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Canada's Dysfunctional Refugee Determination System Canadian Asylum Policy from a Comparative Perspective

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Executive summary

Although many assume that Canada has one of the best asylum systems in the world, no country emulates Canadian policy. The explanation for this is that, while striving to protect those who are fleeing persecution, other countries also strongly emphasize deterring abuse and the control of illegal immigration. The Canadian system, as currently structured, does not accomplish these objectives and is therefore out of step with an emerging harmonization of asylum determination policies and practises in the developed world.

In the area of reception conditions, Canada allows most refugee applicants to seek employment. This is not the case in any of the other major destination countries for asylum seekers in the developed world. In the area of refugee determination, Canada is out of step with international norms in terms of eligibility, structure, and output. Because Canada does not currently employ a “safe third country” or “manifestly unfounded” review process to deter abuse, anyone from any country is granted a full review of their refugee claim in a process that is relatively slow and backlogged. In recruitment and structure of accountability, questions must be raised about the capacity of Canada’s existing decision-making process to effectively balance Canada’s international obligations with a sovereign interest in migration control.

In terms of output, Canada’s refugee determination system strays far from international norms and Canada is the easiest country in the developed world in which to secure Convention Refugee status. Canada is also the easiest country in the world for a Convention Refugee to gain permanent residence and citizenship. Even failed refugee applicants have a significant possibility of securing permanent residence and citizenship through various immi-

gration categories. At the end of the process, relative to other countries, Canada’s effort to remove failed refugee applicants appears to have been given a low priority.

Taken together, Canada’s policies and practises with respect to refugees seeking asylum attract migratory flows. This is because, in comparison to policies found in other developed countries, Canada’s asylum policy constitutes a relatively effective means of migrating to Canada from a range of countries not all of which are in the developing world or normally viewed as producing refugees. For the minority that cannot secure permanent residence status in the extended asylum review process, it offers the possibility of a lengthy stay in Canada with a relatively generous package of social benefits. It is concluded that in comparison to asylum policies found in other countries, Canadian asylum policy, taken together with the many additional naturalization possibilities available to failed refugee applicants, may be characterized as a self-selected immigration program. But, this is a program that has not been evaluated for its intrinsic worth or cost effectiveness. It is a system whose only defence against total collapse derives from visa controls and transit screening. At the same time, this is a system that constitutes a veritable bonanza for transnational people smugglers.

To respond to the imperatives of the global people-smuggling industry, to control costs and advance Canada’s sovereign interest in migration control, Canada should move to harmonize its asylum policies with those of other developed nations. Such an initiative would require fundamental reform of existing reception and determination policies and require the development of an effective removal program for unlawful entrants.

Introduction

The events of the past two years expose the changing foreign and domestic realities of refugee determination. Included are such factors as the events of September 11 and the extraordinary number of refugee claims made in Canada in 2001. The number of claims in 2002 is somewhat lower but still above rates of the late 1990s (figure 1). Meanwhile, in 2001 the Canadian government passed the Immigration and Refugee Protection Act (IRPA), elements of which threatened to enlarge the existing refugee claims backlog. The government responded with a “streamlined” determination process and, in April 2002, backed down from the full implementation of the reforms.¹

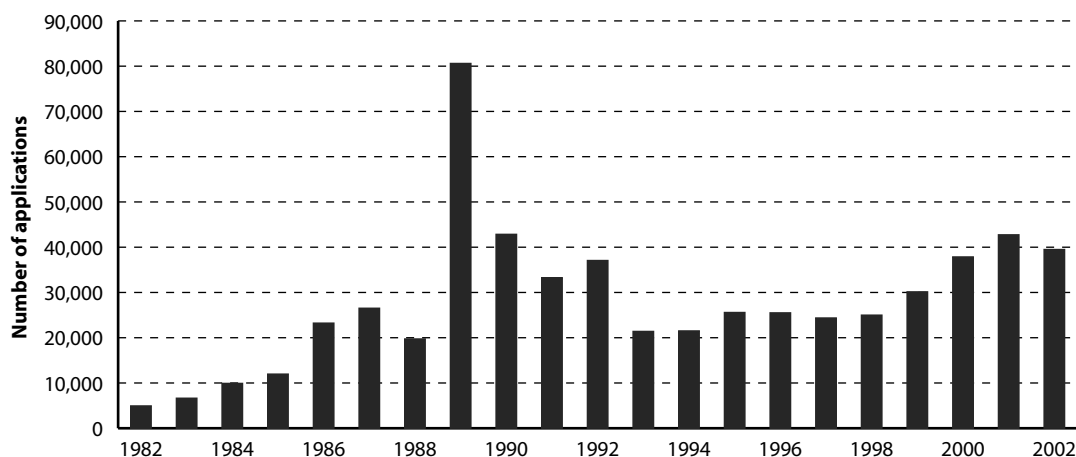
Although it is not clear whether Canada’s reformed refugee determination system is capable of fairly and efficiently addressing the continued high number of refugee applications (assuming the backlog were cleared), it is clear that the new system continues to be inconsistent with an emerging convergence in international refugee determination policy and practice. This gap exists despite the fact that, according to the House of Commons Standing Committee on Citizenship and Immigration

(2000), Canada’s refugee determination system is “generally acknowledged to be one of the best in the world.”

Those who actually make policy decisions in other countries, however, clearly do not share Canada’s confidence in its basic approach to managing asylum seeking flows. The reason relates to policy trade-offs. Canada’s approach is likely viewed as less effective in controlling what is described internationally as “illegal immigration.” Although this is not a term used regularly by the Canadian government, controlling “illegal migration” is a priority and is included in government plans under the strategic outcome of “managing access to Canada” (CIC, 2002: 5).² This priority was also signaled by Canada’s signature on the United Nation’s Palermo Convention on Transnational Organized Crime with its two Protocols seeking to control people smuggling and trafficking.³

Migration control efforts are very controversial and efforts to discourage unlawful entry and deport non-status individuals are especially charged. Of late, addressing the challenge of illegal immigration has become a top-ranked priority of all the countries of the developed

Figure 1: Asylum Applications Lodged in Canada, 1982–2002



Sources: 1982–1999—Canada, Citizenship and Immigration, 2003: figure 1 (This is the “Humanitarian Population” statistic, which includes refugee claimants and individuals in “refugee like” situations but does not include the 7000 humanitarian arrivals from Kosovo in the 1999.); 2000–2001—UNHCR, Population Data Unit, Division of Operational Support, 2003: table 1; 2002—UNHCR, Population Data Unit, 2003: table 6.

world. In Australia, there is a clear preference for policies that deter abuse and many argue that the 2001 election turned on this issue. Concern for illegal immigration was the impetus for the United States to make changes to its asylum-granting regulations in 1995 and pass the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). “Combating” illegal immigration has also been a dominant concern of European policy-makers; was the core theme of the Seville European Council (EU, 2002, Conclusion 30) and was a “top political priority” at the June 2003 Thessaloniki European Council.⁴

Although Canada has shown some determination to address illegal migration with the passage of the IRPA, compared to other countries in the developed world Canada is clearly less willing to use deterrence policies. In the specific area of granting asylum, the Canadian regime that came into force in 1988 has not been fundamentally reformed since its establishment and no developed country has followed Canada’s example in the basic framework of its approach. This basic framework of policy and practices include, first, little or no effort to discourage the choice of Canada as a destination state for illegal arrivals by, for example, restricting employment opportunities available to refugee claimants; second, allowing essentially unrestricted access to the regular or full refugee determination process for “unlawful” arrivals; third, putting in place and retaining a first-instance refugee determination process staffed by “independent” decision-makers; fourth, allowing negative first instance determinations to be appealed directly to the judiciary. Finally, if the Auditor General is to be believed, Canada does not have a removal program that has the capacity to deport its failed asylum applicants.

Each of these characteristics of Canada’s asylum system can act to draw asylum seekers to Canada. In a recent empirical study of OECD states, Eiko Thielemann (2002) argues that there are a range of factors that can influence an asylum seeker’s choice of destination country.⁵ Thielemann reviews a range of “pull factors” that include ability to work, the existence of family connections, the “liberalness” of a country’s policies and political values, and the ease with which the country can be reached. Although in some cases the correlation is not as strong as might be expected, the data shows a link in the expected direction between these variables and flows of

asylum seekers. In other words, the refugee reception and determination policies of a state matter in the choice of a destination and this, in turn, has implications for the cost, integrity, and sustainability of these programs.

In this study, selected aspects of Canada’s refugee reception, determination, and migration-control policies are compared to those of other developed countries that receive large numbers of asylum seekers. I intend to concentrate on a comparison of Canada’s refugee determination system with systems found in three other large English-speaking democracies; Australia, the United Kingdom (UK), and the United States (US), chosen because of the many cultural, historical, and political commonalities that facilitate comparison.

This is a very important area of research. The flow of asylum seekers is objectively large and has a significant social, economic, and demographic impact. In the past 20 years, almost 600,000 people arrived in Canada to make a refugee claim (figure 1). Over the same period, more than 500,000 refugees and people in “refugee-like” situations were granted Permanent Resident Status (PRS) (UNHCR, 2000: tables V3, V4, V19, V20).⁶ Second, it has become a major political issue in most of the developed world, resulting in decisions that directly affect Canada because of the phenomena of “asylum shopping” and people smuggling and trafficking. Currently, the movement of people seeking a new life, for whatever reason, is a global phenomenon facilitated by transnational criminal organizations (see US, Department of State, 2002).

In approaching this subject, I first examine in overview the process of screening asylum seekers for entry to the regular refugee determination system. Second, I compare some aspects of the structure of decision-making at the Immigration and Refugee Board (IRB) to that in other countries. This is followed by a review of international appeal processes and a comparison of the outcome of the determination process. Given that all of these systems are exceedingly complex, this review is by necessity an overview; furthermore, the focus is on those features of the system that are commonly understood to deter abuse and promote administrative efficiency. The conclusion is that, even with the passage of the IRPA, Canada’s refugee-determination system and migration-control policies are out of step with what appears to be a clear convergence of policies and practices in the developed world.

Asylum seeking is a global phenomenon

Canada's situation can not be viewed in isolation from international trends in asylum seeking. What I mean by "asylum seeking" is the practice of crossing one and often many national borders, usually illegally, in order to reach a preferred asylum-granting host nation in the developed world. This phenomenon is of recent origin, facilitated by the emergence of globalized transportation and communications links. An asylum seeker arriving in a developed country can make a claim directly to specialized administration established for reviewing in-country refugee claims (e.g., the Immigration and Refugee Board in Canada).⁷ According to the Office of the United Nations High Commissioner for Refugees (UNHCR), which is the international organization that monitors international refugee trends and policies in the developed world and administers various aid programs for refugees in the developing world, this process brought almost 600,000 "first instance" refugee claimants to the developed world in 2001 (UNHCR, 2002b: 56). There are only a relatively few countries in the world that are destination countries for the flows of asylum seekers and more than half of the flow to the developed world is concentrated in the top five destination countries. Currently asylum-seeking flows are greatly facilitated by a people-smuggling industry that has developed into a vast and lucrative globalized criminal activity (Salt and Stein, 1997; Secretariat of the Budapest Group, 1999). Meanwhile, the vast majority of those whom the UNHCR views as "people of concern" remain in the developing world in close proximity to the area in turmoil. According to UNHCR statistics "[d]uring 1992–2001, 86% of the world's refugees originated from developing countries, while these countries provided asylum to 72% of the global refugee population" (UNHCR, 2002b: 12).

There are a number of basic realities that characterize the international system of asylum seeking. First, all of the countries of the developed world are working overtime to block the flow of asylum seekers before they reach national borders. This is so regardless of the fact that, al-

though many of arrivals would not meet the recognition requirements of the 1951 Geneva Convention on the Status of Refugees (United Nations, 1951) or be viewed as needing "protection," large numbers would. Blocking the transportation routes is emphasized because Geneva Convention obligations only pertain to those physically at, or inside, national boundaries. These efforts, which one analyst refers to as "presumptive refoulement" (Morrison, 2000: 24), have been roundly criticized as abusive of the spirit of the Convention. Nevertheless, all developed countries impose stringent migration controls on most countries in the developing world and especially those in turmoil.

Secondly, there has been a broadening of interpretations of what constitutes "persecution." Although Canada is clearly on the cutting edge of this movement, many other refugee-hosting countries are not far behind. Put simply, the Geneva Convention definition of a refugee as someone with a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" is now viewed expansively by most developed countries. As a result, currently there is no contesting the fact that tens of millions of the world's population (at a minimum) would have a legitimate asylum or protection claim if they could reach the developed world. To take one example: Canada has of late received a flow of Roma from various countries in Europe who have made the claim of persecution. Many have been recognized as Convention Refugees, which resulted in a visa restriction being placed on their source countries. Without diminishing their claim, it is fair to say that India's population of "Dalit" (Untouchables) that numbers approximately 160 million would have at least as credible a claim on Canada's protection. What the latter do not have is knowledge of the possibility of resettlement in Canada and, more importantly, they lack the resources and opportunity to reach it. The fact is Canada has been able to sustain its relatively liberal reception and determination policies

because it is not situated beside or close to countries of emigration. As a result, transit controls and interdiction can be relatively effective. European countries are not insulated in this way.

Thirdly, the cost of reception and refugee determination programs is very high and, in fact, the money developed countries spend on in-country claimant determination alone dwarfs spending on international refugee aid. To take one indicator, Canada transferred \$21 million to UNHCR and spent \$104 million on the IRB in the 2001/2002 fiscal year (Canada, Canadian International Development Agency, 2003: 7; Canada, Receiver General for Canada, 2002: 5.5). With respect to reception and support costs for asylum seekers and those judged Convention Refugees, the Canadian government does not publish figures. According to UNHCR population statistics, Canada held 182,711 “people of concern” (129,950 Convention Refugees and 52,761 Asylum seekers) while the United Kingdom held 200,036 “people of concern” (159,236 Convention Refugees and 40,800 Asylum seekers) (UNHCR, Population Data Unit, 2003: table 1). For its part, the UK government pegged its asylum cost at £1.804 billion (CDN\$4.075 billion) in 2002/2003 of which £1.1 billion (CDN\$2.4 billion) went to the National Asylum Support Service (NASS), which has the responsibility of providing financial, housing, and support services to asylum seekers (UK, Home Office, 2003c). According to the UK Home Office, the average cost of supporting a family of asylum seekers in 2001/2002 was £14,560 (CDN\$32,601) and that for a single person was £5,760 (CDN\$12,897) (UK, Home Office, 2003b: 153).

Finally, public support for in-country refugee programs has been jeopardized by recent trends in asylum seeking (Millbank, 2000; UK, 2003). These trends include the prevalence of illegal entry facilitated by people smugglers and the difficulty of returning failed refugee claimants or those no longer in need of protection.

Although UNHCR is well aware of these realities and the basic tension between the articulated rights guarantees and the capacity and willingness of developed countries to sustain them in the face of mass influx, there is no question of setting aside the principle of asylum in the developed world. The UNHCR does state, however, that refugee flows are best housed close to the conflict area (not the developed world) and that

“voluntary” repatriation is the preferred long-term solution (UN, EXCOM, 2003). This is to say, not “integration” (in the country of first asylum) or “resettlement.” Together these three possibilities are viewed as “durable solutions” to refugee flows.

With respect to the developed world, a reliance on these three durable solutions is problematical. This is because “resettlement” is clearly preferred by most of those who seek refuge in the developed world. According to Gaim Kibreab (2003), the various rights and social benefits available to refugees in the developed world constitute a greater attraction than the pull of countries of origin in the developing world after a stabilization of conditions. An impasse is therefore inevitable if the destination country in the developed world is unwilling to act as a country of “resettlement” as opposed to “refuge” and the emphasis is placed on the volition of the refugee in any repatriation initiative.

Currently there is a concern, voiced by many refugee advocates, that if the Geneva Convention were opened to a discussion of the defects of the international asylum system identified by many but most firmly articulated by Jack Straw (2000; 2001), Philip Ruddock (2002), and Tony Blair (UK, 2003), the result might be that the Geneva Convention itself could be ripped up or gutted in its fundamentals.⁸ This is not to say that there are no efforts to address these concerns. The UNHCR initiated a “global consultations” process that led to reform proposals embodied in the 2002 Agenda for Protection (UN, EXCOM, 2002a). Further suggestions were debated and advanced surrounding the “Convention Plus” initiative.

The United States does not appear to have been moved by such initiatives while Australia’s policies have been strongly criticized by UNHCR. Although the European Union (EU) generally views UNHCR initiatives as “constructive” across a range of issues, there is little support for “resettlement” in Europe as a “durable solution” to refugee flows and especially if asylum seekers were to have some advantage in gaining access to such a program. The central thrust of the European Union’s policy making is to contain asylum-seeking flows in the region of flight (“protection close to the needs”) with all manner of development and institution-building activities to ensure that protection is “effective” in countries of first asylum or transit (EU, Commission of the European

Communities, 2003). The United Kingdom has gone so far as to suggest the creation of “transit processing centres” outside the EU where claims made inside the EU could be transferred for a protection determination.⁹

In recent EU policy documents there is mention of “resettlement” as a durable solution but the wording implies that this is viewed as an alternative to granting asylum to in-country asylum claimants and a means to legitimize a more robust treatment of asylum seeking flows. This can be seen in the fact that the program may be conditional on applications being processed in “regions of origin,” which is to say outside the EU. Even so, it appears member countries may be free not to participate in such a program (EU, Commission of the European Communities, 2003.6.2.2.3).

Australian policy is consistent with this approach in stressing a managed resettlement program focused on those in overseas refugee camps. By contrast, UNHCR with the support of Canada (Canada, 2003) appears to advocate a relatively liberal resettlement program without including some measures to address the dysfunctions created by contemporary asylum seeking. This is an important difference because many, especially in Australia and the United Kingdom, are increasingly of the opinion that the problems arising from asylum seeking can only be addressed if a “migration outcome” understood as the achievement of a “right of residence” is not the end result of in-country refugee programs in the developed world (Millbank, 2003).

In the absence of any effective means of addressing the underlying problems of the Geneva Convention in the short to medium term and being unwilling to disavow it, all the governments of the developed world including Canada’s have pursued duplicitous policies of articulating support for the principle of asylum, even liberal interpretations, while setting in place mechanisms to blunt a liberal implementation. For example, in 2001 Canada’s Immigration Control Officers at overseas air-

ports helped intercept 7,879 “improperly documented” individuals before they could embark. In Canada’s case, success in such efforts deserves no credit because Canada’s in-country refugee process is so liberal that there is little doubt that if these individuals had managed to get past airport security to apply for asylum, there is a better than 50% probability that they would have eventually secured Canadian citizenship. At the very least, they could expect a lengthy stay in Canada with a generous range of social benefits. Furthermore, the imperative to control migration via asylum results in draconian and dysfunctional visa controls. Travelers to cultural, religious, and sporting events must be closely scrutinized for those who might use or abuse the refugee system to settle in Canada. To take but a few examples: in July 2002, 25% of those applying to attend the Pope’s World Youth Day from a range of developing countries were denied visas; in November 2002, 40 Ukrainian artists were denied visas (Schmidt; Sevunts). In 2003, various religious and secular delegates from the developing world attending the Lutheran World Federation’s 10th Assembly in Winnipeg were denied visas (Sokoloff 2003).

What makes the rhetorical tightrope so difficult for government officials to walk is the fact that human rights and refugee advocacy groups are such vocal critics of government backsliding on liberal pronouncements and that the judiciary in many countries appears willing to recognize that asylum seekers have some rights against state interests (Joppke 1998). At the same time, it has to be recognized that contemporary asylum seeking is primarily an illegal flow and the Geneva Convention distinguishes between “lawful” and “unlawful” refugees on the sovereign territory of a signatory country.¹⁰ Put simply, the Geneva Convention as understood by the governments of the developed world does not legitimize secondary movement (“asylum shopping”), which is to say movement beyond the first country entered where protection was available.

Canada is a preferred destination for asylum seekers

Among countries that draw flows of asylum seekers, Canada must be regarded as a preferred destination based on several indicators. First, in absolute numbers, Canada's three-year (2000–2002) total of 120,102 puts it fifth among developed countries (table 1). Germany, the United Kingdom, and the United States receive the most asylum seekers, while Canada and France form the next rung. Canada ranked seventh on a per-capita basis (table 2). In the case of Canada, these numbers are surprising given the practical difficulties of reaching it. The other countries on the list are clearly easier to reach because of transportation links and geographic proximity to refugee claims producing areas.

This does not tell the whole story, however, because, unlike Canada, several countries on the list refuse to consider the applications of the majority of their refugee claimants. In other cases, the in-flow can be managed as a short-term situation and individuals granted protection can be repatriated. For example, in Belgium only 4,325 of 42,691 applications were considered eligible for determination in 2000. That same year, Netherlands received

43,895 applications and refused to consider 35,384 because they were deemed “manifestly unfounded.” Germany also determines a good percentage of its applications to be “manifestly unfounded” and therefore not eligible for determination (28.1% in 1999).¹¹

In most European countries during the 1990s, the largest number of claims represented applications emanating from the former Yugoslavia. Most of these people have since been repatriated. The latest influx was a result of the 1999 Kosovo crisis. The 46,133 applications in Switzerland in 1999 were mostly from Kosovo and, of the 95,331 applications Germany received in 1999, 53,780 were from Yugoslavia, most of these from Kosovo. In 2000, Germany repatriated 32,000 Kosovars (Austria's statistics follow a similar pattern).

Faced with an influx of people fleeing failed states, European countries often utilize various forms of temporary or humanitarian protection that can be revoked or allowed to lapse when conditions in the source country improve. This can ease the return process in comparison to a grant of Convention Refugee status, which may

Table 1: Asylum Applications in the Major Destination Countries of the Developed World (2000–2002)

Rank		2000	2001	2002	Total
1	United Kingdom	98,900	92,000	85,890	276,790
2	Germany	78,564	88,287	56,110	222,961
3	United States	63,700	86,400	58,404	208,504
4	France	38,747	47,291	51,087	137,125
5	Canada	37,858	42,746	39,498	120,102
6	Netherlands	43,895	32,579	18,667	95,141
7	Austria	18,284	30,135	39,354	87,773
8	Belgium	42,691	24,549	18,805	86,045
9	Switzerland	17,611	20,633	26,125	64,369
10	Sweden	16,303	23,515	33,016	72,834
14	Australia	13,065	12,366	5,775	31,206

Source for 2000–2002: UNHCR, Population Data Unit, Division of Operational Support. 2003, Table 1. Source for 2002: UNHCR, Population Data Unit, 2003, Table 6 (First Instance or New Application). Australia is included for comparison purposes.

Table 2: Major destination countries—claims per 1000 inhabitants, 2000–2002

Rank		Number of claims
1	Austria	10.86
2	Switzerland	8.97
3	Belgium	8.39
4	Sweden	8.23
5	Netherlands	5.99
6	United Kingdom	4.65
7	Canada	3.90
8	Germany	2.71
9	France	2.31
10	United States	0.73
–	Australia	1.63

require a formal process of “cessation” in order to return individuals to their source country. To take an example, during 2001, 11,130 of the 19,505 granted humanitarian protection in the United Kingdom came from Afghanistan and Iraq (UNHCR, Population Data Unit, 2002: table 6). In 2002, it was 12,840 of 19,955 (UNHCR, Population Data Unit, 2003: table 7). The events of 2003 have led to preparation in the United Kingdom for the return of many of these individuals. The same pattern can be seen in other countries, such as Sweden and Netherlands, that host large refugee populations from these countries.

Overall, many of the countries on this list of destination countries have simply refused to process the majority of asylum applications because they are viewed as unfounded or they are countries that are responding to short-term flows that may be repatriated. Of the remaining countries, the United States appears to have its system administratively under control and its per-capita intake is not high while France does not appear to be a particularly inviting destination, given that two of its neighbours, the United Kingdom and Germany, pull

roughly twice its number of applicants though they are harder to reach. The reason for this may include France’s restricted interpretation of what constitutes a refugee and its recourse to reception practices that are less generous than its neighbours.

With respect to the United Kingdom, it received the highest number of refugee claims in the developed world in the period from 2000 to 2002 and its asylum policy can best be described as in crisis.¹² The government introduced new legislation again in 2002 after overhauling the refugee-reception system in 1999. Furthermore, the issue of asylum seeking is a primary government concern and perceived failures in the policy sector were a central focus of the 2001 national election.

Canada diverges from this group in a number of ways. First, its asylum flow is not primarily from areas having problems that are likely to be remedied in the near future. For the period from 1999 to 2001, the top three sources of refugees world-wide, Yugoslavia, Iraq and Afghanistan, were not found among Canada’s top 20 source countries, while three of Canada’s top 20, Hungary (3), Argentina (8) and Costa Rica (20) were not found among the top 20 on any other country’s list (UNHCR, Population Data Unit, Population and Geographical Data Section, 2002). Secondly, the diversity of Canada’s asylum seekers should be noted. During this period, 37,000 of those who made asylum claims in Canada came from countries not among Canada’s top 20 source countries. Only Germany had slightly more in absolute numbers (40,000) from those countries that were not among their top 20 (UNHCR, Population Data Unit, Population and Geographical Data Section, 2002). If these indicators are coupled with the fact that Canada has a high rate of asylum seeking flow in absolute numbers regardless of the difficulty of reaching it, the observer must conclude that Canada is viewed as a desirable destination by asylum seekers or those who facilitate their movement (people smugglers).

Managing access to the regular determination process

It is fair to say that of all the countries of the developed world Canada has shown the least willingness to implement measures to discourage asylum seeking by putting into place a process of reception and determination that would cause asylum seekers to choose to go elsewhere. By making a refugee claim in Canada, an asylum seeker secures a relatively generous package of social benefits including the right to work. Canada's current system also normalizes the resident status of legal or illegal entrants seeking a new life in Canada, albeit temporarily, and based on determination statistics and "end-run" possibilities, presents the claimant with a better than even shot at Canadian citizenship. Given the absence of disincentives and the fact that any individual from any country has the right to make an asylum claim, Canada's in-country refugee determination process constitutes Canada's core "self-selecting" migratory opportunity and, by extension, its core migration control mechanism. Other countries generally have policies that encourage foreigners who wish to enter and remain but are unlikely to sustain a claim of asylum to forgo this opportunity and lead clandestine lives.¹³ For example, as noted below, very few of those apprehended entering the United States illegally make an asylum claim.

In the area of reception conditions, Australia, the United Kingdom, and the United States are committed to a range of policies that discourage illegal entry, which is the usual status of asylum-seeking arrivals. If an individual arrives illegally and makes an asylum claim, such policies include closing off employment possibilities, limiting access to social benefits, and detention. To take an example, in Canada asylum seekers may work if they do not have sufficient funds to support themselves. Internationally, the possibility of working while waiting for an asylum claim to be processed is considered a major enticement for asylum seekers. Based on this belief, in 1996 an employment authorization wait of at least six months was put in place by the American government. Given that the "first instance" determination in the American

system must be completed within 180 days, this means that employment opportunities are essentially reserved for those with a positive determination. Recently, the United Kingdom ended its practice of granting work authorization to asylum seekers who had been in the country for six months. According to Home Secretary David Blunkett (UK, House of Commons, Question 57), granting work permits to asylum seekers was dysfunctional:

Firstly, it was an incentive for people not to want an early decision. Secondly, it sent all the wrong signals apropos what happens in other European countries. I do not think we should under-estimate the critical importance of signals that are sent. With countries now evaluating their own policies, we can see and we can track the change in direction of particular nationalities dependent on what they think is available to them. We want to say to people, "If you want to claim asylum, then you should use the legitimate asylum route. If you want to work, you should use the economic migration work permit route."

With respect to access to the regular refugee determination process as opposed to an expedited process, Canada is clearly the country least willing to introduce policies or practices that block or make difficult such access for unlawful entrants. All other developed countries use various mechanisms to control the access of illegally arriving asylum seekers to the often lengthy and appeal-prone process of a full review of the substance of their claim of persecution.

Australia, for example, has recently reformed its asylum system to address the perceived problem of "boat people." These are claimants that employ people smugglers to reach such countries as Indonesia that can be used as a transit point to reach various offshore territories of Australia. The response of Australia has been to designate these islands as outside Australia for the purpose of entry into the regular refugee determination system. This

approach has parallels with the practice of some European nations of designating airports as “international zones” where asylum seekers can be handled outside various processes reserved for in-country refugee determination. If an asylum seeker who entered Australia in this manner is recognized as a Convention Refugee, the full naturalization benefits of such a designation are not given. Instead of a permanent protection visa, only a temporary visa is made available. As a result, at three-year intervals the visa is reassessed whereas a permanent protection visa would allow naturalization relatively soon.

Such mechanisms as an “expedited removal process” in the United States (examined below) or zones designated as international for migration purposes appear to be effective in reducing the influx of claimants. After the United States introduced regulatory reforms in 1995 and the passed the IIRIRA in 1996, there was a substantial fall in the number of refugee applications.¹⁴ Following implementation of the Pacific Solution, Australia’s intake of boat people has effectively ceased.¹⁵

Of course, for some countries, such as Belgium and Netherlands, such policies as “safe third country” (examined below) are a “solution” to flows of asylum seekers because, as noted above, the vast majority of applicants can be refused a full hearing and deported. These deportations unload asylum seekers onto neighbouring countries, which is why the European Union (EU) is working so hard on the Common European Asylum System (CEAS), a harmonized EU asylum policy slated to be fully operational by the end of 2004. The objective is to develop a “regional” solution to this perceived problem. An important component of this system will have to be a means of returning claimants who were unsuccessful or whose status has been revoked to source countries or, at least, to transit countries outside of Europe. The European Union has recently published a “green paper” on a policy of “return” in an effort to stimulate discussion of the subject (EU, Commission of the European Communities, 2002).

The major objective of restrictionist reception and determination policies is to discourage frivolous claims or screen them in order to reach a decision in the shortest possible time. In a situation where there are large numbers of claims of varying worth, the regular determination process can become overburdened. This increases

the possibility that claimants, who without much doubt would eventually be judged not to be persecuted or at risk of return, avail themselves of the benefits of residing in the host country for an extended period of time.

The impact on the asylum seeker and the implications for migration control of how long a claim takes to process depends on the country. In the American system, an asylum claim must be made within a year of arrival or the government need not consider it. In addition, the large population of illegal immigrants, which may number as many as 10 million, has produced a compassion fatigue. A failed refugee claimant must leave regardless of the length of stay in the country. Governments in Europe, however, are concerned about the determination times and the rights that accrue to long-term foreign residents, even those who are illegal. This time in the country can be translated into a stronger claim on a secure residence status and improved treatment. Such a calculus is explicitly recognized in the reception conditions element of the CEAS. The preamble to the European Union’s Proposed Directive on Reception Conditions for asylum seekers states:

The living conditions of applicants for asylum should in all cases be dignified, but they should be improved when applications are considered admissible and not manifestly unfounded.

[. . .]

The number and the quality of reception conditions should be increased in relation to long lasting procedures in so far the length of the procedure is not caused by negative behavior by applicants for asylum. (EU, Commission of the European Communities 2001a).

In Canada, nearly all refugee claimants are given the opportunity to integrate into the community. In general, it takes at least two years and sometimes much longer to complete the full review process including appeals if the individual is not viewed as requiring protection or in need of humanitarian resettlement.¹⁶ In this time, families can grow and deep roots can be planted in the community. At some point, Canadian public opinion appears willing to overlook how initial entry was secured and, in several confrontations between illegal foreign nationals and government officials seeking their deportation,

politicians have intervened and special arrangements worked out.¹⁷ In such an environment, migration control must operate expeditiously in order to be effective. Therefore, a central objective of the reforms in 2002 under the IRPA is to accelerate the determination process. A complicating factor is the existence of a backlog of over 50,000 claims, which will take some time to clear in the absence of an amnesty program.

Mechanisms that control access to the “regular” refugee-determination procedure (full review of the case with appeal rights) in order to speed decision-making may take many forms. One approach is to undertake a quick assessment of whether the claimant has any possibility of being recognized as a Convention Refugee. This may involve drawing up lists of “safe countries of origin” used by EU countries in order to dismiss or expedite claims. In this short review process, a very low threshold for entry into the regular determination system is set. If this threshold is not met, claimants are promptly deported. Generally those rejected as having claims that are “manifestly unfounded” have a much reduced scope for appeal. Many countries, including the United Kingdom and the United States, employ such mechanisms.

A second approach to controlling entry to the regular determination system—or even to the country if the claim is made at an entry point—is based on a determination that the claimant has crossed a “safe third country” in order to reach the host country. This is a standard review criterion in European countries and Australia.

With respect to the first approach, in the United Kingdom at the stage of first-instance determination, weaker or special cases can be singled out and detained at a “removal” centre (e.g., Harmondsworth Immigration Removal Centre) or processed at what is termed a “semi-secure” accommodation centre such as the facility at Oakington, Cambridge. If held at a removal centre, under new rules introduced in 2003 the government can use a “fast track procedure” to seek a determination within three weeks. Alternatively, a claim might be viewed as “manifestly unfounded,” perhaps because the claimant arrived from a designated “safe country.” In the past, such cases could be “certified” meaning that the first appeal to an “immigration adjudicator” constituted the only appeal. In the new certification system created by the Nationality, Immigration and Asylum Act of

2002, a negative first-instance determination that is also deemed “clearly unfounded” can not be appealed from within the United Kingdom and, therefore, removal should proceed expeditiously.

In the past, however, various efforts to make the United Kingdom’s system “faster” have not worked smoothly. For example, there have been several cases that challenged the list of “designated” safe countries under the previous regulatory system. In the case of Pakistan, the High Court has upheld appeals and described such a designation as “erroneous.”

In the case of the United States, the reforms of 1995 and 1996 noted above were focused on screening asylum seekers arriving illegally with the objective of curbing what was termed “abuse” of the system. Illegal aliens were viewed as using the system to gain a status that would allow legal employment or as means to secure release in order to disappear into the underground economy. Reforms included the implementation of a “last-in, first-out” (LIFO) policy to address an influx of asylum seekers hoping to benefit from the existing backlog. These reforms also introduced a system of “expedited removal.” An individual who is apprehended at a border point and does not have proper documents is detained and placed in a removal proceeding. In this way, the vast majority can be questioned, fingerprinted, and deported. Those that return repeatedly can be dealt with more severely.

Those who arrive illegally and claim asylum are a relatively small percentage of this group. At apprehension, illegal aliens are questioned on whether they fear return to their country. If they indicate a fear, they are interviewed by a member of the Corps of Asylum Officers, which is a branch of the US Department of Homeland Security (DHS), Bureau of Citizenship and Immigration Services (BCIS). The criterion for entry into the regular refugee determination system is a “credible fear” of persecution if returned. This standard is understood to be a very low threshold and merely indicates that an individual has some claim, not that there is even a good chance of its success. Although only a relatively small percentage of such cases are deemed not credible, the process may have an important deterrence value in relation to frivolous claims. If the Asylum Officer finds that there is no credible fear, then the individual is deported unless the person specifically asks for an appeal. If so, within

seven days an Immigration Judge must hear the case and if it is negative, there is no further appeal.

The system has received mixed reviews. Refugee advocates have voiced numerous concerns about US entry controls including the danger that potential refugee claimants caught arriving illegally might be turned away at border points without having an opportunity to submit a claim. The concern is that such people would be unaware of their rights or have problems communicating and go unnoticed in the secondary inspection process (Pistone and Schrag, 2001: 37–40). With respect to the expedited removal process itself, the US General Accounting Office (GAO), which studied it in 1998 and again in 2000, found that US Immigration and Naturalization Service officials (INS components were transferred from the Department of Justice to DHS in 2003) “generally complied” with various procedural requirements. They expressed concern, however, about the number of claimants who failed to show for their asylum application hearing in front of an Immigration Judge after being released following a positive “credible fear” hearing (US, General Accounting Office, 2000). Some have questioned the methodology of the studies and suggest that the results may be tainted because of a lack of primary research and a dependence on INS numbers (Center for Human Rights and International Justice, 2000). Regardless, the system appears entrenched and has its share of supporters (Martin 2000).

When Canada first established the IRB in 1988, there was a mechanism in place to uncover cases with “no credible basis,” which is to say, frivolous cases. An immigration official and an IRB Board member sat as a panel to assess eligibility. Given the unwieldy nature of the process, the general state of disorganization of the IRB at the time and the existence of numerous “end-run” possibilities, the system was abandoned in the early 1990s.¹⁸ Since then in Canada, the term “expedited” has been used to refer to efforts to speed positive claims towards recognition.

The second basic defense against overload of a country’s regular refugee determination system is the use of a “safe third country” policy. Article 31 of the Geneva Convention reads: “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 . . .” [italics mine]. In other words, the Geneva Convention does not condone “secondary movement.”

However, Article 33 of the Geneva Conventions still applies. It reads: “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 . . .” The logic of a “safe third country” policy is simple. Once an asylum seeker reaches safety, further movement does not evoke Geneva Convention commitments in the same way. If that further movement involves “unlawful” entry, many countries have policies that allow even legitimate refugees to be returned to safe transit countries. According to James Hathaway,

no refugee has the right to be granted “asylum,” understood in the sense of access to a permanent or durable status in the state to which his or her protection request is addressed. Until and unless a refugee meets the requirements for protection against expulsion under Art. 32—namely, that he or she is “lawfully in [the state party’s] territory”—the governing provisions are Arts. 31 and 33 of the Refugee Convention. Under the combination of these provisions, a state party is not precluded from expelling a refugee claimant from its territory during the earliest phases of refugee reception. It is only barred from doing so mechanistically, or without scrupulous regard for the simultaneously applicable duty of *nonrefoulement*. (Hathaway, 2002: 42)

The prevalence of “safe third country” policies is a result of the fact that even countries geographically distant from refugee-producing areas can become viable destinations for asylum seekers because of the rise of a lucrative people-smuggling industry. Of course, “safe third country” policies benefit some countries more than others, which raise questions of sharing “responsibility.” Those that benefit most are countries geographically isolated from refugee-producing areas and those that are “spokes” rather than “hubs” in the international transportation system. Canada has both these characteristics and it is not surprising that 70% of those making refugee claims at points of entry arrive from the United States (Coderre 2003b).¹⁹

Based on geography, the United Kingdom should also be relatively insulated from flows of asylum seekers, which is why it signed the original Dublin Convention and has opted to accept reforms to the agreement that came into force March 17, 2003 (Dublin II). The Dublin Convention is a “safe third country” agreement that was signed by most European states in 1990 and came into force in 1997.

One of the main difficulties with implementing the Dublin Convention has been the difficulty of determining the country responsible for the protection decision because asylum seekers often retain few, if any, travel documents and may be unwilling or unable to describe their transit route. On January 15, 2003, member states of the European Union began to implement EURODAC regulations, which require the fingerprinting of asylum seekers. This information must be entered into the EURODAC database, which can be accessed by all EU member states. A decision on which country is responsible for determining the claim should now be easier to reach. However, as Stephen Peers (2001) points out, it is hard to see how it is in the interest of countries along the southern boundary of the European Union and those those aspiring to join the EU, most of which are poorer than the average, to implement EURODAC policies enthusiastically when it means that they are likely to become responsible for the claims.

Although the government of the United Kingdom is committed to measures that control access to the regular refugee determination system, the United Kingdom’s judiciary is not in full agreement with the government’s “safe third country” policies, which are supposed to be beyond appeal. A recent decision of the House of Lords (UK’s highest court) reversed decisions to deport certain claims under the Dublin Convention.²⁰ The gist of the decision is that those who claim persecution based on societal sources should not be returned to transit countries that do not regard non-state persecution as grounds for Geneva Convention recognition (e.g., France and Germany) (Gibb 2002). It is such questions that are driving the effort to achieve agreement throughout the European Union on what constitutes a Convention Refugee. The current proposal, which would include society-based persecution as eligible for recognition as a Convention Refugee, had been expected to be accepted by the Euro-

pean Council sometime in 2003 (EU, Commission of the European Communities, 2001d: Article 9).

Technically Canada has had a “safe third country” policy since the creation of the IRB in 1988 but the Mulroney government pledged never to use it and, in fact, it has never been used. Prior to the implementation of the IRPA, a country could have been simply declared “safe.” Now, however, Article 102(2)(a) of the IRPA requires the government to “consider” whether a “responsibility-sharing” agreement exists between Canada and the transit country before a refugee claim can be considered “ineligible” for determination in Canada. Thus far, Canada has succeeded in reaching an agreement with only one country, the United States, and this agreement has yet to take effect. The problem may relate to a lack of interest to enter into an agreement with Canada. Canada is an end destination, not a transit point for asylum seekers.²¹ Given that the vast majority of asylum seekers reach Canada through safe third countries, but most through the United States, Canada’s energy has been focused on reaching an agreement with the United States.

For the American government, there is no independent interest in a “safe third country” agreement with Canada. The flow of asylum seekers is essentially from the United States to Canada. When a State Department official (Kelly Ryan, Deputy Assistant Secretary Bureau of Population, Refugees and Migration, US Department of State) was asked by a Congressional Committee examining the agreement (October 2002) why the American government had agreed to the proposed plan, the response was that “this as an important agreement in the context of the overall 30 points ... that Canada wants and that we are willing to agree to as a trade-off for the other important counterterrorism measures” (US, House of Representatives, 2002). In other words, the United States was willing to accept Canada’s “safe third country” proposal because it was linked to security issues and embodied in the 30-point Ridge-Manley Smart Border Action Plan.

For refugee advocacy groups on both sides of the border, a “safe third country” agreement between the United States and Canada is anathema. According to Bill Frelick of Amnesty International, who appeared before the same Congressional Committee, the United States was wrong to agree to the Canadian proposal. This is because the

agreement does not help fix any of the problems with the American asylum system, which is also faced with a backlog and is currently undergoing administrative restructuring. Furthermore, the agreement is likely to lead to increased smuggling of persons across the Canada-US border, which could adversely affect border security. Finally, asylum seekers themselves would not benefit because they want to go to Canada and, compared to the United States, Canadian reception conditions are more generous. According to Frelick,

It certainly doesn't serve the interests of these 15,000 asylum-seekers, who are looking, usually, to connect with family, friends, people that speak the same language, places where they feel that they would have work authorization while their claims were pending; who would have the right to a court-appointed attorney, which they don't have in this country.

Frelick could have added the fact that Canada grants Permanent Resident Status (PRS) to Convention Refugees in relatively short order. If there are no identity-related concerns, Canadian citizenship, with its extensive range of benefits including the right to sponsor family members in the regular immigration process, can usually be secured in three years. The United States, on the other hand, has put a limit of 10,000 on the number of "adjustments" that would grant an "asylee" permanent resident status. The United States is currently considering adjustments for those who were granted Convention Refugee status in 1998. Therefore, in terms of citizenship as opposed to a residency permit, and not taking into consideration special programs, Canada ends up granting citizenship to more in-country refugee claimants than the United States does on an annual basis. In Europe, those judged Convention Refugees may be naturalized but only after a relatively lengthy period. With the exception of a small program in Germany, no country in Europe has an immigration program and family reunification and other naturalization routes are tightly controlled. Canada's citizenship policies must, therefore, be viewed as a pull factor for asylum seekers.

Clearly a "safe third country" agreement is purely in the Canadian government's interest and, as in other agreements with the United States, favourable or even

equitable terms are difficult to secure. This is clear when the Canada-US agreement is compared to the revised Dublin Convention noted above. Arguably, the latter is an appropriate benchmark for comparison because it was an agreement that came after a long period of pulling and hauling between several relatively equal states of diverse interests. In a "safe third country" policy, the basic rule is that the first safe country that allows an asylum seeker to enter or transit their territory takes responsibility for the claim. The main mitigating circumstance on this rule is the presence of family members in the destination country. The newly revised Dublin Convention provides for family reunification in Articles 6 to 8, which read:

Article 6: Where the applicant for asylum is an unaccompanied minor, the Member State responsible for examining the application shall be that where a member of his or her family is legally present, provided that this is in the best interest of the minor. In the absence of a family member, the Member State responsible for examining the application shall be that where the minor has lodged his or her application for asylum.

Article 7: Where the asylum seeker has a family member, regardless of whether the family was previously formed in the country of origin, who has been allowed to reside as a refugee in a Member State, that Member State shall be responsible for examining the application for asylum, provided that the persons concerned so desire.

Article 8: If the asylum seeker has a family member in a Member State whose application has not yet been the subject of a first decision regarding the substance, that Member State shall be responsible for examining the application for asylum, provided that the persons concerned so desire. (Council Regulation (EC) No 343/2003 18.2.03)

The section that defines "family" for the purpose of the regulation reads:

(i) the spouse of the asylum seeker or his or her unmarried partner in a stable relationship, where the legislation or practice of the Member State con-

cerned treats unmarried couples in a way comparable to married couples under its law relating to aliens;

(ii) the minor children of couples referred to in point (i) or of the applicant, on condition that they are unmarried and dependent and regardless of whether they were born in or out of wedlock or adopted as defined under the national law;

(iii) the father, mother or guardian when the applicant or refugee is a minor and unmarried; country national who applies at the border or in their territory to any one of them for asylum (Council Regulation (EC) No 343/2003 18.2.03, Article 2(i)).

Article 15 of the new regulation allows countries to put in place a wider understanding of “family” for “humanitarian reasons” if they wish.

In the final draft text of the Canada-US “safe third country” agreement, Article 4 (2) sets out some exceptions to the general rule that the first country reached has responsibility for the application. Article 4(2)a includes the case where

at least one family member who has had a refugee status claim granted or has been granted lawful status, other than as a visitor, in the receiving Party’s territory; or (b) Has in the territory of the receiving Party at least one family member who is at least 18 years of age and is not ineligible to pursue a refugee status claim in the receiving Party’s refugee status determination system and has such a claim pending.

In the Article 1 of the agreement, a “family member” is defined as “the spouse, sons, daughters, parents, legal guardians, siblings, grandparents, grandchildren, aunts, uncles, nieces, and nephews” (Canada, Citizenship and Immigration Canada, 2002b).

With the Dublin Convention as a benchmark, the family reunification provisions of the Canada-US agreement appear largely humanitarian. This is because in the case of the Dublin Convention, setting aside the cases of unaccompanied minors, to be eligible for reunification the host state must have already granted refugee status to a family member or be reviewing the family member’s

case. In Canada, any legal status is sufficient. It has to be kept in mind that since 1980 Canada has accepted more than 4 million immigrants (which in no way exhausts the store of potential family members) while the countries of the European Union have recognized fewer than one million Convention Refugees, many of whom have since been repatriated. In addition, the Dublin Convention’s definition of family is restricted to the nucleus while Canada’s definition is broad.

The bottom line is that, without a “safe third country” policy, a developed country with even the most sophisticated migration barriers becomes a target for people smugglers. In a study of people smuggling and trafficking, Adam Graycar, Director of the Australian Institute of Criminology, suggests that migration is endemic:

For as long as there have been people there has been migration. People have always sought to move to better their lot. Many people have willingly sought new lives—many have had little option when faced with violence, terror, or economic doom to seek a new life. For a large number of people, somewhere else looks better. It is said that if you live in Somalia, Egypt looks pretty good. If you live in Egypt, Greece looks pretty good. If you live in Greece, Belgium looks pretty good. If you live in Belgium, Canada looks pretty good. (Graycar 1999: 2)

If this example were taken as a single case and this list of countries a transit route (which is not improbable), on arrival in Canada, given current practices, this individual’s claim can be based on persecution faced in Somalia.

Overall, given the capacity of the current international smuggling industry and in the absence of discouragement or screening mechanisms, such as an expedited removal process, restrictions on social benefits received, or an effective “safe third country” policy, Canada’s refugee determination process is very likely to receive flows of asylum seekers at rates that ensure a continuation and even an expansion of the existing claims backlog. This has implications for those who might be recognized as Convention Refugees using international standards and for those who would not be recognized.

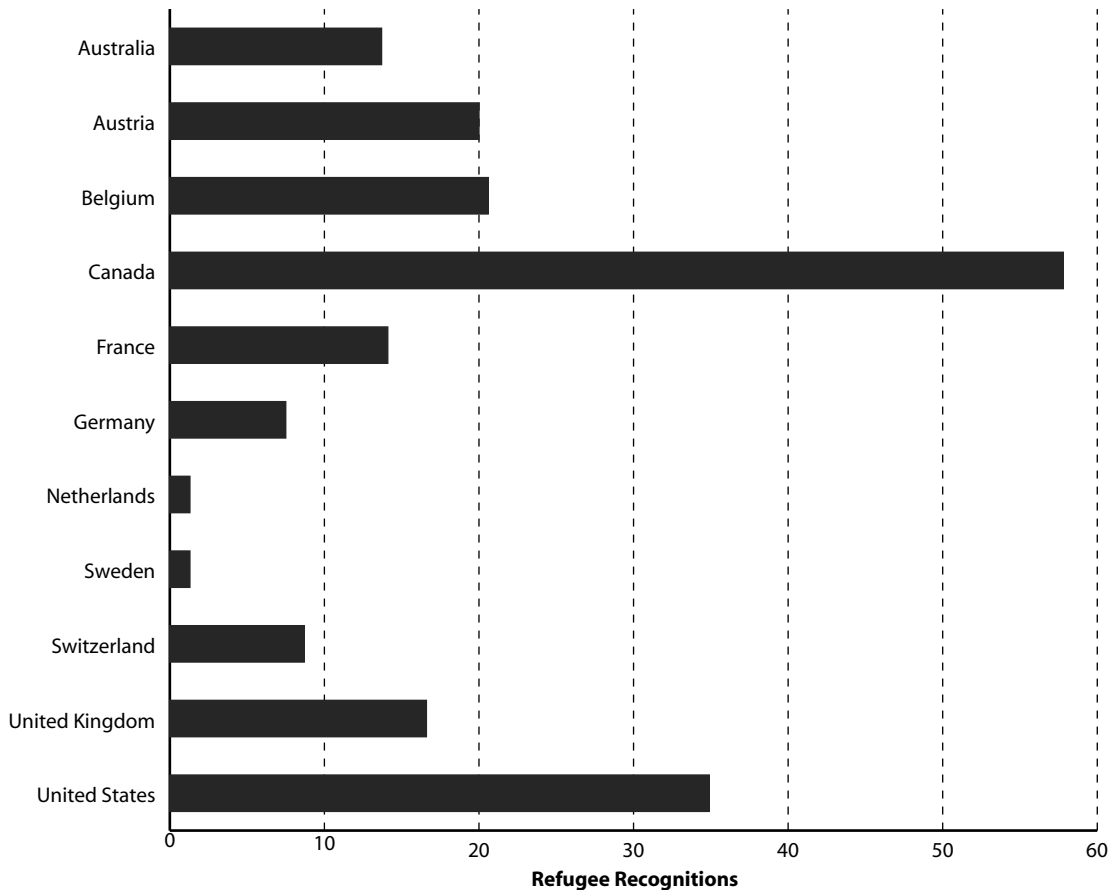
First, Canadian policy is beneficial to those who might be recognized as Convention Refugees or in need

of protection elsewhere because, in the absence of a “safe third country” policy or other discouragement practices, Canada’s policy assumes a responsibility that is rightfully another country’s. In other words, existing Canadian policy and practice grants the asylum seeker the incentive and opportunity to choose Canada as a place to make a protection claim. This means Canada is assuming what are interpreted internationally as discretionary costs. Such costs require trade-offs with other government expenditure programs including funds available to assist international refugees. Such costs and the resulting trade-offs are also inflated to the extent that Canadian interpretations of what constitutes a Convention Refugee go beyond international norms. In fact, as noted below, Canadian positive determination rates are substantially higher than those found in other countries in

the developed world (figure 2).²² One consequence of this is that on a per-capita basis Canada accepts a greater responsibility for refugees than do other developed countries (figure 3). Of course, this may not be a fair comparison because many who are recognized as Convention Refugees in Canada might not be recognized as such elsewhere.

In other countries, it is sometimes argued that there is a cost to legitimate refugees from the presence of so many “bogus” cases that clog the system and slow the process. This cannot be seen as a great problem in Canada because a relatively complete set of social benefits are available to a claimant on admission to the system. Furthermore, for applicants with a strong claim Canada is relatively quick and generous in providing permanent residence and, then, citizenship.

Figure 2: Refugee Recognition Rates (in-Country Determinations) by Major Destination Countries of the Developed World, 2002



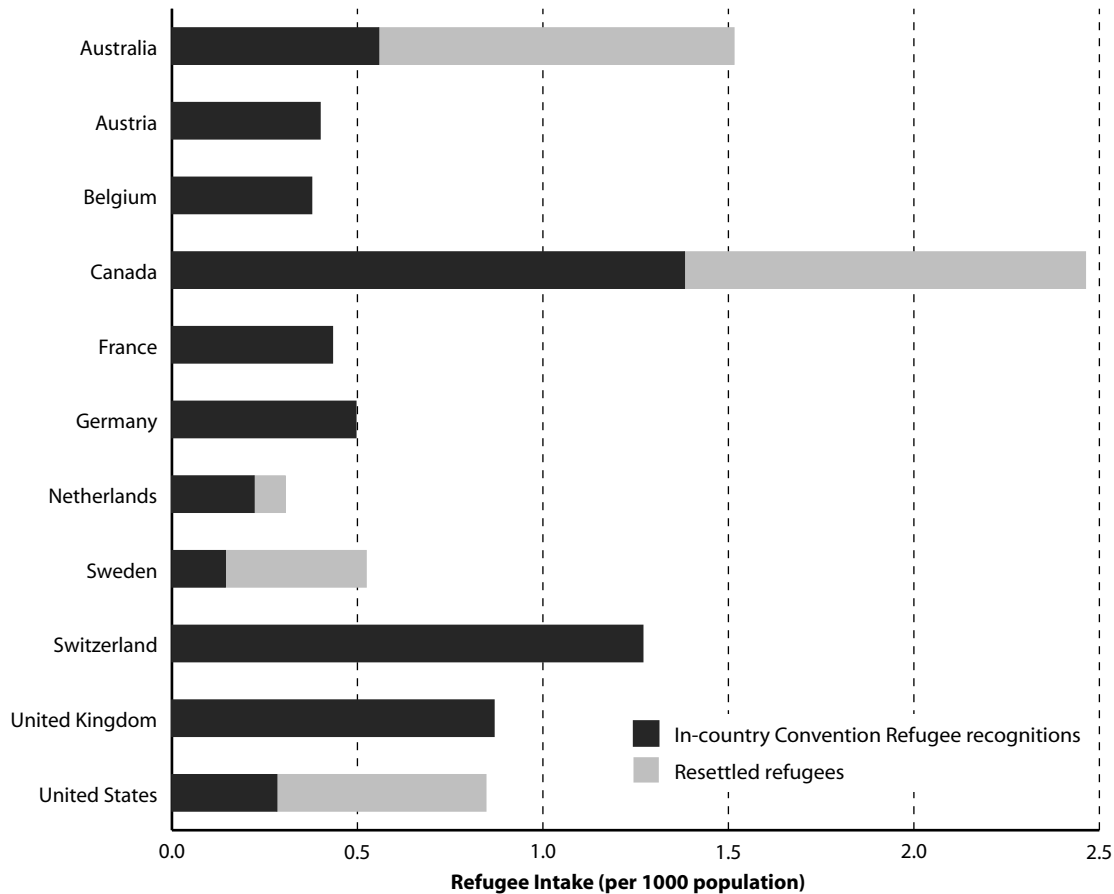
Note: The refugee recognition rate equals those recognized divided by the total of those recognized, other positive, and rejected. Source: UNHCR, Population Data Unit, 2003: table 5.

For those who are unlikely to be recognized as Convention Refugees and the people smuggling industry that profits from their movement, Canadian policy and practice may also be beneficial. This is because a backlog might lead to less vigilance, greater numbers being expedited with eased determination criteria, or the government’s resorting to some means (like amnesty) to clear the backlog. In addition, as noted above, the longer the time spent in Canada, the more difficult it becomes to deport failed claimants.

There are drawbacks to the employment of discouragement and control policies. To begin with, they create hardships and stigmatize a flow of people who are gener-

ally vulnerable and possibly traumatized. The drawback of “manifestly unfounded” policies is that there is potentially a greater possibility of misjudging refugee applicants. In the case of a “safe third country” policy, the outcome is likely to be less than optimal from the perspective of asylum seekers and their advocates who may take the position that a refugee has a “right” to chose where an asylum application is lodged (Hathaway and Neve 1997). This is because Canada is often chosen by asylum seekers because it has the most generous reception, determination, and citizenship policies in the world and because many have family and friends living in Canada.

Figure 3: Per-Capita Acceptance Rate of Refugees by Major Destination Countries of the Developed World, 2000–2002 (Cumulative)



Sources: UNHCR, 2002b: table III.1, Annex C.11, Annex C.12, Annex C.32; UNHCR, Population Data Unit, 2003: table 5. Resettlement numbers for 2002 based on UNHCR “quotas.” US resettlement number set at 160,000 based on estimated actual landings during the 2000–2002 calendar years.

Note: Canada’s intake does not include grants of PRS to Humanitarian Designated Classes. These numbers also do not include various classes of “subsidiary” protection found in the Canada, Europe, and the United States.

First-instance decision-making

To compare the refugee determination regimes in various countries, I will begin by reviewing a selection of the basic characteristics of the decision-making process. A comprehensive comparative analysis of international refugee determination practices would be of great importance but it is a monumental task, given their diversity and complexity and the speed with which this policy is changing.

To begin with, an obvious and major difference between Canada's approach to refugee determination and that of other host nations is that Canada employs "independent" decision-makers in its "first-instance" determination. In other developed countries, the initial determination of whether an individual is a Convention Refugee is undertaken by administrative officials. In Australia, the task is handled by officials of the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA). In the United Kingdom, determinations are made by the Asylum Directorate of the Home Office while, in the United States, determinations are made by the Corps of Asylum Officers, which is a branch of the US Department of Homeland Security (DHS), Bureau of Citizenship and Immigration Services (BCIS)

The obvious reason for this is that public officials can be intensively trained, closely monitored, and effectively directed. The supposition is that ultimately it is the government that is responsible for making the determination of the specific trade-off between the nation's commitment to international human-rights and the sovereign interest of controlling migration. This is especially the case in countries where Convention Refugee status or subsidiary protection leads quickly to naturalization. Of course, this choice is made within the parameters of internationally accepted practice.²³ A benefit of a directly accountable administrative organization is that it can deliver more consistent decision-making. In addition, although nowhere stated, a directly accountable initial determination process can ensure that there are fewer "false positives." This provides a disincentive to the ar-

rival of economic migrants using the asylum system to secure some form of residency.

In Australia, if an asylum seeker is making an application inside the country or has reached Australia by air, the process involves a determination by a DIMIA official on whether to grant a "protection visa." If an asylum seeker was legally in Australia and was determined to be a Convention Refugee, a Permanent Protection Visa (PPV) is granted. Changes to the legislation in 1999 mean that, if the asylum seeker arrived "illegally," the protection visa would be temporary. A Temporary Protection Visa (TPV) requires a re-determination after three years on whether the persecution continues to exist; if it does, then a permanent visa is issued.

In 2001, the Australian government once more amended its first-instance determination regime with the Migration Amendment (Exclusion from Migration Zone) Act 2001. In response to what was perceived as an onerous influx of "boat people" (which is to say, asylum seekers reaching outlying island territories of Australia generally from nearby Indonesia), the law was changed to deny access to the mainland regular determination system. If asylum seekers reach such islands as Christmas or Ashmore and Cartier Islands or are intercepted in Australian territorial waters, they need not be given a full hearing and need not be transferred to the mainland. Even if such "offshore entry persons" or "unauthorized arrivals" are eventually recognized as Convention Refugees, they are only eligible to receive temporary protection visas that can be renewed but never converted to a permanent visa. Dubbed the "Pacific Solution," the objective of the new rules is to deter "forum shopping." Needless to say, this policy has drawn criticism (US Committee for Refugees 2002) but has been clearly effective in deterring abuse.

On entry to the United Kingdom, an asylum seeker is immediately questioned by an Immigration officer at an entry point or, if inside the country, by an officer of the Screening Unit of the Immigration and Nationality

Directorate (IND) of the Home Office. The objective is to establish identity and route of arrival quickly. This initial questioning might be followed by a full interview if the case is suspected of being “clearly unfounded.” Alternatively, the interview could be put off until a detailed questionnaire (Statement of Evidence) is completed. An Asylum Case Officer, who is a departmental official, makes the protection decision. The objective is to have the full interview completed within a month and a decision rendered within 2 months. Statistics show that the UK government was achieving its targets in 77% of the cases (UK, Home Office 2002).

Critics of the process in the United Kingdom are not convinced that government efforts to make the process “fairer and faster” are all to the good. They point to the high rate of reversal at the appeal stage as an indication of the shortcomings of the United Kingdom’s first-instance determination regime. Home Secretary David Blunkett concedes that administrative efforts and training needs to be more “robust.” At the same time, calls for a Canadian style “independent board” do not appear to be given much attention.²⁴

In the United States, prior to 2003 the regular determination process was initiated by application to the Asylum Division of the INS. In March 2003, the enforcement elements of the INS came under the control of the DHS in the Border and Transportation Security Division while the services elements were incorporated in the Bureau of Citizenship and Immigration Services (reporting directly to the Deputy Secretary for Homeland Security), achieving a long-discussed separation of the enforcement and service functions. In the area of refugee determination, however, there does not appear to be any basic change in the offing. In the regular “affirmative” process, an Asylum Officer makes a determination on an application after an interview. If the decision is negative, the case is not automatically sent to an Immigration Judge on appeal unless the individual is “out of status.” If there is an appeal, it takes place in the context of a removal hearing and the rules stipulate that the whole process, including the appeal, must be completed in 180 days.

From the perspective of the asylum seeker, the disincentives against unlawful entry in the American system are important. If an applicant is apprehended when arriving illegally, then an “expedited removal” process is initi-

ated and any asylum claim made at this point is termed “defensive”; that is to say, the asylum claim is viewed as a defense against removal. This can be very disadvantageous for the asylum seeker. First, as noted above, the asylum seeker must be viewed as having a “credible fear” or deportation is immediate. Secondly, if credible fear is recognized, the asylum seeker might still be detained until the completion of the process—most are released (paroled) until their hearing. Studies show that legal representation is positively correlated with success and, because the United States does not provide legal assistance to asylum applicants, detention does not bode well for the applicant (Pistone 2000). If an illegal alien is caught inside the United States and makes an asylum claim, the case is also viewed as defensive and is heard by an Immigration Judge in the context of a removal hearing.

In Canada, the first-instance determination is made by members of the Immigration and Refugee Board (IRB). The IRB is Canada’s largest administrative tribunal, employing approximately 200 board members who are “independent” in their decision-making.²⁵ Under the pre-IRPA rules, the protection decision was made by a two-member IRB panel. Generally both would have to agree that the individual should not be recognized for the decision to be negative. The process itself was non-adversarial and there has been an institutionalized inclination to give the asylum seeker the benefit of the doubt (Canada, Auditor General of Canada, 1997: 25.59).²⁶

Canada’s new process of refugee determination embodied in the IRPA came into force June 28, 2002 and includes efforts to speed up the determination process. The new legislation provides for review of claims by one-member IRB panels and adversarial interventions are permitted. An effort is now being made to interview, and do security checks on, illegal arrivals on entry. In addition, a “triage” system has been developed in which claimants are streamed into one of four categories.

The first is an “expedited” stream into which go those cases where the asylum seeker can provide a credible account from a country that has a history of like cases that themselves have been granted positive determinations.²⁷ It was originally thought that as many as a quarter of all claimants might be streamed into this group (a lower percentage is now envisioned). If so, this would automatically give Canada the second highest Convention Refugee

recognition rate (after the United States) among the top ten receiving nations noted above based on 1990–1999 UNHCR statistics (UNHCR, 2000: table V.16). In practice, the expedited process coupled with those streamed into a short review process might develop into something similar to the “Backlog Clearance” exercise of the late 1980s in which as many as 120,000 cases were fast tracked to PRS. This might be considered necessary because there were nearly 45,000 new arrivals in 2001 and almost 40,000 in 2002. Even with the recent infusion of new resources and an increase in the rate of decisions, the fact remains that there are approximately 50,000 in the backlog and no apparent enthusiasm to deport those that the IRB determines negatively.

Other streams include those cases with a small number of issues that require a decision; otherwise they would have been expedited.

Thirdly, there are cases that involve new issues or security issues or are complex in some other way and require an allocation of significant resources to reach a determination. Finally, one stream will include cases that are termed “regular,” the bulk, one would presume, of the annual influx.

Although it is difficult to speculate on the future and reforms have been made to the existing system, one more aspect of Canada’s refugee process that has no parallel in other countries is its rate of positive determination. Some have investigated the reason for this anomaly and reach disturbing conclusions (Stoffman, 2002: ch. 7). With respect to numbers, in its first-instance determination, Canada grants Convention Refugee status to a greater proportion and to a broader spectrum of its applicants than any other country in world. In addition, Canada granted Convention Refugee status to individuals from countries not recognized as producing refugees by any other country. In some cases, Canada granted Convention Refugee status to more individuals from a given country than all the other refugee-hosting countries of the world put together (Gallagher, 2002a: 110–11). During the 1990s, Canada’s refugee-determination rate was 61.8% during a period when none of the other major destination countries approached 50% and most European countries were in the area of 10% (UNHCR, 2000: table V.16). In 2002, Canada’s Convention Refugee Determination rate was the highest among the major destination

countries and Canada was the only developed country to grant protection (even with humanitarian and temporary protection included) to more than half of the applicants that completed the determination process (figure 3).

From a “realist” perspective, it can be argued that a government has an obligation to consider the interests of its citizens first and it might also be argued that a country’s obligations under an international rights convention need not go beyond internationally accepted norms (Gallagher, 2001). Activities that extend past convention obligations constitute discretionary humanitarian programming. In Canada’s case, the absence of entry and screening controls, an expansive definition of “convention refugee,” the lack of a “temporary protection” option, and a generosity with citizenship suggest that, compared to that of other countries, much of Canada’s refugee program operates as a self-selected humanitarian immigration program. But, compared to other humanitarian policies, this is a program that has not been closely evaluated for its efficiency or cost effectiveness and, in fact, the “humanitarian” credentials of the program may be open to question. In a recent study of asylum migration trends, Stephen Castles and Sean Loughna of the University of Oxford Refugee Studies Centre (RSC) draw attention to the possibility of mixed motives for arrival in Canada and note that Canada is not easy to reach, which may act to screen out those with limited resources. According to Castles and Loughna:

Asylum seekers from the Americas tend to come to Canada by land. But most asylum seekers coming to Canada come much larger distances and by necessity travel by sea or air. It is difficult with the information available to make generalisations and identify patterns about many such asylum seekers going to Canada. A factor seems to be Canada’s programme of resettlement of refugees and asylum seekers. Many asylum seekers going to Canada appear to be from the more elite sectors of their societies of origin and they frequently fly there. (Castles and Loughna 2002: 9)

Taken together there are many aspects of Canadian asylum policy that strongly pull asylum seekers and signal profitability for those who facilitating their transport and recognition.

The appeal and review process

If there is a common feature of contemporary reform of refugee determination procedures in the developed world, it is the general effort of policy planners to limit the role of the judiciary in the refugee determination process. Instead, appeals or reviews are directed to independent adjudicators and administrative tribunals. The general logic is that refugee determination requires specialized expertise not necessarily available in the judiciary. In fine print is the supposition that asylum seekers are foreign nationals applying for the application of the host country's treaty obligations. This claim differs from that made on the host country by its own citizens in that, at base, refugee recognition, with its consequent privileges, is a discretionary act of a sovereign state. As a consequence, the implications of precedent-setting decisions must be closely scrutinized in light of a range of considerations that include not only obligations under international law but also program-management concerns. Of course, refugee advocates condemn this approach and seek to have the rights of asylum seekers treated on a par with those of citizens. In contrast to the United States where relief from deportation is a "matter of grace," in Canada such efforts have had some success.²⁸

In Australia, an appeal of a decision of DIMIA is generally to an independent administrative board, the Refugee Review Tribunal (RRT), which recently employed 38 full-time and 24 part-time members. The decisions of the RRT can in turn be appealed to the Australian Federal Court on points of law. In an effort to address what is considered the most pressing problem, the boat people, legislation has been changed to restrict appeals in these cases. The Migration Amendment (Exclusion from Migration Zone) Act 2001 provides for only a second review by a different DIMIA official of a determination made of an "offshore entry person." If such applicants are brought to the mainland, however, they gain the right to review by the RRT, although later regular judicial review is closed off.

The United Kingdom has introduced numerous changes to its refugee determination appeal system over the years. The basic system requires a failed first-instance claimant to appeal to an "Immigration Adjudicator," the first "tier" of the Immigration Appellate Authority (IAA). Recently, there were as many as 169 full-time, and 423 part-time, adjudicators. If the adjudicator upholds a negative determination, the claimant can request leave to appeal to the second tier of the IAA, the Immigration Appeal Tribunal (IAT). The IAT is an "independent judicial body" established by the Immigration Act 1971 and is headed by a President and a Deputy and employs 27 full-time Vice Presidents. In addition, it has 30 "part-time" Chairpersons and 33 "Lay Members" (UK, Home Office, 2003a). From the IAT, appeals may go to the Court of Appeal and, potentially, to the House of Lords.

The more recent reforms directed at speeding the process to conclusion include provisions in the 1999 Immigration and Asylum Act, which introduced the "one-stop appeal" system and the changes made in 2002 to the treatment of manifestly unfounded (now termed "clearly unfounded") cases noted above. The object of the former is to ensure that all grounds for appeal are stated in the first appeal so that multiple appeals, perhaps based on other grounds than asylum, are not used to delay deportation. If new grounds are raised later, there must be a very good reason for doing so and such appeals may not stave off deportation. With respect to the latter, as noted above, the 2002 Nationality, Immigration and Asylum Act includes provisions that introduced a "non-suspensive" appeal in "clearly unfounded" cases. This means that an appeal of a first-instance negative decision from certain specified countries, including the 10 EU-ascension countries and such countries as Bangladesh, Sri Lanka, and Ukraine, must be made from outside the United Kingdom.

The new Act also includes provisions that restrict IAT appeals to "points of law." Previously, the IAT could

examine the facts of the case and reach decisions that replaced those of an adjudicator. With respect to examining a leave to appeal from an IAT decision, “judicial review” has been replaced with a “statutory review process” that has a single-stage paper review by a single High Court Judge. Of course, as noted above, many initiatives of the UK government have been challenged and blunted by judicial decision-making and, with the entrenchment of the European Convention on Human Rights in 1998, new avenues of appeal were created and the government does not control policy as fully as perhaps it once did.

In the United States, prior to the 1995 reforms, the decision of an Asylum Officer constituted a full stop and “out of status” applicants (i.e., those who were illegal aliens) could then ask for a “de novo” review during a removal hearing before an Immigration Judge. After the reforms, the Asylum Officer in the regular process (Affirmative Process) who decided not to grant Convention Refugee status to an out-of-status or unlawful applicant would simply pass the file on to the Executive Office for Immigration Review (EOIR), a branch of the US Justice Department, where one of approximately 220 Immigration Judges would examine the claim during a removal hearing. The process itself resembles an informal court proceeding. The Immigration Judge has great latitude to control proceedings and ask questions, including those that are decidedly adversarial. Oral decisions that are written into the record may be delivered at the end of the hearing as written decisions are generally reserved for complex cases.

An appeal of an Immigration Judge decision can be made to another branch of the EOIR, the Board of Immigration Appeals (BIA). The BIA, which in the past has had up to 23 members but is scheduled to fall to 11 in 2003, is “the highest administrative tribunal in the immigration field ... (and) is responsible for applying the immigration and nationality laws uniformly throughout the United States” (US, Department of Justice, Executive Office for Immigration Review, 2002). In 1999, new regulations streamlined decision-making by allowing a board member to confirm an Immigration Judge’s decision. These regulations have since been widened to include most of the BIA’s work and, according to Kevin Rooney, Director of EOIR, the result is “im-

pressive”: in the seven months following the implementation of the new regulation, the BIA handled 22,000 cases viewed as “straightforward and non-controversial,” leaving 1,700 for closer examination (US, House of Representatives, 2003b).

The American Civil Liberties Union (ACLU) does not have so positive an opinion of the evolution of asylum policy in the United States in the aftermath of September 11, 2001. According to ACLU spokespersons, Laura Murphy and Timothy Edgar (US, House of Representatives, 2003a), the thrust of these reforms compromise the “civil liberties and fundamental values” of the United States. BIA decisions can be reviewed by the Attorney General, who may render decisions that set precedents for Asylum Officers and Immigration Judges. BIA decisions may also be appealed to the US Court of Appeals and, then, to the Supreme Court.

The basic approach of the Canadian system was to put in place a very generous initial determination system so that appeals should be both unnecessary and fruitless. Therefore, judicial review was theoretically limited and Section 67(1) of the Immigration Act read, “The Refugee Division has, in respect of proceedings under sections 69.1 and 69.2, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction.” The IRPA retains this wording in Section 162(1).

The fact is, however, that since the IRB came into being the Federal Court of Canada has been the only appeal route and by all accounts has actively shaped refugee determination in Canada. The Federal Court is structured into two branches, the Appeal Board and the Trial Division. Together the two divisions employ 34 judges (plus 9 Supernumerary), although this is slated to increase to reflect an expanded anti-terrorism mandate (Tibbetts, 2002). Since the creation of the IRB, refugee and immigration cases have come to take up most of the court’s time. Technically, the pre-IRPA policy provided three opportunities for judicial review prior to removal. The IRPA reduces this to two. In other countries, including Australia, the United Kingdom, and the United States, judicial review comes late in the process because there exist refugee appeal boards and, in the case of the United States, direct intervention by the Attorney Gen-

eral. These provide an appeal possibility in addition to providing direct, expert, and binding guidance to first instance decision makers. Policy planners in these countries have also made efforts to restrain judicial intervention to important points of law. Of course, these efforts have not always been successful as the judiciaries of many countries have exhibited a willingness to question all aspects of government refugee determination.²⁹ In the United Kingdom, the House of Lords has made several decisions that have had the effect of undermining important elements of the government's asylum policy.

By comparison, although there are various efforts to give guidance to Canada's independent first-instance decision-makers through the use of "jurisprudential guides" or "lead cases" regarded as "persuasive," the fact is that refugee determination in Canada is directly supervised by the judiciary. The IRPA includes the creation of a Refugee Appeal Division (RAD) of the IRB that would provide an appeal opportunity and could reach decisions that would be binding on first-instance decision-makers. As noted above, the RAD has yet to be created in order to address the existing claims backlog.

Removal policies and practices

It is often stated that an in-country asylum granting program must be defended with an effective means of removing failed claimants (UN, EXCOM, 2002b, 11). This means that the removal of failed refugee claimants constitutes a core element in a robust refugee determination process because flows of asylum seekers are mixed, including refugees, people in need of protection and “illegal immigrants.”

The thrust of the illegal immigration argument is that a host country’s asylum policies present a migratory opportunity exploited by those for whom a legal migration process is unavailable or too slow. Under Article 33 of the Refugee Convention, refugees cannot be punished for illegal entry. If an individual arrives illegally, which is the case for a majority of asylum applicants in the developed world and is judged not to be a Convention Refugee or someone in need of protection, then policies that allow the individual to remain must be viewed as immigration policies. Furthermore, policies that allow refugees or others to remain after protection is no longer required also constitute immigration policy.

Policies or practices that facilitate the integration of such migrants are a concern to all developed countries because they constitute a mechanism of self-selected immigration. At the same time, governments are not necessarily willing or capable of closing them down. First, domestic and international rights commitments must be honoured. Second, judicial activism trumps executive orders. Third, sometimes it is not politically expedient to act firmly. In the case of illegal migrants or failed refugee claimants, they generally seek to avoid detection so as to benefit from residence in the destination country. At some later date, such residency might support a humanitarian or political claim on a secure residence status. Evidence of the success of these efforts to secure status or at least benefit from residing in the developed world might be seen in the continuing flow of asylum seekers and illegal migrants reaching countries in the developed world in the face of Herculean efforts to block their passage.

With respect to asylum seeking, a necessary response to this flow from the control perspective is to determine quickly and fairly the legitimacy of a refugee or protection claim and then deport failed claimants. In the current market-driven and globalized asylum-seeking system, an unwillingness or inability to remove failed claimants is likely to result in an increased inflow.

The various countries in the developed world that are destinations for asylum seekers have had an uneven response to the removal imperative. Of course, Australia has the best track record when it comes to the removal of illegal migrants. Australia detains all “unauthorized non-citizens” until they are granted some form of legal status. The much assailed legitimization for this is the administrative need to verify identity and ensure attendance at visa hearings. As a result of this mandatory detention policy, nearly all failed asylum claimants are removed. In comparison, an estimated 70% of failed asylum claimants in the United Kingdom abscond (Gibney and Hansen, 2002: 13).

Among the countries that do not detain all asylum seekers, the United States appears to have the most effective mechanisms of removal. Arguably, this is a result of a prolonged combat with illegal migration originating from its southern neighbours. The United States has a vast apparatus of containment and removal. In the 2001 INS Fiscal Year, a total of 176,984 individuals were deported, including 71,597 criminals. Of the total, 69,730 were removed via the expedited removal process. In addition, approximately 400,000 decided to turn back at entry points and 1.25 million individuals were apprehended and voluntarily removed in border regions (US, Department of Justice, Immigration and Naturalization Service, 2003: 5).

Regardless of these efforts, large numbers of illegal immigrants reside in American society. Recent estimates place the number as high as 10 million. This may explain why there is simply no provision made for the integration of failed refugee claimants. The United States has

no humanitarian “leave to remain” process at the end of the refugee determination procedure. If in custody, as large numbers of asylum seekers are during the expedited removal process, the failed asylum applicant is deported. Historically, the United States did not actively pursue absconders or, for that matter, other illegal aliens. However, in the aftermath of September 11, 2001 there are indications that this may change, especially with respect to illegal aliens from countries that the United States associates with terrorism. This has ramifications for Canada because, given current asylum policies, many, even long-term (albeit illegal), residents of the United States, can and are accessing the Canadian asylum system (Nickerson: 2003).

European countries have had uneven success with measures to remove failed asylum applicants. The United Kingdom in particular has struggled with the problem. In a recent appearance before a UK House of Commons Committee to answer questions on illegal immigration, Home Secretary David Blunkett was forced to admit that the government’s target of 30,000 removals for the 2001/2002 fiscal year was a mistake. The United Kingdom managed 9,825 and set a target of 12,000 for 2002/2003 (UK, House of Commons, 2002: Question 88). In 2000, member states of the EU removed 367,552 individuals (EU, Commission of the European Communities, 2002: 3.4.1.). For the most part, however, these were cases of one EU country pushing asylum seekers across a border into another.

In all the major asylum-seeker destination countries with the exception of Canada, the basic response to concerns about illegal migration is similar. Laws exist that allow for the practice of detention for illegal entrants. Asylum seekers are detained not because they are making a refugee claim but because they are illegal entrants.³⁰ Of course, the majority of asylum seekers are illegal and limited resources means that in most countries only a proportion can be detained at one time. In such cases, the main objective is to detain those who are least likely to sustain an asylum application so that they can be promptly removed.

Canada is like some other developed countries that are major targets of asylum-seeking flows in having limited success in removing failed asylum seekers and illegal immigrants. Arguably this reflects, as in other countries,

a policy choice as much as a program failure.³¹ In Canada, prior to the elimination in 1997 of the Deferred Removal Orders Class, which allowed individuals including failed refugee claimants who had staved off deportation for three years to gain PRS, it is likely that the vast majority of all those asylum seekers who persisted in their efforts to remain in Canada eventually gained PRS.³² CIC statistics do include removals, however. At the same time, a good portion of those removed were removed to the United States. Prior to June 2002, being outside Canada for 90 days granted the right to initiate a new refugee claim. There is evidence that many individuals who were deported to the United States returned and that a portion of such repeat claims were successful or the individuals found other ways to stay in Canada (Oziewicz, 1999).

The general disorganization and lack of priority given government efforts to deport failed refugee claimants has been a consistent theme of reports by the Auditor General. The most recent report by the Auditor General (May 2003) on the Department of Citizenship and Immigration’s “control and enforcement” policies argues that departmental efforts to ensure that failed refugee claimants are removed are insufficient and could have dire consequences:

Enforcement activities are under increasing stress and are falling behind. The gap between removal orders and confirmed removals is increasing. Detention budgets and facilities are a departmental concern. The growing backlog in enforcement activities places the integrity of a major part of the immigration program at risk. (Canada, Auditor General of Canada, 2003: 5.118)

The implication is that progress has been slight from the Auditor General’s 1990 review of Immigration Enforcement, which noted that “[a]lthough the resources dedicated to enforcement are substantial and growing, we question the economy, efficiency, and operational effectiveness of a process where the carrying out of enforcement actions (removals) is the exception rather than the rule” (Canada, Auditor General, 1990b: 15.127). It should be kept in mind, however, that in terms of results it is hard to say that Canada’s efforts have had much less success than those of other countries with the excep-

tion of Australia. For example, regardless of the capacity of the American system to deport illegal immigrants, millions live on there and consideration is being given to “regularizing” their status. In Europe, large numbers reside illegally and numerous countries have used various amnesty programs to address this problem. Recently,

Greece, Italy, and Spain naturalized as many as 600,000. At the same time, an absence of an effective removal program is sure to attract migratory flows because those who facilitate the clandestine movement of people are little influenced by empty government rhetoric about deporting illegal migrants.

Conclusion

The conclusion of this study is that Canadian policies related to migration control and refugee determination are not consistent with an emerging international harmonization trend that is focused on addressing the problem of illegal immigration. This harmonization is not unexpected because asylum-seeking flows are currently “mixed,” primarily illegal, international in scope, and to a great extent facilitated by a people-smuggling industry.

Internationally, countries that follow policies that diverge from international norms will pull asylum-seeking individuals to a greater or lesser extent (Thielemann, 2002: 21). The general result has been a “race to the bottom” in terms of reception conditions. Reception conditions for asylum seekers include policies related to employment, freedom of movement, and access to a range of social benefits including welfare, health care, and education opportunities.

In the area of refugee determination, the trend has not so much been a race to the bottom as a hard-headed calculation of what is a legitimate refugee and what are the true obligations of a host state towards asylum seekers. This has led to an increasing convergence in the determination practices of host developed countries. Nowhere is this convergence more institutionalized than in the efforts of the EU to develop the CEAS.

In contrast to these trends, Canadian reception, determination, removal, and citizenship policies continue to be liberal and porous. As a result, the gulf between Canadian policy and practice, on the one hand, and international norms, on the other, is now so stark that control of illegal immigration cannot be seen as a priority of the Canadian government. In fact, if interdiction policies were set aside, the range of in-country policies examined here act more to attract than deter illegal immigration. Canada’s reception conditions for illegally arriving asylum seekers is little different from that faced by legally arriving immigrants. The first-instance refugee determination and appeal processes are the most liberal in the world and routinely recognize as Convention Ref-

ugees more than half of those claimants that complete the process. Furthermore, there are numerous post-determination features to the system, including its removal policies, that work to the advantage of those who would not have the slightest possibility of being recognized as Convention Refugees in any other country. Finally, Permanent Residence Status and citizenship come relatively smoothly and quickly to most and does not appear unattainable to many. Taken together, these policies provide an alternate and fairly reliable means of immigrating to Canada from a range of countries in the developing world. Although clearly not the intent of the policy, in its structure, process, and outcome much of Canada’s asylum system approximates a self-selected humanitarian immigration program.

If Canada were to realign its priorities to address illegal immigration concerns, it would undoubtedly have to put in place the same general kind of policies that are used by other developed countries. Yet any initiative to match American, Australian, or European refugee determination and migration control policies would entail fundamental institutional and process reforms.³³ Such reform would have to include numerous elements, the first being mechanisms that defend Canada’s “regular” determination process from overload. This could involve a “manifestly unfounded” policy that would screen cases that were unlikely to succeed because they are obviously not cases of flight from persecution as internationally understood. For example, unlike those entering Canada, “unlawful arrivals” who make asylum applications from such countries as Hungary, Argentina, Costa Rica, and the United States are unlikely to be granted access to a full refugee hearing with full rights to appeal in any of the other large developed refugee-hosting countries.

Countries that do not use some form of “manifestly unfounded” review for illegal arrivals employ the practice of expediting the cases of those who have crossed a “safe third country”. Canada’s agreement with the United States must be viewed as a truncated version of this

approach given its expansive definition of “family” and the loopholes in the agreement, including the fact that arrival at airports and inland offices are not included. In addition, the agreement may not have the desired effect because, after years of high immigration and refugee acceptance rates, many of those transiting the United States may be able to claim some member of their extended family in Canada. In fact, studies show the presence of family members in a destination country constitutes a core pull factor for asylum seekers (Robinson and Segrott, 2002: 62).

If family members do not exist in Canada, asylum seekers may be forced to transit the border without being detected in order to ensure that their claim is heard in Canada. This may not present great difficulty due to the lax border controls identified by the Auditor General (2003). In any case, as European countries have discovered, “safe third country” policies have drawbacks and may not live up to migratory control expectations.³⁴ In fact, a “safe third country” policy should constitute but one element of a robust program to control illegal immigration and is no panacea for a faltering in-country refugee determination system.

At the same time, if the Canadian government were serious about putting in place an effective migration-control mechanism with a fair responsibility-sharing arrangement, it might seek inclusion in the recently revised Dublin Convention examined above. There is a template for such inclusion in the “parallel agreements” signed by Norway and Iceland, other countries outside the European Union. In fact, Canada lobbied for the inclusion of such a provision in the original agreement (Hathaway and Neve, 1997:218). Furthermore, perhaps the policy principles embodied in the Dublin Convention might form the bases of revisions to the negotiated Canada-US “safe third country” agreement.

Secondly, harmonization would imply that Canada’s first-instance determination process needs to be overhauled. Internationally, the first-instance determination process is a carefully controlled administrative activity that directly implements a state’s understanding of its international obligations towards asylum seekers. Canada’s “independent” IRB is not consistent with this approach. Furthermore, recruitment to the Board has tended to reflect a variety of concerns including representative-

ness and even patronage and, as a result, expertise, professionalism, and consistency of decision-making are not optimized (Norris, 2001; Allan Thompson, 2003). Therefore, in any effort to harmonize Canada’s refugee-determination system with international norms, the IRB would have to be fundamentally reformed. Recently, Citizenship and Immigration Minister Denis Coderre stated that Cabinet was considering reform that would see first-instance refugee determination undertaken by civil servants (Denis Coderre, Minister of Citizenship and Immigration, 2003a; Elizabeth Thompson, 2003).

Thirdly, international norms require an appeal from, or review of, the first-instance determination. This appeal should be to an independent administrative tribunal that is expert on the question of international asylum obligations. Canada has recently moved to create such an institution. The IRPA provides for the creation of a Refugee Appeal Division in the IRB but, in an effort to manage the current backlog, it has not been implemented. Internationally, a further appeal generally exists to the host state’s judiciary but such appeals are normally restricted to questions of law and governments have worked hard to assert, with varying degrees of success, that entertaining such appeals should not be anything other than an exceptional occurrence. In comparison, the Federal Court of Canada continues to be the only appeal mechanism to Canada’s first-instance determination process.

Finally, on the question of returning failed claimants, Canada continues to have major problems, although it is not alone among refugee-receiving countries in this regard. This problem is somewhat mitigated by the fact that, aside from having the highest rate of positive Convention Refugee determination of any country, Canada has additional provisions to grant PRS for protection and humanitarian reasons. In addition, there have been numerous ways in which “humanitarian arrivals” have secured PRS without going through the regular determination mechanism. Even failed applicants who persist in their pursuit of status in Canada have generally gained PRS by being funneled into various immigration categories. For example, in late 2002 the federal government in conjunction with the Quebec government agreed to review the situation of approximately 1000 failed refugee claimants and “non-status” individuals from Algeria

with a view to granting them PRS (Canada, Citizenship and Immigration, 2002c).

Overall, the Canadian government may soon be faced with difficult choices. If reforms embodied in IRPA prove insufficient to address Canada's migration concerns, as seems likely, any effort to harmonize policies with other developed countries to address the challenge of illegal immigration would require fundamental institutional and policy changes. Such reform will evoke strong criticism from refugee advocacy and human rights groups as it has in all other developed countries. What is required is an effective public-information program to illuminate the problems with the existing regime and discuss the costs of ineffectual migration-control measures.

Although thorough reform is necessary, I would argue there is one area of harmonization the government might easily implement. This would involve the development of an expedited process of review for cases that are "clearly unfounded," perhaps building on the UK model. This would involve the use of a reception centre that has refugee determination decision-makers close at hand to facilitate an expedited review of questionable claims. If a claim had any credibility, it would be treated in the existing fashion through the regular refugee-determination process. If the claim were clearly frivolous or a transparent attempt to use Canada's generosity to facilitate migration, the claim could be quickly decided

with a "non-suspensive" appeal procedure such that the individual could be removed in short order.

In conclusion, a failure to undertake reform ensures that existing over-burdened and expensive refugee determination and reception programs will continue to be over-burdened, expensive, and relatively ineffectual as mechanisms of migration control. Based on the experience of European countries, mechanisms of transit interdiction are not fully capable of managing the flow and the "safe third country" agreement with the United States is not likely to help, when or if it is implemented.

In the past, the government's approach to managing backlogs, failed claims, and non-status situations was to create special immigration programs. In the absence of a migration-control system that is consistent from beginning to end, integral, and efficient—this would have to include an effective deportation program—the Canadian government will be forced to continue to use such ad-hoc measures while stressing interdiction efforts. In this environment, the number of asylum claims is likely to continue at current rates and may actually increase as other destination countries render their migration control systems more robust. This is because those seeking to migrate to Canada will be encouraged to do so illegally and the international people-smuggling industry will rightly conclude that delivering to Canada produces satisfied customers.

Notes

- 1 The government has delayed the establishment of the Refugee Appeal Division of the IRB until the current backlog of cases can be cleared (Canada, CIC, 2002a).
- 2 In the Department of Citizenship and Immigration's annual *Report on Plans and Priorities*, the term "illegal immigration" was not used in 2000/2001 and 2002/2003 and used once in 2001/2002.
- 3 For a short review of Canadian commitments to fight people smuggling and trafficking, see Canada, Department of Foreign Affairs and International Trade 2003.
- 4 For a discussion of the issues, see EU, Commission of the European Communities, 2001d.
- 5 Canada was not included in this study.
- 6 Many more who are counted as having made refugee claims on entry (figure 1) gained PRS in non-humanitarian immigration categories.
- 7 Refugees in the developing world are not processed in the same way (if at all) and often reside in "camps" established by UNHCR. Refugees in such camps may have an opportunity to apply for resettlement in a country of the developed world although few are granted a durable solution to their plight in this fashion (87,000 are expected to be resettled in 2003). In such cases, the host country reviews the claim, accepts it, and "resettles" the refugee. Australia, Canada, and the United States are countries that have resettlement programs and Canada in particular has a proud history: Hungarians in 1957, Ugandan Asians in 1972, and "boat people" from Vietnam, Laos, and Cambodia in 1979/1980. Canada has set a resettlement quota of 7,500 for 2003.
- 8 The United Kingdom has openly considered withdrawing from the 1951 Geneva Convention on the Status of Refugees while the Australian government has been vocal in its belief that fundamental reform is required or the Convention would be "at risk."
- 9 See "The Albanian Solution," 2003.
- 10 Such is the logic of Articles 31 and 32 of the Geneva Convention. Article 31, "Refugees Unlawfully in the Country of Refuge" reads: "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* [my italics] in the sense of Article 1". Article 32 reads: "(1) The Contracting States shall not expel a refugee *lawfully* [my italics] in their territory save on grounds of national security or public order." The distinction is the basis for "safe third country" policies to which all developed countries subscribe. See also Australia, Department of Immigration and Multicultural and Indigenous Affairs, 2001.
- 11 Statistics on individual countries and their restrictive practices can be found in the "Country Reports" of the United States Committee for Refugees, <<http://www.refugees.org>>.
- 12 For a study of policy "crisis" with an application to European asylum policy, see Alink et al., 2001.
- 13 Canada's system may have the perverse effect of subsidizing illegal migration by providing those who do not have the slightest chance of being recognized as a convention refugee with at least two years of legality. During this period, alternate means may be pursued in a quest for PRS.
- 14 The numbers of applications were 56,310 (1991); 103,960 (1992); 143,120 (1993); 144,580 (1994); 149,070 (1995); 107,130 (1996); 52,200 (1997); 35,900 (1998); 31,740 (1999) (UNHCR, 2000: table V2).
- 15 See "Ruddock Claims 'Pacific Solution' works," 2002.
- 16 A 2001 Government "Backgrounder" on the pre-IRPA determination system noted a "worst-case scenario" of 5.4 years (Canada, Citizenship and Immigration Canada, 2001).

- 17** The most recent example is the case of “non-status” Algerians fearing return. The largest initiative was the “backlog clearance” exercise of the late 1980s and early 1990s, which may have secured PRS for more than 100,000 individuals.
- 18** For a review of the “no credible basis” test, see *Rahaman v. Canada* (Minister of Citizenship and Immigration), 2002 FCA 89.
- 19** There are few publicly available statistics on how asylum seekers reach Canada. In the past, various figures have been stated by public officials including Deputy Prime Minister John Manly. However, these figures are not detailed and usually refer to claims made at entry points, which only constitute 53% of the total.
- 20** *Regina v. Secretary of State for the Home Department, Ex parte Adan Regina v. Same, Ex parte Aitsegeur* before Lord Slynn of Hadley, Lord Steyn, Lord Hutton, Lord Hobhouse of Woodborough and Lord Scott of Foscote, Speeches, December 19, 2000.
- 21** Canada is, however, a significant transit point for illegal immigration to the United States (see US, Department of State, 2002: 38).
- 22** If “developed nations” is interpreted as a “high income economy” according to World Bank criteria, then two other countries (out of 56 in this category) had a determination rate greater than 50% in 2002: Kuwait had an 84.6% recognition rate (13 cases) and Singapore a 50% rate (4 cases).
- 23** It should be noted that the UNHCR has recognized that differing interpretations of important elements of the Refugee Convention are acceptable. For example, there is some latitude on whether societal actors should be interpreted as agents of persecution.
- 24** There is a movement in the United Kingdom called the Refugee Safe Haven Campaign that has as one of its objectives the creation of a Canadian style “independent board” for the review of refugee claimants (see < <http://www.safe-haven.org.uk> >).
- 25** For a discussion of what it means to be an independent decision maker in the IRB context, see Canada, Immigration and Refugee Board, 2000.
- 26** INA § 208.16; 8 U.S.C. § 1158(a)(1) (1994).
- 27** This might be contrasted with a recent policy change in the United Kingdom that ends a practice of automatically granting “Exception Leave to Remain” (a form of temporary protection) to asylum seekers from certain countries. Individuals with ELR may apply for “Indefinite Leave to Remain” (permanent status) after 4 years.
- 28** For a review of the US government’s “plenary power” over immigration, see Martin, 2002; Benson, 1997.
- 29** For a study of the impact of a liberal judiciary on immigration and refugee policies, see Joppke, 1998.
- 30** The detention of asylum seekers is a very contentious topic. Australia’s policy of detaining all illegal entrants has been criticized by the UNHCR. Detention is viewed as legitimate by the UNHCR only to the extent necessary to ascertain the identity of the asylum seeker and ensure that there is a willingness to appear for hearings.
- 31** For a discussion of why “liberal states” accept “unwanted immigration,” see Freeman, 1994, 1998 and Joppke, 1998. For a study of Canada, see Gallagher, 2002a: 111–15 and Gibney and Hansen 2002.
- 32** The important figure here would be a CIC statistic that compares individuals counted in “Humanitarian Arrivals” with those granted Permanent Resident Status. To my knowledge, there is no data on this.
- 33** This assumes that such fundamental reform is needed. Many in the refugee rights community would not agree that it is or that these international trends should provide a guide. They might argue that major reforms (IRPA) have only recently been introduced and with a “safe third country” agreement with the United States, the new system is adequate to address current claim rates. Others would argue that the existing system is unjust and too restrictive and further control-oriented reforms would be inhumane and likely unconstitutional.
- 34** EU statistics show that in 1997/1998 only 10,998 or 1.7% of all claimants in the European Union were actually transferred using the Dublin Convention process (EU, Commission of the European Communities, 2001b: 2–3).

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