

Searching for Control:
Redefining Asylum-Seeking in the Security Era

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Abstract

Widely considered one of the most generous refugee-receiving countries in the developed world, Canada has embarked on a mission to drastically, and quietly, overhaul its refugee protection regime. Using the language of security and safety, Canada is redefining the motivations and consequences of asylum-seeking as criminal and potentially terrorist actions. By generating expansive immigration legislation and utilizing a range of domestic and international security forces against border intrusion, Canada is succeeding in limiting the number of people to whom it owes protection under international law. This paper argues that these methods are part of an effort by the security regime to expand its influence, and that without transparency and public discussion, the refugee regime in Canada will be effectively dismantled.

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The global debate on asylum-seeking has intensified throughout the last decade, as Western democracies have attempted to reframe the act as one of criminality and even terrorism, rather than one of desperation, based on legitimate fears of persecution and threats to safety or livelihood. This process of reframing has been largely prevalent in Europe and Australia, where governments decry the waves of asylum-seekers they claim are infiltrating their borders.¹ In fact, particularly in Europe and Australia, the backlash against asylum-seekers is more likely an attempt by governments to maintain more control over their ability to grant entry to economically-desirable immigrants, and to deny entry to migrants that are largely seen as a drain on economic resources.² In addition, these governments hope to maintain greater control over the cultural and racial demographics of their countries.³ In Canada, perceptions of foreign migrants changed dramatically after the terrorist attacks on the United States in 2001. Since then, security and public safety are among the primary goals of immigration procedures, and more than ever, foreign travelers are labeled as threats to Canada.⁴

This is a departure from the policies and practices that Canada has followed over the last several decades, a country known for its generosity toward asylum-seekers claiming refugee status.⁵ It is also a break from the international principles that it has largely supported and adhered to for more than fifty years, namely the United Nations Convention relating to the Status of Refugees of 1951 and its 1967 protocols, although the country has gone to great lengths to ensure that its actions appear to adhere to the principles espoused in these humanitarian

¹ Michael Humphrey, "Refugees: An endangered species?", *Journal of Sociology*, 2003, Vol. 39, Iss. 1, pg. 31-43. Pp. 31-32.

² Gayla Benarieh Ruffer, "The *Cosmopolitics* of Asylum-Seekers in the European Union," *New Political Science*, Vol. 27, Iss. 3, September 2005. Pp. 348.

³ Asale Angel-Ajani, "A question of dangerous races?", *Punishment and Society*, 2003, Vol. 5, Iss. 4. Pg. 433-448. Pp. 435.

⁴ "Immigration and Refugee Protection Act," Department of Justice, Objectives and Application, Objectives – Immigration 3. (1) (h), (i) <<http://laws-lois.justice.gc.ca/eng/acts/I-2.5/index.html>>.

⁵ Emily Gilbert, "What are the implications of a perimeter approach to security for Canadian Border and Immigration practices?" *Metropolis Project: "Justice, Policing and Security"* Metropolis. Pg. 1-25. Pp. 3.

agreements. These efforts will be the focus of this paper. Specifically, the paper will argue that since 2001, Canada has worked to decrease the number of people who arrive in the country seeking refugee status. In order to accomplish this goal, Canada has engaged in multiple processes to criminalize asylum-seeking and asylum-seekers. It has also engaged in the collection of extensive biological and personal information on real and potential asylum-seekers in order to track and trace these individuals. Consequently, asylum-seekers are denied protection due to non-illegal behaviour, such as previous asylum claims lodged in other countries. By engaging in these processes, asylum-seekers are re-categorized as largely untrustworthy and threatening, thereby reducing the number of individuals eligible for protections and consideration. The gathering of this information is justified to the public by continual yet unproven claims that asylum-seeking is a national security threat. The adoption of multiple exclusionary tactics leads to the proliferation of non-legal means of entry, which further justifies the labeling of such migrants as criminal, and results in the implementation of additional and stricter tactics and punishments.

This paper will support its argument by first examining the origins and development of the 1951 Refugee Convention and the 1967 Protocols. It will explore Canada's role in the signing of the Convention and the ultimate long-term goals of the Convention. Second, the paper will explore the shift in Canada's perception of asylum-seeking. It will argue that Canada is one of several countries attempting to limit access to asylum-seekers, and that the process accelerated after 9/11, largely due to pressure from its American partners. This section will begin by examining the role played by the United Nations itself in creating a justification for the treatment of asylum-seeking as criminal, through the creation of the UN Convention on Transnational Organized Crime and its additional Protocols. Third, the paper will examine the present period,

and recent moves to accelerate legislative amendments to Canadian immigration laws that target irregular migrants as threatening, and which empower officials to treat such individuals as criminals. The expansion of trans-border policing and the application of biological and technological surveillance tactics will also be discussed. This section will argue that vulnerable peoples are purposely targeted by these efforts and are disproportionately harmed by them.

Finally, the paper will attempt to highlight some of the future and long-term effects of these processes, including the gradual breakdown of the global humanitarian regime; the caging in of people who cannot seek protection outside their own troubled countries; the creation of unstable or violent conditions in countries experiencing an influx of asylum-seekers from neighbouring states in conflict; and, the uncontrolled expansion of the global security regime and state surveillance from vulnerable peoples to ‘regular’ citizens.

The paper will utilize Didier Bigo’s theory of Securitization as the theoretical basis for its argument that migration has been securitized in Canada. It will also rely on several pieces of recent Canadian immigration legislation and international legal agreements in order to argue that Canada’s security experts are reframing humanitarian issues as security issues by re-writing and amending key pieces of domestic law. In addition to articles obtained in academic journals, the paper draws from agreements and announcements provided on the website of the government of Canada and on newspaper articles reporting on changes to Canadian and American policing procedures and laws.

Securitization Theory and the Process of Securitizing Migration

In Europe, many academics have written about the “securitization of migration”. Securitization studies are associated with the Copenhagen School, but the field has also been

influenced by academics such as Didier Bigo of the French School of security studies. Bigo argues that the field of security currently dominates all others, and as a result issues and objects continue to be identified and dealt with as security issues. The field of security, dominated by a range of experts he calls ‘professional managers of unease’, continually identify threats in order to maintain a culture of fear that justifies the expansion and domination of the security field.

Professional managers of unease make claims to linkages between war, crime and migration and the consequent struggle for survival against these threats.⁶ By making claims to superior knowledge of threats, and by routinizing the practice of gathering, sorting and accessing statistical or scientific data, these security experts gain legitimacy. Political and social agents are unable to successfully question claims made by security agents, as they do not have access to the same secret knowledge.⁷ For example, decisions made at the Canadian border as to the level of threat posed by incoming individuals are justified using the language of risk. Border guards (security experts) make decisions using a model of risk assessment, which is elevated to the level of quasi-science and enables them to label individuals as security threats based on suspicion rather than on testable facts.⁸ The role of border guards as protectors of national security allow them to claim that suspicion is a sufficient standard. In fact, it is because of their location that these lower standards are accepted.⁹ As a result, security practices (the collection of private information gained from varying levels of invasive searches, for example) trump civil liberties

⁶ Thierry Balzacq, Tugba Basaran, Didier Bigo, Emmanuel-Pierre Guittet and Christian Olsson (2010) “Security Practices,” International Studies Encyclopaedia Online, ed. Robert A. Denemark. <http://dev.ulb.ac.be/sciencespo/dossiers_membres/olsson-christian/fichiers/olsson-christian-publication7.pdf>. Pp. 6.

⁷ Didier Bigo, *Globalized-In-Security: the Field and the Ban-Opticon. Translation, Biopolitics, Colonial Difference.* N. Sakai and J. Solomon. Honk Kong, University of Hong Kong Press, 2006, pp. 109-156. Accessed online at <<http://www.ces.fas.harvard.edu/conferences/muslims/Bigo.pdf>> 8.

⁸ Anna Pratt, “Between a Hunch and a Hard Place: Making Suspicion Reasonable at the Canadian Border,” *Social and Legal Studies*, Vo. 19, Iss. 4, pg. 4610-480. Pp. 462.

⁹ Ibid 464.

(the right to privacy, or the right to leave a country) due to the low burden of proof placed upon security experts and the seriousness of the threats these experts claim we are facing.¹⁰

Thus, Bigo refers to the term (in)security, as these agents seek new and greater threats in order to generate and maintain fear that allows for further expansion of the security field.¹¹ Importantly, as Sarah Léonard points out, the theory of securitization presented by Bigo emphasizes the importance of practice over discourse. As such, effective analysis should be on the activities (policies, legal instruments) of political or security actors rather than on the ‘discursive articulation’ of security by relevant actors.¹²

Bigo argues that the field of (in)security cannot exist within the confines of state borders. Instead, it grows out of international networks and the trans-nationalization of security, threats, and the bureaucracies that maintain them. This trans-nationalization of security is facilitated by new linkages between disparate security professionals who had previously asserted and maintained their independence. Police, military, migration officials, border patrols and intelligence experts now work together within the field of security to practice the management (maintenance and expansion) of unease.¹³ Bigo argues that this expansion of actors involved in the management of unease signifies a breakdown between the internal and external security fields. Where the military has traditionally exercised its role external to the nation-state, and the police have existed as internal, domestic forces, these roles are increasingly inverted and expanded. Police and domestic intelligence forces are operating at or beyond the border, even in other states, by actively surveilling and tracking the movements of non-citizens.¹⁴ In both the

¹⁰ Ibid 464.

¹¹ Didier Bigo, *Globalized-In-Security: the Field and the Ban-Opticon*. 8.

¹² Sarah Léonard, “EU border security and migration into the European Union: FRONTEX and securitization through practices,” *European Security*, Vol. 19, No. 2, June 2010, 231-254. Pp. 237.

¹³ Didier Bigo, *Globalized-In-Security: the Field and the Ban-Opticon*. 14.

¹⁴ Didier Bigo, *Globalized-In-Security: the Field and the Ban-Opticon*. 14.

European Union and in Canada, this is an expansion of traditional policing and security practices.¹⁵ Examples of the externalization of police forces includes the surveillance and policing techniques that occur at a distance and even outside of the state, for example within embassies abroad alongside immigration officials.¹⁶ The subsuming of transnational migration with crime and criminality by these managers of unease has facilitated this externalization of domestic policing, providing a justification for their presence at and beyond the border, as well as for the expansion of domestic surveillance practices that occur at and within state borders.¹⁷

Adopting Foucault's take on Bentham's panopticon (a form of prison in which the structure enabled guards to maintain constant surveillance of inmates, eventually resulting in submissive inmate behaviour through a form of self-regulation, with which Foucault explained modern state surveillance¹⁸), Bigo argues that the primary device, or *dispositif*, of security experts to maintain and monitor threats is the ban-opticon. The ban-opticon is the control of populations through constant surveillance and policing techniques that exist beyond the view of a majority of the population. Although these devices are utilized against just a small portion of the population deemed undesirable or risky, the ban-opticon exists throughout the globe, beyond national borders, and outside of the political field. The knowledge that (invisible) surveillance is everywhere prompts good behavior by the population, while its limited targets reduce the state's financial burden of constant and extensive surveillance. Bigo argues that the *dispositif* is a combination of multiple mechanisms, including security discourse, infrastructure and seemingly benign administrative or bureaucratic decisions.¹⁹

¹⁵ Mary Bosworth, "Border Control and the Limits of the Sovereign State," *Social and Legal Studies*, 2008, pg. 199-215. Pp. 206.

¹⁶ Balzacq 3, 4.

¹⁷ Bigo 17.

¹⁸ Gilbert Caluya, "The post-panoptic society? Reassessing Foucault in surveillance studies," *Social Identities*, Vol. 16, No. 5, September 2010, pg. 621-633. Pp. 622.

¹⁹ Bigo 43.

The move toward biological information gathering, for example, which is championed as infallible by security experts, allows multiple groups to engage in policing, including international airports, border agencies, and intelligence groups that work trans-nationally and operate outside of national borders to halt or expel travelers.²⁰ The decision to track and possibly deny entry to the traveler is the result of a practice of risk assessment and analysis based on the statistical knowledge of security experts mentioned previously. As Bigo argues,

“...these individuals take it as their mission to prevent crime by acting upon conditions in a pro-active way, anticipating where crime might occur and who might generate it. Their work then consists of making prospective analyses based on statistical knowledge, hypothetical correlations and supposed trends, then anticipating a future in terms of worst case scenario and acting to prevent it.”²¹

For Bigo, the traveler is publicly assessed for his or her potential criminality, but privately for a level of undesirability. This rating is derived from a statistical assessment of a multiplicity of intersecting traits, such as credit history, flight path and country of origin. Actual wrongdoing by the individual is not necessary when the goal is no longer to simply exclude the narrow category of criminal.²² The device of the ban-opticon is characterized by three attributes:

1. “Exceptionalism of power (rules of emergency and their tendency to become permanent)”;
2. “The exclusion of certain groups in the name of their future potential behaviour (profiling)”;
3. “The way it normalizes the non-excluded through its production of normative imperatives, the most important of which is free movement.”²³

²⁰ Bigo 20.

²¹ Bigo 20.

²² Bigo, Didier (2010). Freedom and Speed in Enlarged Borderzones. The Contested Politics of Mobility. Borderzones and Irregularity. V. Squire. Routledge. Pp. 14.

²³ Bigo, Globalized-In-Security: the Field and the Ban-Opticon. 31.

The suspension of normal state functioning occurs without a discussion between the state and its citizens, due to the nature of the initial, justifying emergency. The state concedes the realm of security to its security experts and abrogates its responsibility to its citizens. For example, soon after 9/11 Canada and the United States signed the Joint Statement on Border Security and Regional Migration Issues (JSBSRMI) and the Smart Border Action Plan (SBAP), enabling a group of security agencies (the RCMP, the CBSA, the US Coast Guard and US Customs and Border Protection, to name a few) to collaborate more fully and to enhance their decision-making powers at the border.²⁴ As a result, these agencies chose to facilitate ‘legitimate’ travel across the border while making travel more difficult for ‘risky’ travelers, by creating the NEXUS program. In this program, a small number of willing ‘legitimate’ travelers are assessed for risk and voluntarily provide biometric information in order to cross the border more freely and quickly. For the majority of citizens and non-citizens, cross-border travel has become an activity whereby the traveler must prove his or her non-threatening status and low-risk level, under a veil of suspicion. Travel is slow and cumbersome. The state, rather than protect the right of all its citizens to equal mobility, has allowed the security regime to limit the mobility of a majority of citizens while privileging the ‘legitimate’ few.²⁵

The longer the state of emergency exists, the more normalized technologies of surveillance become, even appearing to be a part of liberalism and the functioning of a liberal state.²⁶ The security apparatus now works to proactively limit and control the movement of people, promoting “logics of exclusion between those who are granted free movement and those who are trapped in the local.”²⁷ Dialogues about the ease and speed of movement are connected

²⁴ Gilbert 4.

²⁵ Gilbert 5.

²⁶ Bigo, Freedom and Speed in Enlarged Borderzones. Pp. 2, 3

²⁷ Bigo, Globalized-In-Security: the Field and the Ban-Opticon. 41.

to the right to free movement in liberal states. The assumption is that select travelers, for example Nexus holders, who are honest and trustworthy will be granted their right to movement without being subjected to the restrictions experienced by potentially suspicious travelers. Surveillance is seen as necessary in order to protect these rights, rather than the product of an extended suspension of every day rules.²⁸ The evolution of North American borders and the regimes that control them are demonstrative of the emergence of the ban-opticon as a device of control.

This process of control and suspension of normal state functioning, based on the successful selection of an existential security threat (in this case, the characterization of migrants as threatening, worthy objects of suspicion), is challenged by existing legislations and principles that define the moral character of the state and which are not so easily overcome. Laws which protect the poor, the vulnerable, the worker, the foreign traveler, and the citizen define procedures which the state must follow when interacting with these individuals. Laws exist to protect these individuals, just as domestic legislation and international agreements exist to protect asylum-seekers.

This paper argues that the security regime has engaged the political and humanitarian spheres to amend legislation and draft new international agreements to strengthen the security agenda and even frame it as a humanitarian ideal. Several studies argue that Canada's shift toward the securitization of some types of migration (refugee and low-skilled migration) has occurred as a result of the events of 9/11. Specifically, the need to assuage American fears that Canada is a likely source country of violent extremism due to its relatively lax immigration rules. Fearful that the U.S. will close or tighten its borders with Canada, thereby reducing essential cross-border trade, this argument posits that the Canadian government has chosen to demonstrate

²⁸ Bigo, Freedom and Speed in Enlarged Borderzones. Pp. 13.

its willingness and ability to be tough on migration by launching a series of restrictive and intrusive anti-immigration measures.²⁹ This argument is plausible and likely partially correct. The focus on refugees specifically, however, indicates that Canada's goals have moved beyond a simple desire to appease US demands. The initial tightening of Canada's immigration system has led to a widespread assumption that asylum-seekers and their method of arrival are justifiably correlated to both national security and criminal concerns.³⁰ This assumption has been promoted by security agencies who operate at or within border zones, and whose existence depends on the presence of an external threat. Asylum-seekers, viewed as economically undesirable, culturally different, and lacking a strong lobbying group, are easily targeted by security agencies attempting to maintain their relevance.

The security frame is important to an analysis of the legislative and political transformation to the Canadian refugee regime, as it allows us to view these events as parts of a continuum, rather than as isolated incidents. The goal of the security regime, which consists of individuals for whom power is gained by doing the job of 'providing security', is to never produce a final, satisfying outcome in which security is achieved. Instead, the goal of the security regime is to maintain a society-wide sense of constant insecurity. As this applies to asylum-seeking in Canada, the role of the security experts is to ensure that Canadian citizens feel that asylum (and perhaps immigration more broadly), is a pervasive threat that must be kept in check by vigilant security experts. As a result, we cannot expect that the legislative and policy changes being applied to asylum-seeking in Canada are the culmination of efforts to overhaul a weak system. Instead, they are single events in a continuum of security efforts that may cease only

²⁹ Jonathan Kent, "Border Bargains and the 'New' Sovereignty: Canada-US Border Policies from 2001 to 2005 in Perspective", *Geopolitics*, Vol. 16, No. 4, pg. 793-818. Pp. 795-797.

³⁰ Gilbert 7.

when an exhausted and embittered populace launches a backlash against its society's over-saturation of security.

In the meantime, the security regime has been enormously successful. It has even been successful at using the United Nations to push its agenda forward. Before we can explore these legislative changes, however, we must examine the origins of the global humanitarian regime as it applied to asylum-seekers, including the important role played by the United Nations and its predecessor the League of Nations. In doing so, one can understand the speed and severity with which the world that asylum-seekers must navigate has changed.

The Origins of Protections for Refugees and Asylum-Seekers

The current refugee protection regime is largely directed by the United Nations High Commission for Refugees (UNHCR). Created in 1951, the UNHCR responds to situations that are causing the displacement of people across state borders, creating and maintaining refugee camps and acting as a liason between refugees, host countries and potential receiving countries.³¹ In recent years, the UNHCR also responds to situations causing internal displacement. The UNHCR's mandate is based on the 1951 Convention Relating to the Status of Refugees and its 1967 Protocols, and for many these documents mark the creation of the global refugee protection regime. In fact, the process began decades earlier, when the League of Nations appointed a High Commissioner for Refugees in order to address the growing crisis of displacement and statelessness that had emerged as a result of the First World War and the resulting collapse of

³¹ "Who is Responsible for Protecting Refugees?" *Restoring Dignity, Inspiring Change*, International Catholic Migration Commission, 2010, <<http://www.icmc.net/appendice-overview#Who%20is%20Responsible%20for%20Protecting%20Refugees?>>.

empires.³² The League's first Commissioner for Refugees, Fridtjof Nansen, created the Nansen Passport to provide displaced people with identity documents that would be recognized by foreign states and to facilitate their travel between countries. The passport was renewable each year, and several hundred thousand were issued.³³

In the 1930s, focus shifted to refugees fleeing Nazi Germany. Alongside the original League of Nations Nansen Office, a High Commissioner for Refugees arriving from Germany was created. In 1936 the League of Nations drafted a Provisional Agreement concerning the status of Refugees coming from Germany, which was amended in 1938 and renamed the Convention Concerning the Status of Refugees coming from Germany.³⁴ By the beginning of World War Two, the League of Nations had created the Intergovernmental Committee of Refugees, which merged the several disparate League of Nations groups working on various refugee issues, particularly the issue of refugees fleeing Nazi Germany.³⁵

In the aftermath of World War Two and the dissolution of the League of Nations, a new refugee protection agency was created. The International Refugee Organization (IRO) was created in 1946, the same year that the League of Nations and the High Commissioner for Refugees were dissolved. The IRO was charged with assisting and resettling those who could not or would not be repatriated. The IRO was due to be dissolved in 1951, yet the reality-11 million displaced persons across Europe-caused the UN to continue its work on refugee protection. At the end of 1950, the United Nations High Commissioner for Refugees was adopted by the General Assembly and in July 1951 the Convention relating to the Status of Refugee was

³² Shauna E. Labman, "Looking Back, Moving Forward: the History and Future of Refugee Protection," August 2009, *ExpressO*, available at <http://works.bepress.com/shauna_labman/1>, pp. 3.

³³ William F. Fuller, "Peace Profile: Fridtjof Nansen," *Peace Review: A Journal of Social Justice*, May 2008, Vol. 20, Iss. 2, pp. 239-243. Pp. 240.

³⁴ Labman 7.

³⁵ Ibid 8.

adopted, coming into force in 1954.³⁶ The original Convention applied only to persons displaced due to events which occurred prior to 1951. The realization that refugee situations were both protracted and multiplying caused the UN to adopt the 1967 Protocol relating to the Status of Refugees, which expanded refugee protection to any individuals to whom the definition of refugee applied, removing the limitations of the 1951 restrictions on date and location.³⁷

The Convention based its legitimacy and reason for being on the 1948 Declaration of Human Rights, on the understanding that all individuals should be free from misery and should enjoy the opportunity to seek happiness, equality and stability. Specifically, the 1951 Convention relates to Article 14 (1) of the Declaration of Human Rights, “Everyone has the right to seek and to enjoy in other countries asylum from persecution,”³⁸ which did not include the temporal and geographic limitations of the original 1951 Convention.

In its preamble, the Convention states that it is underpinned by several principles, “most notably non-discrimination, non-penalization, and *non-refoulement*,”³⁹ (emphasis in text). The latter two are particularly important for the purposes of this paper. First, the Convention specifies that refugees should not be penalized, specifically, that refugees should not be penalized for illegal entry or stay, because “...the seeking of asylum can require for refugees to breach immigration rules.”⁴⁰ The drafters and signatories of the Convention predicted the likelihood of illegal entries and they viewed such entries as acceptable and legitimate. They accepted illegal entries as a lesser evil, a consequence of a much worse reality to which such entrants were

³⁶ Ibid 10.

³⁷ “Text of the 1951 Convention and Text of the Protocol Relating to the Status of Refugees,” United Nations High Commissioner for Refugees, 1951 and 1967, 60th Anniversary, pp. 46.

³⁸ “The Universal Declaration of Human Rights,” United Nations, Article 14 (1), <http://www.un.org/en/documents/udhr/>.

³⁹ “Text of the 1951 Convention Relating to the Status of Refugees and Text of the Protocol Relating to the Status of Refugees,” United Nations High Commissioner for Refugees, 1951 and 1967, 60th Anniversary, <http://www.un.org/en/documents/udhr/> pp. 3.

⁴⁰ Ibid.

victim. This reality was fresh in the minds of the drafters in 1951, who were among the countries that had denied or severely limited the number of refugees fleeing Nazi Germany throughout the 1930s and 1940s.⁴¹ The notion that such refugees should be denied entry to safe havens simply because in their desperation they had chosen illegal entry rather than gamble on being legally admitted to a safe country was, in 1951, unacceptable.

The principle of non-refoulement, the belief that refugees cannot be returned to their countries of origin against their will, was similarly central to the Convention and is a non-derogable right.⁴² This right has been a major challenge to signatory states, and the consequence is that some states have attempted to generate policies that enable them to avoid the obligation of non-refoulement. For example, through its Pacific Solution, Australia, diverted ships carrying refugees to surrounding islands, which it claimed to have excised from its territory. Consequently, asylum-seekers who were diverted to these islands were unable to make an asylum claim in Australia, which meant that the right of non-refoulement did not necessarily apply to these individuals.⁴³

This paper argues that Canada is also attempting to avoid the responsibilities of non-refoulement, by reducing the number of people to whom it can be said to owe this responsibility. In order to do so, it is subverting the right of non-penalization, working to discredit the claims of asylum-seekers, and extending the border in order to reduce the number of people who are able to arrive in Canada and make their refugee claims, a tactic that increasingly defines asylum

⁴¹ Richard Breitman, "The Allied War Effort and the Jews: 1942-1943," *Journal of Contemporary History*, Vol. 20, Iss. 1, January 1985, pg. 135-156. Pp. 148-149.

⁴² "Text of the 1951 Convention Relating to the Status of Refugees and Text of the Protocol Relating to the Status of Refugees," United Nations High Commissioner for Refugees, 1951 and 1967, 60th Anniversary, <<http://www.un.org/en/documents/udhr/>> pp. 3.

⁴³ Jennifer Pagonis, "UNHCR welcomes close of Australia's Pacific Solution," UNHCR, summary of UNHCR spokesperson press speech, February 8, 2008, <<http://www.unhcr.org/47ac3f9c14.html>>.

policy in the European Union, particularly since the Shengen Agreements.⁴⁴ The EU has widely been considered to have securitized migration, and asylum-seekers and low-skilled immigrants are the most common targets of Europe's border security measures and social policies aimed to restrict their entry and monitor their presence.⁴⁵ It is difficult to avoid the parallels presented by Canada's lurch toward migration securitization via targeted border controls and the politicization of asylum-seeking, and the harsh migration policies that have long been practiced in the EU.

When the principles of non-penalization and non-refoulement were invoked, the Convention's drafters believed that they would only apply to a limited number of refugees, and that the refugee protection regime as a whole was en route to expire once the pre-1951 refugees had been resettled or voluntarily returned home. If the drafters had foreseen the addition of the 1967 Protocols and the removal of the temporal and geographic limitations of the Convention, it is possible that they would have restricted the duties owed to refugees. Instead, protection was extended to all refugees, leading to a truly global refugee protection regime that placed pressure on the capacities of receiving countries. In Canada, a country with a robust set of rights and principles that are extended to non-citizens⁴⁶, the increase of refugees to whom it was obligated to provide protection was a considerable long-term challenge. Canada and its Western allies now utilize their considerable power to confer refugee status and designate claimants as legitimate or not legitimate, exerting their control over the distribution of support and protection. Following the terrorist attacks of 9/11, the process of designating successful claimants has been shaped

⁴⁴ Eiko Thielemann and Nadine El-Enany, "Refugee protection as a collective action problem: is the EU shirking its responsibilities?", *European Security*, June 2010, Vol. 19, No. 2, pg. 209-2209. Pp. 210.

⁴⁵ Sarah Léonard, "EU border security and migration into the European Union: FRONTEX and securitization through practices," *European Security*, Vol. 19, No. 2, June 2010, pg. 231-254. 233.

⁴⁶ "Canadian Charter of Rights and Freedoms: Part 1 of the Constitution Act, 1982," Department of Justice, Part 1, Guarantee of Rights and Freedoms and Fundamental Freedoms, <http://laws-lois.justice.gc.ca/eng/charter/page-1.html#l_I>.

most intensely by a security narrative that prioritizes national security prerogatives over rights, obligations and fairness that are at the heart of the 1951 Convention.

The Criminalization of Asylum-Seeking: Anti-Smuggling Measures beginning with the UN Convention Against Transnational Organized Crime

The same organization that produced the most expansive and universal refugee protection regime later drafted and implemented the first global document on combating transnational crime, which chose as its core focus the smuggling of migrants. The UN Convention Against Transnational Organized Crime involved the participation of 120 countries and was signed in December 2000.⁴⁷ Notably, the Convention Against Transnational Organized Crime also included three Protocols, two of which focus on migration: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea and Air.⁴⁸ According to Anne Gallagher in her article on the Convention and its Protocols, the selection of migrant smuggling and trafficking is important. “While human rights concerns may have provided some impetus (or cover) for collective action, it is the sovereignty/security issues surrounding trafficking and migrant smuggling which are the true driving force behind such efforts.”⁴⁹

The Convention seeks to eliminate five broad types of crime: money laundering, corruption, obstruction of justice, serious crime and participation in an organized criminal group. These crimes must be conducted across international borders and must involve an organized criminal group. An organized criminal group is defined as,

⁴⁷ Anne Gallagher, “Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis,” *Human Rights Quarterly*, Volume 23, Number 4, November 2001, pg. 975-1004. Pp. 976.

⁴⁸ “United Nations Convention Against Transnational Organized Crime and the Protocols Thereto,” United Nations Office on Drugs and Crime, 2004, New York,

<<http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>>. Pp. 2.

⁴⁹ Gallagher 976.

“...a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offenses established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.”⁵⁰

A structured group is a group that “is not randomly formed for the immediate commission of an offense and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.”⁵¹ The Convention does not define transnational organized crime itself, and its definition of an organized criminal group is vague, not specifying the length of time such a group must exist prior to the commission of a criminal act, nor does it define a non-financial material benefit. For example, could a home or a paying job in a country of arrival be included as a benefit, either financial or material?

The goal of the Convention is to facilitate cross-border investigations and prosecutions of organized crime. At the core of the Convention is the belief that increased information sharing, cooperation and comparable domestic criminal legislation is essential for combating transnational crime.⁵² The drafters of the Convention feel that transnational organized crime is one of the most serious issues facing countries. This is not simply because crime is dangerous and organized criminals are even more dangerous. It is because the drafters believe that organized crime is leading to more terrorism. The Convention’s preamble mentions the link to terrorism twice, including the statement that, “the United Nations Convention against Transnational Organized Crime will constitute an effective tool and the necessary legal framework for international cooperation in combating...the growing links between transnational organized crimes and terrorist crimes,” and “Calls upon all States to recognize the links between

⁵⁰ United Nations Convention Against Transnational Organized Crime, pp. 5.

⁵¹ Ibid.

⁵² Gallagher 979.

transnational organized criminal activities and acts of terrorism.”⁵³ The Convention urges states to adopt domestic legislation to establish new criminal offenses, including the offense of intentionally participating in a criminal activity, where there is a direct or indirect material or financial benefit, or any conduct by a person who has knowledge of the specific or general criminal activity of an organized criminal group and who takes part in the criminal activities of the group or in other activities, knowing that this participation will further the criminal aims of the group.⁵⁴

The vague wording of Article 5, “Criminalization of participation in an organized criminal group,” allows its broad application and grants states the ability to apply it to a wide range of activities and actors. For the purposes of this paper, it is worth noting briefly here that the Convention may be in conflict with one of the core principles of the 1951 Refugee Convention, the principle of non-penalization. As previously stated in this paper, the principle of non-penalization is that asylum-seekers are likely to use illegal means of entry when fleeing persecution, and that this illegal act is acceptable and justifiable as it is an act of desperation and survival. The Convention Against Transnational Organized Crime, however, would seemingly criminalize such activity, where there is participation of a criminal group (i.e. A criminal group who smuggles asylum-seekers into countries for a payment).⁵⁵ This is notable, because it would appear that Convention would not simply criminalize the act of smuggling individuals, which would be justifiable as it would target the criminal gangs profiting from the desperation of migrants. By its own logic, the Convention should also criminalize the migrants who pay smugglers, knowing that the smugglers are part of a criminal organization, that the crime is

⁵³ United Nations Convention Against Transnational Organized Crime, pp. 3.

⁵⁴ Ibid 6.

⁵⁵ Ibid 7. Article 5.a.(i).

transnational, and that once they have been smuggled, they will obtain financial and material benefits in the form of a job, a home, or government financial support.⁵⁶

This Convention, therefore, outlines a reversal of one of the central foundations of the 1951 Convention and, potentially, of the entire refugee protection regime. As is noted below, the Protocol against Migrant Smuggling in fact states that migrants are not to be *criminally* prosecuted under this Convention.⁵⁷ Yet the Convention makes a strong case for why migrants *should* be punished, and this has enabled the Canadian government to enact immigration legislation that punishes migrants, as criminal prosecution is not currently a possibility. The effect is an attempt to provide the states which drafted and signed this Convention with a capacity and justification to enact legal consequences against smuggled migrants—the only mitigating factor being an inability to launch criminal proceedings against these individuals—as has been done in Canada under the new IRPA legislation (to be discussed below). Any other actions taken by states against smuggled migrants appears to have the blessing of the leading global human rights agency. What is not immediately visible to the layperson is that this organization is no longer simply the champion of the individual, as it was in 1948. Its member states have co-opted it as a participant in their security efforts, and the resulting Convention is tainted by high levels state self-interest. The goal of this Convention is not simply to facilitate the apprehension of criminal organizations. Its implicit goal is to facilitate states in their domestic assault on asylum-seekers, and as such its effect on asylum-rights has grave and far-flung consequences.

The Convention includes two protocols relating to migration. The first is a protocol relating to trafficking in persons, which is defined as,

⁵⁶ Goodwin 194.

⁵⁷ United Nations Convention Against Transnational Organized Crime 55. Article 5.

“the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, or abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of exploitation, forced labour or services, slavery, or practices similar to slavery, servitude or the removal of organs.”⁵⁸

The consent of the victims is not to be taken into account by the receiving country. The protocol on trafficking is at pains to emphasize the victimization of women and children who are trafficked, although the Convention itself advises that such victims should nevertheless be returned to their countries of origin rather than receive asylum. The drafters were concerned that allowing victims to remain in the receiving country would encourage illegal migration. In addition, the Convention is focused on strengthening borders, training immigration and border officials, and cooperation between states in order to prevent trafficking, rather than on the support that should be offered victims.⁵⁹ In contrast, the smuggling of migrants is defined as, “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which that person is not a national or a permanent resident.”⁶⁰

As previously stated, Article 5 of the Protocol states that “migrants shall not become liable to criminal prosecution under this Protocol,”⁶¹ yet the Protocol, and the Convention as a whole, create in fact a justification for the creation of other forms of legislation, for example

⁵⁸ Ibid 42.

⁵⁹ Gallagher 997.

⁶⁰ United Nations Convention Against Transnational Organized Crime 54-55.

⁶¹ Ibid 55.

immigration legislation, that in practice does punish smuggled migrants. For example, signatories to the Protocol are required to criminalize not just the smuggling of migrants, but the possession of fraudulent identity documents as well.⁶² That such documentation is in the possession of a member of a criminal organization is not specified in the Convention. Gallagher notes that unlike the trafficking protocol, state signatories are not required to consider permitting victims of smuggling to remain with the state, even temporarily. In fact, countries of origin must immediately begin the process of repatriating migrants. Importantly, no consideration must be given to the safety of the migrant in repatriating him or her to the origin country. There are no special considerations for the safety of smuggled children.⁶³

Gallagher states that the High Commissioner for Human Rights as well as the UNHCR, UNICEF and the IOM raised the issue of increasing numbers of asylum-seekers who engage in the means of transportation criminalized in this Protocol. They also argued for the inclusion of the principle of non-refoulement in the Convention, as well as a provision that mirrors the non-penalization principle in the 1951 Refugee Convention. In order to ensure states complied with this provision, they argued that states should be required to offer smuggled migrants the opportunity to make an asylum claim. The Convention does mention the Refugee Convention, the 1967 Protocols and the principle of non-refoulement⁶⁴, but not the principle of non-penalization.

Though the drafters of the Convention attempted to assuage the fears of the UNHCR, the OHCHR and other groups protecting the rights of migrants and asylum-seekers by including brief references to human rights protections and specifically, to the principle of non-

⁶² Ibid 56.

⁶³ Gallagher 997.

⁶⁴ Gallagher 999.

refoulement⁶⁵, the principle of non-refoulement is a non-derogable right embedded within UN agreements. The drafters could not have ignored the requests of other major UN departments to include mention of a non-derogable human right in their Convention, without throwing into question the role and legitimacy of the UN, and the notion of non-derogable rights. States have used the murky distinction between smugglers and smuggled migrants to their advantage in strengthening their borders and adjusting or amending their immigration laws.

Changing the Immigration Landscape: New Laws, New Borders, New Police in post-9/11 Canada

In 1976, the government of Canada produced the Immigration Act, replacing the Immigration Act of 1952, which had focused on detailing the types of people who should be denied entry to Canada, and on the ways in which their entry could be controlled. Between 1952 and 1976, Canadian immigration policy had been guided by several regulations. These regulations had been largely progressive since the 1960s, when regulations were implemented to rescind Canada's racist and discriminatory immigration policies.⁶⁶ The 1976 Immigration Act outlined the principles that were to guide immigration policy in Canada, and it defined the short and longterm goals of this policy. These included facilitating population and economic growth, cultural diversity, family reunification, and the fulfillment of Canada's responsibilities as a signatory to various international agreements, including the 1951 Refugee Convention and its Protocols. The Act also created four classes of immigration under which individuals could make a claim to settle in Canada: the family class, the humanitarian class (including refugees and individuals who did not fit the UN refugee definition but were granted special status by a Cabinet

⁶⁵ Gallagher 998.

⁶⁶ "Forging Our Legacy: Canadian Citizenship and Immigration, 1900-1977," Chapter 6, Canada abolishes its racist immigration policy, *Citizenship and Immigration Canada*, July 1, 2006, <<http://www.cic.gc.ca/english/resources/publications/legacy/chap-6b.asp>>.

decision), the independent class and the assisted relatives class (individuals who had some distant relatives willing to sponsor them and who also met some requirements of the independent class). The 1976 Immigration Act was the culmination of several years' worth of progressive, pro-immigrant legislation.⁶⁷ Under this legislation, Canada became one of the most culturally and ethnically diverse countries in the world.

In November 2001, Canada introduced the Immigration and Refugee Protection Act (IRPA), rescinding the Immigration Act of 1976. The Act more clearly defines the categories of migrants eligible for entry into Canada, and the procedures that apply to their admission. Immigrant and refugee procedures are clearly distinguished from one another. The IRPA also clearly defines who is *not* admissible to Canada, and outlines the ways in which Canadian officials are to address the various cases of inadmissibility. In addition, the IRPA includes a large section on enforcement, detailing acts that are considered offenses under the IRPA and some of the procedures by which Canadian officials must respond to such violations.⁶⁸ In bringing Canada's immigration laws into the twenty-first century, the government chose to regulate security concerns and procedures at the outset.

The new IRPA legislation was the first step in a series of legislative and operational changes that were introduced in the immediate post-9/11 period. Throughout this period, Canada began a rapid expansion of its border and policing policies. These policies, which included placing immigration officers abroad at points of exit in order to expand the border and generate multiple checkpoints,⁶⁹ and creating detailed risk profiles in order to generate multiple threat

⁶⁷ "Forging Our Legacy: Canadian Citizenship and Immigration, 1900-1977," Chapter 6, *Citizenship and Immigration Canada*, July 1, 2006, <<http://www.cic.gc.ca/english/resources/publications/legacy/chap-6b.asp>>.

⁶⁸ "Immigration and Refugee Protection Act," Department of Justice, Objectives and Application, Immigration to Canada, Enforcement, <<http://laws-lois.justice.gc.ca/eng/acts/I-2.5/index.html>>.

⁶⁹ "Fact Sheet: Migration Integrity Officer Program," Canada Border Services Agency, November 2009, <<http://www.cbsa-asfc.gc.ca/media/facts-faits/030-eng.html>>.

indicators⁷⁰, were formulated in order to ensure Canada remained safe from terrorists attempting to enter the country. In reality, these policies have targeted asylum seekers and refugees. As Gilbert notes,

“...there has been a change in that crime, criminality and national security have been yoked together so that immigrants are continuously cast as potential terrorists, as in the 2004 National Security Strategy. With this change, racial profiling has also become more pronounced and has shifted slightly away from African Canadian communities to Muslim and Arab groups in Canada, as well as communities suspected of high levels of ‘illegal’ immigration.”⁷¹ Gilbert further argues that racial profiling, particularly as it relates to national security policy, though officially condemned, is increasingly wrapped up with assumptions about nationality and ethnicity. For their parts, nationality and ethnicity are used as legitimate indicators of levels of security risk.⁷² Canada’s National Security Policy 2004 documented this perceived link between refugee claimants and terrorism in its border security strategy, introducing the Immigration Intelligence Unit, developing new processes specifically to screen refugee claimants, and requiring additional countries from which inhabitants must obtain Visas before visiting Canada.⁷³ Pratt and Thompson argue that risk assessments at the border are primarily based on assumptions about nationality, which are themselves tied to ideas about race. They further argue that these notions begin as high level policies and become entwined on the ground:

“The institutional legitimacy of intelligence-based criminal profiles based on nationality and sometimes continents (such as those produced by the Canada Security Intelligence Service

⁷⁰ “Fact Sheet: National Risk Assessment Centre”, Canada Border Services Agency, October 2009, <<http://www.cbsa-asfc.gc.ca/media/facts-faits/039-eng.html>>.

⁷¹ Gilbert 10-11.

⁷² Gilbert 11.

⁷³ “Securing an Open Society: Canada’s National Security Policy,” Privy Council Office, April 2004, pg. 1-60. Pp. 41, 42.

(CSIS) and the Criminal Intelligence Service of Canada (CISC) and circulated through the CBSA and its security partners) thus trickles down to the frontline in interesting ways. The slippage between race and nationality becomes more evident, while the enforcement rationale remains stable.”⁷⁴

The result in Canada is, then, a top-down flow of beliefs and assumptions about refugees based on another set of assumptions about source-countries, ethnicity, and risk level. These beliefs are shaping the way the country treats these individuals (whether ‘legitimate’ or not), to the extent that policies are now generated to exclude and monitor these refugees.

Citing Sassen, Sharon Pickering argues that although individual states may enact differing immigration policies, there is nevertheless a dominant belief among Western states that “immigration policies are rooted within a ‘common set of conceptions about national borders and the role of the state’. Such convergence takes place in a moment when traditional immigration policies are considered ineffective and pan-national and regional approaches to immigration policy are taking shape...”⁷⁵ Canada’s new policies and evolving legislation demonstrates this approach, which appeases US demands for stricter entry controls and harsher punishments for unaccepted claims,⁷⁶ consequently moving Canada’s policies toward a US-style approach to border control. These new legislations also seen as a response to the security concerns generated by the global security regime in Canada. The consequences of this crime and punishment view of border control will be described below.

⁷⁴ Anna Pratt and Sara K. Thompson, “Chivalry, ‘Race’ and Discretion at the Canadian Border,” *British Journal of Criminology*, Vol. 48, July 2008, pg. 620-640. Pp. 628.

⁷⁵ Sharon Pickering, Border Terror: Policing, Forced Migration and Terrorism,” *Global Change, Peace & Security*, Vol. 16, No. 3, October 2004, pp. 215.

⁷⁶ Kent 794.

Smart Borders: Declarations of Border Reconfiguration

In 2002, months after the attacks on the World Trade Centre and the Pentagon, RCMP officer Marcel-Eugène LeBeuf gave a speech at the International Perspectives on Crime, Justice and Public Order, in which he defined the border in three ways: 1) the border as a physical line, 2) the border as something that defines a people, 3) the border as a concept, a zone that moves, “through which interests are both facilitated and safeguarded.”⁷⁷ In this speech, LeBeuf presented a global approach to borders and border security, in which each could be conceived of as a series of concentric circles, each circle a different form of security occurring in different spaces. This approach is based in intelligence sharing, international and professional cooperation, and varying levels of physical security at multiple checkpoints.

“The innermost ring represents the actions to **ensure security** within each country: the visa screening process, followed by airline check-in (point of origin); point of initial embarkation; transit; point of final embarkation; international seaports or airports (point of arrival); and **at the centre, the Canada-US border**. A second is the **co-operation** among security and regulatory agencies. A third ring is the **actual border** that could be managed by the creation of a **bi-national** Joint Border Commission. A fourth ring represents **offshore networks**, cooperation and intelligence sharing with countries around the world. Finally, the fifth ring opens the possibility of addressing **the global problem of migration**.”⁷⁸ (Emphasis added).

The concept of rings of security has been gradually adopted by U.S. and Canadian political representatives. More importantly, it has been adopted by security professionals (such as the CBSA, RCMP, U.S. Customs and Border Protection) in both countries that, like LeBeuf,

⁷⁷ LeBeuf, Marcel-Eugène, “Canada-U.S. Law Enforcement Partnership - An Evolving Situation,” RCMP, Speech delivered at The Sixth Biennial Conference: International Perspectives on Crime, Justice and Public Order, June 2002, <<http://www.rcmp-grc.gc.ca/pubs/ccaps-spcca/bord-partnr-eng.htm>>. Pp. 6.

⁷⁸ LeBeuf 4, 5.

view global migration as a ‘problem’ that must be constrained through multiple forms of physical and technological control.

The result has been a high level of collaboration promoted by both the U.S. and Canada, an important development and reflective of the transversal and transnational *dispositif* of the ban-opticon put forward by Bigo. First, although the moves toward border and security integration were announced by heads of state, the agents are the security experts, collaborating not just across borders, but across professions as well. The intelligence, technological, scientific, border, immigration and police units work together to maintain surveillance and physical control over the borders. As emphasis is placed on maintaining control over entry rights as far away from the border as possible, preferably away from the continent itself, the concept of the border shifts first to an enlarged territorial zone and then to a biological space that is monitored through biometric gathering and risk assessments by intelligence networks that are not present at the formal border.⁷⁹

The move toward an integrated border perimeter was first announced soon after the attacks on September 11, 2001 and again in December 2011.⁸⁰ In the space of those ten years, there was little public debate regarding the evolution toward the integrated border. There was, nevertheless, significant development in the every day practices of internal and external agencies whose main tasks became border monitoring and individual surveillance through the use of newly developed technologies. These ongoing practices occurred without public debate and

⁷⁹ RCMP, “Integrated Border Enforcement Teams - Frequently Asked Questions,” modified June 2008, <<http://www.rcmp-grc.gc.ca/ibet-eipf/faq-eng.htm>>.

⁸⁰ “The U.S.-Canada Smart Border Declaration,” Foreign Affairs and International Trade Canada, signed December 12, 2001, website updated February 27, 2003, <<http://www.dfait-maeci.gc.ca/anti-terrorism/declaration-en.asp>>, and “Addressing Threats Early,” *Perimeter Security & Economic Competitiveness*, Canada’s Economic Action Plan, June 12, 2012, <<http://actionplan.gc.ca/eng/feature.asp?mode=preview&pageId=339>>.

citizens remain generally unaware of the extent to which tools like surveillance are used by the state to monitor population movements.

In December 2001, the governments of the United States and Canada signed the “Smart Border Declaration,” a stated response to the terrorist attacks of September 11, 2001 which focused on developing an action plan that centered on border security and the flow of legitimate goods. The writers of the declaration argued that the terrorist attacks “highlighted a threat to our public and economic security,” and that the two states needed to build and maintain a “zone of confidence against terrorist activity”.⁸¹ The declaration provided an action plan that aimed to guide the development of (1) the secure flow of people; (2) the secure flow of goods; (3) secure infrastructure; (4) coordination and information sharing in the enforcement of these objectives.

Police at the Border and Beyond

In order to manage the border strategies outlined in the original Smart Border Plan, Canada established the Canada Border Services Agency, a border policing agency whose primary aim was to maintain security of the border by monitoring exits and entries into Canada. The creation of the Canada Border Services Agency marked a definitive point in Canada’s decision to partake in transnational policing that explicitly targets population control and seeks to control migration. The CBSA was given immigration responsibilities overseas, and the process of determining who may enter Canada at these overseas checkpoints is controlled by CBSA’s Migration Integrity Officers.⁸² The CBSA thus has a dual role of administering immigration processes and detaining individuals. As armed agents, the latter is explicitly a policing function.

⁸¹ “The U.S.-Canada Smart Border Declaration,” Foreign Affairs and International Trade Canada, signed December 12, 2001, website updated February 27, 2003, <<http://www.dfait-maeci.gc.ca/anti-terrorism/declaration-en.asp>>.

⁸² CBSA, “About Us - What We Do.” Canada Border Services Agency, April 2008, <<http://www.cbsa-asfc.gc.ca/agency-agence/what-quoi-eng.html>>.

CBSA is, consequently, a transnational intermediary policing unit, with both internal and external functions.

The agency links with corporate interests, such as international airlines and airports, to track and detain certain individuals. They are the security experts who function as managers of unease, operating nationally and internationally, networking with multiple agents, and linking issues of immigration, criminality and terrorism. Since 2004 this agency has grown to employ more than 13,000 individuals throughout Canada and at National Headquarters, where intelligence is gathered and distributed, and at checkpoints on Canadian soil and at its ports of entry abroad.⁸³

The re-conceptualizing of borders has enabled this overseas expansion of Canadian policing forces, and allowed these agents to maintain their role as border patrols. If the border as a territorial line had continued to be the definition followed by governments and agencies, then the placement of potentially armed police forces in foreign states would be cause for alarm, despite their placement in consulates and international airports. The reconceptualization of the border as an expanded zone, however, has normalized the practice of placing police units abroad. The border is moveable, and exists wherever the agency chooses.

The creation of the CBSA and the rapid expansion of its powers at home and overseas raises questions about its role in the refugee protection regime. According to the CBSA website, Migration Integrity Officers (MIOs) stop individuals who lack the documentation required by Canadian officials from boarding planes flying to Canada. The MIOs train thousands of airport and airline staff, as well as local officials to identify improper or incomplete documentation in order to stop individuals carrying such documents from boarding planes to Canada. Between

⁸³ CBSA, "About Us - What We Do." Canada Border Services Agency, April 2008, <<http://www.cbsa-asfc.gc.ca/agency-agence/what-quoi-eng.html>>.

2008-2009, MIOs trained 12,000 individuals in documentation identification. Consequently, MIOs stop approximately 5,000 individuals per year from traveling to Canada.⁸⁴

Given these numbers-potentially thousands of individuals denied entry to Canada each year before arriving in the country or making a refugee claim-it is important to refer to the refugee agreements to which Canada is a signatory to assess the impact of MIOs on Canada's refugee obligations. Returning to the non-penalization right in the 1951 Refugee Convention is particularly important. It is arguable that MIOs are placed abroad in order to avoid Canada's obligations under the non-penalization clause in the Convention. Signatories to the Convention recognized that individuals fleeing countries for fear of persecution or loss of life may be forced to seek protection via illegal entry, and that this was justified given the severity of the reasons for fleeing. According to Article 31 of the 1951 Refugee Convention, a state can be said to have met its international obligations when the merits of the individual's claim to refugee status are assessed prior to their punishment (for example, short or long-term detention).⁸⁵

The role of the MIOs to assess the existence or legitimacy of travel documentation may be Canada's attempt to assess the merits of a claim, but it does not fulfill that obligation in reality. A lack of documentation does not indicate a false refugee claim. According to a fact sheet produced by the Canadian Council for Refugees, obtaining identity or travel documentation can be difficult for individuals fleeing persecution or conflict. For example, the fact sheet cites the difficulties in obtaining documentation for Somali refugees, who do not have a government

⁸⁴ "Fact Sheet: Migration Integrity Officer Program," Canada Border Services Agency, November 2009, <<http://www.cbsa-asfc.gc.ca/media/facts-faits/030-eng.html>>.

⁸⁵ Guy S. Goodwin-Gill, "Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention and protection," United Nations High Commissioner for Refugees, November 2001, <<http://www.unhcr.org/refworld/pdfid/470a33b10.pdf>>, pp. 187.

to provide such documentation.⁸⁶ Similarly, individuals who make asylum claims are not necessarily “shopping around”, but searching for a safe and welcoming environment.⁸⁷ Yet individuals stopped by MIOs are often not granted the opportunity to present their case to a member of the Immigration and Refugee Board, unlike individuals who are able to reach Canadian territory.

If Canada is expanding its border, as evidenced by the placement of Canadian border officials abroad, then it should extend its laws, including the right to make an asylum claim and to have this claim assessed by the correct officials, to its border abroad as well. Canada potentially penalizes thousands of individuals per year for their attempts to seek protection in Canada without holding correct documentation. Given the expansion of Canada’s border to locations abroad, this is in direct violation of the non-penalization article of the 1951 Refugee Convention and just one element in the dismantling of the refugee protection regime.

Biometric Borders: Biological Information Gathering and the Bordering of the Individual

The adoption of biometrics is an explicit move from monitoring borders and tracking information to tracking individuals themselves. The National Risk Assessment Centre (NRAC) was established in 2004 as part of CBSA’s intelligence service. The NRAC gathers passenger lists (API/PNR) when flights are en route to Canada in order to identify risky individuals prior to their arrival in the country. It also gathers biometric information (fingerprints and retinal scans)

⁸⁶ “Questions about Canada’s Security Agenda and its Impact on Refugees and Immigrants,” Canadian Council for Refugees, April 2004, page 2. <<http://ccrweb.ca/en/questions-about-canadas-security-agenda-and-its-impact-refugees-immigrants>>.

⁸⁷ Goodwin-Gill 192.

in order to verify travelers' identities and "to make sure that people coming into the country do not pose a threat".⁸⁸

The gathering and checking of this information occurs at the border, and while its public role is as a verification mechanism, its equally important use is its force as a dissuasion technique. Refugee claimants who have previously made a status claim at an American border must provide their biological information. In the event that this claim is denied, the individual may attempt to make a claim at a Canadian border. Canadian officials will consequently request the individual's biometric information, which will match with the information previously obtained by American officials, and which is shared between the two countries. Having signed the Safe Third-Country Agreement with the United States, Canada will deny the individual refugee status and will return the individual to the United States.⁸⁹ In such a case, the refugee is portrayed as though he or she were a criminal attempting to trick the system and take advantage of Canadian officials. The refugee's original denial is viewed as proof of his or her illegitimate claim, rather than as an example of strict admittance rules of a foreign government. The ability of officials on both sides of the border to gather and compare biometric data is viewed as an example of collaboration and scientific technology that works.⁹⁰

Between 2004 and 2005 total refugee claims at the U.S.-Canada land border fell by 55%.⁹¹ The program of biometric gathering was initially justified to Canadian citizens as one that

⁸⁸ CBSA, "National Risk Assessment Centre," Fact Sheet, October 2009, <<http://www.cbsa-asfc.gc.ca/media/facts-faits/039-eng.html>>.

⁸⁹ "Canada-U.S. Safe Third Country Agreement - A Partnership for Protection - Year One Review," Citizenship and Immigration Canada, November 2006, <<http://www.cic.gc.ca/english/department/laws-policy/partnership/chapter4.asp>>.

⁹⁰ "U.S., Canada Will Share Refugee Fingerprints," CBC News, updated November 24, 2009, <<http://www.cbc.ca/news/canada/story/2009/11/24/biometrics-refugees024.html>>.

⁹¹ "Canada-U.S. Safe Third Country Agreement - A Partnership for Protection - Year One Review," Citizenship and Immigration Canada, November 2006, <<http://www.cic.gc.ca/english/department/laws-policy/partnership/chapter4.asp>>.

would not affect them.⁹² As the program targets refugees, temporary workers and students in order to determine potential criminals among them, Canadians would not be subject to these processes.

“Public Safety Minister Peter Van Loan said Canadians have no reason to fear their personal information will be shared with U.S. officials, because the program is aimed primarily at refugee claimants.

“The biometric information sharing is relating to refugee claimants and the refugee situation and some removals — it's more immigration-related,” said Van Loan, flanked by Napolitano after a top-level meeting about border security attended by both the U.S. and Canadian ambassadors in Washington.”⁹³

Yet this sort of biological information gathering and sharing should be of concern, primarily because it is the world’s most vulnerable who are targeted by these policies.⁹⁴ Whether one believes that such procedures are logical and necessary in a world where the number of individuals seeking refugee status is in the millions, the selection of asylum-seekers as a group requiring biological monitoring signals the suspicion that overlays decisions relating to refugee protection. The assumption is that a significant number of asylum-seekers are in fact economic immigrants in disguise, hoping to con their way into Western countries. Biological information gathering is therefore meant to be a filter and a dissuasion technique.⁹⁵ In its announcement to introduce the new Protecting Canada’s Immigration System Act, the government stated that the majority of refugees arrive in Canada from the European Union, and that 95% of these claims are

⁹² “U.S., Canada Will Share Refugee Fingerprints,” CBC News, updated November 24, 2009, <<http://www.cbc.ca/news/canada/story/2009/11/24/biometrics-refugees024.html>>.

⁹³ “U.S., Canada Will Share Refugee Fingerprints,” CBC News, updated November 24, 2009, <<http://www.cbc.ca/news/canada/story/2009/11/24/biometrics-refugees024.html>>.

⁹⁴ “Harper Government Introduces the Protecting Canada’s Immigration System Act,” *Citizenship and Immigration Canada*, February 16, 2012. <http://www.cic.gc.ca/english/departement/media/releases/2012/2012-02-16.asp>.

⁹⁵ Ibid.

withdrawn, abandoned or rejected. The government did not specify the percentage of claims from the EU that were simply rejected, though the minister stated that such “bogus refugees” would be sent a message.⁹⁶ It should be noted that it is not against international law to make a refugee claim in another country once a claim has been rejected. As such, asylum-seekers are being penalized for the simple reason that they are asylum-seekers.

When Canadian officials collect the fingerprints of an asylum-seeker at the border, they are simultaneously collecting a wealth of additional information, including his or her flight origin, language, race, gender, and so on, and drawing assumptions about the level of risk this individual might pose for Canada. This risk may be a security risk-criminal, terrorist-or a welfare risk, depending on the level of community or family support this person could expect in Canada. Without an open, transparent discussion between politicians, officials and the public, we cannot be clear what kind of risk Canadian officials are searching for, what levels of risk are acceptable, or what characteristics elevate or reduce risk. Transparency in government is a key foundation of a free and open democracy. A government that operates in secrecy may not be working in the interests and at the behest of its citizens. Public accountability is a constraint on government overreach, and is essential to a free society.

When the government secretly collects personal information, the assumption is that there is good reason for authorities to demand this information, that these individuals are going to *do something*. The conclusion made in the minds of the public is that these people are risks, criminal or terrorist risks, and that Canadians are at risk because of them. Conclusions are drawn without any discussion taking place, and Bigo’s managers of unease have succeeded in expanding their

⁹⁶ “Harper Government Introduces the Protecting Canada’s Immigration System Act,” *Citizenship and Immigration Canada*, February 16, 2012. <http://www.cic.gc.ca/english/department/media/releases/2012/2012-02-16.asp>.

reach. More than ten years since the terrorist attacks on 9/11, Canada has increased and expanded rather than reduced these security processes.

Expanding Regimes of Control: Legislation and Integrated Enforcement

Bill C-4: An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act and the Marine Transportation Security Act

In the fall of 2011, the Canadian government introduced Bill C-49: An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act and the Marine Transportation Security Act. The act introduced several changes. It granted the Minister of Immigration more power to deny or allow the entry of individuals into Canada. Notably, it created the category of Designated Foreign National, which included individuals who had arrived in Canada via ‘irregular’ means. According to these amendments, these individuals would be subject to a different set of immigration and refugee procedures than all other persons seeking entry into the country. Of note, the bill’s writers stated that it should be read in the context of the UN Convention Against Transnational Organized Crime and specifically the Protocol against the Smuggling of Migrants by Land, Sea and Air, to which Canada made a substantial contribution before its ratification in 2002. In fact, the writers stated that “Canada’s efforts to prevent and combat migrant smuggling were guided by the convention and its protocol,”⁹⁷ an admission that reinforced the powerful role the UN has played in shaping the laws and discourse used by states in their efforts to limit and criminalize asylum-seeking.

The stated primary goal of Bill C-49 was to deter migrants from attempting entry into Canada via clandestine or irregular methods. The new category of “designated foreign national”

⁹⁷ “Bill C-49: An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, and the Marine Transportation Security Act,” November 8, 2010, Section 1.2.1, <<http://www.parl.gc.ca/Content/LOP/LegislativeSummaries/40/3/40-3-c49-e.pdf>>, pp. 2.

was created to deter migrants from using smugglers to travel to Canada, where they would be subject to the protections within the Refugee Convention and to Canada's Charter of Rights and Freedoms, which extends to all persons on Canadian soil. The deterrence was in the treatment these migrants were to endure once they had arrived in Canada and been taken into custody by Canadian officials. A person became a designated foreign national once the Minister of Citizenship and Immigration had declared his or her arrival 'irregular'.

Under Bill C-49, a designated foreign national was subject to a mandatory detention regime, mandatory conditions upon release from detention, and a five year suspension on applications for permanent residency, for a temporary residence permit, or for applications on humanitarian or compassionate grounds.⁹⁸ The Minister of Immigration could designate an arrival as irregular (and consequently label such migrants as irregular) when he or she was concerned for the public safety of Canadians or when the identification of the migrants may be a timely process.⁹⁹

The legislation also appeared to flout several international and domestic obligations. First, Article 5 of the Protocol against the Smuggling of Migrants in the UN Convention against Transnational Organized Crime states that "Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in Article 6 of this Protocol."¹⁰⁰ Under Bill C-49, irregular migrants were not subject to criminal prosecutions, but they were to be treated as criminals, subject to a mandatory detention sentence.¹⁰¹ In fact, these individuals were to be treated worse than criminals, sentenced to

⁹⁸ "Bill C-49: An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, and the Marine Transportation Security Act," Section 2. 1. pp. 4.

⁹⁹ "Bill C-49: An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, and the Marine Transportation Security Act," Section 2. 1, 2. 1. 1. 1. Pp. 4.

¹⁰⁰ United Nations Convention Against Transnational Organized Crime pp. 55.

¹⁰¹ "Bill C-49: An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, and the Marine Transportation Security Act," Sections 2.1.2.1.2 and 2.1.2.1.3.

mandatory detention without legal representation or recourse. The Canadian Bar Association had previously stated that the mandatory detention provisions breach sections 9 and 10 of the Canadian Charter of Rights and Freedoms.¹⁰² According to the Charter, “everyone has the right not to be arbitrarily detained or imprisoned,” and “to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.”¹⁰³ In addition, the detention regime mandated an obligatory twelve month detention period, only after which was a review to be held to determine whether continued detention was warranted. After that, a second review could be held only after an additional sixth month period. The mandatory twelve month detention without period review was the most extreme deterrence method employed by Canada and was in direct contravention of the Canadian Charter. Canadian citizens arrested for a criminal offense are not subject to such extreme measures.

Bill C-49 most notably flouted the non-penalization article of the 1951 Refugee Convention. The heart of the Bill clearly punished individuals based on their means of entry (irregular arrivals by ship or otherwise), despite the fact that means of entry are to have no bearing on the treatment of the individual by the state. Under Bill C-49, individuals were legally bound from applying for permanent or temporary residency, or from applying to stay based on humanitarian or compassionate grounds, for five years.¹⁰⁴ Bill C-49 was an attempt by the Canadian government to target asylum-seekers as criminals, by harshly punishing asylum-seekers in order to dissuade additional migrants from seeking protection in Canada by engaging the services of smugglers.

¹⁰² “Bill C-49, Preventing Human Smugglers from Abusing Canada’s Immigration System Act,” *National Citizenship and Immigration Law Section*, Canadian Bar Association, November 2010, pg. 1-13. Pp. 5.

¹⁰³ “Canadian Charter of Rights and Freedoms: Part 1 of the Constitution Act, 1982,” Department of Justice, March 29, 1982, Legal Rights #9, 10 (c), <http://laws-lois.justice.gc.ca/eng/charter/page-1.html#l_1:s_3>.

¹⁰⁴ “Bill C-49: An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, and the Marine Transportation Security Act,” Section 2.1.3.1, pp. 12.

The goal of this legislation was to diminish and invalidate the individual's claims, and the claims of those who arrive via irregular means. In doing so, Canada has been able to justify its declining acceptance rates of 'undesirable' migrants-refugees, low-skilled workers-in favour of high skilled and potentially high-earning immigrants. Canada is seeking its competitive edge in the global economy, and like the European Union, it believes that refugees are a drag on the economy. This belief dovetails with the assumption that refugees are a cultural strain on society, in large part because they are assumed to have a high criminal potential. Further, as demographics shift, 'refugee' becomes a euphemism for racialized identities.¹⁰⁵ As the collective minority begins to outnumber the majority population, the case can more easily be made for a core, politically-vocal segment of the population that refugees should be excluded from the state due to their low-integration capacity. In these arguments, the security regime is able to dismiss the need for proof.

Bill C-31: Protecting Canada's Immigration System Act

In February 2012, the government introduced Bill C-31, the "Protecting Canada's Immigration System Act," which incorporated elements of Bill C-49. Similar to Bill C-49, the proposed legislation outlines the Minister's power to label irregular arrivals as designated foreign nationals, leading to a mandatory one year detention for those over the age of 16. Children under the age of 16 can be held in detention as well, though this sentence is not mandatory and is at the minister's discretion. The discretion of the Minister in this Bill is significant, enabling the Minister to limit of the right of detained individuals to appeal their detention, and to extend their

¹⁰⁵ Angel-Ajani 439.

detention should he or she feel the migrant poses a security threat, without considering any other factors.¹⁰⁶

The Bill grants the Minister of Immigration new powers as well. For example, the Bill denies refugees from making claims for permanent residency for a minimum of five years after the date at which the individual is granted protection. This is important, because only permanent residents can sponsor family members to come to Canada. Further, the legislation states that permanent residency is not automatically granted to refugees, and that the Minister may order their removal if he believes the situation in the origin country has improved.¹⁰⁷ The aim seems to be to make Canada a less desirable destination country for multiple reasons. Minimum year-long detention, limited appeals, a likelihood of being returned home at the end of the detention period, lengthy delays for family reunification, combine to characterize Canada as an unfavourable destination country.

Bill C-31 outlines other ways in which the government is attempting to shrink the refugee pool and criminalize or delegitimize refugee claims. For example, the bill states that the Minister may designate countries as ‘safe’, meaning that these countries are not typically refugee-producing countries and that they have sound democratic procedures. As a result, claims from individuals fleeing these countries are rapidly assessed by the Immigration and Refugee Board, and appeals processes are disallowed.¹⁰⁸ As the Refugee Lawyers Group makes clear, “There is

¹⁰⁶ “Bill C-31: An Act to amend the Immigration and Refugee Protection Act, the Balances Refugee Reform Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act,” 41st Parliament, currently with the Senate Standing Committee on Social Affairs, Science and Technology, June 21, 2012, <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5667849&File=42>>, section 55 (3.1.b).

¹⁰⁷ “Bill C-31: An Act to amend the Immigration and Refugee Protection Act, the Balances Refugee Reform Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act,” 41st Parliament, currently with the Senate Standing Committee on Social Affairs, Science and Technology, June 21, 2012, <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5667849&File=42>>, section 20.1(1).

¹⁰⁸ Ibid Section 36.1.(2).

no requirement that the Minister will “be guided by expert opinion on the actual human rights conditions in the country of origin, as opposed to political motives related to the promotion of trade or the advancement of foreign policy,” once again raising concerns that the concentration of power within the hands of the Minister will lead to political, rather than humanitarian, decisions on the lives of refugees.¹⁰⁹ It also leads to assertions by the government that claimants from so-called safe countries are bogus, and are attempting to abuse Canada’s generosity in order to gain what is tantamount to illegal entry based on false assertions.

The Bill, consequently, has two aims. The first is to punish asylum-seekers and even successful refugees by declaring them criminal or criminal-abettors due to their method of arrival. It aims to fulfill this mission by placing large discretionary powers within the hands of the Minister of Citizenship and Immigration, a political position that increases the possibility that decisions relating to refugee claims will be subject to the political whims and emotions of the day. The second aim is to shrink the refugee pool by designating countries as safe, restricting the appeals process, and delaying or denying permanent residency requests in order to restrict or limit family reunification for refugees.

Public criticism by lawyers and refugee groups has recently led the Canadian government to concede some aspects of Bill C-31. A person’s detention will now be reviewed within 14 days of detention, and again after 6 months. This is comparable to the treatment given to individuals who have been detained due to a security certificate. Further, a refugee will no longer be at risk of losing his or her permanent residency should the situation in their home country improve.¹¹⁰

¹⁰⁹ “Bill C-31: The Minister says one thing; his bill says another,” Canadian Association of Refugee Lawyers, March 22, 2012, <<http://www.refugeelawyersgroup.ca/theministersays>>.

¹¹⁰ “Legislative Summary of Bill C-31: “Bill C-31: An Act to amend the Immigration and Refugee Protection Act, the Balances Refugee Reform Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act,” 41st Parliament, revised June 4, 2012, <http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?Language=E&ls=c31&Parl=41&Ses=1&source=library_prb#a47>, Section 2. 3. 1 “Changes to Inadmissibility and

Yet the core of the law remains, and its purpose is clear: to imprison asylum-seekers in order to delegitimize their individual experiences and reduce the obligations of Canada toward asylum-seekers as a group. While it should be noted that the government uses the language of detention or detainment, the reality for designated foreign nationals is that they are housed in provincial correctional facilities, or at minimum-security detention centres in Toronto or Montreal.¹¹¹ The placement of asylum-seekers alongside convicted criminals demonstrates the way in which such individuals are treated as criminals by the state. The immigration holding centre in Quebec is on Correctional Services Canada property. The holding centre in Ontario is a refurbished hotel with a wider range of amenities, yet as in all holding centres, families are split and given no option to leave.¹¹²

Evolving Immigration Policies

The pieces of legislation discussed above are examples of sweeping changes made by the government of Canada to immigration policies in recent years, but they are by no means the only changes being made to Canada's policies. The reconfiguration of the border was discussed previously, as was the creation of the CBSA to police these expanded borders. Some of these policies have resurged in recent years and are at the forefront of Canada's international and domestic policies.

Loss of Status.” AND “Bill C-31: An Act to amend the Immigration and Refugee Protection Act, the Balances Refugee Reform Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act,” 41st Parliament, currently with the Senate Standing Committee on Social Affairs, Science and Technology, June 21, 2012, <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5667849&File=42>>, Section 20.2(2).

¹¹¹ “Fact Sheet: Arrests and Detentions,” Canada Border Services Agency, July 2009. <http://www.cbsa-asfc.gc.ca/media/facts-faits/007-eng.html>.

¹¹² “CBSA Detentions and Removals Programs – Evaluation Study,” Canada Border Services Agency, November 2010, <http://www.cbsa-asfc.gc.ca/agency-agence/reports-rapports/ae-ve/2010/dr-rd-eng.html#s06x2>.

On December 7, 2011, the United States and Canada announced their commitment to the Action Plan on Perimeter Security and Economic Competitiveness. On his website, the Prime Minister outlined the impact of the Action Plan on security. Here, he explicitly stated that “Strengthening mutual security by addressing threats as early as possible, especially at the perimeter before they arrive in North America, makes sense from both a security and an economic perspective.”¹¹³ The document stated that Canada and the U.S. would conduct national security threat assessments at and beyond their borders. The document also stated that the two countries would work together to better identify individuals that pose a security risk by improving the methods that determine high risk travelers, verifying entry and exit of travelers from each country, and by sharing information on travelers to either country in order to determine admissibility.¹¹⁴ Cooperation and collaboration between agencies away from the border was emphasized. Further, the document stated that law enforcement agencies from each country would operate on both sides of the border in order to track and apprehend criminals.¹¹⁵

To meet its goals of conducting security threat assessments and identifying risky individuals, the two countries agreed to expand the role of their Integrated Border Enforcement Teams (IBET). The Smart Border Declaration of 2001 had mandated the creation of IBET, a land version of an integrated maritime project called the Shiprider Program, which both the U.S. and Canada hailed as a great success. The goal of Shiprider is to interdict criminal elements and human smuggling at sea. The IBET, consisting of five major agencies from both the United States and Canada, was charged with monitoring and patrolling North American borders. As of 2009 there were 15 IBETS working across Canada and the U.S. IBET was originally comprised

¹¹³ [Stephen Harper, “What the Action Plan Means for Security - Prime Minister of Canada,” Prime Minister of Canada Website, December 7, 2011, <http://pm.gc.ca/eng/media.asp?category=5&featureId=6&pageId=48&id=4523>.](http://pm.gc.ca/eng/media.asp?category=5&featureId=6&pageId=48&id=4523)

¹¹⁴ Ibid.

¹¹⁵ Ibid.

of five organizations: Canada Border Services Agency and the Royal Canadian Mounted Police from Canada, and the U.S. Coast Guard, U.S. Customs and Border Protection/Office of the Border Patrol, and U.S. Immigration and Customs Enforcement. In 2009, the Joint Task Force-North was added on the U.S. side.¹¹⁶ These Canadian-U.S. Teams monitor along either side of the border. In Canada, the IBETs are subject to Canadian law, whereas they are subject to American law while patrolling along the U.S. Side.

The integration of these agencies raises several important issues. First, patrolling along both sides of the border implies that a) the border is still considered, to some extent, a territorial line or demarcation that divides two states, and b) on either side of this demarcation is an expanded zone along which these teams can patrol before jurisdiction is ceded to conventional police units. The agencies that are members of IBET make claims to multiple sources of expert security knowledge (the security intelligence expertise of both the RCMP and the CBSA, and their counterparts from the U.S.).¹¹⁷ The highly secret intelligence that they gather may not be shared, unless it is with an agency that the IBETs determine needs or deserves to know. As a result, these agencies are granted the ability to determine what and where a border is¹¹⁸, so long as it positively affects their ability to gather the most amount of information and control the area as effectively as possible. Since IBETs determine what is secret, what can be shared, and with whom it may be shared, they are able to make decisions about what is a security issue and what is necessary outside of public discussion, or possibly even without private discussion between external government agencies. As Bigo states, however, because managers of unease foresee the

¹¹⁶ RCMP, “Canada-United States IBET Threat Assessment 2010 (Reporting on year 2009),” Integrated Border Enforcement Teams Reports, updated July 2011, <<http://www.rcmp-grc.gc.ca/ibet-eipf/reports-rapports/2010-threat-menace-eng.htm>>.

¹¹⁷ RCMP, “Canada-United States Integrated Border Enforcement Teams,” updated March 2003, <<http://www.cbsa-asfc.gc.ca/security-securite/ibet-eipf-eng.html>>.

¹¹⁸ The Standing Senate Committee on National Security and Defense Evidence, May 14, 2012, Discussion of Bill C-38, Part 4, Division 12, <<http://www.parl.gc.ca/content/sen/committee/411/SECD/49556-e.HTM>>.

worst case scenario and treat it as inevitable, they are likely to engage in extreme behaviour in order to stop a worst case scenario from occurring, rather than adopting more moderate procedures to respond to more probable but less threatening events.¹¹⁹

The integration of Canadian policing units with American counterparts implies a degree of similarity in the laws and policies that govern the actions of these groups. The laws of the United States could have an impact on the actions of the Canadian units, particularly those patrolling along the U.S. side of the border. The fact is, Canada and the United States do not share many important pieces of legislation. For example, this year the United States passed the National Defense Authorization Act (NDAA), commonly referred to as the “Indefinite Detention Bill”. This Bill codifies the power of the United States military and the President to detain indefinitely and without trial “covered persons,” who are defined as “a person who was a part or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners.”¹²⁰ In addition, the NDAA originally expanded the definition of the war on terror from any nations, organizations or persons who “planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001,” to anyone who substantially supports these groups or associated forces.¹²¹ Though a Federal judge ruled this section of the law unconstitutional, due to its vague language, the bulk of the law remains.¹²² Due to Canada’s relationship with the U.S., as its police units are embedded with its police and military units, this law is important for Canada as well.

¹¹⁹ Bigo, Didier (2010). Freedom and Speed in Enlarged Borderzones. Pp4.

¹²⁰ Glenn Greenwald, “Three myths about the detention bill,” Forbes Salon, December 16, 2011, http://www.salon.com/2011/12/16/three_myths_about_the_detention_bill/.

¹²¹ Ibid.

¹²² Charlie Savage, “Detention provision is blocked,” The New York Times, June 6, 2012, <http://www.nytimes.com/2012/06/07/us/terrorism-detention-provision-is-blocked.html>.

Suppose Canadian border police or RCMP officers were embedded with American policing units, including the Coast Guard. A ship containing smuggled migrants is intercepted in American waters. The ship is boarded by U.S. and Canadian officials, and the migrants are detained. Perhaps some of these migrants are Afghan citizens. Given the history of American officials imprisoning individuals without trial¹²³, and given Canada's history of handing over individuals to the Americans upon request¹²⁴, the new law could cause Canadian officials to become involved in actions that are illegal in Canada, such as the arrest, detention, and eventual indefinite detention without trial of migrants. This may appear an extreme example of the types of action the Canadian members of IBET will be a part of, but one must consider the possibility that Canadian officials will be faced with these experiences. American policy becomes Canadian policy when CBSA and RCMP officers conduct business across the border. What this means for Canada's domestic and internal laws on the treatment of migrants, the interdiction of ships and trucks, and procedures relating to asylum seekers has yet to be discussed by Canadian officials with the public.

These moves, to enhance transnational information sharing and cross-border policing, have a significant impact on Canadian migration processes and on the way in which Canadians perceive irregular migration. The assumption is that constant border policing is necessary because these countries are facing constant threats, both along land and at sea. The other assumption is that these threats will be delivered by individuals, likely smuggled migrants, via ship or truck, such that border policing must be strengthened by creating large teams of international agents to police the territory rather than allowing countries to perform these tasks

¹²³ "Guantanamo, Bagram and Illegal U.S. Detentions," *Our Work: Security and Human Rights: Guantanamo*, Amnesty International, <http://www.amnestyusa.org/our-work/issues/security-and-human-rights/guantanamo>.

¹²⁴ Benamar Benatta, "Bitter anniversary for rendition victim," *Toronto Star*, July 20, 2009, <http://www.thestar.com/opinion/article/668160--bitter-anniversary-for-rendition-victim>.

on their own soil. The few ships or trucks carrying smuggled migrants are consequently met by border policing units that function as armed military units. Instead of being processed as asylum-seekers by immigration officials, they are processed as illegal entrants, possibly terrorists, by police units. The primary goal of the refugee regime is no longer protection in Canada, it is security. Protection is secondary, if it is granted at all.

The Triumph of Security over Protection: Consequences and Conclusions

Canada's immigration policies have undergone a series of rapid changes since the September 11, 2001 terrorist attacks. These changes have included new legislation, legislative amendments, new federal departments, new policing units, new international agreements, new border procedures and new information gathering and sharing technologies. Much has been said about the necessity of these changes to the safety and security of Canadians. Little has been said about the real consequences of these changes on non-Canadians, and in particular on the migrants and asylum-seekers attempting to come to Canada who are most affected by these rules and procedures. There has also been little evidence that Canadians are safer because of these laws.

This paper argues that there are three major long-term consequences to the expansion of the security regime at the cost of the dismantling of the protection/humanitarian regime. First, the reconfiguration of the Canadian border and in particular the placement of officers at checkpoints abroad will lead to the "caging in" of genuine asylum-seekers and refugees. Due to the increasing number of countries attempting to stop individuals from entering the state by effectively stopping these individuals from leaving their home countries, more asylum-seekers will become trapped in conflict zones or repressive states that practice persecution and brutality.

Enshrined in the Universal Declaration of Human Rights is the right to freedom of movement and “the right to leave any country, including his own, and to return to his country.”¹²⁵ Countries like Canada are effectively denying this right by codifying into law and generating strict procedures that severely restrict the individual’s ability to leave his or her country. North Korea is routinely condemned for its laws restricting the exit of citizens from the country¹²⁶, yet by enacting strict punishments for individuals who flee their country and enter into Canada without the correct legal documents, Canada is effectively restricting the freedom of movement and exit.

Second, Canada’s policies and the policies of similar states will place an unsustainable burden on countries bordering conflict zones. States which border conflict zones, such as Jordan, Kenya and Iran are themselves often politically or economically unstable. The UNHCR states that “three quarters of the world’s refugees were residing in a country neighbouring their own.” For example, in 2010 1.7 million Afghans sought refuge in Pakistan and Iran.¹²⁷ By 2009, 75% of refugees were hosted in developing countries.¹²⁸ Yet Pakistan and Iran are politically troubled and economically unsound. In such circumstances, refugees and asylum-seekers may be the first targets of an unhappy and discouraged populace.¹²⁹ More restrictive measures in countries like Canada, which typically received large numbers of refugees, mean that refugees in these countries will be forced to remain in temporary camps for longer periods of time. Protracted refugee situations become more difficult to remedy over time, as children are born into camps, adults cannot work, and camps cannot offer adequate environmental protection. The risk for

¹²⁵ “The Universal Declaration of Human Rights,” United Nations, Article 13, <<http://www.un.org/en/documents/udhr/>>.

¹²⁶ “World Report 2012: North Korea, Events of 2011,” Human Rights Watch World Report 2012, <<http://www.hrw.org/world-report-2012/world-report-2012-north-korea>>.

¹²⁷ “UNHCR concerned about Afghan refugees as Pakistan crisis deepens,” *UNHCR Briefing Notes*, August 20, 2010, <<http://www.unhcr.org/4c6e55cc9.html>>.

¹²⁸ “The Impacts of Refugees on Neighbouring Countries: A Development Challenge,” *World Development Report Background Note*, World Bank, July 29, 2010, <http://wdr2011.worldbank.org/sites/default/files/pdfs/WDR%20Background%20Paper_Refugees_0.pdf>, pp. 18.

¹²⁹ *Ibid* 10, 13.

conflict increases between host countries and asylum-seekers, and in regions such as the Middle East or Africa, such conflicts can easily cross borders. Regional conflicts can emerge from local conflicts, producing larger humanitarian crises.¹³⁰ In a globalized world, conflicts abroad diminish the safety and security of citizens around the world, including Canadians.

Finally, the expansion of security at the expense of humanitarianism must be adequately addressed. There has been little serious discussion with the public about the steady dismantling of the protection regime. As well, there has been little discussion about the effects of local surveillance and border policies on Canadian citizens. Privacy erosion is a reality for all Canadians who cross the border. Currently, only non-citizens are mandatorily fingerprinted and biologically tracked, but electronic passports are becoming a reality for all citizens and it is believed that biometric passports will follow. Agreements with U.S. border entities mean that entries and exits between the two countries by citizens and non-citizens are tracked and shared between Canada and the United States.¹³¹ It is possible that Canadian citizens would embrace these procedures and the emphasis on security. Yet there has been no discussion of these policies in Parliament, and no serious case has been made by security officials or by the government for the continuation and expansion of security procedures. This does not just harm the protection regime, it also harms Canada's democratic procedures and the belief that issues that affect the lives of Canadians should be subject to debate. A continuation of silence could set a precedent for the future.

This paper has attempted to argue that Canada's emphasis on security over protection has resulted in the harmful and unfair targeting of asylum-seekers and refugees as threatening and

¹³⁰ Gil Loescher & James Milner, *Protracted Refugee Situations: Domestic and international security implications*, July 2005: Routledge, New York. Pp. 11.

¹³¹ "Data at Your Fingertips: Biometrics and the Challenges to Privacy," *OPC Guidance Documents*, Office of the Privacy Commissioner of Canada, November 2011, pp. 3, 4.

dangerous migrants. Using Didier Bigo's theory of securitization, the paper has attempted to demonstrate the ways in which security agents have triumphed over humanitarian interests by implementing new security processes and concepts in Canadian legislation and immigration and border practices. This exercise has involved the participation of numerous domestic and international groups, including border and policing units in North America and abroad, as well as humanitarian organizations such as the United Nations. Many of the most significant implications of these measures, including the consequences of enabling foreign military agents to engage in border patrols on Canadian territory, have not been discussed publicly or been subject to serious debate with the Canadian public. Similarly, policy stakeholders and politicians who champion these gradual, progressively stricter measures have not been forced to seriously defend them and their impact on migrants or on the refugee protection regime, to the public. These measures, which include mandatory punishments and ongoing biological tracking, exist to dissuade future migrants from entering Canada, enabling the country to reduce the number of people to whom it owes protection and humanitarian obligations. The government has not, however, carefully examined the ways in which stricter entry laws result in increased clandestine arrivals. The root causes of forced migration continue to exist and proliferate, and migrants are forced to take bigger risks in the search for a safe haven. Canada's new laws and procedures, therefore, will not achieve its goals of total migration control, but will lead to the expansion of an immigration detention regime. For Canadians and migrants alike, this will be the heavy social and economic cost of the triumph of security over humanitarianism, and a definitive break from the hopefulness of 1948.

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