of the PFLP. At the same time the Court considered a number of other issues, including whether the term *subversion* in subsection 19 (1) (f), pursuant to which Al Yamani was found inadmissible in the second report, was constitutionally vague. Justice Gibson determined that *subversion* was "an extraordinarily elusive concept" that did infringe the principles of fundamental justice. However, the social and security objectives that the use of the term was designed to achieve were sufficiently important to warrant overriding the constitutionally protected right. *Al Yamani* v. *Canada (Minister of Citizenship and Immigration)* IMM 1919-98, 14 March 2000 (T.D.).
24. 378 U.S. 500 (1964).
25. *United States* v. *Robel*, 389 U.S. 258 (1967).
26. *Re Baroud* (1996) 98 F.T.R. 99 (T.D.) at 109.
27. R. Whitaker, "Refugees: The Security Dimension" (1998) 2:3 *Citizenship Studies* 413 at 428. Professor Whitaker was an expert witness in Baroud's hearing and provides an excellent analysis of that case in the broader context of reviewing the role of security considerations in shaping refugee policy in the West.
28. Hathaway and Harvey agree that this approach "goes too far." J.C. Hathaway and C.J. Harvey, "Framing Refugee Protection in the New World Disorder," forthcoming (2001) 34:2 Cornell Int'l L.J. at n. 166 ff.
29. [1998] F.C.J. No. 726 (T.D.), online: QL (FCJ).
30. [1998] 151 F.T.R.101.
31. *Ibid.*
32. *Ramirez* v. *Minister of Employment and Immigration*, [1992] 2 F.C. 306 (C.A.).
33. *Ibid.*
34. *Ibid.*
35. *Moreno* v. *Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298 (C.A.).
36. *Ibid.*
37. *Dunlop and Sylvester* v. *The Queen*, [1979] 2 S.C.R. 881 at 891 and 896.
38. *Balta* v. *Minister of Citizenship and Immigration,* IMM-2459-94, 27 Jan.1995 (T.D.) at 5-6.
39. But see *Sivakumar* v. *Canada* in which the Court held that "the closer one is to a position of leadership or command in an organization, the easier it will be to draw an inference of awareness of crimes and participation in the plan to commit crimes." The Refugee Board's decision to exclude the appellant from refugee status was upheld on the basis that he had held a number of leadership positions in the LTTE in Sri Lanka—an organization the Court described as having committed crimes against humanity. The Court emphasized the importance of a case-by-case, factual determination. Sivakumar's own testimony confirming knowledge of the crimes and executive roles in, *inter alia*, military training and intelligence services, were the determinative factors in this case. [1994] 1 F.C. 433 (C.A.).
40. As the UNHCR has stated, "The fact of membership does not, in and of itself, amount to participation or complicity . . . [M]embership per se of an organization which advocates or

practices violence is not necessarily decisive or sufficient to exclude a person from refugee status. The decision maker will need to consider whether the applicant had close or direct responsibility for, or was actively associated with, the commission of any crime specified under Article 1F . . . Moreover, regard must also be had to the fragmentation of certain terrorist groups. In some cases, the group in question is unable to control acts of violence committed by militant wings. 'Unauthorized acts' may also be carried out in the name of the group." UNHCR, Exclusion Clauses: Guidelines on Their Application (December 1996), paras. 40, 45, 47, 48.

41. Lawyers Committee for Human Rights, *Safeguarding the Rights of Refugees under the Exclusion Clauses: Summary findings of a Project of the Lawyers Committee for Human Rights,* October 2000 at 17.
42. *T.* v. *Secretary of State for the Home Department* [1996] 2 All ER 865, [1996] 2 WLR 766, House of Lords, 22 May 1996. T., an Algerian national and member of the Islamic Salvation Front, was excluded from asylum in the U.K. on the basis that he had committed a serious non-political crime within the terms of art. 1 F(b) of the Geneva Convention. In the end, the House of Lords upheld T.'s exclusion from asylum because his participation in the planning of a bomb attack at an airport in Algiers and a raid on an army barracks was beyond the "political." For an interesting comment on this case as well as national security and British asylum policy generally, see P. Shah, "Taking the 'Political' out of Asylum: The Legal Containment of Refugees' Political Activism" in F. Nicholson and P. Twomey, eds., *Refugee Rights and Realities* (Cambridge: Cambridge University Press, 1999) 119-135.
43. *Saygili* v. *Canada,* [1997] F.C.J. No. 287 (T.D.), online: QL (FCJ).
44. *Ibid.*
45. *Ibid.*
46. See *Irwin Toy Ltd.*, v. *Quebec (Attorney General)* [1989] 1 S.C.R. 927 in which the Supreme Court held that not all expression is protected; *Reference re ss. 193 and 195.1 (1)(c) of the Criminal Code* in which the Court found that expression of "direct attacks by violent means on the physical liberty and integrity of another person" is not protected by the Charter of Rights [1990] 1 S.C.R. 1123 at 1186; and *R.* v. *Butler* [1992] 1 S.C.R. 452. An unwarranted expansion of this principle can be found in the Federal Court's reasons in a case concerning an alleged member of an Armenian "terrorist" organization (where there was evidence of unlawful activity in Canada committed by others). The Court found no basis for scrutinizing a law [s. 19(1)(g)] that permitted deportation of a permanent resident who had lived in Canada for twenty years. A "*belief* in the indiscriminate use of violence in the furtherance of political ends" was identified as among the reasons that constitutional protection should not be afforded [emphasis added]. See *Moumdjian* v. *Canada*, [1999] 4 F.C. 624 (C.A.).
47. [1998] F.C.J. No. 507 (T.D.), online: QL (FCJ).
48. *Ibid.*
49. Section 15(1) of the Canadian Charter of Rights and Freedoms provides that "[e]very individual is equal before and under the law and has the right to equal protection and benefit of the law without discrimination, in particular that based on race, religion, national or ethnic origin, colour, religion, sex, age or mental or physical disability."
50. *Andrews* v. *Law Society of British Columbia* (1989), 91 N.R. 255 [hereinafter *Andrews*]. See also, *Symes* v. *Canada* [1993] 2 S.C.R. 695; *Egan* v. *Canada* [1995] 2 S.C.R. 513; *Benner* v. *Canada (Secretary of State)* [1997] 1 S.C.R. 358; *Eaton* v. *Brant County Board of Education* [1997] 1 S.C.R. 241; *Vriend* v. *Alberta* [1998] 1 S.C.R. 493; and *Law* v. *Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497.
51. See *Ahani* v. *Minister of Citizenship and Immigration* [1999] F.C.J. No. 1020 (T.D.), online: QL (FCJ); and *Ahani* v. *Canada* [2000] F.C.J. No. 53 (C.A.), online: QL (FCJ). An earlier attempt to challenge the constitutional validity of the security certificate procedures under 40.1 of the Act was unsuccessful. See *Ahani* v. *Canada* [1995] 3 F.C. 669 (T.D.); aff'd (1996) 201 N.R. 233 (F.C.A.) application for leave to appeal to S.C.C. refused [1997] S.C.C. No. 25580.
52. The Court has certified six constitutional questions addressing whether s. 53(1)(b) offends the principles of fundamental justice; whether s. 19(1)(e) and (f) infringe freedom of association and expression and whether the term *danger to the security of Canada* found in s. 53(1)(b) and/or the term *terrorism* found in s. 19(1)(e) and (f) are void for vagueness and therefore, contrary to the principles of fundamental justice. S.C.C. No. 27790, 19 Oct. 2000.
53. *Re Suresh*, [1997] F.C.J. No. 1537 (T.D.), online: QL (FCJ).
54. *Ibid.*, Transcript, Vol. 1, 19 March 1996, Prof. Paust; Transcript, Vol. 38, 15 October 1996; Transcript, Vol. 48, 3 February 1997. Note that counsel for the Minister and Solicitor General called one expert in reply, Prof. Greenwood, who did not endorse many of the views articulated by the respondent's experts. In particular, Greenwood described the conflict in Sri Lanka as "internal" and suggested that the LTTE had no right to resort to force. In his view there was no consensus in the international community about the right of a people to take up arms beyond the colonial situation in South Africa, which was quasi-colonial, and in Southern Rhodesia. *Ibid.*, Transcript, Vol. 46, 14 November 1996 Prof. Greenwood, at 61-67, 72-76, 197-198.
55. *Ibid.*, Respondent's Submissions, 27 March 1997.
56. *Ibid.*
57. *Ibid.*
58. Jackson suggested that "all constitutional interpretations have *political* consequences." R.H. Jackson, *The Supreme Court in the American System* (1955) at 56 [emphasis added].
59. See M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thomson Educational Publishers, 1994) at 3.
60. Whitaker, *supra* note 27 at 415.
61. See *Slaight Communications* v. *Davidson*, [1989] 1 S.C.R. 1038 at 1056-1057, 1078; *Eldridge* v. *British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 20; *Baker* v. *Canada*, [1999] 2 S.C.R. 817; and *Little Sisters Book and Art Emporium* v. *Canada* [2000] S.C.C. 69, File No. 26858. See also C. Scott, "Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally into the Spotlight?" (1999) 10:4 *Constitutional*

Forum 97, for a discussion of the use of international human rights law by domestic courts.

62. *Andrews*, *supra* note 50.
63. *Andrews*, *ibid*.; and *Egan* v. *Canada*, [1995] 2 S.C.R. 513, at 597.
64. *New Brunswick* v. *G.(J)*, [1999] 3 S.C.R. 46 at para. 112, L'Heureux-Dubé J.
65. *Re Suresh*, *supra* note 52.
66. See, *e.g.*, Amnesty International, *Annual Report 2000, Sri Lanka*, online: <http://www.amnesty.org>.
67. The evidence provided by witnesses for Suresh on the activities of the LTTE in Sri Lanka was provided *in camera* to protect the safety of the individual sources and their families in Sri Lanka. However, reliable information about the conflict is readily available from the *Sri Lanka Monitor,* a publication of the Refugee Council in the U.K. The *Sri Lanka Monitor* confirms that the LTTE has a well-organized fighting force that engages in conventional operations as well as "guerrilla warfare." For information on the LTTE in 1996-97, the time frame of the security certificate proceedings, see "West of the Lagoon," describing LTTE attacks on police and soldiers, government reprisals that included indiscriminate shooting on civilians, shelling of an entire village, and the gang rape of a villager (*Sri Lanka Monitor* No. 106, November 1996); "No Progress on Peace Alert," reporting that the LTTE was prepared to discuss peace at a ministerial level (No. 107, December 1996); "Refugees Killed in Reprisal Firings," reporting on LTTE attack of the Batticaloa district police station, police firing on the Pelthalai refugee camp, and the army using bus passengers as a human shield; "Securing Mannar," LTTE attack on a soldier, police firing indiscriminately on Mannar town, and army attack on civilians; "Tigers Strike East," reporting that LTTE challenged government control of key towns in eastern Sri Lanka, mounting simultaneous assaults on an airbase and army camp (No. 110, March 1997). For more recent information, see "Tigers Take Chavakachcheri" (No. 148, May 2000); "Red Cross Concern" (No. 150, July 2000); "Vavuniya Violations" (No. 151, August 2000); "Depriving the North" (No. 152, September 2000), online: <http://www.gn.apc.brcsl/project>. The LTTE collects taxes, and finances and delivers a range of "municipal" services in the Vanni region as well as large parts of the Jaffna peninsula and the Eastern province. The LTTE finances the Puthukkudiyirupu Hospital in Vanni and several orphanages, and distributes food and medicine. See R. Cheran, *Nationalism and National Liberation in Sri Lanka and the Tamil Diaspora* (Ph.D. Thesis, Department of Sociology, York University, 2000, c. 6 [unpublished]). Even security and intelligence agencies, which generally assess the LTTE as a "terrorist" organization, acknowledge that the LTTE provides a "reasonably well-managed administration." Jane's Sentinel, 4 September 2000, online: <http://www.janes.com/security/regional_security/news/sentinel/sent000904_6_n.shtml>. Note also a letter from Bill Graham, MP for Toronto Centre-Rosedale (26 September 1997) which stated, "As a political organization, the LTTE operates in several Western countries including France and the U.K. Officials with Canada's Department of Foreign Affairs have met with LTTE political officials in Sri Lanka and elsewhere . . . " As for the Court's concern about Suresh's refugee claim, a procedure is available to the Refugee Board to revoke refugee status if it is found warranted, after a full oral hearing and a right of judicial review. That question, however, is distinct from an assessment of the security risk Suresh could pose, or the risks he faces on return to Sri Lanka.
68. Letter from Amnesty International, Canadian Section (English-speaking Section) to Minister of Citizenship and Immigration, 12 November 1997. Amnesty International has continued to advocate for Suresh: see "Urgent Action Re Manickavasagam Suresh," AI Index AMR 20/02/98; "It's Time, Amnesty International's Briefing to the UN Committee against Torture with Respect to the Third Report of Canada" [UN Doc. CAT/C/3/Add./3 Nov. 2000]. The organization is one of several public-interest groups seeking leave to intervene in his appeal, pending before the Supreme Court.
69. Memorandum by D. Gauthier, Case Management Branch, Citizenship and Immigration, 18 December 1997, as cited in *Suresh* (C.A.) *supra* note 16.
70. *Suresh* (C.A.), *supra* note 16.
71. See, *e.g.*, U.S. Department of State Report on Sri Lanka, 1997; Human Rights Watch Report on Sri Lanka, 1997; Amnesty International, "Sri Lanka: Torture in Custody," AI Index, 37/10/99; Amnesty International, *Annual Report 2000, Sri Lanka*, *supra* note 66; and Amnesty International, Canadian Section (English-speaking), "Amnesty International's Concerns with Regard to Tamils Returned to Sri Lanka," 18 May 2000.
72. While the Refugee Convention does not impose an obligation on states to *grant* asylum, the Convention's provisions for *non-refoulement* are binding and apply to protect all refugees, regardless of whether refugee status has been formally conferred. The Convention has extra-territorial application, which means that a signatory state cannot avoid responsibility for *refoulement* when actions within its effective control were carried out on the high seas or in another country. See OAS, Inter-American Commission on Human Rights, *Haitian Center for Human Rights et al.*, v. *United States*, Report No. 51/96, Decision as to the Merits of Case 10.675, United States (1997), online: IACHR <http://www.cidh.org/annualrep/96eng/96ech3zy.htm> (date accessed: 26 February 2001).
73. *The Globe and Mail* (16 January 1999); Amnesty International Bulletins ASA 37/19/98; ASA 37/21/98.
74. The documentary "In Search of the African Queen: A People Smuggling Operation" (Montreal: Wildheart Productions, 2000), screened on TV Ontario in March 2000. The film covered the full saga of the Tamil asylum seekers and the actions of the Canadian government and includes interviews with everyone involved, including twenty-one-year-old T. Kamalathasan, the man who was tortured.
75. The U.S. Department of State, Country Reports on Human Rights Practices-2000, Sri Lanka, at 7, online: <http://www.state.gov> (date accessed: 26 February 2001). The report also indicates that "[p]rison conditions generally are poor and do not meet minimum international standards because of overcrowding and lack of sanitary facilities" at 8. The report documents an incident in October 2000 in which police allegedly looked on while twenty-seven Tamil males between fourteen

and twenty-three years of age were hacked to death by local villagers armed with machetes and clubs; fifteen others were injured. "Police allegedly took part in the killings and did nothing to prevent the villagers from entering the detention camp. The victims were former child soldiers being detained at a government-run 'rehabilitation' camp at Bindunuwewa near Bandarawela . . . [T]he massacre . . . led observers to question the continued security of residents of these facilities" (at 3 and 12). See also Amnesty International, *Annual Report 2000, Sri Lanka* at 2, online: <http://www.amnesty.org/web/ar2000web.nsf/countries/> (date accessed: 25 February 2001).

76. The U.S. Department of State, *ibid.*, at 7.
77. *Pushpanathan* v. *Canada*, [1998] 1 S.C.R. 982, as am. [1998] 1 S.C.R. 1222. Note, as well, that the Vienna Convention on the Law of Treaties provides that treaties should be interpreted in "good faith in accordance with the ordinary meaning to be given to the treaty in their context and in light of its object and purpose." 8 I.L.M. 679 (1969), 1155 U.N.T.S. 331.
78. *Suresh* (C.A.), *supra* note 16 at paras. 23-35.
79. UN Human Rights Committee, General Comment No. 20 (article 7), para. 9 states, "States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement…" UN Doc. CCPR/C/21/Add.3.
80. For a discussion of these decisions, see part 1 of this paper, n.132.
81. *Suresh* v. *Minister of Citizenship and Immigration* [2000] 176 D.L.R. (4th) 296 at 308 (C.A.), in which the Court granted an application for a stay of removal.
82. Note, however, *Minister of Justice* v. *Burns and Rafay et al.* [2001] S.C.J. No. 8 at para 48, online: QL (SCJ) concerning the Justice Minster's decision to extradite Canadian fugitives without obtaining assurances from American authorities that the death penalty would not be imposed. In a ruling released in February, the Supreme Court confirmed that the citizenship of the fugitives was an irrelevant factor in determining the human rights and justice issues at stake. More generally, a limitation to a constitutional guarantee will be sustained when two conditions are met. First the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be "reasonable" and "demonstrably justified in a free and democratic society." In order to satisfy the second requirement, three criteria must be met: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must impair rights and freedoms as little as possible; and (3) there must be proportionality between the effect of the measure and its objective, so that attainment of the legislative goal is not outweighed by the abridgement of the right. *R.* v. *Oakes* [1986] 1 S.C.R. 103; and *Egan* v. *Canada*, [1995] 2 S.C.R. 513 at para. 182, Iacobucci J. Generally the second criterion is the most difficult to meet because it requires the government to demonstrate that Parliament chose the least injurious means of achieving the goal.
83. For an interesting discussion of how international comity has overtaken human rights in the extradition context, see E. Morgan, "In the Penal Colony: Internationalism and the Canadian Constitution" (1999) 49 U.T.L.J. 447.
84. R. Fowler, Statement in the UN Security Council, 19 October 1999, UN Press Release SC/6741.
85. *Suresh* (C.A.) *supra* note 16 at paras. 36 and 67.
86. See *Sivakumar* v. *Canada supra* note 38.
87. In *The Prosecutor* v. *Rutaganda*, ICTR-96-3-T (6 December 1999) the Chamber noted that an essential element of "crimes against humanity" is that they are widespread or systematic. *Widespread* has been defined as "massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims"; while *systematic* has been defined as "thoroughly organized action following a regular pattern on the basis of a common policy and involving substantial public or private resources . . . there must be some kind of preconceived plan or policy" (at paras. 66-67). See also *The Prosecutor* v. *Akayesu*, ICTR-96-4-T (2 September 1998); and The Rome Statute, art. 7. In terms of individual responsibility, military commanders are responsible for crimes within their command and control about which they know or *should have known,* while non-military superiors are held to a lower standard—responsibility is engaged for crimes committed by subordinates about which they knew or *consciously disregarded*, concerning activities that were within their effective responsibility and where superiors failed to take all necessary and reasonable measures within their power to prevent or suppress. In any event, the Minister made her decisions about Suresh based on a law that purports to deal with "terrorism."
88. See Human Rights Watch, *World Report 2001: Sri Lanka*, online: <http://www.hrw.org>.
89. UN Human Rights Committee, Concluding Observations on Canada, UN Doc. CCPR/C/79 Add.105, 7 April 1999. In 1997 and 1998 Canada carried out deportations in contravention of requests from the Committee against Torture (*Tejinder Pal Singh* v. *Canada*) and the Inter-American Commission on Human Rights (*Roberto San Vicente* v. *Canada*). See Amnesty International, "Refugee Determination in Canada: The Responsibility to Safeguard Human Rights," Response to Government of Canada's White Paper, February 1999.
90. UN Committee against Torture, Concluding Observations on Canada, UN Doc. CAT/C/XXV/Concl.4 22 November 2000.
91. The Inter-American Commission on Human Rights found that Canadian procedures did not ensure full compliance with the government's obligations to prevent and protect against torture. The Commission commented further that "[t]he fact that a person is suspected of or deemed to have some relation to terrorism does not modify the obligation of the State to refrain from return where substantial grounds of a real risk of inhuman treatment are at issue." Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, OEA/Ser.L./V/II.106/Doc.40 rev. (2000) at para.154.
92. W. Elcock, Submission to the Special Committee of the Senate on Security and Intelligence, 24 June 1988 at 1.
93. W. Elcock, *ibid.*, at 11 and 23.
94. *Report of the Special Senate Committee on Security and Intelli-*

gence (Kelly Committee), January 1999, c. 1 at 2, online: <http://www.parl.gc.ca/36/1/parlbus/commb/com-e/secu-e/rep-e/repsecintjan99-ehtm>.

95. W. Elcock, *supra* note 92 at 11.
96. CSIS, Report #2000/01, *Trends in Terrorism*, 18 December 1999 at 2, online: <http://www.csis.gc.ca/eng/miscdocs/20001e.html> (date accessed: 23 July 2000).
97. W.M. Reisman, as cited in R.F. Turner, "Legal Responses to International Terrorism: Constitutional Constraints on Presidential Power" (1999) 22:1 *Houston Journal of International Law* 77 at 78.
98. Cohen coined the phrase "moral panic" to explain how certain groups in society are periodically labelled as a particular threat to society, a process that becomes the basis for "law and order" responses. S. Cohen, *Folk Devils and Moral Panics* (London: Macgibbon and Kee, 1972). In a similar vein, Stuart Hall identified a moral panic as the source for "mugging" being presented in the British media as a new and rapidly growing phenomenon in the face of official statistics to the contrary. S. Hall *et al.*, *Policing the Crisis: Mugging the State, and Law and Order* (London: Methuen, 1978).
99. R. Lohrmann, *supra* note 12 at 8.
100. D. Thomas, "The Foreign Born in the Federal Prison Population" (Canadian Law and Society Association Conference, Carleton University, 8 June 1993) [unpublished].
101. See P. Koring, "Some Border Security Gaps Plugged Remain" *The Globe and Mail* (14 March 2001) A10.
102. A recent report indicates that Canada's High Commissioner in Sri Lanka was "called onto the carpet by the Sri Lankan government" after the event. However, Finance Minister Paul Martin and International Development Minster Maria Minna have vigorously defended their decision to attend the dinner, which was "attended by hundreds of people, Canadian citizens and contributing citizens of the country." Minna stated that she did "not judge all of the Tamil community as being part of the terrorist group." S. McCarthy, "Grits Warned about Fundraiser" *Globe and Mail* (24 February 2001) A17. The *National Post* has published numerous reports citing concerns that Canada has become a safe haven for Tamil "terrorists." See, *e.g.*, S. Bell, "Court Ruling Could Make Canada 'Haven' for Terrorists, Assassins" *National Post* (17 February 2001).
103. See J. Beltrane, "The Enemy Within" *Maclean's* 113:43 (23 October 2000) 36.
104. See K. Selick, "Go Ahead, Make My Day" *Globe and Mail* (10 January 2001) A15.
105. Section 19(1) of the Immigration Act provides, *inter alia*, that

> [n]o person shall be granted admission who is a member of any of the following classes:
>
> (c) persons who have been convicted in Canada of an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more;
>
> (c.1) persons who there are reasonable grounds to believe
>
> (i) have been convicted outside Canada of an offence that, if committed in Canada, would constitute an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more, or
>
> (ii) have committed outside Canada an act or omission that constitutes an offence under the laws of the place where the act or omission occurred and that, if committed in Canada, would constitute an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more.

105. See Maytree Foundation, *Brief to the Standing Committee on Citizenship and Immigration Regarding Bill C-31*, 18 August 2000 at 30, online: <http://www.maytree.com> (date accessed: 27 August 2000).

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Book Review

Kosovo's Refugees in the European Union

Edited by Joanne van Selm
London and New York: Pinter, 2000

Joanne van Selm's edited volume provides a critical analysis of European refugee policies during and after the Balkan crises, and introduces a balanced selection of new studies for readers interested in studying the European case.

Van Selm sheds light on the reactions of select European states and societies to the Kosovo crisis, within the context of the creation of a common policy for European immigration and asylum. Contributors to the book come from different disciplines and specialize in different countries, each attempting to make sense of the approach (both past and future) by EU member states to the Kosovar refugee crises.

In her previous work, *Refugee Protection in Europe,* van Selm also addressed the issue of refugee protection based on the lessons to be learned from the (pre-Kosovo) crisis in the former Yugoslavia. Specifically, she provided a comprehensive overview of the twentieth-century history of refugee protection, the relationship between refugee protection measures and the human rights regime, and trends in the formulation of asylum and immigration policies in Europe. In her earlier work as well as the Introduction to this edited volume, van Selm asserts the need for and merits of a common, comprehensive approach to forced migration in Europe. Meanwhile, she is also keenly aware of the limitation posed by the relations between states, between states and the societies they govern, and, the general framework of prejudices about "non-Europeans," "refugees," "aliens," and "migrants" affecting European societies. In this context, *Kosovo's Refugees in the European Union* is a further step in understanding the complex phenomenon of refugee acceptance and protection in this quintessentially wealthy and powerful corner of the world. The book offers a rewarding combination of topical, timely, and in-depth analysis, for the debates presented are built upon the expertise of van Selm and other contributors on refugee reception in Europe.

According to van Selm, the Kosovo crisis is a test case for the European asylum and immigration laws that came into effect with the 1999 Treaty of Amsterdam. Europe-wide debates on asylum seekers and immigration quotas, particularly in the area of temporary protection, are crucially important in how they reveal the practical meaning of European claims for possessing a truly civilized, humanitarian identity. *Kosovo's Refugees* sets the stage for debating these issues within the paradigm of linkages between "societal security and [perception] of refugee movements." Each of the case studies in the book thus works around questions on the relationship between causes of forced migration, the types of protection offered by the chosen European country, and the locus of challenges to the protection of refugees in the receiving state. In this context, policy reactions of EU governments to the Kosovo crisis are treated as a microcosm of general European trends in immigration and refugee protection. In turn, the response of member states to the outpouring of Kosovo refugees is examined for lessons learned first from the Bosnian and then Kosovar cases, related and resultant national debates on asylum and immigration, and the impact of EU integration policies on the responses of individual states. Although wider theoretical issues are also brought into the picture, the volume's strength lies more in the careful examination of select cases.

Both van Selm and contributing scholars to the volume regard the Kosovo case as a "European refugee crisis." And yet their analyses of Austrian, French, German, Italian, Dutch, Swedish, and British responses to this crisis are largely based on the problems caused by the perception of these and other "foreigners" as security threats to the receiving European societies. Consequently, there is an embedded tension in each article as a result of the "mismatch" between the geographical location and cultural classification of Kosovo Muslims. It is true that the member states chosen as case studies reflect significant variation in Euro-

pean attitudes towards asylum and immigration policies, the investment or interest EU states in the formulation of a "common European approach" or "burden-sharing schemes," and their stance on the NATO intervention in Kosovo. However, both in the weakness of a coordinated response to the Kosovo refugee crisis and in lessons learned and emerging areas of reflection, there is a gap between what each government considers a threshold for accepting needy foreigners, even if they happen to be coming from within Europe, and what the refugee crisis demanded. Across Europe, post-Bosnian perception of refugees is coloured by the introduction of restrictive measures aimed at halting spontaneous arrivals and ad hoc arrangements and quotas for the application of the non-convention, temporary-protection category. It is interesting that these measures were introduced, despite the fact that only Germany had to shoulder the burden of large number of Bosnian refugees. In other words, the lessons learned from the Bosnian case were far from constructive; they were tainted by fear and an increased sense of vulnerability toward the sudden arrival of thousands in Fortress Europe. In this context, it is not surprising to see the European governments' hesitation and unplanned approach to the Kosovar refugee crisis.

Meanwhile, there is also something uniquely elevating about the analyses presented in *Kosovo's Refugees.* Both van Selm and the contributing authors argue that government reactions to the Kosovo refugee crisis were out of sync with the general public reception of refugees and their needs. In fact, they provide considerable evidence supporting the case that national debates on asylum and immigration favoured acceptance of this particular group of refugees. This unusual reaction was partly due to the fact that Kosovars were perceived as "good refugees" of European origin. Needless to say, the highly orchestrated media campaign portraying the NATO intervention in Kosovo as a necessary act of self-protection of the European civilization went hand in hand with this peculiar approach. In summary, the conviction of the volume is that the European public related much more to the plight of the Kosovars than did their governments or indeed the political body of the European Union. The feeling of "relatedness," in turn, reduced the (perceived) threat to European identity in receiving societies and allowed the portrayal of refugees not as abusive intruders but as victims of violence and intolerance who needed protection. Whether one can extrapolate from this particular case and argue for a promising trend in members of the European Union opening their doors for future refugee crises of non-European origin, however, is an altogether different debate. In fact, the Europe-wide insistence on the rhetoric of return and the temporariness of the protection provided suggests that the Kosovo case may well have been a highly conditional extension of the charitable hand. Furthermore, once the military conflict was judged to have come to an end, people leaving Kosovo were no longer considered as worthy of protection. Instead, the familiar description of "large groups of illegal Kosovar Albanian immigrants" forcing themselves through the borders quickly resurfaced. In this regard, in Europe, the threat-oriented perception of refugees appears to reign supreme, despite the brief spark of public goodwill and understanding that came with the Kosovo crisis. The remaining questions, then, are about how to erode the basis of this edifice of prejudice and what ethical principles could be introduced to or emphasized within the European context in order to achieve substantive and long-term change.

This book is suitable for a wide range of readers in refugee and migration studies, including academics, students, policy-makers, and lawyers.

There is a group of other recent titles in the related literature that need a brief mention here, as well. On the particular case of Kosovar refugees, the report prepared by Astri Sukhre, M. Barutciski, M. Sandison, and R. Garlock for the UNHCR, *The Kosovo Crisis: An Evaluation of UNHCR's Emergency Preparedness and Response* (February 2000) is another essential reference. On European trends in general, Hans Korno Rasmussen's *No Entry: Immigration Policy in Europe* (Handelshojskolens, 1997), the edited volume *Refugees, Citizenship and Social Policy in Europe* by Alice Bloch and Carl Levy (Palgrave Press, 1998), Grete Brochman and Tomas Hammar's *Mechanisms of Immigration Control* (Berg Publishers, 1999), the edited volume *Challenging Immigration and Ethnic Relations Politics* by Ruud Koopmans and Paul Stratham (Oxford University Press, 2000), and Rey Koslowski's *Migrants and Citizens: Demographic Change in the European State System* (Cornell University Press, 2000) are some of the most influential works.

Combined, this body of inquiry would provide the reader an informed understanding of recent developments in Europe at state, inter-governmental, and popular levels. In *No Entry,* for instance, Rasmussen focuses on the demographic conflict between Europe's fast-growing elderly population and swelling numbers of young people leaving Third World countries for the "Promised Land of Europe." The two key questions the author attempts to answer are, Can Europe's borders hold? and, Is it wise to protect Europe from immigration? In *Mechanisms of Immigration Control,* Brochman and Hammar regard the types of bar-

riers to movement of people as a litmus test for national and international politics. By attending to the control policies practiced by eight receiving European countries during the 1980s and 1990s, they provide a comparative picture of how immigration is perceived at the state level across the continent. Bloch and Levy's edited work *Refugees, Citizenship and Social Policy in Europe* is yet another valiant attempt to produce a comprehensive, up-to-date account of the policies of European welfare states towards refugees and asylum seekers, but this time with particular attention to norms and laws of citizenship within the European Union. Koopmans and Statham's *Challenging Immigration and Ethnic Relations* also aims at presenting a substantive cross-national analysis of the contentious politics of immigration from the perspective of changing ethnic relations within Europe. The contributors to the edited volume discuss different European responses to the need for the integration and acceptance of minorities who arrived via immigration, and examine the linkages among policy-making, xenophobic, minority, racist, and anti-racist movements. In a similar vein, Koslowski's *Migrants and Citizens* examines the effects of East to West as well as South to North migrations and the post–cold war arrival of masses of refugees on Europe's self-perception. Koslowski concludes that the transformation of nationality laws, as well as European efforts for the establishment of joint border controls, reveals the extensive impact on migration movements produced in Europe. The history of European countries as a net exporter of peoples for centuries makes coping with the recent trends ever so difficult, a complication compounded by the lack of suitable institutions and political mechanisms to deal with the arrival of large numbers of foreigners.

The rich and multi-faceted debate on Europe's reception, perception, rejection, and acceptance of migrants and refugees indeed constitutes a very important dimension of the conceptualization and configuration of issues surrounding global forced migration. Europe represents a model, a particular way of viewing insiders and outsiders in established, wealthy societies, that thrived upon centuries-old relations of domination of and extraction from others. Individual European countries as well as sectors within each society vary significantly in their acceptance and integration of non-Europeans. However, especially with the further strengthening of European Union laws and political institutions with a Europe-wide command, these variations are essentially levelled, and a uniform facade is emerging. Studies such as van Selm's tell us that these new formations are worth continuous close examination for us to understand how things work at the level of reaction-formation in receiving societies that are subject to the pressures produced by the unbalanced state of world affairs. Excesses of wealth confronted with misery, law and order confronted with chaos, aging populations confronted with the influx of eager young ones, traditional cultural identities and values confronted by cosmopolitanism and multicultural mixing, are not conditions unique to Europe. However, the European response to these challenges at least partially sets the tone for what future confrontations of this kind might hold for societies that both produce and receive refugees.

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