CANADIAN COUNCIL FOR REFUGEES
CONSEIL CANADIEN POUR LES RÉFUGIÉS

INTERDICTING REFUGEES

May 1998

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ACKNOWLEDGEMENTS

This document relies heavily on the contributions of Stéphanie Cartier, Catherine Balfour, Catherine Marx and Mirella Bontempo, who showed great enthusiasm and patience in their efforts to collect the elements of this report.

Special thanks are also due to François Crépeau and Alex Neve, for preparing their papers included in this document, and to David Matas, who has written extensively on interdiction and its alternatives, and persistently drawn our attention to this issue.

Janet Dench was responsible for assembling the various parts of the report and rooting out extra pieces of information and examples. Without her efforts, this document would never have been produced.

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1. INTRODUCTION

< Record numbers of illegal immigrants smuggling themselves into Britain has led the government to take tougher action. This year immigration officers have discovered 650 people trying to enter the country illegally through Dover alone, doubling last year's figures. Due to the scale of the problem, the government has called in the services of the intelligence service MI6 to help catch the organisers. The government believes most illegal immigrants are "economic migrants" who, because of their numbers, are hampering the cases of genuine asylum seekers. *BBC News*, April 30, 1998.

< Canadian immigration officials are now daily boarding international flights arriving in Vancouver in an effort to catch people entering the country on false documents. The procedure has already resulted in fines to the airlines bringing them here. *Vancouver Sun*, February 18, 1997.

< Federal immigration officials, working secretly with Canadian and foreign intelligence operatives, thwarted an attempt to smuggle 96 Indian nationals into Canada from West Africa this past summer. *Globe and Mail*, September 28, 1996.

< Gypsies escaping persecution in the Czech Republic will now find it almost impossible to seek asylum in Canada because of a new visa requirement that went into effect today. *Canadian Press*, October 8, 1997

In the modern world, governments are entitled to decide who enters their territory. They establish rules to determine which non-nationals should be allowed into the country, as visitors, as students, as temporary workers or as immigrants. And they act to make sure that the rules are respected, checking people's documents on arrival, working to prevent those who are not welcome from getting into the country, and identifying and removing those inside the country who have no right to be there.

Those trying to get around the rules have a wide variety of motives. Some undoubtedly are criminals - seeking to avoid prosecution for crimes committed in other countries, or pursuing international criminal ventures. Some do it out a desire for adventure. Many are trying to escape from wretched conditions of life at home.

Among those trying to gain entry into countries of "asylum" are refugees fleeing persecution in their home country. Targets of human rights abuses, refugees are people who have decided that they have to get out. In attempting to flee, they generally face two big challenges: first, how to get out of their country and, second, how to get into another country. Viewed as enemies by their persecuting government, they often cannot leave the country legally. They may have to assume a false identity, or slip across the border at an unguarded point or take their chances in a boat. If they succeed in leaving their own country, however, they still face the challenge of entering a country willing to offer them refuge.

Everyone has the right to seek and to enjoy in other countries asylum from persecution. Article 14.1, Universal Declaration of Human Rights.

The right of governments to control entry into their country comes into conflict with the right of every individual to seek and enjoy asylum from persecution. In this area, states must relinquish their right to control their borders in order to respect the principle of *non-refoulement*, meaning that they must not send refugees back to a country where they may be persecuted or tortured[1].

When a refugee arrives at its borders, a state is obliged not to refoule him or her. But what about refugees who are in transit? If states take actions to prevent refugees from reaching their borders, the issue of *refoulement* never arises.

The measures implemented by the governments of refugee-receiving countries to prevent refugees from reaching their borders are known as measures of interdiction. By interdicting the refugees, these countries avoid processing their refugee claims and their possible entry into the refugee determination process.

Interdiction measures include, among others, the following measures which can be combined in various ways:

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[1] The fundamental principle of *non-refoulement* is articulated in Article 33 of the 1951 *Geneva Convention relating to the Status of Refugees*: "1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".

The 1984 UN *Convention against Torture* also contains a *non-refoulement* provision:

Article 3.1 No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

- the imposition of a visa requirement for citizens of a refugee-producing country;

- blocking of “suspicious” foreigners in aeroports or points of departure for the country, by the police of the country of departure, by immigration officials of the interdicting country, or by the staff of the transportation company;

- training by the interdicting country of police officers or immigration officials in the countries of departure on how to detect false documents and how to identify “suspicious” foreigners;

- training by the interdicting country of the staff of companies transporting people to their territory on how to detect false documents and how to identify "suspicious" foreigners;

- the application of sanctions against transportation companies for allowing foreigners to arrive in the country without adequate documentation for entry;

- measures to block and send back “suspicious” foreigners from the airports of the interdicting country;

- “deterrence” measures against foreigners on their arrival, no matter what their status: harassment, detention, etc.;

- return of refugee claimants to countries of transit by virtue of concepts of “safe third country” or “country of first asylum”;

- negotiations with countries of transit so that the latter take all possible measures to prevent foreigners from transiting through their territory en route to the interdicting country;

- government support for measures to block flows of refugees in “international security zones” created in the territory of the country being fled.

In recent years, the Canadian government has been increasing its efforts to prevent refugees from reaching Canada to seek protection here. As a result of these interdiction efforts, people are prevented from boarding planes to Canada. They may be jailed in the country in which they are interdicted or sent back to the country they fled. We also see the impact of interdiction in the harassment of visible minority Canadian citizens or permanent residents returning to Canada from a visit abroad: they are subjected to intensive and discriminatory questioning simply because of their ethnic origin.

The stories of refugees interdicted are mostly untold: far away from Canada and in extreme situations of vulnerability as they try to avoid *refoulement*, they have no opportunity to sound the alarm bell. It is thus easy for government spokerspersons - and media - to characterize these voiceless, faceless human beings as “illegal migrants”, passing over in silence the reasons for their flight and the consequences for them of being interdicted. No study has ever been

conducted to discover who the people interdicted are, why they were travelling in this manner and what happened to them as a consequence of being interdicted.

This document explores what lies behind the newspaper stories quoted at the beginning of this introduction. It reviews the principal methods of interdiction and their impact on refugees, situating the Canadian experience in the global context. Our goal is to make the facts better known and to encourage informed discussion about how Canada could adapt its interdiction practices so that refugees' rights are not trampled upon.

Some will say that interdiction tactics are not aimed at refugees, and that insofar as they suffer the consequences it is as accidental victims of policies to combat a very serious problem of "illegal migration". We do not agree. On the contrary, as the evidence in this document suggests, many interdiction measures deliberately target refugees, in violation of their fundamental human right "to seek and to enjoy in other countries asylum from persecution". It is from this standpoint that the document is presented.

There are certainly legitimate concerns about the motives and identity of some people seeking to enter Canada. But any system to control the border must have safeguards to ensure that refugees are not the victims.

2. INTERNATIONAL COOPERATION ON INTERDICTION OF ASYLUM-SEEKERS: A GLOBAL PERSPECTIVE[2]

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Asylum is an aspect of globalization, although it is seldom presented and analyzed as such. Migrations are being globalized as much as trade exchanges, to which they have always been related: it is not yet officially recognized by policy-makers, but they are in fact already acting upon that assumption. Because of this reality, a global perspective on asylum issues is essential in order to understand how policies were born, have been transmitted and have evolved, and to be able to anticipate new developments.

The growth in number of asylum claims in Western countries at the beginning of the '80s led to a perceived necessity to discuss the issue, to share experiences, to experiment with solutions. The United Nations High Commissioner for Refugees (UNHCR) initiated "informal consultations" which rapidly became Intergovernmental Consultations (IGC), entirely led by Western States under the direction of Jonas Widgren (now of the Vienna Group). Dating back as early as 1983, it constituted the earliest forum for cooperation on irregular migration control. The operations developed by the IGC produced results, although these have never been quantified. Examples of these operations include an operation in Turkey to block Iranian refugees en route for the West, another operation in Romania to prevent Romanians from leaving home, and the development of country profiles (such as the one on Ghana discussed at Niagara-on-the-Lake in 1992) to give all Western States a common understanding of the political situation within source countries.

The most powerful push for international migration control cooperation came with European integration. Without going into a detailed description of this integration, the principle and objective is the free movement of persons within Europe, since the Single Europe Act of 1985. The disappearance of internal borders induces new forms of police cooperation for the control of criminal activities. The abolition of internal borders has a major symbolic importance

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[2] The author takes responsibility for all opinions found in this paper. He thanks CHRC and the Fonds FCAR for their financial support, and Ms. Leanne Holland for her valued assistance. The paper was originally prepared for the Canadian Council for Refugees Interdiction Workshop, held in Toronto, 1 February 1996.

The Intergovernmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia (IGC), also known as the "Informal Consultations" describes itself as "an informal, non-decision making forum for information exchange and policy concertation". Participating countries: Australia, Belgium, Canada, Denmark, Finland, Germany, Italy, the Netherlands, Norway, Spain, Sweden, Switzerland, the United Kingdom and the United States of America.

In 1991 a secretariat was established, financed by participating states, with an operating budget of "under one million US dollars". The secretariat "enjoys diplomatic status with technical backup from UNHCR and IOM by way of a special administrative arrangement".

Human trafficking is a priority area for IGC, with a regular working group assigned to the subject.

The secretariat runs a web site: http:/www.igc.ch/

as it is a direct blow at one of the defining elements of a State since the Renaissance: policing the territory and maintaining public order is one of the few absolutely essential functions of any political power. As evidence of this, one can think of the fact that, on December 19, 1995, the French government announced another delay of several months in opening its borders under the Schengen Accord: France continued to insist that it must maintain strict border controls because of terrorist attacks. Further, police cooperation between European countries have proved to be very difficult: differences between legal and constitutional systems, differences in the police administrative structures, as well as language barriers. This cooperation covers the wide spectrum of international criminality: money laundering, smuggling, drug trafficking, arms trafficking, mafia-type criminality, terrorism, and irregular migrations. To be sure, this cooperation, as defined, produces an illegitimacy transfer to the detriment of migrants, as migration is henceforth associated to all the criminal activities mentioned.

This illegitimacy transfer has operated effectively. Public opinion has been turned within less than fifteen years, from the real openness shown towards Indochinese boat-people in 1979 to the definite reluctance to allow in refugees from Bosnia in 1993-1994. Altering public opinion was probably the major challenge facing immigration control administrations during the '80s and, coupled with an economic situation which weakened social consensus and polarized the fears of many, these administrations succeeded in denigrating the image of the asylum-seeker, associating it to that of the defrauder.

In simple accounting terms, the overall objective is to reduce the number of asylum claims to be treated by any refugee determination system. Two sub-objectives can be distinguished:

1. *A law enforcement objective.* Immigration departments throughout the Western world believe that no more than 10% of all asylum-seekers are bona fide refugees. Most are considered illegal economic migrants attempting to bypass the procedures. This is the message that has been conveyed to and lately accepted by Western public opinion. In an international law conference in Ottawa, Brian Grant, of the Enforcement Branch at the Canadian Immigration Department, bluntly stated that his department was an "impotent gate-keeper". This tough stand on immigration and refugee issues is politically rewarding, easily fueled by any media coverage of a new immigration horror story.

2. *A cost-reduction objective.* The mechanisms necessary to determine refugee status are extremely costly (not to speak of the cost of migrants to social security mechanisms), particularly so in a State which is bound by constitutional rules regarding the protection of basic human rights and fundamental justice: the Canadian Immigration and Refugee Board (IRB) and the French Commission des recours des réfugiés are the biggest administrative tribunals of their respective countries with regard to the number of cases decided each year. As we are constitutionally bound to maintain such mechanisms (in Canada, by virtue of the Canadian Charter of Rights and Freedoms; in Europe, by virtue of the European Convention on Human Rights), the only way to reduce costs is to "welcome" a considerably reduced number of asylum-seekers into the system. In order to reduce the number of refugee claims to be treated, one can try to "maximize the output" or one can try to "minimize the input".

Maximizing the output means sending back as soon as possible as many asylum-seekers as possible that have entered the territory and made an asylum claim. Several mechanisms may be used and they are now added to one another in order to achieve a cumulative effect.[3]

- *Maximization of removals.* The percentage of illegal aliens actually removed from the territory remains generally low. In any given Western country, removals are within the 20%-50% bracket: more than half of illegal and removeable aliens remain on the territory, either because they are making use of all legal recourses available, or because practically they cannot be legally removed (for example, no country is willing to accept them), or because they have eluded all controls and altogether vanished underground.

The French Interior Minister, Jean-Pierre Chevènement estimated that eventually 75,000 foreigners would be deported. He argued that controlling illegal immigration could facilitate legal immigration. (98/05)

As fighting flared up in Kosovo, the German federal representative for the Balkans urged the interior ministers of the 16 federal Länder to continue to deport rejected asylum-seekers to Kosovo. Stopping deportation might be interpreted as an offer of Temporary Protected Status. (98/04)

[3] Professor Crépeau's points are illustrated and re-inforced in the right-hand column with examples taken from recent issues of *Migration News.*

- *Accelerated procedures.* Almost all countries have introduced into their refugee status determination mechanisms accelerated procedures designed to treat certain categories of asylum claims more quickly than others. Essentially, they aim to eliminate "manifestly unfounded claims", that is claims deemed not to be worthy of a thorough examination. Sometimes, on a more positive note, the procedures will be accelerated in favour of persons who will be deemed to be refugees (by virtue, for example, of their country of origin, deemed to be a refugee-producing country).

In May 1998, the British government is expected to change its asylum system to speed up removal of refused asylum-seekers: they are to be removed within seven days. (98/05)

On January 6, Hong Kong's status as a port for asylum-seekers was ended by the Executive Council. Illegal immigrants will not be permitted to apply for asylum: they will be immediately deported. (98/02)
[an extreme example of "speeding" up the asylum process!]

- *Manifestly unfounded claims.* Either the claim itself is considered to be prima facie unworthy or frivolous since it does not correspond to any of the criteria set out in the 1951 Geneva Convention, or the claim is made by a national of a "safe country of origin", or by a person who can be sent back to a "safe third country".

Since April 1, 1997, US INS has been using the "expedited removal" procedure for asylum-seekers who cannot demonstrate a "credible fear". About 1,000 foreigners a week are refused under this procedure. (98/02)

- *Safe third country*. The asylum claim will not be heard on the merits where it appears that the claimant could have asked for protection while in a country of transit. This mechanism is based on the idea very vocally defended presently by all Western countries, that asylum-seekers do not have the choice of their country of refuge and that they must ask for protection in the first country which they enter that is considered "safe" in the limited sense of protection from persecution. Family links or personal preferences of refugees are conveniently said to be immigration criteria that will come into play when the refugee, protected in the "safe third country", begins immigration procedures towards the country of her choice. Coupled with *refoulement* agreements, it will allow the West to return

In December 1997, a UK court ruled that a Kurdish asylum-seeker could not remain in the UK while her application for asylum was considered, because the Home Secretary had determined that she should be removed to France. The woman had arrived at Waterloo Station in London in August 1996, having travelled through France on her way to the U.K. (98/01)

German Interior Minister Kanther called again for an EU fingerprinting system, EuroDat, to include prints from all asylum-seekers and apprehended illegal aliens. He pointed out that EuroDat would allow Germany to return to Italy Kurds who came to Germany via Italy. (98/05)

most asylum-seekers into the hands of its satellite countries such as Turkey, Morocco, Mexico and Poland. Canada's *Immigration Act* has contained a "safe third country" provision since 1989, although it has still to be put into force (no list of "safe third countries" has yet been adopted).

- *Safe countries of origin.* Following the same principle, an asylum claim will not be heard on the merits if the claimant comes from a country deemed not to produce refugees. In such cases, the claimant's burden of proof is higher and she will not be given the benefit of the doubt, as advocated by the UNHCR: on the contrary, the claimant is presumed to be an irregular economic migrant. Canada has a provision for recognizing certain countries as safe (again no list of "safe" countries has ever been adopted).

The British government is proposing sending asylum-seekers back home while their application is considered if they come from a "safe" country of origin. (96/01)

- *Suppression of appeal procedures.* Asylum-seekers are known to use (often repeatedly) every available procedure in order to delay their removal. If their life or liberty is at stake, this procedural compulsiveness can be understood. The assumption made by most Western States that 90% of asylum-seekers are not worthy of protection leads them to trim appeal possibilities in order to streamline and accelerate the overall process and thus reduce costs. Canada has a "good" record on this point. The IRB decision cannot be challenged by way of an appeal: it can only be subject to an administrative review in Federal Court, on points of law (the findings of fact of the IRB will not be challenged unless there is a very unreasonable gap between the evidence and the findings) and with the permission of the Court (seldom granted, as one can imagine, given that the IRB is the biggest Canadian administrative tribunal in terms of volume).

The Australian government has tabled a bill, expected to be voted on in early 1998, that would limit access to the Federal Court for asylum-seekers appealing deportation orders. (97/12)

Beginning April 1, 1997 INS may summarily exclude applicants for asylum if they cannot show a "credible fear of persecution". Applicants may appeal their exclusion to a trained INS staffperson, but not as previously to a court of law. (97/02)

- *Reduction of lawyers' assistance.* Another way developed to avoid delays due to an "exaggerated" use of procedures is to limit access to legal aid programs. Asylum-seekers will have difficulties in making use of the intricacies of the legal system if they cannot hire a lawyer. The poorer and more illiterate the refugees, the more difficulties they will have. The Québec government, for example, has cut by half the fees awarded to lawyers in immigration procedures.

The British government is considering denying legal aid to asylum-seekers who challenge deportation orders. (97/09)

- *Reduction of welfare benefits.* Welfare benefits are considered a major attraction for irregular migrants and so governments have tried to reduce their availability in order to diminish their inducement capacities and reduce costs. Allowances are generally reduced to a bare minimum and often replaced by in-kind contributions (deemed less attractive), such as refugee residences or camps, food and clothes provided.

In February 1998, Germany's upper house (the Bundesrat) debated a proposal to reduce benefits to asylum-seekers who come to Germany to receive social benefits and destroy their passports. They would be allowed only to receive accommodation in group quarters. (98/03)

Since August 1996, foreigners who do not apply for asylum upon entry into the UK are not eligible for housing assistance or social security benefits. (97/12)

- *Reduction of access to the labour market.* Asylum-seekers will or will not have access to the labour market of the host country. If deterrence reasons prevail, they will not. If public finance interests prevail, they will. Both can be witnessed successively in the same country in a relatively short span of time. The immense consequences, on the social and personal levels, of remaining idle for months, in an already destructured and shattered context must however be considered.

French police arrested 33 unauthorized Asian workers employed in three garment factories in a north Paris suburb. The workers, who worked long hours, were paid FF1000 per month. Most were paying off the $4,000 fee to be smuggled to France. (97/11)

- *Readmission or refoulement agreements.* Readmission agreements have been concluded bilaterally between most of Western European countries. They are intended to facilitate the return to country

Austria attempted to return 3,000 foreigners to Hungary in 1997. Hungary accepted 2,000 on the basis of readmission agreements. (98/05)

A of a national of a third country who has illegally entered the territory of country B through its border with country A: within certain parameters, country A is obliged to readmit the person to its territory. Unfortunately, these agreements do not distinguish between refugees and other aliens, and combined with the above-mentioned measures (especially, the manifestly unfounded claims definition) they can be of much use in rapidly sending back asylum-seekers. Central and Eastern European countries have now signed numerous such agreements between themselves as well as with Western European countries. A 1992 readmission agreement between Schengen countries and Poland is particularly notorious for it was preceded by fierce negotiation between Germany and Poland over financial compensations due to Poland if it accepted the readmission of the estimated 100,000 persons per year who illegally crossed the Polish-German border.

Greece complained that Turkey has not signed an agreement on readmitting immigrants caught in Greece after passing through Turkey. (98/03)

- *Asylum-sharing agreements*. This mechanism is designed to designate the country which is responsible for processing an asylum claim: it is useful to avoid "refugees in orbit", but there is a major risk of violation of international obligations. This type of situation can be avoided by asylum-sharing agreements. However, these agreements can also be a convenient means of returning asylum-seekers to another country without really considering whether the individual will effectively be protected by the authorities of the State to which she is returned. Too often, such agreements are signed between countries which have very different refugee determination mechanisms, refugee definition interpretations and social protection systems. Country A violates its

In March 1995, a "train of despair" carried 100 Kurds through Latvia, Lithuania, and Russia for several weeks as each country rejected the Kurdish asylum-seekers from Afghanistan, Iraq, and Iran - half of whom were children - as countries argued that they were the responsibility of the other. In early April, the refugees were moved to a prison building in a small town near Riga, Latvia. They have remained there for the past nine months, awaiting Russia's agreement to accept their return (96/1).

In March 1998, 56 Kosovans arrived in Italy on an Alitalia flight from Amman, Jordan, with tickets through to London. Italian police ordered them on to London, but when they arrived UK authorities prevented

international obligations under the 1951 Geneva Convention if it sends an asylum-seeker to country B, knowing full well that that person risks inadequate protection there. Asylum-sharing agreements should therefore only be signed by countries which have previously harmonized their refugee protection systems in accordance with international standards.

them from leaving the plane and applying for asylum and ordered them returned to Italy. Under the Dublin Convention, to which Italy and the UK are parties, asylum-seekers must be dealt with in the first "safe" European Union country to which they come. (98/05)

- *Temporary protection status.* The December 1995 Bosnia peace plan turned the spotlight on the Bosnians living in Germany as "tolerated" (geduldet) foreigners allowed to stay in Germany at least until March 1996. Germany granted these Bosnians only a temporary protection status and expressly disallowed their application for refugee status: the idea behind the scheme was to avoid being bound by international obligations, so as to be able to treat them as one pleases. This precarious status was awarded in order to facilitate their return to Bosnia as soon as materially possible, and to avoid the somewhat permanent nature generally associated with Convention refugee status. The result is unequal levels of protection: several years after their leaving Bosnia, on expiry of their temporary protected status (decided by the host country authorities at will), it will be difficult for the individuals to provide evidence of their well-founded fear of persecution were they to be returned, and to show that they should be awarded refugee status. Most should therefore effectively be returned soon (forcibly if necessary), and this was the ultimate objective.

Of 340,000 Bosnians who arrived in Germany in the early 1990s, 220,000 remain. Under the "tolerated" (TPS) status, they are prohibited from working. State and local governments must cover the $1.7 billion annual cost of housing and feeding the Bosnians. Most states and cities are offering money to Bosnians to leave and also offer money to communities in Bosnia to encourage them to support the return of Bosnians from Germany. (98/05)

In 1992 and 1993 about 3,400 Somalis applied in Switzerland and the same number in Sweden. Virtually all Somali applications were refused, but in both countries 80% of Somalis were allowed to remain. In Sweden, they received unlimited residence permits and in Switzerland, one-year residence permits. (98/04)

Minimizing the input: Yet another way of reducing the number of asylum claims to be treated by a given host country, and one which is much more efficient, is to prevent asylum-seekers from even reaching its borders. The efficiency lies in the fact that the asylum-seeker can never invoke (with the help of a lawyer or an NGO) the constitutional guarantees or international obligations

that constrain the action of the authorities (police or immigration) when the asylum-seekers have reached the territory.

- *Visa requirements.* All Western States have included refugee-producing countries on their list of countries whose nationals need a visa to enter their territory. The European Union has produced a common list of over 100 countries for which visas are required, including all refugee-producing countries. Further, a list of 10 countries (all of them refugee-producing) has recently been adopted obliging possession of a visa for transit purposes.

Austria is pressing Hungary and the Czech Republic to require visas for Romanians. Austrian Interior Minister claimed that 54% of illegal immigrants enter Austria through Hungary, 14% though the Czech Republic. (98/05)

On April 8, 1998 the UK imposed further visa requirements on nationals of the former Yugoslavia: they are now required to have visas even if they are only passing through UK airports en route to another country. (98/05)

- *Reinforced border controls.* All Western States have upgraded their border control procedures, with some results.

The U.S. INS will have 8,000 Border Patrol agents by the end of 1998, double the number in 1993. Rep. Duncan Hunter called for 20,000 Border Patrol agents and a triple fence along the entire Mexico-U.S. border. The INS is constructing an "electronic wall" to augment the steel fences along the border. Cameras and heat sensors are mounted on 60-foot high platforms and underground sensors are in place. (98/04)

In March 1998 Italian Interior Minister vowed that "Italy will work tenaciously to reinforce external border controls, both on land and at sea, to fight against illegal immigration and all forms of criminal infiltration". (98/05)

- *Carrier sanctions and training of carrier and airport personnel.* According to the evaluation of Western States' authorities, control of airport entries is very efficient in terms of limiting the number of undesired entries. One major mechanism used is to make airline companies liable for each irregular entry upon the territory by

KLM Royal Dutch Airlines was charged with bringing 4,500 improperly documented passengers into Schiphol Airport. KLM, which is liable for fines of 5000 guilders a person, says that it must often rely on independent security personnel to check documents. (98/05)

passengers they have transported. In order to avoid the fines that are consequent to their being found liable, carriers will filter the passengers before boarding in order to make sure that they have all necessary documents to legally enter the territory of the country of destination: passengers with documents that appear not to be adequate will not be allowed to board, and no consideration is taken of any potential need of protection. Police and immigration authorities have offered training programs in order to enable carrier personnel to detect false documents. This mechanism effectively turns flight attendants into borderguards, a function for which they are not trained. Reports are constantly made as to the discriminatory attitude towards some passengers on the part of flight attendants in performing these functions. This mechanism constitutes a form of privatization of essential State functions, that engage the State's responsibility and should therefore only be performed by State employees.

The UK fines most airlines and ferries $3,200 per improperly documented passenger brought into the UK. However the Eurostar train (Paris to London) is exempt from these fines. (98/01)

In April 1998 the UK said that the Carriers Liability Act would be extended to trains. (98/05)

- *Short-stop operations.* Western States' authorities sometimes send teams of employees to airports abroad in order to filter all passengers boarding there headed for the Western States in question, and disallow those with inadequate documents from boarding, as well as training airport or carrier personnel while abroad.

The UK has airline liaison officers in Dhaka, Delhi, Colombo, Nairobi and Accra (97/12)

- *Police cooperation.* As an example of such cooperation, police officers accompanying returnees to a Southern country (generally the country where the alien has boarded a plane heading for the Western territory) may stay abroad to train and help police officers of that country or that airport in the

On February 16, 1998 the interior ministers of Morocco and Italy signed a convention to cooperate in the fight against drug smuggling and illegal immigration. (98/03)

detection of inadequately documented passengers.

In February 1997, Bonn and Algiers concluded an agreement under which Algerian police can escort compatriots being expelled home from Germany. (97/07)

- *Readmission agreements.* We have seen the immediate objective of readmission agreements: allowing country A to quickly send back to country B an alien who has irregularly entered the territory of country A through its border with the territory of country B. The ultimate and much more efficient objective of such agreements is to make sure that, fearing that it will be overflowed with returnees, country B will adopt the same immigration and police standards and mechanisms at its border with country C, thus preventing aliens from ever entering its territory and indirectly protecting country A. This in turn will force country C to do the same at its own border with country D, etc. The Schengen-Poland readmission agreement is the best example such scheme: in terms of effective returns from Germany to Poland, the agreement is a complete failure, but all Central European States have signed readmission agreements with their neighbours. In effect, Western States have created a buffer zone, where their "protection" is being implemented upon foreign territory by foreign authorities.

On December 27, 1997 the Italian coast guard brough ashore some 825 Kurds. Most Kurds do not stay in Italy but head north, many to Germany. Germany criticized Italy for not detaining the Kurds and for appearing to welcome them. Italy announced that it would tighten its border control. Italy also asked Turkey to take action against the gangs it says are involved in smuggling immigrants to Italy. (98/01, 98/02, 98/05)

- *Economic cooperation agreements.* In 1992, a few months before the signing of an important economic agreement between the European Union and Morocco, the latter "cleaned up" its coast in front of Gibraltar, where many Africans attempt entry into Spain's territory illegally: it closed the hotels where they lived, it arrested many, detained them, then sent them back to Mauritania, and confiscated the pateras (boats which helped cross the channel), etc. Again, the

Italy and Albania announced that they had concluded an agreement on a seasonal worker plan that would allow an annual quota of Albanians into Italy as seasonal workers. In return, the Albanian Interior Minister said that Albania would crack down on boats filled with migrants headed for Italy. (97/12)

Morocco has undertaken to prevent Africans departing illegally for Spain and, in

goal of Western States is that other countries do their "dirty work" of arresting, detaining and returning aliens: it is much more efficient to have these functions performed in countries where States' authorities can act without being hampered by constitutional provisions protecting rights and liberties, by the action of NGOs or lawyers, by media coverage, or by the intervention of the courts. The Barcelona conference on the Euro-Mediterranean partnership in the fall of 1995 highlighted this type of cooperation. After two days of negotiations, the 15 Members of the European Union, 11 Mediterranean nations (Algeria, Morocco, Tunisia, Egypt, Israel, Jordan, Lebanon, Syria, Turkey, Cyprus and Malta) and the Palestinian Authority launched a process of political, social and economic cooperation with ambitious development and trade objectives. In the social field, the participants recognized that current population trends in the Med 12 must be counterbalanced by "appropriate policies to accelerate economic take-off", agreed to strengthen their cooperation to reduce migratory pressures and illegal immigration and acknowledged the principle that source countries had "a responsibility for readmission" of illegal immigrants to Europe.

return, got a promise from the European Union of assistance in destroying its cannabis crop. Morocco plans to return the non-Moroccan Africans to their countries of origin. (97/10)

In exchange for $140 million in German aid, Vietnam agreed to accept more than 2,000 Vietnamese living in Germany, as a first step towards its commitment to take up to 40,000 of its citizens living in Germany without residence permits. Most of the Vietnamese who are to be returned had applied for asylum. (96/07)

- *War and armed intervention.* Western States have not hesitated to use armed intervention to prevent irregular migration flows. One only has to think of the operation against Iraqi Kurds fleeing towards Turkey at the end of the Gulf war, where, for the first time in its history, the Security Council of the United Nations determined such migration to be in itself a threat to international peace and security. One can also think of the interdiction, on the high

On January 30, 1998 EU interior ministers announced plans to create a safe haven for Kurds somewhere in the Middle East, similar to the safe haven established in northern Iraq after the Gulf War in 1991. (98/03)

On February 11, 1998, Turkish newspapers creported that Turkish troops had occupied a nine-mile buffer strip inside northern Iraq to prevent Kurds from entering Turkey in

seas, by U.S. coastguards' ships of Haitian boats fleeing the Cedras regime to which their passengers were often returned: even though technically this is piracy, the U.S. Government was criticized only by UNHCR. The U.S. Supreme Court was complacent enough to declare, against all odds, that the *non-refoulement* principle - the cornerstone of international refugee law and proclaimed by the 1951 Geneva Convention - did not apply on the high seas.

the event of a military action against Iraq. (98/03)

Six weeks after Italy's peacekeeping troops began arriving in Albania, critics are questioning whether it will succeed in its objectives: to restore order and normality, prevent mass immigration and ensure a climate of order and legality for elections. (97/06)

What is striking is the intense cooperation that now takes place in this area. Within Europe, as within the entire Western world, numerous fora at all political and administrative levels work on these issues, and constantly produce new agreements, regulations, interpretations, implementation mechanisms, procedural techniques, etc. Europe has a particularly impressive record on these issues: Schengen, Trevi, Europol, OSCE, etc. Without going into detail in this paper, it is sufficient to say that the Third Pillar (Justice and Home Affairs) of the European Union has mostly focused its action on asylum and illegal immigration control, these being considered as only one element of a wider security package which also includes drug trafficking, arms trafficking, smuggling, money laundering, terrorism, international criminality, etc.

In conclusion, one can discern that, in immigration and refugee issues, Western States base their action on a twofold operating consensus.

1. Immigrants must be selected according to criteria related to the economic benefits for the country of immigration (there are hints that Germany could adopt an immigration policy akin to the North American ones). Hence, those not selected by the country of immigration, "self-selected migrants", must be rejected and expelled as soon as possible or better yet prevented from reaching the territory altogether.

2. Most refugees can find protection in the region of origin pending repatriation and should therefore, in most cases, stay in that region. Few are the cases where resettlement abroad is required for protection purposes and Western States always respond favorably to such requests when made by UNHCR. Hence, it is generally not necessary nor advisable to protect them abroad: Western States have adopted the principle of the "regionalization" of the refugee problem and consider that they should not be called upon to host persons who originate from a distant country, as they should be send back home as soon as possible. Moreover, according to the same "regionalization principle", Western States have also adopted the principle that a refugee should claim the protection of the first available safe country on which she sets foot (usually a neighbouring country) and has no right to pick and choose her country of refuge. Any subsequent cross-border

movement is no longer asylum-seeking but falls within the realm of immigration. Consequently, a refugee may be sent back to any of the countries of transit where she had an opportunity to obtain protection.

The net result is that Western States believe that they should not be held responsible for most asylum-seekers and are now openly taking all steps available to implement this new protectionist attitude.

These measures have some effect, as the number of asylum claims initially drops sharply. But this effect is generally not long-lasting as migrants rapidly find new ways and means to get in. For example, despite geographical isolation and tough immigration and police controls, the number of asylum applications in the UK in 1997 was 32,502, almost exactly the same number as five years earlier (IGC statistics).

As long as huge disparities in democracy and prosperity remain between North and South, migration pressures towards the North will be intense. Treating migration flows as a security risk, without effectively distinguishing between refugees and other migrants (although the distinction is ever harder to make), leads to a blind escalation in repressive measures that ultimately threaten the rights and freedoms of all, citizens and aliens alike.

The UN High Commissioner on Refugees had this to say to governments of the West:

The high number of new arrivals in combination with a reported increase of irregular migration, has resulted in strong political pressure in the countries which you represent to control migration, be it of migrants or asylum seekers. Often it is difficult to distinguish between them. On the one hand, migrants claim to be refugees in order to be admitted, on the other, immigration control measures are often indiscriminately applied to asylum seekers. Illegal immigration is enhanced by trafficking of aliens, whereas a trafficker might be the only resort for a refugee to reach safety and protection. While the number of asylum seekers declines, there is evidence that trafficking of aliens and illegal immigration is on the increase. The Inter-governmental Consultations and IOM [International Organization for Migration]have, rightly, drawn attention to these aspects of the migratory issue.

But there is a fundamental difference between refugees and migrants, as we all know. The need for protection distinguishes a refugee from a migrant and this distinction is essential for an organization like UNHCR, mandated to provide international protection. Given the relationship between the different forms of displacement, a comprehensive approach should address the problems of refugees and migrants, in order to find the appropriate response to each of them. In this context, I welcome the close cooperation between my Office and IOM.

In the search for an appropriate policy response, it is imperative to safeguard the rights of refugees and asylum seekers. Allow me to raise in this connection some questions:

- *how do you in practice distinguish between the irregular migrant and the person in need of protection?*

- *how do you ascertain that the necessary immigration control measures will not render impossible admission to safety of those in need of protection?*

- *how will re-admission agreements take into account the special position of asylum seekers?*

- *how do you guarantee that your immigration and asylum policies do not get confused? How do you avoid the public perception that equates refugees with illegal aliens, and weakens the awareness of the plight of those in need of protection?*

From the Statement by Mrs. Sadako Ogata, United Nations High Commissioner of Refugees on the occasion of the Inter-Governmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia
The Hague, 17-18 November 1994

On 28 December 1997 and 1 January 1998, two boats arrived in Italy with a total of less than 2,000 migrants, mostly Kurds from Turkey and northern Iraq. The Italian President, in his New Year address, said that Italy's doors must be opened to the Kurds "because they are living with persecution". Other European countries, and particularly the Germans, criticized Italy for not controlling its borders more effectively.

On 26 January 1998 the Council of the European Union adopted an Action Plan entitled *Influx of Migrants from Iraq and the Neighbouring Region.* The core of the action plan deals with *Preventing Abuse of Asylum Procedures, Tackling the Involvement of Organised Crime,* and *Combatting Illegal Immigration.* Under the latter heading the European Union committed states to a whole series of actions, including the following:

23. Member States to exchange information within the Council about the visa issuing process at Embassies and Consulates in the region and identify whether procedures require amendment.

27. Member States, bilaterally or within the Council, to promote joint missions to specific departure points to train carriers in the detection of false documents ...

28. Member States to provide mutual assistance in the training of border control staff and airline personnel, eg by bilateral exchange programmes.

31. Member States to operate consistent and effective border controls...

32. Member States to exchange officials by mutual agreement, both between themselves and with the third countries concerned, in order to observe the effectiveness of measures to prevent illegal immigration.

33. Member States to send experts to the third countries concerned, by mutual agreement, to advise on the operation of controls at land and sea frontiers.

35. Routine and effective implementation by Member States at national level of security measures and carrier's liability legislation against carriers bringing undocumented passengers and passengers with forged documents to the EU. The introduction and implementation of sanctions against carriers.

38. Members States within the Council, taking into account the circumstances in each case, to examine the scope for readmission agreements with the third countries most concerned, including countries of transit.

3. CANADIAN MEASURES OF INTERDICTION

> *International Service is also a world leader in developing interdiction strategies against illegal migration. Interdiction consists of activities to prevent the illegal movement of people to Canada, including application of visa requirements, airline training and liaison, systems development, intelligence-sharing with other agencies, and specific interdiction operations. CIC has also developed an Immigration Control Officer (ICO) network dedicated to the control function. The Canadian network is helping other countries develop similar networks.*
>
> Citizenship and Immigration Canada
> *1997-1998 Estimates, Part III*, p. 23

Canadian interdiction practices consist of measures that Canada takes to stop the arrival of immigrants from abroad that do not have valid identity or travel documents. The measures are aimed against "improperly documented" travellers, a group which almost inevitably includes refugees. Furthermore, the measures frequently target groups known to be fleeing human rights abuses.

VISA REQUIREMENTS

Nationals of most countries need a visa to visit Canada. Those who are fleeing as refugees usually can't stop in to ask for a visa when they are running for their lives. More importantly, it is most unlikely that it would do them any good. People who are seeking refuge in Canada will be refused a visitor's visa. Only a tiny minority of refugees could qualify for a permanent resident visa and anyway the processing is too slow for anyone in a dangerous situation.

There is a correlation between the imposition of a visa requirement by Canada and the kinds of human rights abuses that cause refugees to flee. The worse the human rights abuses, the more likely the country is to have a visa requirement imposed on it. When refugee claimants start arriving in Canada from a country without a visa requirement, the government generally puts a visa requirement on the country, whether or not the claimants are in fact refugees. An example of this occurred in 1997, when there was an increase in arrivals of Roma claimants from

According the *1997 World Refugee Survey* of the US Committee for Refugees, the countries producing the greatest number of the world's refugees are: Afghanistan, Bosnia and Herzegovina, Liberia, Iraq, Somalia, Sudan, Sierra Leone, Eritrea, Croatia, Vietnam, Burundi, Rwanda, Azerbaijan, Angola, Tajikistan, Armenia, Burma, China (Tibet), Bhutan, Zaire, Georgia, Sri Lanka, Mali, Western Sahara, Mauritania, Ethiopia, Bangladesh, Uzbekistan, Iran, Guatemala, Cambodia, Togo, Nicaragua, Senegal, Chad, Niger, Turkey, Uganda, India, El Salvador, Djibouti, Ghana and Indonesia.

Nationals of all these countries require a visa to enter Canada.

[Palestinians are also the single largest refugee nationality, but don't have a country on which Canada can impose a visa requirement.]

the Czech Republic, leading to the re-imposition of the visa requirement, despite the fact that there was ample evidence that Roma were suffering serious human rights abuses in the Czech Republic. Canada uses the visa requirement to stop persecuted people from finding protection in Canada.

The same principle is applied in decision-making about who should be granted a visitor's visa. For example, when the situation in Sri Lanka becomes more tense and human rights abuses increase, a Sri Lankan, particularly a member of the persecuted Tamil minority, is less likely to be granted a visitor's visa in order to attend a family wedding in Canada. The worse the situation, the more the Canadian visa officer thinks the person might take the opportunity to ask for Canada's protection.

CARRIER SANCTIONS

Visas are not by themselves sufficient to keep refugees out of Canada, since to claim protection a refugee needs only to get to Canada's gates. To prevent improperly documented people (and of course this includes refugees) from getting to a Canadian entry point, the government enlists the assistance of the transportation companies: ships, buses, trains and above all airlines. The transportation companies, or "carriers" are given the legal obligation to ensure that all passengers have the proper documents for entry into Canada and are fined (or

> *Every transportation company shall ensure that the persons it brings to Canada are in possession of all visas, passports and travel documents required by this Act or the regulations* ... Article 89.1 (1) of the Immigration Act

technically levied administration fees) if they bring in to Canada passengers who are not entitled to be in the country.

The fees amount to $5,000 for each member of the flight crew that deserts in Canada and $3,200 for any passenger that arrives improperly documented. The fees for the deserters are set and cannot be reduced. However the fees for the other passengers are subject to reduction (initially to $2,400) if the transport company signs a "Memorandum of Understanding" with Canadian immigration authorities.

If the company keeps the number of improperly documented passengers below the estimated number agreed to in the Memorandum, the fine can be reduced further (even to zero). This estimate is agreed to following an observation period of the transport company to judge its efficiency at stopping travellers without valid documents from embarking. The greater its efficiency, the lower the fees.

The terms of the MOU are negotiated with each transportation company, but standard provisions include the following commitments:

The Minister of Citizenship and Immigration will:
- make available visa authentication devices.
- provide fraudulent document detection and fraud prevention training to the transportation company personnel.
- maintain a network of Control Officers abroad for consultation and support.
- provide timely fraud prevention information.

The transportation company will:
- ensure that all passengers' travel documents are screened by trained personnel and refuse to carry improperly-documented passengers.
- use technological aids in screening documents.
- ensure that appropriate personnel are trained in fraud detection.
- mark the airline ticket of a refused passenger to indicate to other airlines that boarding was refused because of improper documents.
- respond expeditiously to requests for information from immigration officers about passenger identity, itinerary, etc.
- make photocopies of travel documents and communicate in advance names of passengers whose travel documents are bona fide but who it is suspected are likely to arrive in Canada without the documents (in the alternative the transportation company will take temporary custody of the document).

> "Let me be quite clear, immigration control is a government function. Air carrier staff are not Immigration Officers and should not be expected to perform that role. Notwithstanding an outstanding cooperative relationship between air carriers and CIC, it seems that every day air carriers are being asked to do more to ensure that those seeking to come to Canada as refugees, no matter what their motivation, are kept out."
>
> Howard P. Goldberg, Vice President and Secretary, Air Transport Association of Canada, in a letter dated 8 May 1997 to Robert Trempe, Immigration Legislative Review Advisory Group

Carrier sanctions in the courts

In July 1991 an Iranian family of three arrived in Toronto on board a Lufthansa flight from Frankfurt and claimed refugee status. They were travelling on fraudulent Italian passports. Lufthansa was fined $3000, but appealed.

The Ontario Court (General Division) sided with Lufthansa in its judgment in November 1993. Lufthansa argued that it had shown due diligence in checking the passengers.

"In the summer of 1991, Lufthansa handled approximately 250 flights daily (20,000 passengers) at Frankfurt airport. Lufthansa ran 20 flights a week from Frankfurt to Canada and shared in 8 further flights...

"Because of a vast increase in improperly documented passengers arriving in Canada from Frankfurt, Lufthansa retained AVS for the express purpose of carrying out further checks of travel documents on Canadian-bound flights from Frankfurt. Canadian-bound flights were the only Lufthansa flights in Frankfurt to receive this additional check. The owner and C.E.O. of AVS has over 30 years of police and security experience. He was formerly head of security at Frankfurt Airport. The personnel he hired to perform document checks were recruited from the ranks of experienced senior police and border patrol officers.

"In detecting fraudulent passports, AVS employees rely on their police experience and training, regular contact with the Canadian Embassy personnel and information published by Immigration Canada. Two AVS employees are stationed at the entrance to each boarding lounge for all Canada-bound flights and check the travel documents of each passenger before that passenger is permitted access to the lounge. It was this check which the family went through. On the day in question, two passengers with fraudulent passports and one smuggler accompanying them were apprehended at this check.

"Immigration Canada provided Lufthansa with a comprehensive looseleaf volume entitled "Guide to Fraudulent Documents" (the Guide) to assist in detecting improperly documented passengers. The Guide contains carefully reproduced examples of fraudulent and genuine documents and typical profiles of passengers using fraudulent documents...

"In assessing whether a passenger fits the profile of a passenger travelling on fraudulent documents, single characteristics are less important than a combination of circumstances...

In 1991, Lufthansa intercepted 75% of improperly documented passengers seeking passage from Frankfurt to Canada."

However, the judge decided that Lufthansa had not established a due diligence defence because it appeared that the family had not been subjected to a final intensive scrutiny because boarding needed to be expedited in order not to lose a time slot for taking off.

On the other hand, the judge decided that Lufthansa should not be fined because the passengers were refugees (the wife had by this time been recognized as a Convention refugee). The *Immigration Act* is in conflict with itself. "On the one hand, it sets up a system of strict requirements, including visas, in order to regulate and control the admission of persons to Canada." On the other hand, it encourages entry by convention refugees and recognizes that refugees are often forced to travel on fraudulent documents, exempting them from prosecution for using false documents.

"It is one thing to put Lufthansa in the front line of deflecting disqualified passengers, but it is another thing, and surely contrary to the spirit and objectives of the Act to prosecute Lufthansa for bringing to Canada convention refugees so determined."

"Surely, it offends common sense and decency to convict Lufthansa of bringing an undocumented passenger to Canada when that passenger is eventually determined, after due process, to be a convention refugee..."

However, on appeal the Ontario Court of Appeal threw out this argument, arguing that the Act's provision of immunity to Convention refugees "is a matter which concerns the passenger and Canadian immigration; it does not concern the carrier, nor does it extend immunity to any carrier."

Instead the Court found that the prosecutions against Lufthansa were invalid because the family had been found not to have documents by Immigration Canada officials who boarded the plane on arrival in Toronto. Lufthansa had therefore never been given a chance to present the passengers to an immigration officer, as required in the law.

This means that when Immigration Canada board aircraft to do document checks, they lose the right to fine the airline for improperly documented passengers. However, airlines can - and are - still fined (or charged administrative fees) for bringing into Canada refugees escaping persecution.

The cases cited above are:
R. v. Deutsche Lufthansa Aktiengesellschaft (25 November 1993), Action No. SCA(F)289092 (Ont. Ct. Gen. Div.) per Langdon J.

R. v. Deutsche Lufthansa Aktiengesellschaft (25 July 1994), Action No. C17406 (Ont. C.A.) per Houlden, Weiler and Austin JJ.A.

IMMIGRATION CONTROL OFFICERS

Immigration Canada has had in place since 1990 an "enhanced" or "global" Control Strategy to control arrivals to Canada[4]. It consists of a network of immigration control officers put in place to fight against illegal immigration. Working in the International Service of Canadian Immigration and Citizenship, they carry out their work abroad. Their business is to stop migrants without valid travel documents from reaching Canada. They do this by:

- giving information sessions to the transport companies and other parties, such as the local police or other immigration officials, on the issue of control of identity papers.

- providing technical support to help intercept people without valid documents.

- negotiating "Memoranda of Understanding" between the transport companies and the Canadian government regarding the administrative fees levied for the transport of people without valid documents to Canada.

- monitoring whether the transport companies are in compliance with the "MOU" they have signed, especially regarding the checking of documents.

- working closely with the local police, immigration authorities and other agencies to exchange information about the traffic of immigrants and the use of false documents.

- carrying out specific interdiction programs like the "Short-Stop operations".

- reporting on migrant-smuggling operations and trends as well as organized crime that could affect Canada.

- explaining Canada's control and enforcement strategy to host countries and obtaining their cooperation in deterring "illegal migrants".

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[4] Even though Immigration Canada reports that it has had an "enhanced control strategy" since 1990, its 1998-1999 *Report on Plans and Priorities*, declares that "CIC will seek to develop an international enforcement strategy. Increased cooperation among affected countries will be pursued through partnership agreements with public and private sector bodies, coordination of immigration control activities, and the sharing of information on security threats, trends in illegal migration, and the activities and movements of criminals. Special emphasis is being placed on enhancing cooperative arrangements with the United States and the United Kingdom" (page 17).

There are Immigration Control Officers in 24 offices abroad[5]. This is up from the 23 offices (with 26 full-time agents, 7 part-time agents reported in the *1996-97 Estimates*). In addition to the Control Officers, Visa Officers devote a small portion of their time to control[6].

In 1995-96, 5,171 incorrectly documented migrants were intercepted en route to Canada.

SHORT-STOP OPERATIONS

These are activities carried out directly by Immigration Control Officers themselves, as special short-term initiatives. The officers, working in foreign airports, stop improperly documented people from boarding planes destined for Canada. (Needless to say, they make no evaluation of their eligibility to make a refugee claim or their need for protection.) They also help train airline staff.

In its performance report for the year ending March 1997, Citizenship and Immigration Canada announced that it had launched the London Project, "a cooperative effort between CIC and the airline industry". The objectives were described as follows:

The primary goal of the project is to reduce the total numbers of inadmissible passengers utilizing the major London airports of Heathrow and Gatwick as gateways to Canada. The secondary objectives are to reduce the numbers of Improperly Documented Arrivals in Canada who had embarked from or transited through London and to reduce the use of Heathrow Airport by professional smugglers.

In November and December 1996, a three-week interdiction exercise was held at Heathrow Airport as part of this project. Three Canada-based Immigration Officers were available to assist airlines in document-screening of Canada-bound passengers. They worked under the guidance of the Canadian Immigration Control Officer based in London. During the exercise 75 people were intercepted and 28 people arrived as Improperly Documented Arrivals. The report concludes: "Valuable information was obtained concerning document use and other smuggling methodologies. The project also enhanced the working relationships between CIC and its airline partners."

Performance Report, For the period ending March 31, 1997, Section 4.2 (Intelligence and Interdiction).

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[5] Citizenship and Immigration Canada, *1997-98 Estimates, Part III*, p. 49.

[6] Citizenship and Immigration Canada, *1996-97 Estimates, Part III*, p. 51.

SAFE THIRD COUNTRY

Canada's *Immigration Act* contains provisions for sending refugee claimants back to a "safe third country" (i.e. a country through which the claimant has passed on the way to Canada, and which the Canadian government judges is "safe" for refugees). However, the government has never named any country as "safe" and therefore the provision has never been put into effect.

This is not for want of trying. For a number of years Citizenship and Immigration Canada has been energetically pursuing a Memorandum of Agreement with the United States, which would have allowed the United States to be named as a "safe third country". This would have turned the U.S. into a kind of "buffer" state, "protecting" Canada from refugees. Since between a third and a half of refugee claimants in Canada come via the U.S., the deal could have had a substantial impact on the number of refugees able to find protection here. In theory, the deal worked both ways, but since few refugee claimants travel through Canada in order to make a claim in the U.S., the main impact would have been on refugees trying to come to Canada.

However, the United States, for whom the agreement would have few if any obvious advantages, was unwilling to pursue negotiations in the foreseeable future, and in February 1998, the Canadian Minister of Citizenship and Immigration announced that negotiations had been abandoned.

The Canadian government has also made known its interest in making similar agreements with European governments. Here again, their enthusiasm is not matched by their counterparts, who are preoccupied with harmonizing European policies and practices, and who similarly note that the movement of refugee claimants is almost entirely one way.

4. IMPACT OF INTERDICTION

For a phenomenon that affects thousands of people, very little information has been collected on the impacts of interdiction. One significant reason is that those affected are extremely vulnerable people in transit - an almost impossible subject for study. Many of the stories of interdiction that can be told are stories of ultimate success - people who eventually found their way past the barriers. But what of the less fortunate? Almost by definition, those who are worst affected by interdiction measures are unlikely to be able to tell their tale.

A refugee interdicted in England

Davood[7] was interdicted in London, England while trying to come to Canada on a false Italian passport.

He had been a political activist in Iran, where he had been imprisoned and tortured. After his release from jail he was expelled from the university. Later he went into hiding after a friend had been arrested by the Revolutionary Guard. He decided he had to leave Iran when he heard from his mother that the authorities had come to his house looking for him.

He had to travel clandestinely because the Iranian government had refused to give him and members of his family passports. Because he had sisters already in Canada as refugees, he decided to seek refuge here.

When he was stopped at Heathrow Airport while in transit to Canada, he asked for refugee status in the UK. He was denied after a very short interview, deemed an illegal immigrant and an expulsion order was issued against him. He appealed to the Special Adjudicator but was refused all status and was again to be expelled. He then asked for permission to appeal to the Immigration Appeal Tribunal, which also refused him. During all this period he was in a prison with criminals, an experience he found deeply traumatizing.

Fortunately for him his sisters in Canada were able to take action on his behalf. He was sponsored by a church organization. Once the application was underway, Davood was released from jail in England. He was accepted by Canada as a refugee and arrived in this country in 1997.

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[7] Not his real name.

Refugees en route for Canada interdicted in the UK[8]

The University of Cambridge Institute of Criminology published in 1996 the results of a study of refugees caught up in the criminal justice system, after being arrested at Heathrow Airport. The researcher was Liz Hales, Probation Officer with the Inner London Probation Service.

The study followed the cases of 123 passengers arrested on charges of being in possession of false travel documents, while they attempted to board flights for Canada or the U.S. (66% were bound for Canada). The researcher found that, on interview, 91% of the prisoners gave political reasons for their flight. 53% reported that they had been imprisoned in their home country for political reasons and 46% had experienced torture.

Most of the prisoners had been sentenced within days of their arrest (34% were sentenced the day after arrest), having received minimal legal counsel. The majority received sentences of between 60 and 120 days. They were imprisoned in Wormwood Scrubs.

In addition to their criminal sentence, the prisoners were in immigration detention. Most of the prisoners had made an asylum claim with the UK at the time of interview, but they faced the prospect of remaining in detention until a decision on asylum was made (which, given the acceptance rates in the UK, was quite likely to be negative).

The experience of being jailed among criminals was traumatic for these refugee prisoners. Language barriers left them isolated, unable to communicate their needs and often very confused about their immigration status and what would happen to them. Those who had been tortured while jailed in, for example, Algeria, Iran or Iraq, were extremely frightened, particularly at first. Locked up 22 hours a day in their cell, memories of their earlier experience were very much present.

Like the majority of foreign nationals arrested at Heathrow Airport there was distress, panic and confusion at their predicament. However, there was an additional factor which was that many claimed to be refugees and they could not understand how in their search for safety, they were being treated like criminals. p. vii

"I was given electric shocks four times a week and then beaten with batons. In prison I remember all of this. The door is locked all the time and my head becomes hot. I think too much and panic because I don't know when the door will next unlock."
Prisoner interviewed by Liz Hales, p. 25

[8] *Refugees and Criminal Justice?*, Liz Hales, Cropwood Occasional Paper NE 21, University of Cambridge Institute of Criminology, 1996.

Liz Hales connects the imprisonment of these refugees very directly to carrier sanctions. This new type of inmate at Wormwood Scrubs was “due to the work of security firms employed by airlines to stop passenger with forged documents from boarding their aircraft. This tightening up of airline security has been in response to Carriers' Liability Legislation..” (p. 2.) She notes that the U.S. has a standard fine of $3,000 per improperly documented passenger and that Canada changed its law in 1993 to introduce an ‘administration fee’.

Odyssey of an Iranian family

L. left Iran with her family at the age of 15. Her parents had converted to Christianity and feared religious persecution. Without passports or identity papers, they fled from Tehran to Turkey, travelling partly by car, partly on foot, paying a series of “guides” to help them cross the border at an uncontrolled point.

In Turkey, the family found someone who made up false passports for the whole family. L.'s mother and her two brothers were the first to attempt the journey to refuge in Canada. They travelled on false German passports to Milan, where Italian authorities stopped them. They returned to Turkey and then tried again, using the same false passports, this time via Lyon. This time they succeeded in reaching Canada where they claimed refugee status.

L. and her father then started their journey from Turkey, travelling first to Spain. The smugglers sent L. on by herself by train to Lyon. French officials in Lyon detected that the passport was false and detained her overnight at the airport. She was given the opportunity to claim asylum in France, but since her mother was already in Canada and she did not want to compromise her chances of gaining refugee status in Canada she declined. She was escorted back to Spain the next day.

Next, the smugglers proposed sending L. and her father via Mexico. They were this time given false Greek passports. Having safely arrived in Mexico City, they had to take a plane to Tijuana. L.'s father was stopped just as he was about to get on the plane, but L. got through. She wanted to wait for him, but another Iranian, G., told her (falsely) that her father had been released, so she got on board.

In Tijuana, L. and G. were arrested but released after they paid a bribe. A taxi driver took them to some smugglers, a group of armed men who were drinking and tried to force L. to drink too. The next morning they crossed the U.S. border on foot through a forest. They had been told to leave their bags in Tijuana and that they would get them later (which turned out not to be true).

American authorities caught their “guide” close to the border. Not knowing what to do, L. and G. gave themselves up. They were treated unusually well because Iranians had never before been seen at that border point. They were not handcuffed and were given a “Big Mac”

because they were very hungry (they hadn't eaten or slept for over 48 hours). L. was separated from G. and put in a packed detention cell where there was not even room for the women and children detained there to sit down.

After explaining that her mother was in Canada and her father in Mexico, L. was released on condition that she appear for a hearing in 9 months time. L. then went to San Diego where she had an aunt and from there to Seattle and across the Canadian border.

Meanwhile L.'s father had been detained for 38 days in Mexico. He stayed in a cell with all kinds of other travellers, including a man with a six-year-old child, who were there when he arrived and still there when he left. They were given one meal a day: if they wanted more, they had to buy it.

Once released, L.'s father was able to travel back to Spain, although the Mexican authorities had intended to deport him back to Iran and had only been dissuaded from doing so by pressure exerted as a result of his family's efforts in Montreal. From Spain, he successfully travelled, on the same false Greek passport, via Portugal to Toronto where he claimed refugee status.

By the time L. completed her journey and arrived in Canada she was 16 years old. She and her family have all been granted refugee status. She is in high school and says she wants to become a police officer in order to “protect innocent people”.

The Human Smuggling Trade

One clear impact of interdiction practices is that they increase the prices charged by agents who help refugees - and others - get across borders. Enforcement officials argue that what is needed are tougher enforcement measures: more penalties for those who smuggle and more resources put into catching those being smuggled. But getting tougher doesn't change the desperation of the people seeking the smugglers' assistance. The more barriers are set up, the higher the smugglers' prices, and the higher the price of safety for refugees. And the narrower the options, the more people who are desperate feel driven to try life-threatening methods of getting to their destination.

In a *Calgary Herald* article from 12 May 1998, titled *Illegal aliens linked to organized crime*, Richard Foot reports that “An illicit, living cargo of more than four million people moved around the world last year, smuggled from Asia and other developing countries to Europe and North America”.

The figure of four million was offered at an international conference on organized Asian crime held in Calgary. The article quotes Michel Gagné of Immigration Canada's Organized Crime Bureau: “We're seeing more and more groups using the networks and structures

traditionally used for drugs, to smuggle people." Gwen McClure from the US Federal Bureau of Investigation said that there is little statistical evidence of an increase in human trafficking except the record high prices: "We've seen the prices go from $5,000 to $10,000 US a couple of years ago, to now you can make $30,000 to $40,000 apiece smuggling human beings".

According to Interpol, most of those smuggled are from China, Indonesia, Sri Lanka, Iran and increasingly Africa.

Michel Gagné of Immigration Canada acknowledged that most of the "illegal aliens" coming into Canada make refugee claims.

> In the past few decades, people smuggling has become one of the largest, most profitable international organized crime activities, trading in human misery. Billions of dollars in profits are made every year. The risks are few for the smugglers, who face little chance of being caught, and small penalties if they are.
>
> *Not Just Numbers*, Immigration Legislative Review, 1998, p. 115

Impact on visitors

Often people wishing to visit Canada are refused visitors' visas because Canadian immigration officials decide, rightly or wrongly, that they might stay on in Canada illegally, or make a refugee claim. Many of these refused visitors are wanting to visit family in Canada. Sometimes refusals are reported in the media, for example when a visa is refused to someone wishing to visit a dying family member in Canada. Often reported, too, are refusals where the person was going to participate in a cultural event. For example, on 14 May 1998, *La Presse* reported that three young theatre critics from Eastern Europe had been denied visas. The three had been selected to participate in a training session to be held during the Carrefour international de théâtre in Québec City.

Boat-people - seeking refuge, finding death

Yiohan

In December 1996, about 460 Sri Lankans, Indians and Pakistanis boarded the *Yiohan* in the Mediterranean Sea, having each paid thousands of dollars to be smuggled into Sicily. On Christmas Day, a launch arrived aside the *Yiohan* to transport them to the Sicilian beach. Something went terribly wrong. Far more than the 100 people that was the capacity of the launch were forced down, some falling straight overboard. Then the *Yiohan*, either deliberately or by accident, rammed the launch, causing it to sink. 280 lives were lost. The *Yiohan* went on to Greece and dumped the 182 survivors there. The Greek authorities, hearing their testimony, issued arrest warrants for mass murder for the three individuals in charge of the operation. The story was barely covered by the media.

Maersk Dubai

According to crew members on board the *Maersk Dubai*, a ship sailing from Europe to Canada, two Romanian stowaways were in March 1996 put overboard on a raft, on the order of the ship's captain. A third stowaway, also Romanian, was believed to have been thrown overboard in May 1996. When the ship sailed into Halifax in May, the captain and several officers were arrested, charged with murder by Romania. In March 1997, however, the Nova Scotia Supreme Court ruled that the accused could not be extradited to Romania because the alleged crime did not take place on Romanian territory. The Canadian crown had decided that the case could not be prosecuted in Canada, because neither the accused nor the victims were Canadian and the alleged murder took place in international waters.

Why would the ship's officers have thrown the stowaways overboard to virtually certain death? One possible explanation is that they wanted to avoid the fines that would have been imposed by the Canadian government for bringing stowaways into the country.

Zolotitsa

In 1996 the *Zolotitsa* sailed from Liberia with 400 people fleeing the country's civil war. When they arrived in Ghana, they were refused permission to land. Ghana had earlier refused another boatload of refugees on board the *Bulk Challenge*, but finally relented after pressure from the UNHCR and let the refugees disembark. However, they would not back down when the *Zolotitsa* also appeared. A Ghanaian official said "We will not accept any refugee ship anymore. We have had enough".

The *Zolotitsa* moved on to Benin, Togo and Côte d'Ivoire but was refused by each country. After three weeks at sea it returned to Liberia.

St. Louis

In 1939, 907 Jews fleeing Nazi Germany sailed on the *St. Louis* from Hamburg, Germany, with entrance visas for Cuba. However, when they got to Havana, the Cuban government refused to recognize the visas. Latin American governments were approached, but all refused to take the refugees. The *St. Louis* was forced to leave Havana harbour and sailed north. The U.S. government's response to the ship was to send a gunboat to make sure that it kept away from U.S. shores. Finally, despite an appeal by some prominent Canadians, Canada declined to take in the refugees. The top immigration official commented that no country could "open its doors wide enough to take in the hundreds of thousands of Jewish people who want to leave Europe: the line must be drawn somewhere".

The *St. Louis* sailed back to Europe, where three-quarters of its passengers were murdered in the Holocaust.

Forged documents and the Second World War

It is only in the last century that documents became an essential accessory for the traveller. During the Second World War thousands of refugees from the Nazi regime owed their survival to false documents. The right kinds of papers were needed not only to escape the Nazis, but also to enter a safe country - or even to pass through.

Raoul Wallenberg was one of the best-known dispensers of life-giving documents and saved thousands of Jews in Hungary. His creative and courageous use of various diplomatic papers, often with a blank space for the name to be written in, offered some measure of protection to the bearer.

In 1940, Japanese consul Sempo Sugihara, based in Lithunia, realized that he could use his consular power to issue transit visas to save lives. Acting on his conscience, he ignored warnings from Japan to stop and gave out visas to anyone who applied, accepting any explanation for why the applicant didn't have documents.

Varian Fry spent 13 months in Vichy France, helping political leaders and intellectuals escape Nazi Europe. He was sent there by the New York-based Emergency Rescue Committee. Working with a team of staff and volunteers, many themselves refugees, he uncovered sources of plausible documents and ever-new stratagems for spiriting the persecuted out of France. An Austrian cartoonist, Bill Freier, who had spent time in a concentration camp, became their principal forgery-artist. Ideally, refugees needed an exit visa from France, transit visas for Spain and Portugal, and an American visa. Since it was rarely possible to get all these (and even less to get them all valid at the same time), creative solutions were required, even once a person had a passport, in either their own or an assumed name.

The U.S. Government did not appreciate these efforts: "This government cannot countenance the activities as reported of Dr. Bohn and Mr. Fry and other persons in their efforts in evading the laws of countries with which the United States maintains friendly relations."

Varian Fry was eventually forced to leave by the Vichy government, with the cooperation of the U.S. Government.

Why Canada?

In justifying Canada's interdiction measures, government spokespersons often suggest that those interdicted, even if they are refugees, don't really need Canada's protection, since they are generally travelling through other countries where they could find asylum.

Canada's geographical location means that it is a long way from the countries most refugees are fleeing. We have a land border only with the United States, which has not recently been producing many refugees (although Canada has in the past served as an important refuge to Americans fleeing slavery, and more recently to Americans who refused to serve in Vietnam). Our geographical isolation is the main reason that Canada receives very few refugees per capita compared to many other countries.

However, the rise of air travel has brought the world a lot closer. Someone in southern Africa, needing to flee persecution at home, can just as easily fly to Canada as to northern Africa, if he (or less plausibly she) has the means.

Some people argue that refugees should remain in the region from which they come. By far the majority of refugees do just this, either by choice or because they have no choice. But staying in the region is often extremely dangerous. For example, refugees from Mobutu's Zaire who sought protection in neighbouring Congo could be picked up and forced back to Zaire, because the Congolese authorities were complicit with Mobutu. Iranian refugees in Turkey have no protection in that country: Turkey has refouled many Iranians back across the border into the country they fled.

Europe is often not safe for refugees either. Because of inadequate safeguards in the refugee determination systems, restrictive interpretations of the refugee definition and underlying hostility towards claimants, many refugees are denied protection. In addition, refugees are sometimes treated in an inhuman manner: detained, denied family reunification and right to work, subjected to racist attacks.

Many of the refugees who come to Canada do so because they have connections here: they may have family or friends here, or they may have studied here. When someone loses almost everything in becoming a refugee, these kind of connections are profoundly important.

Refugees are fully within their rights in making their own choice about where they claim refugee status. Nothing in international law requires them to claim in the first country in which they arrive.

According to Conclusion 15 of the Executive Committee of the UNHCR:

> *The intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account. Regard should be had to the*

concept that asylum should not be refused solely on the ground that it could be sought from another state. Where, however, it appears that a person, before requesting asylum, already has a connexion or close links with another State, he may if it appears fair and reasonable be called upon first to request asylum from that State.

Have you ever been stopped and asked searching questions about your identity as you tried to board a plane on your way back to Canada?

If you answered NO, chances are you are white. On the basis of their ethnic origin, many Canadian citizens and permanent residents are routinely subjected to special scrutiny by airline personnel, security officers hired by the airlines or Canadian immigration officials doing some spot checks. They ask questions to find out whether the person is REALLY who they claim to be.

This kind of interrogation is not only a nuisance: it is very demeaning to have your identity called into question in public. And because it is discriminatory, those stopped are made to feel that they are not considered "full" Canadians, but rather pretenders who have to prove themselves at each step.

5. ALTERNATIVES

Unlike other areas of policy and practice concerning refugees, there has been relatively little discussion about alternatives to interdiction. How to make interdiction less dangerous for refugees is not on the government agenda. Interdiction is dealt with almost exclusively as an enforcement issue, and not a refugee issue.

The recently released report of the Immigration Legislative Review Advisory Group, *Not Just Numbers*, is a good example of this perspective on the subject. It discusses carrier sanctions in terms of competing interests of the Canadian government and of the transportation companies. The interests of refugees are not even mentioned.

In this chapter we present certain recommendations or comments on interdiction that may suggest a way forward.

Canadian Council for Refugees

In Resolution 10 of June 1996, the Canadian Council for Refugees called on the Canadian Government to:

1. Convene a full public inquiry into the allegations of murder in the Maersk Dubai case and any similar cases and the possible links to carrier sanctions;

2. Immediately stop the practice of imposing carrier sanctions when individuals make refugee claims, and amend the *Immigration Act* accordingly.

State of the World's Refugees

The 1997 *State of the World's Refugees*, a publication of the United Nations High Commissioner for Refugees, recognizes that it is unlikely that states will now abandon the use of carrier sanctions, despite their harmful effects. "Efforts must therefore be made to ensure that such controls are implemented in as equitable a manner as possible. At the very least, states should apply sanctions only if the carrier has shown negligence in checking documents, and should impose no fine at all in relation to passengers who submit an asylum claim which is subsequently accepted for consideration." (p. 193)

Amnesty International

As part of its 1997 refugee campaign, Amnesty International adopted the following recommendations on interdiction and deterrence measures[9]:

End practices that prevent or deter asylum-seekers pursuing claims

Article 14.1 of the *Universal Declaration of Human Rights* states that "everyone has the right to seek and to enjoy asylum from persecution". While governments are entitled to control immigration and entry to their territory, they should ensure that asylum-seekers have access to a fair and satisfactory asylum procedure. They should ensure that there are no restrictions on entry or border control measures that in practice obstruct access. They should not detain asylum-seekers in violation of international law. They should not deny asylum-seekers the means of adequate subsistence while their asylum claims are being considered, which can in practice force refugees to withdraw their claims because they cannot survive.

! States should ensure that any restrictive measures, such as visa controls, carrier sanctions and interdictive border controls, do not in effect prevent asylum-seekers obtaining access to their jurisdiction or asylum procedures.

! All asylum-seekers, in whatever manner they arrive at the border or within the jurisdiction of a state, must be referred to the body responsible for deciding asylum claims.

! Detention of asylum-seekers should normally be avoided. No asylum-seeker should be detained unless it has been established that detention is necessary, is lawful and complies with one of the grounds recognized as legitimate by international standards. In all cases, detention should not last longer than is strictly necessary. All asylum-seekers should be given adequate opportunity to have their detention reviewed by a judicial or similar authority.

! Governments should never detain asylum-seekers in order to deter people from seeking asylum in their country, to impede their asylum claim or to induce them to abandon their claim.

! Governments should not deny asylum-seekers access to adequate means of subsistence while their asylum application and any appeal is being considered.

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9 *Refugees: Human Rights have no Borders*, 1997, p. 111.

Interdiction Alternatives for Canada: David Matas[10]

It is necessary to find a control system that comes closer to meeting Canadian legal and moral human rights and humanitarian obligations.

If the goal of the government is to limit access by refugee claimants to manageable levels, it should at least focus on distinguishing, before arrival, between those truly in need of protection and those who are not. This can be achieved as follows:

General:

- the discretionary system of the *Immigration Act* should be changed to one of clear entitlements and disentitlements for both inland and overseas processing.

- entry should be prohibited for persons who are believed (with serious grounds) to have committed a crime against peace, a war crime or a crime against humanity.

Visa Controls:

- visa requirements for individual countries should be re-examined regularly and should not be imposed on those countries where human rights violations are grave, the number of claimants is manageable, the Canadian acceptance rate is high, and Canada is a logical and accessible country of refuge.

Visa Granting:

- persons who have *prima facie* refugee claims or those who fit the profile of persons most likely in need of protection should be granted visitor visas for the purpose of making a claim in Canada.

Carrier Sanctions:

- carriers should not be penalized for bringing to Canada undocumented passengers who are, in fact, refugees (liability should be suspended pending refugee determination)

Overseas Control:

- if it is deemed necessary to stop refugee claimants en route to Canada, two mechanisms which can be put in place to ensure that real refugees are not returned to the country from which they have fled are:

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[10] The following is a summary of a paper prepared by David Matas for the Learned Societies Conference, June 7, 1995.

1. A safe third country agreement (not for claimants who arrive in Canada, but for those stopped en route). The agreement would allow claimants to seek adequate protection in the country where they are stopped and would ensure that this protection was granted according to the standards of processing, assessment and treatment that would be legally acceptable in Canada.

2. Canadian screening en route either through:

    1. refugee screening - the overseas screening system should be equivalent to the inland system to prevent differentiated screening and to inhibit circumvention of the overseas system; or

    2. eligibility screening - by which those who would be eligible to make a refugee claim if they were in Canada would be allowed to continue on to Canada to make a claim.

> Interdiction in its present form must stop. It is a violation of international law, of morality, of principles of humanity. The choice does not have to be between letting in everyone who is coming to Canada without proper documentation and letting no one in. There is a duty to find a control system that comes closer to meeting Canadian legal and moral human rights and humanitarian obligations.
>
> David Matas
> *Interdiction Alternatives for Canada*, June 1995

1994 Immigration Consultations

As part of the 1994 Immigration Consultations, a number of working groups were established to examine different immigration areas, each with participants from the government, non-governmental organizations, academics and others with relevant expertise. Working Group # 3, co-chaired by Rivka Augenfeld, Table de concertation de Montréal pour les réfugiés, et Bill van Staalduinen, Citizenship and Immigration Canada, examined the question: "How do we meet our humanitarian obligations including the 1951 *Convention relating to the Status of Refugees*?"

What follows is the section of their report dealing with interdiction.

Issue 3: Canada's interdiction and entry control policies and refugee protection.

Core Recommendation:

Canada's legitimate responsibility for controlling entry into its territory is recognized. Nevertheless, Canada must ensure that:

a) persons seeking asylum who are interdicted abroad (1) have access to a fair refugee determination system, (2) are not subject to *refoulement* (direct or indirect), (3) are guaranteed a minimum social standard, and,

b) similar protection-focused safeguards are contained in any related international agreements into which Canada may enter.

Discussion:

Draft Conclusions on International Co-operation

The working group recognized the Canadian government's legitimate responsibility for exercising sovereign control over the movement of foreigners into and out of Canadian territory.

However, the working group also had concerns about the protective role that Canadian authorities should be playing on behalf of persons requesting or potentially requesting Canada's protection abroad, in particular, under international instruments to which Canada is party. Specifically, the group noted that in line with Article 14 of the *Universal Declaration of Human Rights* and the spirit of the 1951 Convention, no impediments should be put in the path of those seeking asylum. Concern was expressed that certain Canadian policies aimed at curbing illegal immigration without making any distinction between immigrants and refugees may prevent people in search of protection from reaching Canadian territory or allow their rapid removal without assurances that they will be given effective protection elsewhere.

Four Types of Canadian Action in Particular are of Concern

Operations enabling immigration officers stationed abroad (embassy staff) or on special assignment ("*Shortstop*" type operations) to prevent people in foreign airports from boarding planes to Canada because their identity or travel documents are suspicious or inadequate, fail to take into account their need for protection or possibilities for effective protection in the third country in which they find themselves or of the risks they may face there. Although Canada is not obliged to take positive protective action under international law, since actions in foreign territories are involved, indiscriminately refusing boarding to persons may jeopardize the "life, liberty or security" of those persons. These words, pronounced by Canada at various

international fora regarding the need to protect people in danger, are thus contradicted by the actions of Canadian authorities.

Also, because penalties are imposed on carriers that allow foreigners to disembark in Canada without adequate documentation, carriers tend to prevent anyone with "suspicious" documents from boarding, at risk of discrimination and without consideration of their need for protection. Carrier officials thus carry out what is essentially a government function. Most members of the working group felt that such delegation of the authority of sovereign control over border movement is inconsistent with Canada's commitment to helping people in need of protection.

Consequently, the group concluded that if Canada is going to continue to pursue policies aimed at preventing foreigners from reaching Canadian territory, these policies must stipulate that when asylum seekers (that is, persons who would request asylum if they succeeded in entering Canadian territory) are prevented from reaching Canadian territory, three conditions must be met:

1. Asylum-seekers in a third country must have access through an established referral mechanism to a refugee determination process which meets Canadian standards of being fair, equitable and effective, and be able to request the protection of that country in the event that they do not meet the international refugee definition but might still require protection.

2. Asylum-seekers must not be refouled from the third country to the country that they fled, either directly or *indirectly* (namely, by means of successive removals through the countries of initial transit).

3. During their stay in the third country the asylum seekers must be provided with living conditions which meet the minimum basic human standards set out in Conclusion ExCom NE 22 of 1981.

No asylum-seeker should be removed from Canada to a third country, except within the framework of bilateral or multilateral agreements actually providing the person with the benefits of the above-noted conditions, in particular, in cases where the concept of "safe third country" may be cited to justify the removal of persons without assessment of their need for protection.

In addition, any agreement between Canada and a third country providing for the removal of illegal migrants (readmission agreements) and any agreement on the division of responsibility for processing asylum claims (e.g., draft Canada-U.S. agreement; draft convention parallel to the Dublin Convention of June 15, 1990) should contain provisions to ensure adherence to these same conditions in respect of asylum-seekers or persons in need of protection.

In sum, within the framework of legitimate policies on sovereign control over transborder migratory flows, the action of Canadian authorities must be guided by the *paramount* concern of providing effective protection for refugees and asylum seekers.

Specific Recommendations:

R11: That any control mechanisms (e.g., readmission or responsibility-sharing agreements, "Short-stop" initiatives) implemented by the Canadian government should ensure and hold paramount the protection of the individual.

3. WOULD THE PROPOSED CANADA/U.S. MEMORANDUM OF AGREEMENT WITHSTAND A CHARTER CHALLENGE?

Alex Neve[11]

[This paper was written before the Minister of Citizenship and Immigration announced, in February 1998, that negotiations on the proposed U.S.-Canada MOA had been abandoned. Since some such deal may re-appear on the agenda in the years to come, the article may come into its own again before too long. Indeed, recent developments at the U.S.-Canada border, which have caused refugee claimants seeking refuge in Canada to be detained in the U.S., create a situation in many ways similar to the proposed MOA - but without any of the safeguards - and the same arguments may be of use in responding to this new situation.]

THE IMPLICATIONS FOR REFUGEES

The risks to refugee protection in Canada if the MOA goes through have been compellingly identified and catalogued by others. There are serious concerns about the quality of refugee protection in the United States, and the situation continues to deteriorate following the recent introduction of tough new legislation.

In the United States, refugee claimants who arrive without documents, or with fake documents, are now subjected to a summary exclusion procedure, in which they risk being removed from the country without expert examination of their claim and without having had the benefit of legal assistance.

Refugee claimants and refugees in the United States are routinely held in harsh detention, in appalling conditions, for extended periods of time. U.S. detention practices often contravene international standards. U.S. officials believe that the use of detention deters others from coming to the United States.

Detained or not, refugee claimants face tremendous obstacles in obtaining legal assistance, as legal aid is often unavailable and assistance often depends on non-profit

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[11] Based on an analysis developed along with James Hathaway, now published in James C. Hathaway and R. Alexander Neve, *Fundamental Justice and the Deflection of Refugees from Canada* (1996), 34 Osgoode Hall L.J. 213.

organizations and law students. For detainees the prospect of legal assistance is even more bleak, as detainees are often hold in isolated areas which are difficult for lawyers to reach.

Impartial decision-making is of vital importance to refugee claimants. However, refugee protection decisions and policy in the United States unquestionably reflect a bias which corresponds to U.S. political interests. Often cited, for example, is the U.S. record in dealing with claims from the U.S.'s Central American allies in Guatemala and El Salvador. Acceptance rates in the U.S. have consistently been much lower than in Canada, at times as low as 2% in the United States and as high as 70% in Canada. At the same time, of course, claimants from Cuba were given automatic status in the United States. Recent statistics show an acceptance rate of 5.7% in the United States and 57% in Canada for claimants from Guatemala.

Most dramatically, the United States has shown on a number of occasions that it is willing to flaunt the most fundamental of refugee rights, the protection against *refoulement*, even in the face of widespread international condemnation. Faced with the exodus of boat people fleeing a brutal military dictatorship in Haiti, U.S. authorities sent out the Coast Guard to interdict the asylum-seekers, destroy their boats, and forcibly return them to Haiti. The U.S. Supreme Court ruled that the practice was lawful, as the individuals were not yet physically present in the United States.

Similarly, in July 1993, the U.S. diverted three boatloads of Chinese asylum-seekers from U.S. territory to Mexico, a country which has not yet ratified the Refugee Convention. The U.S. has also taken steps to stop boats carrying Cuban asylum-seekers, including signing an agreement with the Cuban government which actually requires Cuba to take steps to stop people from leaving the country by boat.

Clearly, individuals who seek refugee status in Canada but who are told, instead, that they must make their claims in the United States, face a real risk of not being granted status, being returned to dangerous conditions at home, and facing serious human rights violations including arbitrary and harsh detention while in the United States. The implications of the MOA are, therefore, serious indeed. This is not just about letting people choose where they want to live, it is about ensuring that refugees are given access to a system which is likely to provide them with protection and respect their rights.

DOES THE CHARTER APPLY?

If a Memorandum of Agreement is ever signed, individuals and groups concerned about refugee protection in Canada will turn their attention to the courts. Lawyers have, in the past, been able to use the Charter of Rights to ensure that refugee claimants in Canada are treated fairly. Most notably, the Supreme Court of Canada's decision in Singh v. M.E.I[12], now celebrated yearly with

[12] Singh v. M.E.I., [1985] 1 S.C.R. 177.

Refugee Rights Day, established that all persons, not only Canadian citizens or permanent residents, who are physically present in Canada, have the right to look to the Charter for protection of their rights. That should include individuals seeking entry into Canada who the government seeks to turn away under the MOA and send back to the United States to pursue their claims.

There are two principal concerns about the MOA and related legislative provisions, which would possibly offend the Charter. The first, and most important, is that the agreement operates in a way that individuals are not allowed to have a hearing or even tell their story in any kind of forum. They are physically present in Canada but are not allowed to state the reasons for their claim. For the past decade, the right to a hearing has been the centrepiece of refugee determination in Canada. Summarily excluding claimants from refugee determination pursuant to the MOA quite clearly runs afoul of that ruling. Does it therefore violate section 7?

The second, but less important as it is not as much an attack of the overall scheme, but only certain aspects of it, would be to argue that the MOA operates in a discriminatory fashion, contrary to section 15 of the Charter. Is it unfair - unequal treatment - that only refugee claimants passing through the United States have been singled out? Is it unfair - unequal treatment - that it only applies to people who have been in the United States for certain periods of time? Do those limitations mean that people with less money, who have to make their journeys to Canada more slowly, will be unfairly and unequally excluded under the MOA?

Perhaps most obviously, there is a clear section 15 argument in that the quotas set up under the agreement operate in a truly discriminatory and arbitrary fashion. What is more unequal than to say that a group of 500, chosen simply on a first come basis, will be excluded whereas everyone else will be allowed to access the system as usual? I do not intend to delve into the section 15 arguments in this presentation, but I did want to identify and highlight them. At this stage I believe it is more important to focus on the broader section 7 fundamental justice issues that arise in the policy of returning people to "safe third countries" such as the United States.

THE MOA AND THE CHARTER: REFUGEE PROTECTION AND ACCESS TO JUSTICE

Singh is grounded in section 7 of the Charter, which guarantees that,

> *[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with principles of fundamental justice.*

The Court held that security of the person is directly engaged in the refugee determination process and that fundamental justice requires, therefore, that claimants be given an adequate opportunity to state their case. The decision noted that since credibility is often

central to a claim, this would ordinarily require an oral hearing. Under the terms of the MOA, refugee claimants returnable to the United States will have no opportunity to explain the basis of their fear to anyone, nor to argue that they are unlikely to receive protection in the United States.

There are three important questions to be asked in considering whether the MOA violates section 7 of the Charter. Does the MOA touch upon a right to life, liberty or security of the person? If so, does it infringe that right in a way that is in keeping with the principles of fundamental justice? If fundamental justice is not observed, can the violation be justified under section 1 of the Charter?

THE MOA AND SECURITY OF THE PERSON

Section 7 and Eligibility Screening

Turnbacks to the United States would take place at the eligibility screening stage of the process. These decisions would be made by immigration officers at the border, without an oral hearing and without access to the Immigration and Refugee Board. At the time of the Singh decision, there was no eligibility screening in Canada's procedure. Anyone making a claim was given access to the determination system. The Federal Court has held that using a screening procedure to restrict access to the IRB, thus denying some claimants the right to a hearing, does not necessarily offend the Charter.[13] Essentially, the Court has ruled that section 7 concerns do not arise until and unless a claimant passes the eligibility stage and is able to then rely on his or her statutory right to a hearing. While these cases have involved other types of eligibility criteria, including screening for serious criminals, clearly the Canadian government would seek to defend MOA screening on the same basis.

However, strong legal arguments can be made that a screening process cannot be used by the government to insulate the refugee determination process from Charter scrutiny. On that basis, all claims could simply be screened out of the system and diverted from the IRB, with no Charter implications. Canada would run afoul and make a mockery of its legal obligation to protect refugees if it could avoid being held accountable for *refoulement* simply by screening out cases and refusing to assess their merits.

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[13] Berrahama v. M.E.I. (1991), 132 N.R. 202 (F.C.A.); Nguyen v. M.E.I., [1993] 1 F.C. 696 (C.A.). In Nguyen, the Court concluded that "[a] foreigner has absolutely no right to be recognized as a political refugee under either the common law or any international convention to which Canada has adhered ... [A] declaration of ineligibility does not imply or lead, in itself, to any positive act which may affect life, liberty or security of the person."

In Singh, while Madam Justice Wilson did emphasize that all refugee claimants in Canada had a statutory right to an examination of their case (*i.e.* that there was no form of screening), that was not the full essence of her analysis. Quite simply and more importantly, she noted that what was particularly critical was whether government action would lead to a risk of grave harm. She explicitly rejected an analysis that distinguishes between rights and privileges. She also highlighted the fact that refugees have the crucial right to be protected from *refoulement*, obvious proof of the potential harm at stake. Similarly, the MOA engages section 7 rights in a way that puts refugees at risk of harm, notably *refoulement*, without the safeguards required by fundamental justice.

Section 7 and the "Save Haven" Test

The government might raise two other arguments in support of their position that the MOA does not give rise to section 7 concerns. First, they might insist that the legislative scheme which allows Canada to enter into the MOA ensures that refugees will only be returned to countries which are demonstrably safe. Second, they might argue that any harm that will ensue is too remote to attract scrutiniy under the Charter - *i.e.*, if something does befall the claimant, it will be some other country's fault, not Canada's.

Do the provisions in the *Immigration Act* which authorize agreements such as the MOA sufficiently ensure that countries that are designated (in this case the United States) are truly safe havens?[14] A country can only be prescribed if the federal cabinet is satisfied that it complies with article 33 of the Convention.[15] However, the Act lays out a very curious test for making that assessment. Section 114(8) identifies a number of factors that are to be "taken into account". Is the country a party to the Convention? What are its actual policies and practices with respect to Convention refugee claims? What is its human rights record? Does Canada have a formal agreement (such as the MOA) with the country?

While these factors would seem to suggest an assessment that looks at a broader range of factors, other than only the country's respect for *refoulement*, the overall legislative test is explicitly linked to *non-refoulement*. It is questionable then, to what degree the Canadian government is bound to consider other human rights concerns, such as the grave concerns about harsh and arbitrary detention in the U.S. asylum process. As highlighted in footnote 14, above, the UNHCR Executive Committee does require a consideration of both the degree to which *non-refoulement* is observed, and the degree to which other fundamental rights are upheld.

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[14] In Singh Madam Justice Wilson does note that Canada would be justified in refusing to grant protection to refugee claimants who already "have a safe haven elsewhere". UNHCR Executive Committee Conclusion Number 58 allows the summary removal of claimants who have "already found protection" of basic human rights and against *refoulement.*

[15] *Immigration Act,* section 114(1)(s).

But most critically, both the Supreme Court and the UNHCR Executive Committee limit safe havens to countries in which an individual has actually *already* found protection - that, obviously, involves a degree of certainty. The MOA and related legislative provisions, on the other hand, allow return to countries where a claimant should or ought to be able to find protection - clearly quite a degree of uncertainty. There is not even means for a particular claimant to raise individual or minority-based objections to the assessment that the country is a safe haven.

Section 7 and Remoteness

Would the government be able to successfully argue that the risk of harm which an individual faces, if returned to the United States to pursue his or her claim, is too remote to attract Charter attention? After all, the potential agents of harm are not Canadian officials, and not U.S. officials, but the officials of some third, fourth or even fifth country down the chain of removals.

Madam Justice Wilson did recognize remoteness in a refugee context, but only with regard to the life and liberty branches of section 7. She explicitly ruled, however, that remoteness does not diminish a claim based on an individual's security interests. Canadian courts have, in an extradition context, been willing to accept remoteness as a defence to arguments brought under article 12 of the Charter, which protects against torture and cruel and unusual treatment and punishment. They have, however, been willing to evaluate the merits of arguments which assert security of the person under section 7.

As well, there have been compelling, well-reasoned dissenting Supreme Court decisions which reject remoteness as a defence even in an article 12 context, which examine the degree to which Canadian action is implicated in the chain of events and the objective foreseeability of the eventual harm that may await the person.[16]

International human rights bodies have consistently rejected remoteness arguments. The European Court of Human Rights has simply recognized that if a state takes steps, through extradition or deportation, which have a direct consequence of exposing an individual to harm, that state action attracts liability under human rights documents.[17]

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[16] Lamer J., in United States v. Allard, [.1987] 1 S.C.R, 564, at 574-75; Cory J., in Kindler v. Canada (Minister of Justice), [1991] 2 S.C.R. 779, at 824, noting that "[t]he ceremonial washing of his hands by Pontius Pilate did not relieve him of responsibility for the death sentence imposed by others and has found little favour over the succeeding centuries."

[17] *Soering* (1989), Eur. Ct. H.R., Ser. A, NE. 161, at 35-36.

FUNDAMENTAL JUSTICE

Refugees returned to the United States under the MOA are denied a hearing. They are denied any opportunity to state their case - be it of fear in their country of origin or concern that their rights, including to *non-refoulement*, will not be respected in the United States. They are denied access to the IRB, the independent, expert body charged with responsibility for refugee determination in Canada. They are not even allowed a hearing before an immigration adjudicator.

It would seem quite clear that the MOA and related legislative provisions do not observe the principles of fundamental justice. The government might, however, advance an argument that although they are not being afforded fundamental justice in Canada they will be in the United States, such that there is no violation of section 7. In effect, the government would be asserting that the United States has become Canada's partner in ensuring that refugees receive fundamental justice.

This argument really only works if it can truly be said that "partner states" have comparable approaches to refugee determination, in full compliance with international standards. Human rights groups have argued that the international trend toward "responsibility sharing" agreements such as the MOA should be halted until there is a level international playing field. They have called for states to draft a binding international agreement which sets out minimum procedural and substantive standards to be applied in refugee determination.

Canada does not have such an agreement with the United States, let alone any other state. While the agreement is between Canada and the United States, other states' refugee determination systems (or lack thereof) are relevant as well, as the MOA does foresee the possibility of third country removals, if both the Canadian and U.S. governments agree.

As outlined at the beginning of this paper, refugee determination differs widely in Canada and the United States. In the United States claimants are quite likely to go unrepresented, to be held in harsh conditions of detention, and possibly be subjected to summary exclusion if they lack proper identity documents. They will face the prospect of having their claims determined in a country with a long record of politically-biased decision-making and examples of flagrant disregard for the principle of *non-refoulement*.

In the U.S. claimants will also be held to a higher standard of proof than they would in Canada, in demonstrating that their fear of persecution is well-founded. Notably, in the U.S. they must show that there is a "clear probability"[18] of persecution, whereas in Canada only a

[18] INS v. Stevic, 467 U.S. 407 at 430 (1984).

"reasonable chance" of persecution must be established.[19] They may also be required to meet the almost impossible requirement of proving the subjective intent of their feared persecutor.[20]

Supreme Court decisions in an extradition context highlight that courts will allow a certain margin of appreciation when comparing the delivery of justice in different countries. Judges would not expect the U.S. system to parallel the Canadian in all respects. The Supreme Court has indicated that the foreign legal system should operate within a system of checks and balances, ensure reasonable due process, and deliver essential fairness.[21] However, the concerns highlighted above are of sufficient seriousness that a court would likely conclude that the margin of appreciation does not apply.

THE SECTION ONE DEFENCE

If a court concludes that the MOA does violate section 7 of the Charter, it would be open to the government to seek to defend that violation on the basis of section 1, which provides that rights may be subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

There is some debate as to whether a section 7 violation can ever be justified under section 1.[22] However, even if the possibility exists, it is unlikely that the government would be able to justify this particular violation. The government would need to demonstrate that important objectives are advanced by the MOA, that the MOA is a rational means to secure those ends, that rights are minimally impaired in the process and that the rights violation is proportionate to the objective at stake.[23]

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[19] Adjei v. M.E.I., [1989] 2 F.C. 680 at 682-83 (C.A.).

[20] INS v. Elias Zacarias, 502 U.S. 478 (1992).

[21] Canada v. Schmidt, [1987] 1 S.C.R. 500, at 522-23.

[22] For instance, in Reference *Re* Section 94(2) of the Motor Vehicle Act. R.S.B.C. 1979 [1985] 2 S.C.R. 486, at 523, Wilson J. states: "I do not believe that a limit on a section 7 right which has been imposed in violation of the principles of fundamental justice can be either 'reasonable' or 'demonstrably justified in a free and democratic society'. In the same case, Lamer J. concluded that a section 7 violation could only be upheld under section 1 in truly exceptional conditions "such as natural disasters, the outbreak of war, epidemics and the like." Ibid., at 518.

[23] R. v. Oakes, [1986] 1 S.C.R. 103.

There are three likely objectives that the government would put forward: deterring abuse of the refugee determination system, national security concerns, and promoting international comity or cooperation. However, none are likely to survive the Oakes test.

There is nothing to support the contention that the MOA would deter abuse of Canada's refugee determination system. There is no convincing proof that the system is regularly abused. Furthermore, there is no evidence that those who are turned down had defrauded the system. Even if there was evidence of abuse, there are other means that could be employed, which more carefully target abusers and not all claimants.

It is difficult to conceive of what national security grounds might be advanced by the government. There is no evidence that any more than a minuscule number of refugee claimants pose a danger to the safety and security of Canada - certainly not enough to justify such a widesweeping approach as the MOA. Perhaps the government would raise the spectre of numbers of claimants posing a security threat. Government officials have referred to the 450,000 claimants said to be pending in the backlogged U.S. system, and their fear that those individuals would make claims in Canada if turned down in the U.S. However, again, there are clearly less drastic options open to the government if that is a concern, such as adopting an expedited process of some sort to deal with individuals who have already claimed refugee status in the U.S.

What of international comity? Would the courts allow the MOA, despite the fact that it violates the section 7 rights of refugee claimants, on the basis that it is necessary in furtherance of Canada's valid goal of securing international cooperation and smooth relations with other states. Comity is, for example, applied in an extradition context, on the basis that Canada must readily cooperate with extradition requests made by other states if we are to expect those states to cooperate, when Canada makes similar requests of them.[24] The argument does not make sense in a refugee protection context however. In turning away refugee claimants Canada will not be helping other countries, such as the U.S. Quite the contrary, we will simply be adding to the burdens and costs already borne by their protection systems.

Beyond that, would the courts accept a comity-based argument that simply appeals to the broad importance of international cooperation? U.S. officials have offered a similar explanation for their interest in entering into the MOA, arguing that agreements of this nature are the wave of the future worldwide and that no country can afford to be left out. While that may be true, it does not satisfy the section one justification test. Courts have held that section one must be interpreted in a way that promotes democratic values. If international "responsibility sharing" agreements did truly reflect a principled approach to apportioning the burdens of refugee protection among states, the argument might be more persuasive. However, as they stand, these agreements do little more than shift burdens from one country to another with the inevitable

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[24] Kindler v. Canada (Minister of Justice), [1991] 2 S.C.R. 779, at 853.

result that poorer, less developed states are left responsible for protecting more and more of the world's refugees.

CONCLUSION

This paper gives a brief overview of some of the arguments that might be advanced in a Charter--based challenge to the MOA. The conclusion reached is that the MOA would not be able to withstand a challenge brought under section 7. To summarize, the building blocks of the Charter argument are as follows:

1. Refugee claimants physically present in Canada have the right to Charter protection.

2. In making a claim for refugee status in Canada, the “security of the person” of refugee claimants is on the line, such that they can assert section 7 of the Charter.

3. Turning claimants away from Canada under the MOA and related legislative provisions violates their security of the person. The agreement and legislation do not ensure that individuals will only be turned back to situations where they have already found a safe haven.

4. The potential harm that refugees face in being turned away from Canada is not too remote to attract Charter scrutiny.

5. The U.S. refugee determination system is flawed to such a degree that it cannot be said that claimants turned away from Canada would be afforded fundamental justice in the United States.

6. The section 7 violation that flows from the MOA cannot be defended under section 1.

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