Canada's Asylum Policy and Process

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Introduction

A global leader in refugee policy, Canada has an established reputation as a welcoming country for refugees. Its asylum system involves claims for refugee protection made by foreign nationals in either at a port of entry when they arrive in Canada, or at an inland office. The Immigration and Refugee Board of Canada (IRB), an administrative tribunal, determines refugee status for inland asylum seekers.

The asylum system pursues the overarching objective of saving lives and offering protection to the displaced and persecuted (Immigration and Refugee Protection Act (IRPA) 2001, s. 3). It was established to implement Canada's international legal obligations under the 1951 *Convention relating to the Status of Refugees* (Refugee Convention) (IRPA, s.3(2)(b)), notably the principle of *non-refoulement* which prohibits deportation of individuals to places where they may face persecution or the substantial risk of torture or similar abuse (Art. 33(1) of the Refugee Convention; IRPA Section 115; Segal 1988, 737).

This chapter examines two major and interrelated trends in Canadian asylum policy and process since the 2000s: 1) the criminalization of asylum seekers, specifically those arriving irregularly in Canada; 2) the externalization of international protection. 'Criminalization' can be defined as a process that involves the integration of criminal law procedures, institutions, categories, techniques and discourse into the administrative law of immigration control, without incorporating into the administrative law of immigration control the evidence and procedural rules which, in criminal law, guarantee the protection of the innocent (Stumpf 2006, 381). Externalization refers to "measures preventing asylum-seekers from entering safe territory and claiming international protection, or transfer of asylum-seekers and refugees to other countries without sufficient safeguards" (UNHCR 2021). We discuss these trends together with their negative implications for asylum seekers who find themselves barred from accessing protection in Canada and at risk of human rights' violations.

This chapter builds on the scholarship exploring the changes in inland refugee admission in Canada in the last two decades as well as the factors and processes that shape asylum policy. The question of who is allowed to stay as a refugee and who should leave Canada is ultimately determined by geopolitical considerations, national and foreign policy interests, as much as, if not more, than by humanitarianism and international legal obligations. Criminalization and externalization emerge as convenient processes for authorities to advance these considerations and interests.

An Overview of the Asylum Process in Canada

Before implementing a refugee status determination system, Canada has responded to humanitarian emergencies by resettling refugees from overseas. The Refugee Convention was ratified in 1969 and incorporated into Canadian domestic law in 1973. Refugees were defined as

a distinct class of immigrants in the *Immigration Act* of 1976 (77, c. 52, s. 1) whereby they were given legal recognition and status on the basis of the Refugee Convention (Epp 2017, 15). Resettlement policy remained the main avenue for refugee admission in Canada until the 1980s (Baglay and Martin 2017, 11). Every year approximately 4,000 people claimed asylum in Canada in the 1980s (Epp, 2017). As noted by Hathaway, the successful inland claims for refugee status averaged well below 1,000 persons per year in the early 1980s (1988, 703). The asylum system was designed to handle only a small number of refugee claims. Prior to 1989, the initial determination of whether an individual is a Convention refugee was conducted by public servants at the Minister of Employment and Immigration and did not include a hearing (Anderson 2010, 946–47). The refugee determination process was revised after the Supreme Court of Canada found that it violated asylum seekers' right to life, liberty and security, protected by section 7 of the *Canadian Charter of Rights and Freedoms* (*Singh v. Minister of Employment and Immigration* 1985). The Supreme Court held that "everyone" who is physically present in Canada, including asylum seekers are entitled to "fundamental justice" in their claims, including an opportunity to state their case in an oral hearing and to know the case they have to meet where credibility is at issue. The *Singh* decision was instrumental in the establishment, in 1989, of the Immigration and Refugee Board of Canada (IRB), where asylum seekers are entitled to a quasi-judicial and, in most circumstances, non-adversarial, oral hearing of their claims. The IRB enjoys institutional and adjudicative independence. It reports to Parliament through the Minister of Immigration, Refugees, and Citizenship (IRCC).

A person can make a claim for refugee protection in Canada either at a port of entry when they arrive in Canada, or at an inland office. At a port of entry, a Canada Border Services Agency (CBSA)[1] officer decides whether the claim is eligible to be referred to the IRB. At an inland office, it can be either a CBSA or an IRCC officer who decides on the claim's eligibility.[2]

Eligible claims are referred to the Refugee Protection Division (RPD) of the IRB for refugee status determination (IRPA, ss. 99–100). The RPD process revolves around assessing the credibility of oral testimonies and of documentary evidence submitted by the claimant. Credibility assessments determine whether the claimant's account of feared persecution is genuine (Rehaag 2017, 39). Prior to *Immigration and Refugee Protection Act* that replaced the *Immigration Act* (1976) in 2002, the only category of person who was entitled to protection was

[1] Created in 2003, the CBSA is a federal agency that provides integrated border services. It reports to the Minister of Public Safety and Emergency Preparedness.

[2] The ineligibility grounds include: refugee protection has been conferred on the claimant under IRPA; a claim for refugee protection by the claimant has been rejected by the IRB; a prior claim by the claimant was determined to be ineligible to be referred to the Refugee Protection Division, or to have been withdrawn or abandoned; the claimant has been recognized as a Convention refugee by a country other than Canada and can be sent or returned to that country; or the claimant has been determined to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, the claimant has, before making a claim for refugee protection in Canada, made a claim for refugee protection to a country other than Canada, and the fact of its having been made has been confirmed in accordance with an agreement or arrangement entered into by Canada and that country for the purpose of facilitating information sharing to assist in the administration and enforcement of their immigration and citizenship laws (IRPA, s. 101(1)).

a person who fell under the definition of "Convention refugee". IRPA expanded international protection to persons who are at risk of torture as defined in Article 1 of the Convention Against Torture, and to persons who are at risk of cruel and inhumane treatment upon deportation to their country of nationality or former habitual residence (IRPA, s. 97(1); Waldman 2021).

If a claim is eligible to be heard before the RPD, the CBSA will investigate issues of inadmissibility during a front-end security screening (FESS) that includes biographic and biometric checks, as well as the initiation of security and criminality checks. Security screening is conducted by the CBSA in partnership with the Royal Canadian Mounted Police (RCMP) and Canadian Security Intelligence Service (CSIS) with the purpose of ensuring that 'individuals who might pose a risk to Canada would not be granted protection and could not use the refugee determination process to gain admittance to Canada' (IRB 2006).

If, in light of information collected through the FESS, the CBSA or IRCC is of the opinion that a person is inadmissible to Canada, they will intervene in IRB hearings.[3] If the refugee claim is accepted by the RPD, the individual can remain in Canada as a refugee and apply for permanent residence 6 months after receiving refugee status. If the claim is rejected or if the individual withdrew or abandoned the claim, they must leave Canada or the CBSA will enforce the removal (IRCC 2016a). Refused claimants can appeal the RPD decision to the Refugee Appeal Division (RAD) of the IRB (IRPA, s. 110 (1) and IRPA, s.159.91). Established in 2012, the RAD reviews the merits of decisions by the RPD, ultimately deciding to confirm the decision, set it aside and substitute its own decision, or refer it back to the RPD for redetermination.

Claimants who receive a negative decision from the RAD and those who do not have access to the RAD (see below) can file an application for leave and for judicial review of the RAD decision or the RPD decision with the Federal Court. Refugee claimants are generally eligible for legal aid, although access to legal aid varies from province to province. They also benefit from other procedural rights, including the right to an interpreter. To further reinforce the principle of *non-refoulement*, IRPA introduced the pre-removal risk assessment (PRRA) which allows any person in Canada to apply to an officer for assessment, as to whether he or she would be at risk of persecution, torture or other forms of cruel and inhumane treatment (Waldman 2021, 17-18).

In the past two decades, significant changes were made to improve decision-making, including the IRB member appointment and selection criteria (Rehaag 2019). Members of the IRB receive regular training in refugee and immigration law. They are assisted by a number of Chairperson's

[3] IRPA describes different grounds of inadmissibility for refugees, which include: security (s. 34(1)); human or international rights violations (s. 35(1)); serious criminality, criminality and organized criminality (ss. 36(1) and (2); 37(1)); health grounds (s. 38(1)); financial reasons (s. 39); misrepresentations (s. 40(1)); non-compliance with Canadian immigration laws (s. 41); and, inadmissible family member (s. 42). IRCC ministerial interventions are restricted to cases involving programme integrity and credibility, as well as cases where exclusion pursuant to art 1E of the Refugee Convention arises. The CBSA intervenes in two situations: (i) cases involving serious criminality, security concerns, war crimes, crimes against humanity, or acts contrary to the purposes and principles of the United Nations, according to article 1F of the Refugee Convention; (ii) hybrid cases, that is, where there are combined programme integrity/credibility issues and criminality or security concerns (IRCC 2016b).

Guidelines that provide principles for adjudicating and managing cases (Thériault 2020). Decision-making is subject to regular quality assessments undertaken by independent experts. In addition, as seen in the *Singh* (1985) case, the *Canadian Charter of Rights and Freedoms* (1982) has been instrumental in advancing fairness for refugees (Zinn and Perryman 2013, 137). Litigation and advocacy in refugee matters have helped the development of a sophisticated case law on questions, such as refugeehood, exclusion and procedural and substantive rights of asylum seekers. At the global level, Canada has engaged in initiatives to advance refugee rights, playing a key role in the negotiation of the Global Compact on Refugees (2018). James Milner noted that Canada emerged "as a norm entrepreneur and leader on issues of gender inclusion, accountability, and inclusive and participatory mechanisms" (2020, 42).

Criminalization of asylum seekers

Positive developments in Canada's asylum system have paradoxically been accompanied by the efforts to control the number of asylum seekers through policies and practices that criminalize them. Baglay and Martin underlined the tension within the overall framework of the IRPA, which "ambivalently combines liberalization in certain aspects of refugee determination (e.g., expanded grounds for protection) with greater restrictions in others," such as reduced procedural guarantees and increased immigration detention (2017, 24).

As noted by Cholewinski,

> the criminalization of migration is understood not only in the narrow dictionary sense of 'making an activity illegal' by the imposition of penal sanctions on the migrant where there were none previously, or to reflect the increased involvement of international criminal groups in irregular migration movements, but more broadly to encompass the culture of suspicion and distrust surrounding the movement of … irregular migrants in particular (2007, 302).

Criminalization is a powerful tool that conditions the public's view of refugees. Shaped by the ideology and political agenda of the ruling authority and by geopolitical conditions, it has considerable impact on the design and enforcement of immigration laws (Bigo 2002, 45; Balzacq 2010). Punitive measures that *inter alia* expands criminal consequences for immigration law violations are implemented without, however, affording adequate protections for migrants. In addition, the expansion of law-enforcement and correctional powers enhances the government's discretion to decide who may be excluded from the territory and from membership in the society (Stumpf 2006; Vasquez 2015).

Canada's geographical location makes it difficult for asylum seekers to reach its borders. Irregular and spontaneous arrival of migrants in search of international protection had remained limited compared with other regions, such as the southern borders of the European Union or the US. However, authorities regard irregular migration, in particular, group arrival by boat or through the US-Canada land border, as an abuse of Canada's refugee system, thus a challenge to state sovereignty, and a security threat often associated with terrorism and other criminal activities, such as corruption, drug and arms trafficking (Robinson 1984; Global Affairs Canada 2016). The 9/11 terrorist attacks in the US accelerated the criminalization of asylum seekers and

migrant smuggling. Unauthorized movements are typically met with public backlash and political opposition, prompting regular reviews of the refugee determination process to deter asylum seekers arriving irregularly in Canada and limit their access to international protection (Trebilcock 2019, 835). Some of the most significant recent policy changes are discussed below.

Introduction of new classes of refugee claimants in Canada

The arrival of nearly 600 Tamil asylum-seekers from Sri Lanka aboard two boats in 2009 and 2010 prompted a major overhaul of the refugee determination system. The Conservative government (2005-2016) stigmatised the passengers as security threats and referred to them as "bogus refugees" and "queue jumpers" (Government of Canada 2012). It suggested that the integrity of our immigration system was undermined by the costs of processing baseless claims. Furthermore, the government took the approach that mutual humanitarian aid falls under the category of 'human smuggling' defined as a 'transnational organized crime', rendering some of the passengers both inadmissible to Canada under IRPA s. 37(b) and subject to criminal liability for human smuggling, under IRPA s. 117 (Atak et al. 2019). Several asylum seekers aboard the boats were therefore criminally prosecuted. The CBSA intervened in every passenger's refugee claim, in an attempt to exclude them from refugee protection and alleging that each one had engaged in human smuggling because they facilitated the irregular arrival of co-passengers (Grant 2018). The government's approach was challenged before courts and in 2015, the Supreme Court of Canada found the definition of human smuggling overbroad. It ruled that acts of humanitarian and mutual aid (including aid between family members) should not constitute people smuggling under the IRPA (*R. v. Appulonappa*, 2015 SCC 59, par 45; *B010 v. Canada*, 2015 SCC 58). The rulings point to the unfair treatment of several asylum seekers who spent months in immigration detention and were stigmatized as criminals.

At the same time, Parliament introduced landslide legislative changes through the *Balanced Refugee Reform Act* (SC 2010, c 8) and the *Protecting Canada's Immigration System Act* (SC 2012, c 17) that amended the *Immigration and Refugee Protection Act.* To illustrate, the Designated Foreign Nationals (DFN) policy created a new set of rules for groups suspected of entering Canada through smuggling means (IRPA, s. 20.1 [1]). It mandates the arrest and detention of DFNs aged 16 and over (IRPA, s. 55(3.1)). The detention is reviewed after 14 days, followed by another review after six months and then every six months. In comparison, the decision to detain non-DFNs is always made on a discretionary (case-by-case) basis; an initial detention review takes place within 48 hours, followed by a review within seven days, and then every 30 days from the previous review. DFNs whose refugee claims are rejected by the RPD of the IRB are denied the right of appeal to the RAD (IRPA, s. 110(2)(a)). DFNs do not have the right to an automatic stay of removal upon applying for leave and for judicial review to the Federal Court and can, therefore, be deported during their application. In addition to the denial of procedural rights, the new regime involves socio-economic deterrents. Unlike other asylum seekers, DFNs are ineligible to apply for a work permit until their claim is approved by the IRB, or until their claim has been in the system for more than 180 days and no decision has been made (IRPA, s. 24(5)). Moreover, even when they obtain refugee status or the status of a "person in need of protection," DFNs are required to wait five years before applying for permanent residence and before they can sponsor their family members. By contrast, foreign nationals who obtain the status of "refugee" or "protected person" can apply for permanent residence after 180

days have passed, and sponsor family members once they gain permanent residence (IRPA, s. 11(1.2)). Despite being used only once since 2013, the DFN class yet remains in place should the government decide to invoke the designation in response to migrants arriving through unauthorized migration channels. The policy illustrates the government's aim to deter the mobility of some groups of asylum seekers by criminalizing them and by limiting their fair and equitable access to international protection.

The policy is likely to be found unconstitutional by courts as it was the case for another similar policy, the designated country of origin (DCO) scheme, also introduced in 2012. The Minister of Immigration had the authority to designate a country as "safe" if, among other criteria, the country was deemed to possess formal state institutions commensurate with democratic principles and the rule of law. Hence, asylum seekers from 42 DCOs, including several European Union member states, faced shorter timelines than non-DCO claimants to prepare for an IRB hearing. DCO claimants were denied the right to appeal a negative decision before the IRB's Refugee Appeal Division and faced a 36-month bar on the Pre-Removal Risk Assessment. They also had limited healthcare and faced delayed access to work permits. Civil society groups and refugee advocates successfully challenged the policy's consistency with the Charter. The lack of appeal before the RAD and restrictions to access healthcare services were struck down by the Federal Court of Canada (Y.Z., 2015 FC 892; Canadian Doctors, 2014 FC 651). The Federal Court found that the compressed timelines and reduced procedural safeguards made the policy discriminatory for claimants from the DCOs, depriving them of substantive equality vis-a-vis those from non-DCO countries and expressly imposing a disadvantage on the basis of national origin alone (Y.Z. 2015 FC 892). In May 2019, the Liberal federal government removed all countries from the DCO list and suspended the DCO policy, until it can be repealed through future legislative changes (Atak et al. 2019).

Broadening of the statutory grounds for refugee ineligibility

Refugee ineligibility is another tool used by the government to criminalize asylum seekers. A controversial ineligibility ground is found in the *United States (US)-Canada Safe Third Country Agreement* (STCA) entered into force in 2004. Under the IRPA section 101(1)(e), the Minister of Immigration, Refugees and Citizenship can designate a country as a safe third country. To date, the US is the only country that Canada has designated as a safe third country. Accordingly, refugee protection claims must be made by asylum seekers in the *first* safe country -the US or Canada-, they pass through. The STCA bars most third-country nationals in the US from making an asylum claim at Canadian official ports of entry along the land border (2004, Art. 4.1). Asylum seekers are returned to the US, with the exception of those who have family members in Canada, are unaccompanied minors, have valid documents (visa or work permit) or qualify for public interest exceptions (2004, Art. 4.2). Importantly, those who manage to arrive on Canadian soil, by crossing the border between official ports of entry, albeit irregularly, are allowed to stay and make an asylum claim.

The bilateral agreement has had a criminalizing effect on asylum seekers by leaving many no other option than crossing the US-Canada land border irregularly, between official ports of entry. As noted by Esses et al. (2021), blocking safe entry routes incentivized people smuggling. It had resulted in their treatment as bogus refugees or criminals (Arbel 2013). On 22 July 2020, the

Federal Court of Canada determined that the STCA is unconstitutional. Noting that those returned by Canadian officials are detained in the US as a penalty, and without regard to their circumstances, moral blameworthiness, or their actions, the Federal Court concluded that detention and the ensuing hardship and risks, including denial of access to a fair refugee process infringe upon asylum seekers' right to liberty and security protected in the *Canadian Charter of Rights and Freedoms* (Canadian Council for Refugees 2020 FC 770, paras. 135 and 146). The Court emphasized that Canada is not a "passive participant" in the rights' violations of asylum seekers returned to the US. On the contrary, Canada was deemed by the Court, to be directly responsible for the faith of these individuals since the actions of Canadian officials in returning ineligible STCA claimants to US officials facilitates a process that results in detention. In April 2021, the decision was overturned by the Federal Court of Appeal on almost exclusively technical grounds (CARL 2021). Thus, the STCA remains in effect.

As a burden sharing instrument, the bilateral agreement aims to prevent and deter the secondary refugee movements between the US and Canada. Similar to the DFN or DCO classes, it performs a function of migration control. Foreign policy, trade and diplomatic relations with the US may also explain the reluctance of the Canadian government to suspend or terminate the highly contentious agreement despite strong evidence that it violates the Charter. Authorities are admittedly not ready to make a decision that would publicly acknowledge that the US is not a safe county for refugees.

Canada's response to the unprecedented increase in refugee movements from the US following the election of President Donald J. Trump in November 2016 exemplifies both the criminalization of migrants and the central role of domestic policy considerations and foreign relations in refugee policy. More than 59,000 individuals irregularly crossed the Canada–US border to claim asylum in Canada from January 2017 until March 2020, when the land border was closed due to the COVID-19 pandemic. In fact, 57,816 refugee protection claims by the so-called "irregular border crossers" -i.e. those who entered Canada between official ports of entry- were referred to the RPD between 1 January 2017-31 July 2020. The vast majority (54,035) of these individuals entered Canada through Quebec, notably Roxham Road. Nigeria (15,547), Haiti (8,918) and Colombia (3,369) were the top three countries of origin (ATIP request). These statistics illustrate the fact that most asylum seekers in Canada are from the Global South and racialized, factors that are regularly mobilized in the enactment of punitive immigration controls (Abji 2020, 69; Moffette and Vadasaira 2016). In addition, irregular border crossings had been perceived by the public as abuse of Canada's refugee system (Angus Reid Institute 2018) despite the fact that over 50% of the refugee protection claims by irregular border crossers between 1 Jan 2017-31 July 2020 were accepted by the RPD[4] (ATI records released by the IRB as ATI #2021–00653, with the author). Increases in the number of asylum claims exacerbated the already overstretched administrative capacity of the Immigration and Refugee Board and contributed to a record level backlog of cases in 2019 (IRB 2019). New asylum arrivals put the capacity of reception and settlement services under strain. As a result, tensions heightened between the federal and provincial governments. The government faced growing criticism from the opposition in Parliament for its border response (Atak et al. 2021). To tackle irregular crossings, the federal government established an Ad Hoc Intergovernmental Task Force on Irregular

[4] Total claims: 60,009, Accepted: 33,154; Rejected 22,729; Abandoned, Withdrawn and Other: 2,856.

Migration in August 2017 and heavily invested in reinforcing border security (Government of Canada, Budget Plan 2019, 184).

What's more, a new refugee ineligibility ground was added to IRPA s. 101(1) in June 2019. The provision makes asylum seekers ineligible for protection in Canada if they have made a previous refugee claim in a country that Canada shares an information-sharing agreement with (*Budget Implementation Act*, s. 306). Such agreements are currently in place with the US, Australia, the UK, and New Zealand which, together with Canada, form the so-called Five Eyes alliance, an intelligence-sharing and strategic cooperation partnership established during the Cold War. The following quote, that references a Five Eyes 2018 Position Paper, is telling of the shared vision of irregular migration:

> There is a shift in irregular migration, from people seeking to evade detection in order to join underground economies, to using irregular routes in order to enter and remain in Five Eye countries as asylum seekers. This creates new challenges for our countries' asylum systems as increased volumes lead to a growing administrative burden and increased strain on health and social services, which erodes public confidence in government institutions and immigration programs (CBSA 2020, Annex C).

The existence of a refugee claim in another country is confirmed through information sharing with the immigration divisions in partner countries (see below). Importantly, this ineligibility ground applies regardless of whether a decision was ever made on the previous claim. Asylum seekers only have access to a pre-removal risk assessment (PRRA) which, as mentioned, involves an evaluation of the risk they would face if removed from Canada (IRPA, s. 113.01). PRRA does not offer access to fair and efficient protection and can hardly be compared with the IRB's refugee status determination (Canadian Council for Refugees (CCR) 2019).

The new eligibility provision is a strategic move by Canada to exclude asylum seekers, mostly those coming through the US, with a previous refugee claim in that country and who managed to arrive on Canadian soil irregularly. Unlike the STCA, these individuals cannot benefit from any exceptions or exemptions (e.g., having family members in Canada or qualifying for public interest exceptions). Moreover, there is no provision in IRPA or the Immigration and Refugee Protection Regulations (IRPR) under which those who are deemed ineligible would be removed to the country where they made a prior claim (e.g., the US). Instead, asylum seekers are subject to the usual deportation processes under the IRPR. In most cases, they are returned to their country of nationality (i.e. the country of feared persecution) which involves a risk of *refoulement*.

The policy has been designed as a border control mechanism to deter the secondary refugee movements across the Canada–US border. Smith (2019) found that the government considered the new provision as a pre-emptive measure 'in case of US policies that might spur more migration, particularly in the lead-up to the 2020 US presidential election' (para 33). As discussed below, the eligibility provision exemplifies the prominent role of externalization in asylum policy.

In their analysis of the government's response to the intensification of irregular border crossings in 2017-2020, Boyd and Ly agreed that

> new legislation and enhanced funding for controlling the borders underscore a core component of Canada's exceptionalism in migration—that immigration refers to well-managed legal entries and not ad hoc irregular ones. The federal government firmly intervenes to maintain this principle when unwanted and uninvited migrants bypass existing admission rules and regulations (2021, 114).

The COVID-19 pandemic offered an opportunity to reinforce exceptionalism in migration. When Canada closed its international borders to all "non-essential travel" in March 2020, the mobility of asylum seekers was not deemed to be "essential travel" by the government. As well, the US and Canada have reached a temporary agreement allowing Canada to send back, asylum seekers entering Canada from the US, without authorization, between official ports of entry along the land border and at air and marine ports of entry (Government of Canada 2020). Therefore, asylum seekers who entered Canada irregularly were denied the right to claim refugee status in Canada. Only those who qualified under one of the exceptions to the STCA were allowed to stay. Mercier and Rehaag noted how "Canada has leveraged a global pandemic to persuade the US to (at least temporarily) agree to the de facto extension of the STCA" (2021, 722). Irregular border crossings have picked up following the easing of the pandemic related border closures in 2022.

Externalization of international protection

Externalization includes territorial and administrative expansion of a given state's migration and border policy through the direct involvement of the externalizing state's border authorities in other countries' sovereign territories and the outsourcing of border control responsibilities (Casas-Cortes et al. 2015; Frelick et al. 2016). The main aim is to reduce the rate of unauthorized arrivals of asylum seekers (Koslowski 2019). As Macklin and Blum observed "owing to Canada's remoteness from refugees' regions of origin, and the fact that its only land border is with the United States, its extraterritorial deflection measures are not as visibly violent as deterrent tactics employed by other states. But they are effective" (2020, 18). In fact, the STCA offers a typical example of such deflection measures. The government has accelerated and expanded its efforts to "push the border out to stop threats before they arrive in Canada" (Public Safety Canada 2011). The 2009 and 2010 maritime arrivals of asylum seekers followed by the unauthorized land border crossings from the US further legitimized externalization in the name of cracking down on migrant smuggling -depicted as an organized crime- and preventing the 'abuse' of the refugee system. On the one hand, the government pursued its close cooperation with some other destination countries, in particular the US, with a focus on biometric information sharing as a privileged tool to track and block asylum seekers. On the other, Canada has engaged in capacity building and technical assistance with transit and source countries for asylum seekers.

Information sharing

As the refugee ineligibility ground adopted in 2019 shows it, information sharing has been a privileged externalization instrument. In 2001, the Smart Border Declaration, signed between the US and Canada and instated a 30-point Action Plan for Creating a Secure and Smart Border, already set the ground for the development of common biometric identifiers, increased security screening within refugee/asylum processing, and exchange of information (2001, paras 4 and 5). The 2003 Annex regarding the Sharing of Information on Asylum and Refugee Status Claims complements the 2003 US-Canada Statement of Mutual Understanding on Information Sharing. The agreement allows automated, systematic sharing of information about asylum seekers (IRCC 2003; see also Arbel 2016, 837). Authorities considered these initiatives necessary to address the risk of terrorism and criminality/security presumably linked to cross-border mobility in the aftermath of 9/11 terrorist attacks.

In the last decade, Canada has doubled efforts to pre-emptively identify asylum seekers through information sharing. The 2012 Biometric Visa and Immigration Information Implementation Arrangement with the US, which supplemented the aforementioned 2003 Asylum Annex, governs "the initiation of a direct, electronic fingerprint query" through an automated data base for the purpose of enforcing the immigration laws (IRCC 2012, Art. 3). Canada has also entered into similar agreements with the other Five Eyes countries (the United Kingdom (2015), Australia (2016), and New Zealand (2016)) for the purpose of sharing (biometric) information on an automated basis. The transition to the automated data exchange and increased international interoperability -as opposed to more traditional approaches of document verification performed at the border- was rationalized by the need to easily accumulate digital data from a variety of sources to sort and control migrants' mobility (Topak et al. 2015). In fact, the information collected serves several purposes, including pre-emptive screening, determining whether a foreign national is eligible to make a refugee claim and whether s/he is admissible to Canada as well as enhancing deportations. Digital technologies impede access to international protection as they allow the categorization and flagging of asylum seekers' migration and personal history, often before they have an opportunity to explain the reasons of their flight or the circumstances of their migration path (Ellis et al. 2022). They also raise important privacy risks and carry potential for error (Molnar 2019).

Capacity building for transit and source countries

Canada provides training, equipment, technical and legal assistance to transit and source countries to combat irregular migration and migrant smuggling, portrayed as organized crime (Ranford-Robinson 2020, 834; Global Affairs Canada 2019). These efforts are supported by diplomatic outreach and inter-governmental dialogue. In addition to the above-mentioned legislative changes, a Migrant Smuggling Prevention Strategy was elaborated to amplify the Canadian government's migration control operations overseas. In 2010, Ward Elcock, a former Canadian Security Intelligence Service (CSIS) director was named as special adviser to prime minister on human smuggling and illegal migration. The special advisor and other Canadian officials actively collaborated with the local authorities in transit countries in Southeast Asia to intercept and return to their home countries asylum seekers who were presumably waiting to board ships destined for Canada (Ranford-Robinson 2020, 820-822).

Not only foreign affairs and immigration authorities, but also law enforcement and intelligence agencies, including CSIS, RCMP and CBSA are involved in capacity building. For instance, in 2010-2015, the RCMP was in charge of implementing almost half of all capacity building projects, a trend that points to the law-enforcement focus of the initiatives (Global Affairs Canada 2016). Canadian authorities collaborate with their counterparts in the partner states, international organizations and private companies. After the 2009 and 2010 maritime arrivals of Tamil asylum seekers, a task force comprised of the RCMP, the CBSA and other federal officers was deployed to the region to work with local governments in Thailand, Malaysia, Vietnam, Myanmar, Cambodia, and later in West Africa to thwart migrant smuggling operations. Building key institutional contacts with higher-level immigration and border officials has improved cooperation between officials at multiple levels (Government of Canada 2019). According to media reports, the efforts led to the interception of at least two boats carrying migrants in 2011 and 2012 (Bureau & Robillard 2019; The Times 2011).

To sustain overseas operations, the government created the so-called "Human Smuggling Envelope" (HSE) in 2011 as part of its Anti-Crime Capacity Building Program (ACCBP).[5] The HSE is focused on preventing maritime migrant smuggling bound for Canada and provides capacity-building assistance to beneficiary states in Southeast Asia and West Africa (Global Affairs Canada 2016). According to Global Affairs Canada, the program works "to increase the capacity of local authorities in both origin and transit countries to disrupt, interdict and deter human smuggling ventures." (Global Affairs Canada 2019, para 5). The government further rationalized the program as a means to mitigate the increased cost to Canada associated with the arrival of irregular migrants on Canadian shores, such as social welfare costs. It held that the program provides some assurance to transit states that they will not be solely responsible for the cost of assisting stranded migrants and without such programs, there would be little incentive for transit states to cooperate in the detection and interception of irregular migrants, especially in countries where resources are scarce and governance is weak (IRCC 2015). From 2011 to 2015, the HSE program supported over 50 projects, ranging in scope from 11,000 Canadian dollars to $1.9 M in over 30 countries across Asia and West Africa (Global Affairs Canada 2016). Moreover, the government provided funding to and worked in cooperation with intergovernmental organizations such as the International Organization for Migration (IOM) and the UN Organization on Drugs and Crime (UNODC) to implement interception operations and capacity building projects in Southeast Asia and West Africa (IOM 2015; IRCC 2015).

Canada's financial and technical support to source and transit countries has expanded under the Liberal government that came to power in October 2015. Based on data obtained through access to information requests, the Canadian Broadcasting Corporation (CBC) revealed that the government dedicated nearly $18 million a year to the capacity building programs (Bureau & Robillard 2019). Examples include Canada's collaboration with the IOM to provide training to passport and border officials from 18 countries, to improve border management and reduce irregular migration in the Americas (Government of Canada 2019). In 2017 and 2018, the Trudeau government contributed funding to Project Relay, an Interpol operation to better equip seven Southeast Asian countries in the detection of irregular migrants and smugglers. According

[5] ACCBP was established in December 2009 to enhance the capacity of beneficiary states, government entities and international organizations to prevent and respond to threats posed by transnational criminal activity in the Americas (Global Affairs Canada 2016).

to Interpol, Canada also took part in and funded Operation Turquesa in South America. The operation which took place in October 2019 was intended to disrupt the primary smuggling routes used by migrants to make their way to the US and Canada. The operation has led to arrests and interceptions of migrants by Mexican border guards (Bureau 2020). Another ACCBP project entitled Enhancing Border Security in Mexico and Guatemala was implemented by the CBSA from June 2018-December 2021. It was allocated a budget of $595,000 and aimed at enhancing "the capacities of Mexico's Customs Administration and Immigration Department to better identify, interdict contraband, drugs and imposters, in order to disrupt smuggling routes and irregular migration" (ACCBP TIP Projects List dated October 2021 we obtained through ATI records released by CBSA as ATI #202100829–2021-11-03, with the author).

Implications of criminalization and externalization

Lumping together irregular migration and organized criminal activities further criminalizes asylum seekers by creating what Didier Bigo describes as (in)security continuum. The notion refers to a process whereby the legitimacy of the fight against a certain type of identified enemy (e.g., terrorism, drug or arms trafficking) is transferred towards more dubious forms of illegality relating to migration management (e.g., migrant smuggling and irregular migration) (Bigo 2016, 1079). (In)security continuum allows authorities to delegitimize asylum seekers' protection needs and to demonize migrant smuggling, although research shows that both irregular migration and smuggling are bolstered by states' border securitization policies (Mountz 2004; van Liempt and Sersli 2018).

Refugee admission involves a process of social ordering. Refugees may apply for permanent residence status and eventually become citizens. Asylum system ultimately determines the boundaries of membership (Stumpf 2006). Negative portrayals and treatment of asylum seekers as bogus, threats to national security, deceitful, burden on the welfare state, undeserving of protection legitimize exclusionary policies against racialized populations and ultimately aim to keep them out of membership in Canada. This amounts to what Provine and Doty describe as contemporary racism that at an institutional level, "can occur within structures that make room for differentiated enforcement and also by practices and policies that exclude or target particular groups" (2011, 267).

There is a strong correlation between externalization and the criminalization of asylum seekers. Ranford-Robinson documented how Canada's actions triggered a shift in the perception and treatment of asylum seekers in transit and source countries in Southeast Asia and Western Africa:

> Through diplomatic outreach, the Office of the Special Advisor attempted to enroll affected governments into the task of anti-smuggling policy, in a process of problematization that adopted the familiar tropes of the criminalisation narrative and the securitised representation of migrant smuggling as a global phenomenon to combat (2020, 829).

Moreover, Canada contributed to the reinforcement of these states' capacity to contain unwanted migrants through personnel training, infrastructure building, and technology transfer. Some of the countries with which Canada cooperates with are not signatories to the 1951 Refugee

Convention and therefore, are not bound by the same international obligations toward refugees as Canada. The criminalization of asylum seekers exacerbates the risk of refoulement for asylum seekers and other fundamental rights' violations at the hands of Canada's partner states and private security companies who made major inroads into border management with lucrative contracts procured by governments (Molnar 2019). This raises the question of accountability for border enforcement and commitments to human rights law.

Externalization comes with a high financial and human cost, but few tangible results seem to be achieved. The number of would-be asylum seekers intercepted overseas is unknown. Most projects do not track the outcomes of initiatives such as short-term training delivered due to capacity (financial and human resources) constraints (Global Affairs Canada 2016). However available information reveals that the government has not always reached its stated objectives in terms of returning intercepted migrants home (IRCC 2015*)* or bringing human smugglers before the courts (Bureau & Robillard 2019). This incongruency between government rhetoric and action points to the government's underlying goal to obstruct the onward movement of asylum seekers rather than prosecuting criminal activity.

Criminalization of migrants and border externalization in the form of capacity-building and responsibility sharing is a convenient strategy for Canada, to minimize, if not evade, its obligations under the Refugee Convention and general human rights law, when asylum-seekers are intercepted, detained and removed far from its national territory (Tan 2021, 9; Gammeltoft-Hansen and Hathaway 2015, 242). Canadian jurisprudence lags behind the case-law of international and regional human rights adjudication bodies that found externalization of border controls doesn't insulate states from legal liability and from the obligation to comply with the principle of non-refoulement (*Al-Skeini and others v. the United Kingdom* 2011, para 133[6]; *Hirsi Jamaa and others v. Italy* 2012, paras 74-75). Courts in Canada have held that non-citizens who are not on Canadian soil can claim the Charter's protection only if they can 'establish a nexus to Canada', for example by being subject to a criminal trial (*R v Hape* 2007, para 14). Drawing on the *Khadr* case in which the Supreme Court held that the Charter precluded Canadian officials from acting in a manner inconsistent with our international obligations, Waldman contends that "it is not correct to assert that Canadian officials acting outside of Canada are not bound by the Charter" (2022, 21). However, unlike other jurisdictions, such case-law has been scarce in Canada. The policies that are extraterritorially implemented continue to be considered as falling outside the ambit of Charter review (Arbel 2016).

Concluding remarks

Refugees have special status in international law. Canada's asylum system flows from its international legal obligations under the 1951 Refugee Convention and the 1967 Protocol. Additionally, asylum seekers benefit from an array of rights and freedoms under the international human rights treaties ratified by Canada in areas, such as the prohibition of racial and gender discrimination and torture, protection of children, women, persons with disabilities. However, as discussed in this chapter, Canada has moved toward the criminalization of asylum seekers

[6] A State's jurisdiction outside its own border can primarily be established in one of the following two ways: a. on the basis of the power (or control) actually exercised over the person of the applicant; b. on the basis of control actually exercised over the foreign territory in question.

through legislative changes and international cooperation. Border controls have been increasingly externalized in the name of fighting migrant smuggling, preserving the integrity of the asylum system and burden-sharing. These developments have demonized certain groups of asylum seekers, particularly those arriving irregularly in Canada, impeded their access to international protection and other fundamental human rights, such as the principle of non-refoulement.

Some of the recent measures were successfully challenged by civil society organizations and refugee advocates and struck down by courts. However, externalization makes it even more difficult for civil society or courts to hold the Canadian government accountable for its actions beyond national boundaries.

The IRPA objectives of humanitarianism and fulfilling international legal obligations under the refugee law have often been sidelined by other considerations geared towards migration management and population control (Baglay and Martin 2017, 23). As stated by Hathaway:

> the Canadian policy of "compassion with realism" toward refugees impliedly accepts the promotion of the Canadian national interest- domestic economic development- as the primary determinant of its refugee policy, and strives to accommodate other concerns to the extent that they are not incompatible with that dominant focus (1987-88, 683; see also: Falconer 2019, 5; Bose 2022).

The developments explored in this chapter point to geopolitical conjecture, domestic policy considerations and foreign policy interest that heavily shape Canada's refugee regime and limit the right to seek and to enjoy asylum from persecution.

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