

# POLICY SERIES



## **Abusing Canada's Generosity and Ignoring Genuine Refugees**

**An Analysis of Current and Still-needed  
Reforms to Canada's Refugee and  
Immigration System**

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**By James Bissett**

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Upon leaving the Public Service in 1992, he was employed by the International Organization of Migration as their chief of mission in Moscow. He worked there for five years helping the Russian government to establish a new Immigration Service and draft new immigration legislation and a new *Citizenship Act*. During this period, he was also in Chechnya helping to evacuate refugees and find accommodation for refugees fleeing the civil war in 1994. Since his return to Canada in 1997, Bissett has acted as a consultant to the federal government on a number of immigration issues. He was a regular panellist on the now-defunct Public Broadcasting System (PBS) TV program *The Editors*. He regularly contributes columns to a variety of Canadian newspapers. He is also a member of the advisory board of the Centre for Immigration Policy Reform.



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Close to 500 smuggled Tamil refugee claimants arrive on the West Coast of Canada aboard the MV Sun Sea, August 2010.

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# Executive summary

Canada's refugee asylum system is in disarray for the following reasons:

- It does not serve the needs of genuine refugees;
- It is extremely expensive;
- It encourages and rewards human smuggling;
- It has damaged our bilateral relations with many friendly countries and it compromises our trade and tourism industries;
- It undermines every effort to maintain the security and safety of Canadians and is the primary reason our southern border has been, in effect, militarized and why Canadian goods, services and people can no longer cross the border quickly and freely;
- It is a system dominated by special interest groups—immigration lawyers, consultants, non-governmental organizations and agencies that are given millions of taxpayers' dollars to deliver services and legal aid to asylum seekers, and by other human rights activists and ethnic organizations that advocate for more-generous asylum legislation;
- It is out of step with other countries that are trying to stop the flow of asylum seekers.

**“...the process is bogged down by frivolous and unfounded claims.”**

## Unlike other countries, Canada allows almost unlimited access

Canada permits anyone from any country to claim asylum and to apply for refugee status. Applicants gain entry by claiming to be persecuted in their own country. In 2008, people from 188 countries claimed asylum, and many of them came from countries that share our democratic traditions and are signatories to the United Nations Refugee Convention, which obligates them to protect refugees (Citizenship and Immigration, 2008).

A key weakness of our asylum system is that it cannot quickly distinguish between those who need protection from genuine persecution and those who abuse the system and avoid normal immigration rules. As a result, the process is bogged down by frivolous and unfounded claims.

For example, in 2008, there were claimants from 22 of the 27 European Union (EU) countries—including Germany, England, France and Belgium. Approximately 2,300 claims originated in the United States—a country that leads the Western world in receiving asylum claims. These statistics illustrate why Canada's system has become a travesty of what the UN Convention was designed to do (Citizenship and Immigration, 2008).

EU countries long ago introduced pre-screening processes to sort out frivolous claims, and they have accelerated procedures for dealing with claimants who originate from countries that are safe for refugees. Many countries reduced welfare benefits and other services for

asylum seekers, and others do not permit asylum seekers to work. These methods were implemented so that fraudulent claimants who were really migrants did not overwhelm their asylum systems.

## The growing number of refugees and the growing costs to Canada

It is estimated that roughly 800,000 asylum seekers entered Canada in the past 25 years. In the past two years, more than 70,000 claims were registered. This is almost 3,000 per month.

Considering there is already a backlog of approximately 60,000 claims waiting to be heard by the Immigration and Refugee Board (IRB), it is not alarmist to think that the system is out of control (Citizenship and Immigration, 2010).

In 2009, Canada became the third-largest receiver of asylum seekers (33,000) in the Western world after the United States (49,000) and France (42,000). On a per capita basis, however, we rank first with one claim for every 1,000 people compared with the United States with one claim per 11,000 people (Citizenship and Immigration, 2010).

Perhaps the most insidious feature of Canada's asylum system is its enormous financial costs and the naïve presumption that the sums involved are justified because we are helping people who simply claim to be refugees.

Unfortunately, it is difficult to determine the actual costs because they are spread over three levels of government: federal, provincial and local—and involve a wide variety of activities such as housing, welfare, legal and medical fees as well as the operational cost of the IRB itself, which is expected to reach just over

\$117-million in 2010 (IRB, 2010).

In 2008, Canada received 37,000 asylum seekers and approximately 60 per cent of these will be refused refugee status by the IRB. Since the government estimates each failed asylum seeker costs \$50,000 we can calculate that in 2008 the taxpayers faced a bill of approximately \$1.11-billion just to deal with the number of refused cases in the 2008 flow. (Citizenship and Immigration, 2010a).

Added to the costs are those required to deal with the existing backlog. Even if the costs of the 2008 failed cases are subtracted from the backlog, its numbers have been supplemented by the 33,000 new asylum arrivals in 2009 so the backlog figure of 60,000 would remain at approximately the current level. The costs of dealing with its failure rate of approximately 60 percent would be close to \$1.8-billion.

Moreover, we are not told the figures for those who end up being granted refugee status, and the costs do not end when the asylum seeker changes status.

These are sobering numbers and they illustrate the urgent need for reform. It is little wonder that Quebec complained in 2008 that the 6,000 Mexican asylum seekers in that province had cost more than \$171-million even though 90 per cent of the claims were found to be false.

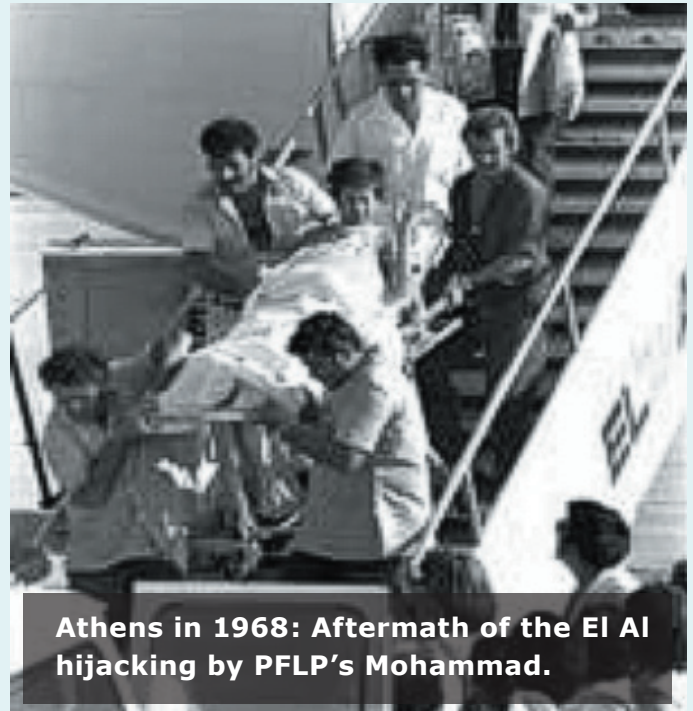
Lastly, permitting 30,000 to 40,000 people to enter Canada freely each year without first screening them for medical, criminal, or security issues is irresponsible, and to assume that all of these people are refugees fleeing torture and death makes a mockery of border control.

## The European Union harmonizes its asylum policy

In contrast to Canada, the EU substantially reformed its immigration and refugee policies. EU countries eventually adopted asylum policies through the provisions of the Schengen Agreement of 1985, which called for the removal of border controls between EU states. The Treaty of Amsterdam in 1997 incorporated Schengen into EU law, forcing the members to harmonize their rules regarding asylum seekers and to impose common restrictions.

The restrictions are listed below and with few exceptions are followed by all EU countries.

- **Safe Third Country:** This provision removes the right to seek asylum from anyone coming from a European Union country or from a signatory country of the UN Refugee Convention or the European Convention on Human Rights.
- **Safe Country of Origin:** Asylum claims from anyone coming from a country that is safe for refugees are considered “manifestly unfounded” and such a claim can only be entertained in special circumstances. Germany’s first list consisted of Bulgaria, Ghana, Gambia, Hungary, the Slovak Republic, Romania and Senegal. Switzerland, although not a member of the EU, has the same list plus India.
- **Frivolous Claims:** These are claims that have no substance. The claimants give no obvious reason for fearing persecution, and their stories contain inconsistencies and contradictions. Their claims are considered “manifestly unfounded,” and these claimants are subject to accelerated procedures and summary removal.



Athens in 1968: Aftermath of the El Al hijacking by PFLP’s Mohammad.

## The \$3-million terrorist living in Canada for more than 20 years

Perhaps the most glaring of abuses is the case of Mahmoud Issa Mohammad. In Athens in 1968, Mohammad and a fellow terrorist member of the Popular Front for the Liberation of Palestine (PFLP) attacked an El Al aircraft with machine guns and grenades. They wounded a flight attendant and killed a 50-year-old Israeli man before being overpowered. Both men were sentenced to life in prison but were released a month later when other PFLP gunmen hijacked a Greek aircraft and exchanged their hostages for the two men.

Mohammad assumed a new identity and arrived in Canada in 1987. He was soon apprehended and ordered deported. His appeal against the deportation order was dismissed, but his lawyer has submitted a series of appeals and called for court reviews. The bottom line is that after more than 20 years, and an estimated cost to taxpayers of \$3-million, Mohammad is quietly continuing to live in Brantford, Ont., caring for his fruit trees (Brown, 2008).



Signatories of the Amsterdam Treaty, 1997.

- **Abusive Claims:** These are claims submitted by people who are using false documents or who arrive without documents and who do not co-operate with officials. Their claims are considered “manifestly unfounded” and are dealt with by accelerated procedures.
- **Removal under Appeal:** Most EU countries do not allow appeals for the lifting or suspending of an order of removal. Denmark, for example, rejects claimants at the border if they are coming from a safe third country. France, Sweden, Switzerland and Germany deny a right of appeal to claimants coming from safe third countries.
- **Re-admission Agreements:** These are formal bilateral agreements signed by countries that agree to take back rejected asylum seekers, thus making it easier for the removal of failed asylum seekers. In some cases, the agreement was negotiated on the understanding that development aid is conditional upon the agreement being signed.
- **Restricted Social Welfare and Benefits:** Most EU countries restrict the movement of asylum seekers and keep track of their movements by requiring them to check in and out of their accommodation. They do not permit claimants to accept employment pending their asylum decision. Moreover, welfare and other social benefits are lower than those received by citizens and legal residents. In this connection, it is interesting to note that asylum seekers in the United States are not permitted to work during the first six months of their stay.
- **Agents of Persecution:** Germany, France and Sweden apply a strict interpretation to the UN Refugee Convention and only accept claims from people persecuted by state authorities.
- **Temporary Protection Status:** A number of EU countries grant temporary protection status to asylum seekers rather than process their refugee claims. Germany, during the Bosnian war of the early 1990s, gave temporary status to people fleeing the violence there. This practice avoids the lengthy and litigious process involved in refugee determination and leaves the state free to send home people with temporary status when conditions improve.



## Why reform is needed: Genuine refugees are plentiful and threatened by slack Western asylum policies

At the end of 2009, the UN High Commissioner for Refugees (UNHCR) found itself responsible for the care and protection of 43.3-million refugees and forcibly displaced people who were under UN protection. This was the highest number since the mid-1990s and consisted of 15.2-million refugees and a further 28.1-million people displaced in their own country (UNHCR, 2010b).

A majority of the refugees had been living as refugees for five years or more and many of them lacked food, healthcare, housing, and decent living conditions. Many were elderly, many were women with small children, and few had any hope of obtaining any viable solution to their plight.

The vast majority of these unfortunate people were located in Asia, Africa and the Middle East. Some 350,000 Sierra Leone citizens fled to Guinea—one of the poorest countries in the world—for temporary protection. There were 248,000 people who escaped from the tyrannical regime in Myanmar, and almost two million internally displaced people in the Democratic Republic of the Congo. South Africa received 207,000 asylum seekers in 2008—the highest number of any other nation (UNHCR, 2010c).

Most of these refugees and displaced people do not have access to the sophisticated asylum systems in the Western industrial countries. Usually, they fled on foot, or by boat, if they were fortunate enough to find transportation. They fled with whatever they could carry, and while they found temporary

protection, it was rudimentary and frequently dangerous.

They relied on the UNHCR and other agencies for food and basic essentials. They do not have the money or means to pay international traffickers to fly them to a Western country where they can apply for asylum. What they have received in assistance is of a very poor standard, and the camps they live have been inadequately protected. In African camps, armed raiders have frequently kidnapped the women and children.

These refugees and the displaced are the forgotten people. In the eyes of the Western nations, they are of low priority. They receive little attention and less financial help. The money goes to the asylum seekers, their lawyers, and the non-governmental organizations (NGOs) that assist them.

The annual budget available to the UNHCR in 2009 to care for the 43.3-million refugees and others under its care was US\$2.1-billion. This is roughly what Canada is estimated to have spent on its asylum system that year. The UNHCR's 2009 budget of US\$2.1-billion is in revealing contrast to the US\$10-billion spent by the Western industrial countries on the 400,000 asylum seekers who enter their countries each year (UNHCR, 2010d).

***These refugees and the displaced are the forgotten people. In the eyes of the Western nations, they are of low priority.***

## A roadmap to reform

Western asylum systems have been largely dysfunctional since the early 1980s, and since then a few simple truths that point the way to system reforms have emerged. It has taken a long time for these to be accepted, but the EU countries have taken the lead through the harmonization of their asylum systems. Unfortunately, too many in Canada, with the possible exception of Jason Kenney, the new Immigration and Citizenship Minister, seem unwilling to learn from Europe.

***Governments have abdicated responsibility for formulating rational asylum policies and co-ordinating a government position on global refugee issues.***

### Half-measures do not work

The first truth is that half-measures do not work. Tentative methods to improve the efficiency of asylum systems—time limits on appeals, adding more board members, adopting one-member hearings—and other mechanical tinkering with the process only result in failure, and they further undermine public confidence.

The Netherlands learned this truth the hard way. In 1987, bowing to public pressure to reform the system and curtail the flow of asylum seekers, the government passed more-restrictive legislation. The new measures did not work and further restrictions were imposed in 1991. However, these did not succeed either and further restrictions in 1993 also proved inadequate.

If Canada had enacted the third-country provisions of the 1989 legislation, we would have preceded the EU in introducing sensible reform of the system and saved billions of dollars, put an end to human trafficking, strengthened our security infrastructure and maintained our good-neighbour relationship with the United States.

### No quasi-judicial system that offers benefits can manage volume without restricting access

The second simple truth is one Professor Ratushny identified in 1984: No quasi-judicial system that offers benefits can manage large volumes without restricting access. This has been proven repeatedly and is true for every Western asylum

country. No matter how many panels are set up, no matter how many employees are hired, no matter how stream-lined the process, it will be overcome by the unrestricted demand on its services. Without restricting access, the system will not work.

The most effective way to restrict access is by adopting the measures taken by the EU countries—safe third country, safe country of origin, accelerated hearings, removal pending appeal, etc. The EU restrictions have shown that they do help in reducing asylum flows.

It remains to be seen if these measures will, in the end, prove restrictive enough to prevent future asylum flows from crippling the international effort to help the refugees in camps around the world and to combat human smuggling.

### **Refugee determinations that are made after a claimant enters a country are too late**

The third simple truth is to recognize that the key to the problem of asylum seekers is that under all current systems the asylum decision about whether the claimant complies with the UN Convention definition of “refugee” can only be taken after the claimant has entered the territory of the country concerned. However, by then it is too late.

This is the heart of the matter, and until it is addressed, it is unlikely that asylum flows will be managed, because the aim of the vast majority of asylum seekers is not protection but access to a Western country. Once in the country, the chances of removal are negligible, and the legalistic nature of the various determination systems guarantees that time is on the side of the asylum seeker.

Among other things, this is why the financial earnings from human smuggling and trafficking have almost reached those of the international drug trade.

There is no obligation to hear an individual’s claim to asylum from within the country concerned. In the early 1990s when the United States was faced with large volumes of asylum seekers arriving by sea from Cuba and Haiti, it implemented a policy of intercepting ships at sea and removing the asylum seekers to holding centres in the Panama Canal Zone and Guantanamo Bay, where the asylum claims were adjudicated. If the claim was successful, the refugee was admitted to the United States.

In the summer of 2001, Australian authorities intercepted a Norwegian ship carrying 438 asylum seekers who were en route to Australia. The vessel was diverted to offshore islands, and the passengers had their asylum claims processed there.

Those whose claims were accepted were told they could join the backlog of people waiting for places in the 12,000-refugee quota that is accepted by Australia annually. Those whose claims were refused were given the opportunity to return voluntarily to their home countries or be subject to forced removal.

Australia has faced a difficult problem with asylum seekers arriving by sea, and it has had an off and on policy of intercepting and diverting the vessels elsewhere to process the asylum seekers’ claims. However, since January 2010, 81 ships have attempted to offload asylum seekers, and the asylum policy has become a major political issue.

On April 9, 2010, in a desperate measure to stop the ships, the Australian Minister of Immigration, Chris Evans, announced the immediate suspension of all new

asylum claims by people from Sri Lanka and Afghanistan. He gave changing circumstances in those countries as the reason for the decision (BBC, 2010).

The Australian and U.S. experiences with adjudicating claims offshore have been controversial and subject to severe criticism from the refugee lobby. Nevertheless, *the establishment of asylum centres outside the territory of the receiving state is not in violation of the UN Refugee Convention*. The core obligation of the Convention is to not return refugees to the countries where they might face persecution. It says nothing about where the claim is heard.

The concept of determining refugee status in neutral territory or in UN safe havens is not new. In 1986, Denmark made a similar proposal at the United Nations General Assembly. The Danish representative suggested that asylum seekers outside of their regions should be returned to their regional United Nations Processing Center where their claims for refugee status would be examined. Seven years later, in 1993, the Netherlands Secretary of State for Justice made a similar proposal in Athens at the fifth conference of Ministers for Migration Affairs—the processing of asylum claims should be conducted at reception centres in the claimants' own regions. As these suggestions lacked support from other countries and the UNHCR, nothing came of them. However, offshore determination of asylum claims may prove to be the answer to this long-lasting and seemingly insoluble problem.

If reform is to come, it will have to be because a group of Western nations demanded that the UNHCR step up to the plate and do its job of helping to resolve this issue.

It would be logical for Canada to take this initiative. We played an important role in the formation of the UNHCR and in the drafting of the 1951 Refugee Convention, and we were once regarded internationally as a key player in the asylum and refugee policy fields because of our historical role in helping to resolve refugee problems.

However, for the last 25 years, Canadians have allowed this fundamentally important area of public policy to be completely dominated by the refugee lobby and special interest groups. Governments have abdicated responsibility for formulating rational asylum policies and co-ordinating a government position on global refugee issues.

In order to regain our former standing and have any hope of being listened to seriously in international forums, let alone have influence, Canada would have to put its own house in order. It does not appear feasible in the short term, given the powerful influence of the refugee lobby and the obstinate refusal of the opposition parties to consider even modest proposals for reform.

It may prove to be impossible in the final analysis to institute effective reform of our asylum system without amending the Canadian Charter of Rights and Freedoms. As long as Section 7 of the Charter applies to everyone instead of just Canadian citizens and legal, permanent residents, meaningful reform may not be obtainable. It should not be impossible to change the Constitution. If, because of its wording, the Charter itself endangers the "life, liberty and security of Canadians"—as it may well do if we cannot control our borders—then it should be changed.

## Part 1

# Canada's refugee policies over the decades

### The UNHCR and the UN Refugee Convention

The aftermath of the Second World War left thousands of refugees and displaced people in Europe who were unable or unwilling to return to their own countries. To help resolve this problem, the United Nations General Assembly in 1949 agreed in principle to appoint a High Commissioner for Refugees and establish an office of the High Commissioner, to become effective in 1951.

This was done in January 1951, and six months later the UN adopted the United Nations Convention Relating to Refugees, which, among other things, defined the term, "refugee" and set out the obligations of member states to provide protection for refugees and to honour the principle of *non-refoulement*, not returning refugees to countries where they fear persecution.

The Convention defines a refugee as

...anyone, who owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to return to it... (UNHCR, 2010a).

The definition has remained the same since 1951. However, in the *Immigration and Refugee Protection Act* of 2001, which was strongly influenced by the

ubiquitous refugee lobby, Canada chose to broaden the definition to include anyone who is persecuted for any reason. This was an unfortunate and misguided decision since the UN definition was designed precisely to avoid the probability that each state would give the word "persecution" its own interpretation.

Although Canada had played a major role in drafting the Convention, we did not sign it until 1969, and it was not until the *Immigration Act* of 1976 that the Convention definition was incorporated into Canadian law. There were reasons for this apparent reluctance.

### Canada becomes a country of resettlement, not asylum

Immigration officials feared that if the Convention was signed, Canada might become a magnet for thousands of refugees and that we might lose the right to refuse entry to undesirable refugees. Furthermore, Canada thought it could play a more useful role by helping to resolve international refugee problems by resettling refugees who had already found asylum in other countries.

For reasons of geography, it is difficult for asylum seekers to reach Canada directly from the countries where they fear persecution. Sharing the refugee burden with the countries of first asylum by selecting refugees out of the camps located in their countries seemed a sensible and helpful policy.

The countries of first asylum welcomed the Canadian contribution and it won the approval of the UNHCR.

From 1947 to 1952, Canada selected approximately 186,000 refugees from the European refugee camps. In subsequent years, we took thousands more who had found safety in countries of first asylum or, in some cases, from the refugee-producing country itself: Hungary in 1956 (37,000), Czechoslovakia in 1968 (12,000), Uganda in 1972 (7,000), Chile in 1973 (7,000), Indochina from 1975 to 1984 (100,000), and Lebanon from 1976 to 1979 (11,000) (Bissett, 1986).

In 1986, the UNHCR awarded Canada the Nansen Award in recognition of our valuable contribution to helping the office cope with the growing number of refugees around the world. This was the first time the Nansen Award was given to a country. During the presentation of the award, the then-president of the Canadian Branch of Amnesty International, Michael Schelew, interrupted the proceedings to unleash a scathing verbal attack against the government's asylum policy. It was a forewarning of trouble to come.

In those years, as it continues to do now, Canada was actively seeking immigrants to enhance its labour force, and the selection of refugees fulfilled a dual purpose. Refugees helped Canada meet its humanitarian obligations as a signatory to the UN Convention, and at the same time assisted the country in meeting its immigration goals. The refugees selected by Canada were, for the most part, individuals who were able to satisfy Canadian visa officers that they would be able to become successfully established within a year of their arrival in Canada.

The blurring of the difference between refugees and immigrants has been a unique characteristic of Canadian refugee

policy. And it is maintained today. When refugees are selected from abroad or are sponsored by a private Canadian group, they come to Canada as landed immigrants. Similarly, when asylum seekers are granted refugee status by the Immigration and Refugee Board, they are automatically granted immigration status after they pass the medical, criminal and security requirements. They do not have to meet any of the other requirements applicable to immigrants.

In most countries, a distinction is made between refugees and immigrants. Refugees are not automatically given permanent residence status and are often expected to return home when conditions improve enough that they can be safe.

Germany repatriated 32,000 Kosovars after that conflict ended. Other EU countries followed the same practice with Kosovars and Bosnians. Many Iraqi refugees who fled to Syria returned home when it seemed safe to do so. There is no obligation under the UN Convention to grant permanent residence to refugees, only to ensure they are not returned to a country where they might be persecuted.

## **The 1976 Immigration Act**

In the 1960s, there was growing pressure, especially from the Department of External Affairs, for Canada to sign the UN Convention. External Affairs thought that by doing so Canada would be seen to be playing a more important role in the promotion of multilateralism by operating through the UN system. In addition, the introduction in 1967 of new immigration regulations that ushered in a non-discriminatory immigration policy added to the arguments for signing the Convention. However, it was not until the *Immigration Act* of 1976 that the word "refugee" appeared in Canadian legislation.

The new *Act* also prescribed a process for dealing with people who arrived or were already in the country and asking for asylum. This provision was deemed necessary because by the mid-1970s, small numbers of asylum seekers were arriving in Canada. The procedure set out in the legislation called for a transcript review by immigration officials of the reasons for the asylum claim and a recommendation to the Minister, who would decide the case. The processing capacity of the new system was about 500 claims a year.

By the time the *Act* came into force in 1978, the numbers were increasing, and in 1980, there were 1,600 claims registered. People wishing to avoid the normal immigration process were flooding the new asylum system. The asylum seekers were primarily coming from non-refugee-producing countries such as India, Brazil, and the Caribbean, and many of them had relatives in Canada.

Because the system took time and each case had to be dealt with individually, it could not cope with high volumes of claimants. This was to become a familiar pattern over the years. Visitors entered Canada and then sought asylum after their arrival. By the early 1980s, the asylum charade was well underway and it continues to this day.

To avoid the collapse of the system, the government was obliged to impose visitor visas on the countries whose citizens were abusing the system. This stopped the flow, but it had also become apparent that a new system was urgently needed.

A new system, however, required new legislation and there was little agreement about what this should entail.

In recognition of a growing backlog problem that had reached 9,000 by 1984,

the new Liberal Minister of Immigration, John Roberts, had appointed Dr. E. Ratushny, a distinguished professor of law at the University of Ottawa, as a special advisor to conduct a major review of the process and recommend a new asylum system for Canada.

## The 1984 Ratushny Report and missed opportunities

Ratushny's study, *A New Refugee Status Determination Process for Canada*, argued for a tough approach to the adjudication of asylum claims. He thought the essential element of any system was to restrict access to the decision-making body and to ensure that frivolous and unfounded claims were summarily disposed of at the front end of the process. He cited the example of West Germany where 108,000 claims were received in 1980 and some \$250-million was spent on welfare in support of those waiting a decision on their claim. This large sum, he said, would have tremendous value in dealing with refugee problems at their source.

Ratushny maintained that any quasi-judicial body that conferred rights and allowed unlimited access to its deliberations was predestined to fail because it would be overwhelmed by claimants using it as a means of gaining entry to Canada. He thought the objective of Canada's asylum system should be to limit direct access to Canada as a place of refuge in order to ensure that asylum is made available to those most in need of protection.

He wrote that those who advocate for unlimited access to the process must face the reality that not only those in need of protection will use it.

With 10-million refugees throughout the world, any system that confers rights must insulate itself from the flow of people seeking only to better their conditions of asylum.

He also warned that the effectiveness of procedural standards could be overrated. He considered an important factor that was often overlooked was the quality of the decision-maker. Where refugee claims were involved, he thought special knowledge, experience and sensitivity were extremely important.

He concluded his report with the words, "Canada is in the fortunate position of being able to deal with such potential problems before they materialize. However, there is no reason for any sense of complacency." Little did the professor imagine the power of the refugee lobby to manipulate the media and influence the shaping of asylum legislation to its liking and advantage.

Had Ratushny's recommendations been incorporated into the proposed legislation, Canada would have been well on its way away to resolving its asylum quandary. It was not to be.

The Ratushny report was effectively shelved. It was submitted to Minister Roberts in May 1984, on the eve of a federal election. As frequently happens, rather than deal with the recommendations in the report, the Minister announced that another study was to be conducted. Rabbi Gunther Plaut, of Toronto, a refugee from Nazi Germany and a prominent human rights and refugee advocate, was selected.

## **The 1985 Plaut Report: Idealism without regard for consequences**

In sharp contrast to Ratushny's study, Plaut's report, *Refugee Determination in Canada*, argued for unrestricted access to the asylum system. He thought that restricting access was a minimalist approach to Canada's obligations under the UN Convention, and he thought the number of claimants should not be an issue. He stressed that each person has only one life to live and the opportunity to do so in decency and dignity is not determined by quantitative comparisons but rather by the quality of the response with which Canada met the needs of refugees. Plaut thought there was a human dimension to saying 'yes' to refugees.

Unlike Ratushny's study, Plaut's report was not shelved. It was eagerly accepted by the new Conservative Minister of Immigration, Flora MacDonald, who praised the report for its excellence and tabled it in Parliament in the spring of 1985. The report was referred to the Standing Committee of the House of Commons responsible for refugee and immigration matters. The report was to form the basis of new asylum legislation. There seemed to be a consensus about the direction the new legislation should take.

As might be expected, Plaut's report was enthusiastically endorsed by the NGO community, the lawyers and activist groups. His terms of reference had specifically directed him to consult with "advocacy and refugee-assisting groups concerned with refugee claimants in Canada." This signalled to the active refugee lobby that their views would be taken into account.



Many undoubtedly felt that the government would be bound by the report's recommendations.

All agreed that the creation of a new, independent Refugee Board was essential and that there should be, in effect, unrestricted access, two opportunities to appeal a negative decision and access to the courts. It was also generally agreed that individuals claiming asylum should be entitled to an oral hearing.

## The Supreme Court's 1985 Singh Decision

In fact, an oral hearing was a mandatory requirement as a result of a ruling by the Supreme Court in *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, April 1985. The Court found that a transcript review and a refusal by the minister prescribed in the 1976 *Act* were in violation of the Canadian Charter of Rights and Freedoms. The Court ruled that when a serious question of credibility is involved, fundamental justice requires that credibility be determined at a hearing, and the people concerned should have the chance to state their case and know the case they have to meet.

This ruling, known as the Singh decision, has led many refugee commentators to believe it forces every asylum system to allow the claimant to be seen and heard by a tribunal or duly constituted board. This interpretation may be justified but the Court also said that the absence of a hearing is not in itself inconsistent with natural justice in every case but rather the adequacy of the system for persons to state their case. This seems to suggest that credibility might be determined by other than a duly constituted board or committee.

A decision by the British Columbia Court of Appeal in 1985 in *Hundal v. the Superintendent of Motor Vehicles* involving administrative tribunals found that the type of hearing depended on the circumstances of the case involved. It could be a full and formal hearing or a simple hearing where there is an opportunity to be seen and heard and to respond to the case made by the accuser. This ruling also suggests that a single officer at a port of entry might conduct the hearing, and having listened to the claimant's reasons for fearing persecution, decide if the claim is valid or not and provide the claimant an opportunity to respond. The above interpretation of the Singh decision is one that might be worthy of testing before the courts

However, the Singh decision was important for another reason. The decision also made it clear that Section 7 of the Charter guarantees to everyone, not just Canadian citizens, "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."

These words seriously put in doubt whether it is possible to adequately and in a timely fashion control not only the entry into Canada of non-Canadians but also the ability to remove those who are undesirable without going through the full panoply of hearings, appeals, reviews and access to the courts.

What is quite clear is that in light of the Singh decision, the government is seriously limited in exercising sovereign control over who can enter Canada and in removing non-citizens who are in violation of immigration rules or other laws.

## New legislation introduced in 1986

On May 21, 1986, almost one year after the Plaut report was tabled, the Immigration Minister of State, Walter McLean, announced the government's proposed legislation. There was some urgency since the number of asylum claims had increased. In 1984, over 7,000 claims were registered and in 1985, the number rose to 8,500, creating a backlog that exceeded the 20,000 mark. It took over a year, and in some cases three years, before a claim could be heard—almost the same amount of time it takes to hear a case today.

The proposals called for a new, independent Refugee Board composed of members appointed by the government. Asylum claimants would appear before a two-member panel. The hearing would be non-adversarial and both board members had to agree on a refusal. If one member accepted the claim, it was successful. A refusal demanded a written reason for the decision but a positive decision did not. Unsuccessful cases were entitled to a review of the transcript by a different board member. If the claim was rejected again, the claimant could seek leave to appeal to the Federal Court.

The proposal included modest access controls—access to the Board would be denied to those who had already been recognized as refugees in other countries, those who had not submitted a claim within six months of their arrival, those who had submitted unsuccessful claims, and those people under order of removal.

The government was confident the new proposals would meet with general approval from the lawyers, advocacy groups, non-governmental organizations and church groups. The government was wrong.

“*...the government was confident the new proposals would meet with general approval. [It] was wrong...*”

Two days after his announcement in Parliament, Walter McLean addressed the biannual meeting in Toronto of the Standing Conference of Canadian Organizations Concerned for Refugees. Before a packed hall, he outlined the government's proposals. As he reached the end of his speech, he was interrupted by a storm of protest. An immediate resolution was moved by the Conference condemning the proposals and moving a vote of no confidence in the Minister, who walked out of the meeting hall.

The chief criticism of those opposed to the Bill was their insistence that an asylum claim that was refused at the first level should be allowed a *de novo* appeal before a second review panel—not just a transcript review of the original judgment. (A *de novo* appeal meant that the case would, in effect, be starting at the beginning and new evidence could be introduced.) The critics also demanded that there be unlimited access to the Board—anyone wishing to make a refugee claim should be allowed to do so. Even the extremely modest exclusion clauses were adamantly rejected.

The expectation of implementing the badly needed reform of the already burdened asylum system was premature. In fact, it was almost four years after Plaut's report was tabled in Parliament before new asylum legislation was enacted in January 1989.

By that time, the backlog had reached the 100,000 mark, and the estimated operational cost of dealing with it was \$179.5-million—not taking into account the social support costs of the provincial and federal governments (Bissett, 1998).

However, as events were to show, the refugee lobby overplayed its hand. In less than six months, because of rising numbers of claimants and a growing public concern that the government had lost control of the program, immigration officials were forced back to the drawing board to devise a much tougher asylum system.

## Events in 1986 and 1987

In the summer and fall of 1986, two events focused public attention on the asylum fiasco and added to public awareness that Canada was rapidly losing control of its borders.

- In August, 155 Tamils were found in lifeboats off the coast of Newfoundland. After an initial welcome, it was revealed that the Tamils were transported to Canada in a large ship from Germany, where many of them had been residing for years. It was also disclosed that they had paid the ship's captain to bring them to Canada. This incident created unusual public interest in the asylum process, and, for perhaps the first time, the media had cause to question our asylum policy.
- Three months later, in November 1986, the United States declared an amnesty for illegal aliens who had entered the country before 1982. This announcement had unintended consequences for Canada—those who had entered the United States illegally after 1982 faced deportation, and many of them headed for the Canadian border to claim asylum

A large proportion of these asylum seekers were from El Salvador and Guatemala and were assisted in their desire to get to Canada by U.S. and Canadian advocacy groups.

By December 1986, the numbers attempting to enter Canada with a refugee claim were alarmingly high. In one three-day period that month, over 1,000 asylum claims were received, and NGO hostels and safe houses on the U.S. side of the border were overcrowded with others waiting their turn for transportation to Canada (Bissett, 1998).

That month, in a last-ditch effort to reach some form of compromise with the refugee lobby, Jim Hawkes, the Chairman of the Parliamentary Standing Committee, arranged a meeting for the new Minister of State for Immigration, Jerry Weiner, his officials and representatives of the NGOs and advocacy groups. Rabbi Plaut attended. This attempt at compromise failed.

A month later, in January 1987, yet another effort was made, this time by the Minister of Immigration, Benoit Bouchard, to convince the lobbyists that their demands were unreasonable. Minister Bouchard's effort also failed.

Finally, with no hope of reconciliation with the refugee lobby, Cabinet approved a much tougher legislative proposal than it had approved the previous April. It had become painfully obvious that in the face of the increasing volume of asylum seekers (18,000 claims in 1986 alone), more-rigid access controls were essential. As Ratushny predicted, without access controls, any quasi-judicial tribunal will inevitably be overcome by numbers.

## Imitating Western Europe on asylum procedures

The tougher model presented for Cabinet approval introduced a safe third country provision that was being used in a number of Western European countries to control the number of asylum seekers. Asylum seekers arriving from a safe third country are ineligible to submit an asylum claim and are returned to the safe third country for their claim to be adjudicated. The return to the third country is safe because there is no danger of *refoulement*, or the return of a refugee to a country where there is risk of persecution.

### Definitions of "safe countries"

A safe third country is a country wherein an individual passing through could make an asylum claim. To be clear on the differences:

- The first country is the country in which the individual claims to be persecuted.
- The second country is the country where he would prefer to seek asylum.
- The concept of a safe third country is based on the assumption that people genuinely fearing death or torture who manage to flee their own country would normally apply for asylum in the first safe country reached.

Those who move voluntarily from a country of asylum to another country because it offers more services or benefits—or for any reason—put their asylum claims in question and are referred to as asylum shoppers, and asylum shopping is a practice that is not sanctioned by the Refugee Convention. In Canada's case, most of the asylum seekers were coming from Western European countries or from the United States—countries considered safe by any standard—and they were expected to apply for asylum in those

countries rather than in Canada.

Cabinet approved the new proposals in February 1987 and in May 1987, the new Refugee Determination Bill, known as Bill C-55 was tabled in the House of Commons.

## The "Sikh Ship" and new Bills

In 1987, the tabling of Bill C-55 did not deter the refugee lobby from its bitter opposition to the legislation, and a full-scale assault on the Bill was launched—reinforced by their antagonism to the safe third country provision. The opposition parties in the House of Commons also strenuously criticized the legislation and argued for the amendments favoured by the refugee lobby. Outside of Parliament, a highly organized campaign was launched, and by the summer of 1987, it looked as if the Bill was doomed to fall victim to the refugee lobby.

However, in July 1987, another asylum boat arrived off the coast of Nova Scotia. It carried 174 Sikhs who, like the Tamils before them, had paid a ship's captain to transport them to Canada and run the boat ashore, where they disembarked.

The arrival of the Sikh boat was headline news in Canada, and there were outcries of public concern and anger at this blatant violation of immigration—and border—control rules. This second boat gave the government the opportunity to capitalize on the public mood. In August, Parliament was recalled for a special session to put a stop to further boat arrivals and to pass Bill C-55.

A new anti-smuggling Bill, C-84, was hastily drawn up. It imposed stiff fines and jail sentences for smugglers, the detention of people arriving without documents, fines for transportation companies that carried undocumented passengers, and the power to intercept and turn back ships suspected

of carrying illegal migrants.

The government expected swift passage of the two Bills, but instead they caused uproar within Parliament and the refugee lobby. Criticism focused primarily on the clause authorizing the government to turn back ships at sea. It was argued that to do so might result in genuine refugees being sent back to torture or death. The imposition of imprisonment and fines for smugglers was also criticized because it could result in church workers and other well-meaning activists being sent to jail for trying to help refugees.

The opposition to the Bills was once again gaining the upper hand. Their publicity campaign included demonstrations, write-in campaigns, petitions, public meetings, sermons in churches and circular letters, all backed by advocacy power. The objective was to convince Canadians that the asylum legislation was Draconian and inhumane—a betrayal of Canada's humanitarian tradition.

The debate continued through the summer and fall of 1987. However, the government, sensing that most Canadians supported the Bills, did not back down and used its large majority to pass both Bills through the House of Commons without difficulty. The battleground then shifted to the Liberal-dominated Senate, which stubbornly refused to pass the Bills. It returned them to the Commons with a long list of suggested amendments.

The Minister, Benoit Bouchard, would not entertain any changes. A deadlock occurred and the debate carried on intermittently throughout the winter of 1987 and into the spring and summer of 1988.

Finally, a new Minister, Barbara McDougall, compromised with the Senate by agreeing that the clause authorizing the turning back of ships would expire within six

months of the passage of the Bill and that the prosecution of smugglers would have to receive prior approval by the Solicitor-General and the Minister of Immigration. With these amendments, the two Bills were passed in July 1988, to become effective on January 1, 1989.

However, the struggle to reform the asylum system was not over. The refugee lobby did not cease its attacks on the legislation and centered its attack on the safe third country provisions. More seriously, Barbara McDougall, the Immigration Minister in the months leading up to the deadline for the enactment of the new legislation, thought that the United States was not a safe third country for El Salvadorians and Guatemalans.

This became a serious issue because her colleague, the Foreign Affairs Minister, Joe Clark, could not envisage a list of safe third countries that did not include the United States—the leading refugee-receiving country in the world. Any list of safe third countries without the United States on it would seriously endanger U.S.-Canada relations.

The difficulty was resolved by a typical Canadian compromise. Three days before the new asylum legislation was to come into force, Minister McDougall, without consulting her officials, issued a short press release stating the new refugee bill would come into effect on January 1, 1989—but the release also included the words *"...at the present time I am prepared to proceed with no country on the safe country list."* With those words, the long struggle to give Canada a workable and sensible asylum policy was doomed. The all-powerful refugee lobby had won again, and again our political leaders had lost their nerve (MacDougall, 1986).

As could be expected, the asylum travesty went from bad to worse.

The federal government appointed 180 new refugee board members—many drawn from the ranks of immigration lawyers, advocacy groups and ethnic organizations. Ratushny's warning that refugee decision-makers must have special knowledge and experience was forgotten or ignored. Predictably, the acceptance rate of the Board soared, giving Canada the highest acceptance rate in the Western world.

From 1991 through to 1995, the new Board accepted 70 per cent of the cases it dealt with. This compared with an acceptance rate of 10 per cent to 11 per cent by European countries. In 2000, the IRB approved 1,600 Pakistani cases and 2,000 cases from Sri Lanka. In that year, the European countries, the United States and Australia collectively approved 500 cases from those two countries (Bissett, 2001). In 2003, the IRB's acceptance rate was 49.1 per cent compared with the average 12.6 per cent approval rate for the United States, Britain, Australia, New Zealand, Ireland and 12 European countries (Collacott, 2006a).

The high acceptance rate acted as a strong pull factor, and when combined with generous welfare and social assistance programs, legal aid, the right to work, freedom to move throughout Canada and an almost-certain guarantee of permanent residence, even if the Board rejected the asylum claim, it is little wonder that Canada became a country of choice for asylum seekers.

### **The 2001 *Immigration and Refugee Protection Act***

Any useful reform of the abuse now inherent in the refugee and immigration process deteriorated when in 2001 the Liberal government tabled a new *Immigration and Refugee Protection Act* in Parliament. In introducing the *Act*, the

Minister, Elinor Caplan, stressed that it was designed to ensure "...we are able to say 'yes' more often to immigrants and refugees," and she paid tribute to the Canadian Bar Association, the Council for Refugees and the UNHCR for their valuable help in the formulation of the legislation.

The new *Act* made it easier for asylum seekers to qualify as refugees by expanding the Convention definition to include anyone who claimed persecution and by adding a new Appeal Division to the IRB that would allow a full de novo appeal hearing for claimants who were refused at the first IRB hearing. The right to seek leave to the Federal Court was maintained.

The *Act* incorporated the UN Convention against Torture, thus making it almost impossible to remove serious security risks or criminals—most of whom claim mistreatment if returned to their own country.

It also formalized the administrative practice of conducting a review of possible risk of mistreatment before removing anyone, the pre-removal risk assessment. Under the new *Act*, everyone refused by the IRB was entitled—even after all of the other appeals had been dismissed—to have this additional pre-removal risk assessment carried out, and everyone was also entitled to appear personally at the hearing and to appeal the decision. The new *Act* also made it more difficult for Canada to designate safe third countries by imposing conditions that had to be met before such designations could be made.

The new *Act* was a lawyer's dream and a death blow to any attempt to maintain border-control sovereignty or to manage an effective security policy. Canada's asylum policy was safely in the hands of the refugee lobby.

The new legislation passed through the House of Commons with little discussion and little media interest. None of the

opposition parties raised concerns about the compromising of national security by the obstacles in the *Act* to the removal of terrorists and criminals. There was no concern expressed that the new legislation was out of step with the efforts being made by the European Union, the United States and Australia to stem the tide of asylum seekers.

Any hope that the Bill might be changed or amended after the events of 9/11 were dashed when the Senate passed the legislation. It came into force in November 2001.

However, the Liberal government, when faced with the reality of the mounting asylum backlog, wisely decided not to bring into effect the promised Appeal Division of the IRB, because to add another *de novo* appeal opportunity would have brought the asylum system to a complete collapse. The refugee lobby, however, was outraged by this and vowed to fight hard for its implementation.

## The Canada-U.S. Safe Third Country Agreement (2002)

In December 2002 after the new legislation was passed, the government, in a further measure to curb the flow of asylum seekers, signed a Safe Third Country Agreement with the United States. The agreement was part of the U.S.-Canada Smart Border Action Plan, which was initiated following the events of 9/11. The Agreement was intended to prevent people who were not U.S. citizens from applying for asylum in Canada but contained a number of exemptions that lessened its effectiveness, but it was at least a step in the right direction.

The U.S. negotiators were aware that many individuals who entered the United States were doing so as a means of joining relatives in Canada by applying there as

asylum seekers. They therefore insisted that anyone with relatives in Canada be exempted from the Agreement. The list of relatives went far beyond close family members and included nieces, nephews, uncles, aunts, grandparents, common-law partners and same-sex spouses. *This exemption underlined the hypocrisy of the asylum system by accepting the idea that having a relative in Canada entitles one to an asylum hearing.*

Another weakness of the Agreement was that it only applied at the land border between the two countries. Anyone who flew into Canada or came by sea was still entitled to make an asylum claim. There seemed no logical explanation for this exemption and none was offered.

Strange as it may seem, Canada insisted on an exemption to the Agreement that applied to anyone in the United States who had been charged with or convicted of a crime that might involve the death penalty. Individuals in this category, if applying for asylum in Canada, were to be allowed entry.

This exemption was not negotiated with the United States—one assumes out of embarrassment—but was quietly passed after the negotiations as an Order in Council without any discussion in Parliament and without any publicity or announcement. *It remains in effect despite being in conflict with and in violation of the Immigration Act, which lists serious criminals and terrorists in the prohibited classes and, thus, inadmissible to Canada* (Government of Canada, 2004).

The Order in Council would appear to be a welcome mat for serious criminals and terrorists running from U.S. law enforcement officers. Canada's Charter of Rights and Freedoms may prevent us from returning convicted and alleged murderers to the United States where they might

face the death penalty, but surely there is a difference between returning a serious criminal who is already in the country and being obliged to let in one who appears at our borders seeking to enter.

## **The refugee lobby objects to the Safe Third Country Agreement**

The refugee lobby is far-reaching and highly organized. It consists primarily of immigration lawyers and consultants; the Canadian Council of Refugees, an umbrella organization founded in 1978 that represents groups across Canada that are involved in the settlement and protection of refugees; the Canadian Council of Churches, the largest ecumenical body in Canada, which represents 85 per cent of Christians in Canada; Amnesty International; and a wide assortment of ethnic advocacy and human rights groups that believe in generous refugee legislation.

The refugee lobby was outraged by the Safe Third Country Agreement and immediately challenged its validity in the courts. But, the Federal Court of Appeal upheld the legality of the Safe Third Country Agreement, and a further effort to bring the issue to the Supreme Court failed when the Court refused to hear the appeal.

This was an important decision because it recognized that under the terms of the UN Refugee Convention, Canada has an obligation to not return refugees to a country where they might face persecution, but it is not prevented from sending asylum seekers back to a safe third country. Nevertheless, despite this decision, there remains hesitancy on the part of our political leaders to declare other countries as safe third countries.

The reason for this is that the powerful refugee lobby continues to assume it has

a proprietary right to advise government about the substance and direction of Canada's asylum and refugee policy, and it is encouraged to do so by the Department of Citizenship and Immigration and by politicians from all political parties. It is not a coincidence that government officials call the lobbyists stakeholders. Representatives of the lobby are always front and centre at Parliamentary committees that study new refugee legislation, and they are the spokespeople the media calls upon to comment on refugee issues.

It is not in the interest of either the government or the members of the refugee lobby to expose the reality of the asylum charade to a Canadian public that is unaware of the numbers or the costs involved. Most Canadians—not to mention the media—do not make a distinction between genuine refugees and asylum seekers. They assume that, as Canadians, we should welcome the chance to help the poor and disadvantaged—little knowing that, by far, the majority of people seeking asylum are not refugees.

Experience since the abortive attempt in 1989 has demonstrated that any measures taken by the government to reform the asylum system will be fiercely opposed by the refugee lobby, often supported from a compliant and ill-informed media. This will be the major problem faced by our current Immigration Minister, Jason Kenny, as he moves toward legislative reform of the system. What is without question is that reform of the current system is urgently needed.



## Part 2

# The current dysfunctional system

Canada's refugee asylum system is in disarray for the following reasons:

- It does not serve the needs of genuine refugees;
- It is extremely expensive;
- It encourages and rewards human smuggling;
- It has damaged our bilateral relations with many friendly countries, and it compromises our trade and tourism industries;
- It undermines every effort to maintain the security and safety of Canadians, and it is the primary reason our southern border has been, in effect, militarized, and why Canadian goods, services and people can no longer pass quickly and freely across the border;
- It is dominated by special interest groups—immigration lawyers, consultants, non-governmental organizations and agencies that receive millions of dollars to deliver services and legal aid to asylum seekers, and by human rights activists and ethnic organizations that advocate for more-generous asylum legislation;
- It is out of step with other countries that are trying to stop the flow of asylum seekers.

### **Unlike other countries, Canada allows almost unlimited access**

Canada is one of the few countries that permits anyone from any country to claim asylum and apply for refugee status. People do this after gaining entry by claiming to be persecuted in their own country. In 2008, people from 188 countries submitted asylum claims, and many of them were from countries that share our democratic traditions and are also signatories to the United Nations Refugee Convention and therefore are as obligated as Canada is to protect refugees (Citizenship and Immigration, 2008).

One of the key weaknesses of our asylum system is that it cannot quickly distinguish between those who need protection from genuine persecution and those who are intent on abusing the system by avoiding having to meet normal immigration rules. As a result, the process is bogged down by frivolous and obviously unfounded claims. For example, in 2008, there were claimants from 22 of the 27 EU countries—including Germany, England, France and Belgium. There were 2,305 claims made by individuals from the United States – a country that leads the Western world in asylum claims. These statistics speak for themselves and illustrate why our system has become a travesty of what the UN Convention was designed to do (Citizenship and Immigration, 2008).

European Union countries long ago introduced pre-screening processes to sort out frivolous and clearly false claims from genuine ones, and they have accelerated procedures for dealing with claimants originating from countries considered safe for refugees. Many countries have reduced welfare benefits and other services to asylum seekers and others do not permit asylum seekers to work. These methods have been implemented so that fraudulent claimants who are illegal immigrants do not overwhelm their asylum systems.

Under Canada's system, there is no effective pre-screening procedure to separate the obviously unfounded claims from those that are genuine. As a result, all who submit a claim receive a quasi-judicial hearing before the IRB to determine if they are to receive refugee status. In most cases, the claimant also receives free legal assistance when appearing before the IRB.

The problem is that although the IRB finds that almost 60 per cent of the claims are false, there are so many claimants, it can take two years or more for a claim to be heard. In the meantime, the claimant is entitled to welfare, free medical care and other services as well as having permission to work in Canada.

## **Few removals of false refugee claimants**

Moreover, if the IRB decides the claimant is not a genuine refugee, there is a series of appeals and reviews available to determine if there are humanitarian or compassionate reasons why the person should be allowed to remain. In addition, no one can be removed if there is an indication that if the person is sent home, he or she might face torture or death.

The longer the claimant remains in the

country, the better the chances are that there will be no removal. Time is on the side of the claimant. Prolongation of the time in Canada means that the authorities are either unable or unwilling to follow through with the unpleasant, expensive and time-consuming deportation process.

As a result, thousands of failed claimants are able to stay, and this adds to the attractiveness that Canada has for others who wish to use the asylum route to gain entry. The name of the game is to gain entry to the country; for the vast majority of claimants, whether their refugee claim is eventually successful or not is irrelevant. They will get to stay.

On average, it takes 4.5 years from the submission of a claim until a person who is found not to be a refugee is removed; in some cases, it takes 10 years or more. More often than not, the individual either disappears or is eventually allowed to remain in Canada. The Auditor-General's report of 2007 pointed out that there were 42,000 warrants for the arrests of failed asylum seekers whose whereabouts were unknown and another 15,000 with addresses presumably listed with the authorities (Auditor-General, 2008).

The forced removal of failed asylum seekers is a difficult and expensive exercise, frequently fraught with emotional distress and bad publicity when the media or church groups that offer sanctuary champion individual cases. Large numbers of asylum seekers arrive with false documents or without any, so it is difficult to know where to send them when the time comes for their removal. Often it is impossible to obtain travel documents from the individual's own country.

Removal costs range between \$1,500 and \$15,000 per removal but some cases can cost up to \$300,000. The new Bill introduced by the Immigration Minister,

Jason Kenney, estimates a cost of \$540.7-million over five years for the removal of failed asylum seekers. This could be reduced considerably if, upon arrival, there were a fast screening system that would prevent obviously false claims from proceeding. Unless removal can be carried out within 48 hours, the chances of successful removal become problematic (Citizenship and Immigration, 2010).

## Canada as a country of choice for smugglers

None of the asylum claimants who arrive at our ports of entry is medically examined or screened for criminality or security issues. Many of them use forged documents and false identities to board aircraft bound for Canada. Some are smuggled into the country by international criminal organizations.

The United Nations estimates that 2.4 million people are in forced labour situations at any given time and that the annual profit from this exploitation is estimated to be US\$32-billion. The UN makes a fine point between smuggling and trafficking—the primary one being that smuggling involves crossing international boundaries and involves the consent of the individual being smuggled. Trafficking, on the other hand, can take place within the victim's country, involves exploitation and misrepresentation and does not always have the consent of the person being trafficked. It is a subtle distinction because a person being smuggled across borders may also end up being exploited (Trafficking, 2010).

The annual profit from human smuggling is included in the US\$32-billion. Of this, \$22-billion comes from future exploitation of the victim after they reach their destination and \$10-billion from the initial

transaction. The human smuggling profit is included in the \$10-billion and is estimated to be \$8-billion to \$9-billion annually.

It is well known that criminal groups involved in human smuggling exploit Canada's immigration and refugee system. For example, some have estimated that approximately 60 per cent of asylum seekers do not possess documents upon arrival. This is because few asylum seekers are detained upon arrival.

In addition, most are released after being asked to show up for their asylum hearing, which will not take place until a year, or two, after their arrival. Many claimants do not bother to show up for the hearing.

Those who do show up have often settled in, found a job, or married a Canadian. In any event, since there is no tracking process for asylum seekers who are not detained, there is no way of knowing where they are or what they are doing during the long waiting period before their refugee hearing. That the system is vulnerable to criminal and terrorist infiltration is self-evident.

Canada has become the country of choice for human smuggling because the smugglers are able to guarantee that the people smuggled in will be allowed entry. Only about 11,000 people are removed from Canada each year, and while several thousand of these are likely to be failed asylum seekers, the numbers are insignificant compared with the annual inflow of 30,000 to 40,000 people.

If an asylum claim is refused by the IRB and all of the reviews and appeals have been rejected, the person is asked to leave the country. However, there is no serious follow-up, and since we have no exit controls, there is no way of knowing if a person has departed. And only the Auditor-General seems to care.

## Lawyers and consultants dominate the debate and policy

Canada's asylum process is lengthy and complex, and it has become excessively litigious to the point where decisions about who is or is not a refugee have become the domain of judges, lawyers, immigration consultants and patronage-appointed amateurs who sit on the IRB—few if any of whom have ever been in a refugee camp.

The Canadian Law Reform Commission reported in 1991 that it seemed in practice that refugee cases hold a fatal attraction for review courts and that their differences with decision-making panels turn frequently on subtle variations in inference (Law Reform, 1991).

This unfortunate trend to interpret refugee issues as resting exclusively in the realm of legalities has focused the emphasis on process rather than policy. As a result, policy initiatives are seldom put forward by the Department of Citizenship and Immigration, the IRB or the House of Commons Immigration Committee. Lawyers and judges monopolize the refugee and asylum issues debate, and the focus is on legal processes, human rights, and Charter of Rights and Freedoms protection.

As the number of asylum seekers increased through the years, so did the number of lawyers specializing in immigration and refugee law. Today there are 1,696 registered immigration consultants in Canada. There is a great deal of money to be made in representing asylum cases before the IRB and the Federal Court.

The more complex the asylum rules and the more levels of review and appeal that exist, the higher the fees.

Thus, it is not surprising that the most-active asylum lobbyists before the House of Commons Standing Committee on Citizenship and Immigration are lawyers and consultants. The mandate of the Canadian Society of Immigration Consultants boasts of "...working together with government on policies and initiatives..." To wit, the consultants and the lawyers do not see themselves as lobbyists—which they are—instead, they see themselves, at least in public, as stakeholders (Consultants, 2010).

## Growing numbers and costs to Canada

It is estimated that roughly 800,000 asylum seekers entered Canada in the past 25 years. In the last two years, over 70,000 claims were registered. This is almost 3,000 per month, and considering there is already a backlog of approximately 60,000 claims before the IRB, it is not alarmist to think that the system is out of control (Citizenship and Immigration, 2010).

In 2009, Canada became the third-largest receiver of asylum seekers (33,000) in the Western world after the United States (49,000) and France (42,000). On a per capita basis, however, we rank number one with one claim for every 1,000 people compared with the United States with one claim per 11,000 people (Citizenship and Immigration, 2010).

Perhaps the most insidious feature of Canada's asylum system has been its enormous financial cost and the naïve presumption that the sums involved are justified because we are in fact helping refugees.

Unfortunately, it is difficult to determine the actual costs because they are spread over three levels of government—federal,

provincial and local—and involve a wide variety of activities such as housing, welfare, legal fees, medical care and, of course, the operational cost of the IRB itself, which is expected to reach just over \$117-million in 2010 (IRB, 2010).

The chameleon-like character of asylum seekers also makes it difficult to determine costs. Asylum seekers undergo a transformation of status after arriving in Canada. If the IRB refuses their claim, they become a failed asylum seeker and are subject to removal pending any appeals submitted. However, if their claim is accepted, they are given refugee status. Then, as a refugee, they are eligible to apply for permanent residence status, and if accepted, their status changes to that of immigrant. Different costs are involved at each stage of the transformation of status.

In 2008, Canada received 37,000 asylum seekers and approximately 60 per cent of these will be refused refugee status by the IRB. Since the government estimates each failed asylum seeker costs \$50,000 we can calculate that in 2008 the taxpayers faced a bill of approximately \$1.11-billion just to deal with the number of refused cases in the 2008 flow. (Citizenship and Immigration, 2010a).

Added to the costs are those required to deal with the existing backlog. Even if the costs of the 2008 failed cases are subtracted from the backlog, its numbers have been supplemented by the 33,000 new asylum arrivals in 2009 so the backlog figure of 60,000 would remain at approximately at the current level. The costs of dealing with its failure rate of approximately 60 percent would be close to \$1.8-billion.

Unfortunately, we are not told if the \$50,000 cost figure for failed cases is an annual cost or if it is the total cost involved from refusal of the claimant to

eventual removal from Canada. Nor are we informed of the costs of those asylum seekers who are given refugee status by the IRB. The costs do not end when the asylum seeker becomes a refugee. Although it may never be possible to determine the true cost of our asylum system it is obvious that the current system is terribly expensive and cries out for reform.

John L. Manion, who was a senior bureaucrat experienced in government financing, a former Deputy Minister of Immigration, Secretary of the Treasury Board, and Associate Clerk of the Privy Council, thought the costs of Canada's dysfunctional asylum system were in the billions of dollars. After his retirement, he wrote letters to two immigration ministers, Sergio Marchi and Elinor Caplan, urging them to initiate reform of the system even if it meant using the notwithstanding clause of the Charter. He did not even get an acknowledgement to his letters (Manion, 1999).

The Department of Citizenship and Immigration has a lavish grants program that gives money to organizations, agencies and community groups that help immigrants and refugees become settled and that assist them in finding employment, language training and housing. The money is often channelled through agreements with the provinces or given directly to specific agencies.

The allocation for 2010-2011 for Alberta was \$60-million; British Columbia, \$114-million; Ontario, \$408-million; and Quebec, \$253.7-million. The remaining provinces and territories received \$57.7-million, for a total of \$893.4-million. Asylum seekers are the beneficiaries of some of this funding (Treasury Board, 2010).

Asylum seekers also receive services from organizations and groups that are given direct financial grants from Citizenship and Immigration. In the period from October 1 to December 31, 2009, almost 200 agencies across Canada received grants of more than \$25,000. Sixty of those agencies were awarded contributions in excess of \$1-million. For example, the South Asian Family Support Services of Toronto received \$13-million, the Settlement and Integration Services of Hamilton received \$9-million, and nine Ottawa-area groups received \$9.5-million (Disclosure, 2010). The total allotted for contributions to the settlement program in the Main Estimates for 2010-2011 was \$651,749,278 (Citizenship and Immigration, 2010b).

Canadians pay a high price for an asylum system that finds 60 per cent of those assisted to be false refugees. It becomes even more scandalous when compared with the cost of other organizations or programs. One can only surmise what an injection of \$2-billion to \$3-billion more would do if directed at improving Canada's health or educational programs or reducing the deficit. In a time of alleged austerity and government deficits, it would seem there is no shortage of funding for refugees and immigrants.

## The politicization of refugee issues in Canada

Prior to the 1990s, it was expected that the immigrants selected to join the labour force would become established within a year and those sponsored by their relatives in Canada would be looked after by the sponsoring family and would not be eligible for government assistance. Even refugees selected from camps abroad were expected to be on their own within a year, and they could expect only minimal financial help during their first year in Canada.

Why is it now assumed that immigrants and refugees require massive injections of tax dollars to help them become established in their new country? Could it be that government funding to ethnic and other groups dedicated to helping refugees and immigrants is designed more to enlist the political support of these groups than it is to provide help to needy newcomers? These handouts are not widely publicized by government, and few Canadians are aware of the millions of dollars devoted to these programs.

## The damage to bilateral relations

While Canada boasts that its refugee system is often praised by the United Nations High Commissioner for Refugees as one of the most generous asylum systems in the world, it sometimes tries to prevent potential refugees from using it in contradiction with its officially declared openness. When there has been a flood of asylum seekers entering Canada from a particular country, the government cuts off the flow by imposing a visitor visa requirement on the citizens of the country concerned.

Over the years, Canada issued visas on a long list of friendly countries whose citizens, after arrival as tourists, tended to submit asylum claims. The countries include India, Pakistan, Portugal, Brazil, Trinidad and Tobago, Jamaica, Bulgaria, Turkey and Costa Rica. In addition, there have always been visa requirements for about 150 countries—primarily in the developing world, e.g., Africa, Asia, the Middle East and South and Central America, where the visa is used as a screen to prevent large-scale movements of people who might be potential asylum seekers.

Imposing a visa on friendly countries means that ordinary tourists, business

people and other temporary entrants must apply at a Canadian embassy or consular office and attend an interview prior to their visit. Anyone suspected of being a potential asylum seeker is refused a visa. Recently, use of visa requirements has been imposed on the citizens of Mexico and the Czech Republic, much to the anger and dismay of those two countries, which see the move as an affront to the principle of free travel and as damaging the maintenance of friendly commercial and bilateral relations.

Despite the harm done to tourism, trade and friendly relations, the visa imposition is effective and stops the flow of asylum seekers. The long-term damage, however, is not easily measured.

During his visit in May 2010, Mexican President, Felipe Calderón, called upon Canada to change its policy, and he pointed out that Mexican tourism was down 40 per cent because of the visa requirement. In turn, the European Union warned that unless Canada removes the visa requirement for citizens of the Czech Republic, the EU might be forced to retaliate by demanding visas of Canadians visiting any of the 27 EU countries. This threat can be seen as one of the reasons the Immigration Minister introduced legislation in Parliament to reform the asylum system.

Another means used by the government to prevent potential asylum seekers from reaching Canadian shores is to use Canadian enforcement officers in selected countries overseas to interdict improperly documented passengers and others suspected of being asylum seekers from boarding aircraft destined for Canada. The government calls these officials Integrity Officers, a euphemism to camouflage their real purpose.

Their efforts have had moderate success but obviously do not have much impact on the asylum flow.

The imposition of visas and the use of overseas interdiction demonstrate that our government is fully aware that the asylum system has (a) played a primary role in attracting and enabling human trafficking, (b) is a shockingly expensive program and, (c) is not helping real refugees. Until recently, it has obstinately refused to reform the system.

### **A threat to Canada's security: Canada's inability to deport the bad guys**

Permitting 30,000 to 40,000 people to enter Canada freely each year without screening them for medical, criminal, or security issues is irresponsible, and pretending that these people are refugees fleeing torture and death makes a mockery of border control.

While there is little question that the great majority of these people are not a threat to the safety and security of Canadians, we do know that some of them are. The most notorious case is that of Ahmed Ressay, the Algerian asylum seeker who planned to blow up the Los Angeles airport on the eve of the millennium. There are others.

In 2006, the Fraser Institute reported that of 25 known Islamist terrorists and suspects, 16 had gained entry to Canada by claiming asylum. At one time, seven of the eight suspected terrorists held in detention under the now-discredited security certificate process had come to Canada by claiming asylum. These men were released under bail conditions, and they are still in Canada (Collacott, 2006b).

The Canadian Border Service Agency reported that at least 25 of the 76 Sri Lankan men who arrived by sea in October 2009 and claimed asylum were identified as members of the outlawed terrorist group Liberation Tigers of Tamil Eelam. However, they were released from custody and also remain here. It is one thing for our security services to identify or to have reasonable grounds to suspect an individual is a terrorist—it is another thing to prove it since they do not have membership cards and seldom have criminal records.

All these suspects have Charter protection and, they enjoy all the legal rights available under Canadian law, and since they have not committed any crimes that can be proven, it is not possible to keep them detained indefinitely. There is little choice but to release them regardless of any risks involved (Hansen, 2010).

Moreover, they cannot be returned to their own countries if there are reasons to believe they might face torture or death. To do so would not only violate their Charter rights but would also be contrary to the UN Convention against Torture of 1985, which prohibits sending anyone to a country where he or she might face torture. This presents a serious dilemma for Canada. We have two bad choices: We cannot get rid of the bad guys, and we cannot really risk letting them stay.

Some democratic countries have taken a proactive approach to the problem and resolved it by obtaining an agreement from the individual's home country that guarantee she or she will not be mistreated if returned. The agreement also stipulates that consular officers of the sending country will be permitted to do periodic checks to ensure the removed person is not being harmed. Germany and Britain have used this method to deport

a number of unsavoury individuals to countries known to mistreat or torture prisoners. So far, Canada has not shown an interest in initiating this procedure.

A number of notorious criminals and terrorists have managed to avoid removal by using the courts to resist every attempt by the government to deport them.

### **The \$3-million terrorist living in Canada for more than 20 years**

Perhaps the most glaring of these is the case of Mahmoud Issa Mohammad. In 1968, Mohammad and a fellow terrorist member of the Popular Front for the Liberation of Palestine attacked an El Al aircraft at Athens airport with machine guns and grenades. They wounded a flight attendant and killed a 50-year-old Israeli man before being overpowered. Both men were sentenced to life in prison but were released a month later when PFLP gunmen hijacked a Greek aircraft and exchanged their hostages for the two men.

Mohammad assumed a new identity, and in 1987, he arrived in Canada. Shortly after his arrival, he was apprehended and ordered deported. His appeal against the order was dismissed but his lawyer submitted another appeal. Since then there has been a series of appeals and reviews by the courts. The bottom line is that after more than 20 years, and an estimated cost to taxpayers of \$3-million, Mohammad is quietly living in Brantford, Ontario, and caring for his fruit trees (Brown, 2008).

The argument against his removal is based on medical grounds—he would not be able to obtain the same quality of medical treatment in Lebanon. This case underlines the absurdity of our legal



system when dealing with attempts by authorities to remove even convicted terrorists. When a nation voluntarily gives up its right to decide who may or may not enter or remain in its territory and combines this folly with forfeiting the right to deport undesirable criminals and terrorists, it has, in effect, relinquished its sovereignty.

It is one thing to deplore our inability to remove known terrorists, but we should also worry about the ones we do not know about. In 2008, just over 5,000 asylum seekers from countries known to produce terrorists filed asylum claims. They presumably are listed in the massive backlog of people waiting for their refugee hearing before the IRB, but nobody knows where they are, or whether they will show up for their hearings (UNHCR, 2009).

On May 11, 2008, at a hearing before the House of Commons Standing Committee on Citizenship and Immigration attended by the author, a witness who is a former member of the IRB stated that Canada's wide-open asylum system presents a threat to the nation's security. She was immediately interrupted by one of the opposition members on the Committee, accused of saying that all refugees are terrorists and told she should apologize for saying so.

The witness explained that she had not said that all refugees are terrorists, but she continued to be harassed by the Member of Parliament. Finally, in exasperation, the witness said that she is the child of Holocaust survivors and did not need to be lectured about refugees by the Honourable Member or by anyone else. This ended her interrogation. The incident, however, does illustrate the risk of verbal abuse that any witness might suffer if daring to question the merits of the current system or suggest it is need of reform.

## **Canada and the United States: No longer an undefended border**

There was a time when politicians from Canada and the United States, when visiting each other's countries, would proudly refer to the boundary that separates their countries as the longest undefended border in the world. Not anymore. That little bit of pleasantry and good neighbourliness came to an abrupt end as a result of our differing responses to the terrorist attacks on the World Trade Center and the Pentagon on September 11, 2001.

In the immediate aftermath of that attack, there were allegations from prominent Americans that the terrorist perpetrators had entered the United States from Canada. This perception has lingered despite the fact that all of the terrorists had legally entered the United States with U.S. visas, and none had ever been in Canada.

Then-senator Hillary Clinton was one of the first to level this accusation. She was followed by others, including, in 2005, the senator from Montana, Conrad Burns, and as late as 2009, by Janet Napolitano, Secretary of Homeland Security. Napolitano made it clear she considered the northern border to be more of a risk to the safety and security of the United States than was the southern border with Mexico.

Canadian politicians and our commercial and business executives find it difficult to understand why the previously undefended border has, in effect, been militarized. Some argue it is simply an excuse to make it difficult for Canadian goods and services to cross into the United States—an excuse to erect trade

barriers and impose another form of tariffs. Others believe it is because of the persistent rumour that the terrorists entered the United States from Canada.

If our political and business leaders devoted more attention to Canada's cavalier attitude toward security and our dysfunctional asylum system, they would know why the United States has erected more barriers along our common border. Their lack of knowledge is also because they have not been listening to their U.S. counterparts.

Former U.S. president George W. Bush warned us in plain words that "security trumps trade." A number of U.S. politicians have expressed concern about our wide-open asylum system and generous immigration policy. U.S. officials have claimed they have apprehended terrorists attempting to enter from Canada. One of these was the notorious Ahmed Ressam, the millennium bomber now serving a life sentence in a U.S. jail for his attempt to blow up the Los Angeles airport.

U.S. politicians and their Homeland Security officials are very much aware that 30,000 to 40,000 asylum seekers enter Canada each year and that none of them are checked for security before arrival. They have seen that Canadian courts are reluctant to give tough sentences to convicted terrorists and that Canada dismantled the security certificate process, which was the primary instrument we had to detain and remove suspected foreign terrorists.

They also know that in March 2007, the Canadian Parliament refused to renew key sections of our anti-terrorist legislation, leaving the country vulnerable to terrorist attack, with only the Criminal Code to deal with terrorists—whose first and only criminal act is often to blow themselves, and others, to pieces. The U.S. authorities

are also familiar with the Order in Council that requires Canadian border officers to admit anyone from the United States who is charged with or convicted of an offense that might involve the death penalty.

U.S. politicians and officials are more aware of our asylum system than are our own politicians—with the exception perhaps of those MPs who sit as members of the Citizenship and Immigration Committee, and they seem to be studiously unconcerned about the security implications of our asylum system.

A large part of the massive U.S. Homeland Security buildup along the Canadian border, with the increase in border guards, electronic and aircraft surveillance, and passport requirements, is a direct result of the continuing failure of Canada to acknowledge that our asylum system presents a clear and present danger to the safety and security of U.S. citizens. Whether Canadians like it or not, we are seen to be the weakest link in the efforts of the United States to defend its country from the ongoing terrorist threat.

Unless there is a serious change in the Canadian attitude toward the terrorist threat, our bilateral relations with our neighbour to the south may never return to the good-neighbour policy of the pre-9/11 years. This may in the end be the most serious damage done by our cynical and hypocritical asylum policy.

### **The asylum phenomenon: How other countries have reformed their refugee process**

Canada is not the only country that has had to deal with thousands of people entering the country as asylum seekers. In this regard, we are far from unique. In

the early 1980s, hundreds of thousands of asylum seekers and illegal migrants from the developing world began to flood into Western Europe, the United States, and Canada. This massive movement of people constituted one of the largest migrations in history. It has also become one of the most serious problems of our time, and because of the smuggling in human lives involved, it has moved to the top of the policy agenda of the G8 countries.

A variety of reasons are given for the asylum phenomenon, and in some cases they are wholly understandable: people wish to join relatives who migrated earlier as guest workers or immigrants, the ease of modern transportation, the influence of TV and instant electronic communication, and the rigidity of legal migration rules. Some see it as a natural manifestation of globalization.

However, the simplest explanation is that people have always moved from one region to another to improve their standard of living, to give their children better life opportunities, or to escape poverty, war, and famine. This is the iron rule of migration that has prevailed since the beginning of time. None of that should provoke anything less than sympathy by Canadians. However, completely open border areas are a non-starter, especially in a less-than-peaceful world. Thus, the challenge for the developed countries is to regulate and manage these large-scale and irregular movements.

So far, that challenge has not been met.

It is estimated that over nine million asylum claims were registered in Western European countries in the last 25 years. Approximately 20 per cent of these claimants were found to be legitimate refugees. The costs to the host countries for the processing, care and maintenance of these people are staggering—400,000

claims each year at an estimated cost of US\$10-billion. The greater part of these costs is for the 80 percent who were found not to be refugees (Van Kessel, 2010).

## Germany amends its Constitution

Germany provides an example of how a country can be rapidly overwhelmed by large numbers of asylum seekers. After the collapse of the Third Reich in 1945, the new German Constitution of 1949 contained a generous provision for the acceptance and protection of those seeking asylum in the new Germany. Article 16 stated unequivocally, "Persons who are politically persecuted have a right to asylum in Germany." It was a laudable attempt to reverse course on pre-1945 actions and attitudes by the former and now-defeated German regime (Constitution, 1949).

The asylum process post-1949 was similar to Canada's current system—unlimited access, highly judicial procedural safeguards, and a multi-tiered appeal system with access to the Federal Constitutional Court for cases that were refused at a lower level. The process had a maximum capacity of approximately 5,000 asylum claims per year.

As might be expected with the onset of the mass movement of asylum seekers into Western Europe, in the early 1980s the German system was inundated with claims. In 1992, 438,000 claims were registered, and in the following year a further 322,000 claims were filed. In the face of this mass migratory movement, the Germans reacted swiftly in 1993 to amend the Constitution and imposed restrictions on asylum seekers (Germany, 1992).

## The European Union harmonizes asylum policies

In contrast to Canada, the EU countries eventually adopted asylum policies through the provisions of the Schengen Agreement of 1985, which called for the removal of border controls between EU member states. The Treaty of Amsterdam in 1997 incorporated Schengen into EU law, forcing the members to harmonize their rules regarding asylum seekers and to impose common restrictions.

The restrictions are listed below, and with few exceptions, are followed by all EU countries:

- **Safe Third Country:** This provision removes the right to seek asylum from anyone coming from a European Union country or from a signatory country of the UN Refugee Convention or the European Convention on Human Rights.
- **Safe Country of Origin:** Asylum claims from anyone coming from a country safe for refugees are considered "manifestly unfounded" and only in special circumstances can such a claim be entertained. Germany's first list consisted of Bulgaria, Ghana, Gambia, Hungary, the Slovak Republic, Romania, and Senegal. Switzerland, although not a member of the EU, has the same list but with the addition of India.
- **Frivolous Claims:** These are claims that have no substance; the claimants have given no obvious reason for fearing persecution and their stories contain inconsistencies and contradictions. Their claims are considered "manifestly unfounded" and the individual is subject to accelerated procedures and summary removal.
- **Abusive Claims:** These are claims that are submitted by people who are using false documents or who arrive without documents and who do not co-operate with officials. Their claims are considered "manifestly unfounded" and are dealt with by accelerated procedures.
- **Removal under Appeal:** Most EU countries do not allow appeals. Denmark, for example, rejects claimants at the border if they are coming from a safe third country. France, Sweden, Switzerland and Germany deny a right of appeal to those claimants coming from safe third countries.
- **Readmission Agreements:** These are formal bilateral agreements signed by countries that agree to take back asylum seekers, making it easier for the removal of failed claimants. In some cases, the agreement was negotiated on the understanding that development aid is conditional upon the agreement being signed.
- **Restricted Social Welfare and Benefits:** Many of the EU countries restrict the movements of asylum seekers and keep track of their movements by requiring them to check in and out of their accommodation. Many do not permit claimants to accept employment, pending their asylum decision. Moreover, welfare and other social benefits are lower than those received by citizens and legal residents. In this connection, it is interesting to note that asylum seekers in the United States are not permitted to work for the first six months of their stay.
- **Agents of Persecution:** Germany, France and Sweden apply a strict interpretation to the UN Refugee Convention and only accept applications from people who claim persecution by state authorities.

- **Temporary Protection Status:** A number of EU countries grant temporary protection status to asylum seekers rather than process their refugee claims. Germany, during the Bosnian war of the early 1990s, gave temporary status to people fleeing the violence there. This practice avoids the lengthy and litigious process involved in refugee determination and leaves the state free to send people with temporary status home when conditions improve.

All the measures used by the EU countries are efforts to restrict access to their asylum systems and to try to sort out the genuine refugee from the person who is really a migrant or someone who is being smuggled into the country by international criminal gangs. To some extent, they have been successful in reducing the heavy volumes of the 1990s. For example, Germany managed to reduce the numbers from the high of 438,000 in 1992, to just 98,000 in 1998.

The Europeans, partially because of the measures described above, lowered the flow from a high of 620,000 in 2001, to 287,000 in 2009—but despite all efforts, the asylum flows continue. Nevertheless, it is of interest to note that Canada received more claims in 2009 (33,000) than Germany did (27,800) (UNHCR, 2010e).

In fact, it seems obvious that as Europe tightens its asylum systems, Canada refuses to do so. It is little wonder we have become the target of choice for human smuggling. We are out of step with all of the other countries that are grappling with the asylum phenomenon. What is recognized as a major international problem finds that Canada—which once led the world in dealing positively with this global issue—is stubbornly determined to keep its head in the sand and do little, or nothing, to help.

It remains to be seen if the positive attempt by the current Immigration Minister, Jason Kenney, to introduce modest reform will be successful. His original Bill was watered down because of criticism from the asylum lobby and opposition parties, and he was forced to compromise on the key element of the Bill, which would have denied asylum seekers from safe third countries the right of appeal to the new IRB Appeal Division. The new legislation now offers all asylum seekers the right of appeal to the Appeal Division—something the refugee lobby fought for during the last 25 years and which will inevitably cause lengthy delays.

### **Why reform is needed: Genuine refugees are plentiful and threatened by slack Western asylum policies**

At the end of 2009, the UN High Commissioner for Refugees found itself responsible for the care and protection of 43.3-million refugees and forcibly displaced people under UN protection. This was the highest number since the mid-1990s and consisted of 15.2-million refugees and a further 28.1-million people displaced in their own countries (UNHCR, 2010b).

A majority of the refugees had been living as refugees for five years or more and many of them were short of food, healthcare, housing, and decent living conditions. Many were elderly, many were women with small children, and few had any hope of obtaining any viable solution to their plight.

Most of these unfortunate people were located in Asia, Africa and the Middle East. Some 350,000 Sierra Leone citizens fled to Guinea—one of the poorest countries in the world—for temporary protection.

There were 248,000 people who escaped the tyrannical regime in Myanmar, and there were almost two million internally displaced people in the Democratic Republic of the Congo. South Africa received 207,000 asylum seekers in 2008—the highest number of any other nation (UNHCR, 2010c).

Most of these refugees and displaced people did not have access to the sophisticated asylum systems operating in the Western industrial countries. They usually fled by foot or by boat if they were fortunate enough to get transportation. They fled with whatever they could carry, and although they found temporary protection, it was rudimentary and frequently dangerous.

Refugees rely on the UNHCR and other agencies for food and basic essentials. They do not have the money or means to pay international traffickers to fly them to a Western country where they can apply for asylum. What they receive in assistance is of a very poor standard, and the camps they live in are inadequately protected. In the African camps, raids by armed men who kidnap the women and children are frequent.

These refugees and the displaced are the forgotten people. In the eyes of the Western nations, they are a low priority. They receive little attention and less financial help. The money goes to the asylum seekers, their lawyers, and the NGOs who assist them.

The annual budget available to the UNHCR in 2009 to care for the 43.3-million refugees and others under its care was US\$2.1-billion. This is approximately the amount Canada spent on the 62,000 asylum seekers in the country that year (UNHCR, 2010d). Considering, that globally, approximately 20 per cent of asylum seekers are found to be genuine

refugees and that 80 per cent of those who are found not to be refugees are not sent home, it would seem obvious that something is seriously wrong with the way Western countries manage their asylum systems. Not only are the systems morally indefensible, from a cost-benefit viewpoint they are unpardonable.

The major problem, of course, is the staggeringly high cost of these elaborate and quasi-judicial systems. Because the costs are so high, Western countries are reluctant, or unable, to provide the funding needed by the UNHCR to protect, feed and house the 43.3-million people under its jurisdiction.

The UNHCR relies entirely on donations from signatory states for budgetary purposes, and the primary donors are the industrial nations: the United States, Japan, the European countries, Canada, and Australia. However, because most of these countries—with the exception of Japan—are burdened with the high costs of their asylum systems, they do not always respond adequately to the UNHCR's appeal for funding.

The United States was the largest donor, contributing US\$640.7-million to the UNHCR's 2009 budget, followed by the European Commission with US\$126.9-million, and then Japan at US\$110.5-million. Canada ranked ninth on the list (below Denmark, Sweden, Norway and the Netherlands) with a contribution of US\$45.5-million. Canada's contribution to the UNHCR is insignificant compared with the estimated \$2- to \$3-billion it expends annually on asylum seekers (UNHCR, 2010f).

This is the paradox of asylum and the reason Western asylum systems are the major threat to the resolution of global refugee problems. For almost a quarter of a century we have been pretending to help

poor refugees who are fleeing persecution when, in fact, we have been playing a game of charades by encouraging human smuggling and the irregular migration of thousands of individuals who could not or would not meet normal immigration rules.

## The UNHCR's failure of leadership

Any attempt at reform of Western asylum systems must have the support of the UNHCR. Yet despite the difficulties of managing an enormous international refugee disaster, and facing the prospect of rising costs and dwindling donor contributions, the UNHCR has shown little concern about asylum abuse and its role in distorting the real refugee problem. Indeed, the UNHCR has been critical of any steps taken by governments to slow down or stem the flow of asylum seekers.

On the other hand, the UNHCR did assume a leadership role in the mid 1980s in changing the once-popular policy of resettling refugees from developing countries in Europe or North America. This policy not only carried a high price tag but was also found to generate more refugees—the “if you take us, we will come” syndrome.

The UNHCR took the lead in championing the policy of containing refugees in their region of origin and arranging speedy repatriation when conditions warranted. Resettlement to developing countries is now considered a last option.

Each year, the UNHCR identifies a number of refugees in the camps whose resettlement in the West would be the preferred solution. These are often difficult cases involving elderly refugees or those with disease and poor health. Unfortunately, there are few countries willing to accept them. The Scandinavian countries are

the exception and always try to help the UNHCR.

On the issue of asylum policy, however, there is no sign of a change of attitude on the part of the UNHCR. While the UNHCR assigns a low priority to the resettling of refugees in the West, it sees nothing wrong with the large flows of asylum seekers from the developing world entering and remaining in Western countries. In March 2010, the UN High Commissioner for Refugees, António Guterres, dismissed claims that asylum seekers were flooding into developing countries and explained that the numbers in 2009 had remained stable, at 377,000! (UNHCR, 2010g).

There has never been an answer to this obvious policy dichotomy on the part of the UNHCR. It may be because the UNHCR has always regarded the refugee lobby as a reliable ally in supporting refugee causes, and it does not want to alienate this strong non-governmental support group.

Whatever the reason, the UNHCR has decried almost every attempt by states to reform their asylum systems. Any control measures such as the imposition of visas, or the use of accelerated or fast-track processing, are condemned as unfair or as placing the lives of refugees in jeopardy. The use of safe country of origin, safe third country and readmission agreements is questioned. Detention or the withdrawal of welfare to asylum seekers is denounced.

Since its inception in 1951, the UNHCR has never questioned the validity of the asylum processor, or its widespread abuse. Critical of almost all efforts to reform the system, or to manage more effectively these massive flows of people, the UNHCR has operated instead in concert with the refugee lobby—the activists, the lawyers and the NGOs.

If there is to be a better way to manage international asylum flows, the UNHCR must change. Meaningful reform cannot happen without the leadership and wholehearted support of the organization that is mandated to deal with refugee problems.

It is up to the UNHCR to address the problem of asylum seekers and to initiate badly needed reform.

In 1982, at the UNHCR Executive Committee annual meeting, delegates raised the growing problem of asylum seekers, and in numerous subsequent sessions, the problem was raised again but little has been done. There have been muted suggestions for reform but no concrete recommendations for action and no pressure on the UNHCR to take the lead in proposing a comprehensive plan to deal with this international problem.

***“Whatever the reason, the UNHCR has decried almost every attempt by states to reform their asylum systems.***

***Any control measures such as the imposition of visas, or the use of accelerated or fast-track processing, are condemned as unfair or as placing the lives of refugees in jeopardy...***

***Since its inception in 1951, the UNHCR has never questioned the validity of the asylum processor, or its widespread abuse.***”



## Part 3

# The road to reform

Western asylum systems have been dysfunctional for the most part since the early 1980s, but during this time a few simple truths that point the way to reforming the systems have emerged. It has taken a long time for these to be accepted, but the EU countries have taken the lead through the harmonizing of their asylum policies. Unfortunately, too many in Canada, with the exception of the new Immigration and Citizenship Minister, Jason Kenney, seem unwilling to learn from Europe.

### Half-measures do not work

The first truth is that half-measures do not work. Tentative methods to improve the efficiency of asylum systems—time limits on appeals, adding more board members, adopting one-member hearings—and other mechanical tinkering with the process only result in failure and further undermine public confidence.

The Netherlands learned this truth the hard way. In 1987, bowing to public pressure to reform the system and curtail the flow of refugees, the government passed more-restrictive legislation. The new measures did not work and so further restrictions were imposed in 1991. However, these, too, failed and even further restrictions were passed in 1993 that in turn proved to be inadequate.

Had Canada enacted the third-country provisions of the 1989 legislation, we would have preceded the EU in introducing sensible reform of the system, saved

billions of dollars, put an end to human smuggling, strengthened our security infrastructure and maintained our good-neighbour relationship with the United States.

### No quasi-judicial system that offers benefits can manage volume without restricting access

The second simple truth is one identified in 1984 by Ratushny that no quasi-judicial system that offers benefits can manage volume without restricting access. This has been proven repeatedly and is true for every Western asylum country. No matter how many panels are set up, no matter how many employees are hired, no matter how streamlined the process, it will be overcome by the unrestricted demand on its services. Without restricting access, the system will not work.

The most effective way to restrict access is by adopting the measures taken by the EU countries—safe third country, safe country of origin, accelerated hearings, removal pending appeal, etc. The EU restrictions have shown that they do help in reducing asylum flows. Nevertheless, it remains to be seen if these measures will, in the long run, prove sufficiently restrictive to prevent future mass flows from crippling the international effort to help the refugees in camps around the world or to combat global human smuggling.

## Refugee determinations made after a claimant has entered a country are too late

The third simple truth is to recognize that the key to the problem of asylum seekers is that under all current systems, the asylum decision about whether the claimant meets the UN Convention definition of "refugee" can only be taken after the claimant has entered the territory of the country concerned—but by then it is too late.

This is the heart of the matter, and until it is addressed, it is unlikely that asylum flows can be managed. The aim of the vast majority of asylum seekers is not protection but access to a Western country. Once an asylum seeker is in a Western country, the chances of removal are negligible, and the legalistic nature of the various determination systems guarantees that time is on the side of the asylum seeker. Among other things, this is why the financial earnings from human trafficking have almost reached those of the international drug trade.

There is no obligation to hear an individual's claim to asylum from within the country concerned. In the early 1990s, when the United States was faced with large volumes of asylum seekers who arrived by sea from Cuba and Haiti, it implemented a policy of intercepting ships at sea and removing the potential asylum seekers to holding centres in the Panama Canal Zone and Guantanamo Bay where the asylum claims were adjudicated. If the claim was successful, the refugee was admitted to the United States.

In the summer of 2001, Australian authorities intercepted a Norwegian ship carrying 438 asylum seekers en route to Australia. The vessel was diverted to offshore

islands and the passengers had their asylum claims processed there. Those whose claims were accepted were told they could join the list of refugees in the backlog of Australia's annual 12,000-refugee quota. Those who were refused asylum were given the opportunity to return voluntarily to their home country or be subject to forced removal.

Australia has had a particularly difficult problem with asylum seekers who arrive by sea, and it has had a policy of intercepting and diverting the vessels elsewhere to have the asylum claims determined. However, since January 2010, 81 ships have attempted to offload asylum seekers, and asylum policy has become a major political issue.

On April 9, 2010, in a desperate bid to stop the ships, the Australian Minister of Immigration, Chris Evans, announced the immediate suspension of all new asylum claims by people from Sri Lanka and Afghanistan. He gave changing circumstances in those countries as the reason for the decision (BBC, 2010).

The Australian and U.S. experiences with adjudicating claims offshore have been controversial and subject to severe criticism from the refugee lobby. Nevertheless, the establishment of asylum centres outside the territory of the receiving state is not in violation of the UN Refugee Convention. The core obligation is to not return refugees to the country where they might face persecution. It says nothing about where the claim should be heard.

The concept of determining refugee status in neutral territory is not new. In 1986, a similar proposal was made by Denmark at the United Nations General Assembly. The Danish representative suggested that asylum seekers outside of their regions should be returned to United Nations

Processing Centers in their regions, where their claims for refugee status would be examined.

In 1993 in Athens, at the fifth conference of Ministers for Migration Affairs, the Netherlands Secretary of State for Justice proposed that the processing of asylum claims should be conducted at reception centres in the claimants' own region.

Because these suggestions lacked support from other countries, and the UNHCR, nothing came of them. However, offshore determination of asylum claims may prove to be the answer to this long-lasting and seemingly insoluble problem.

If reform is to come, it will have to be because a group of Western nations demanded that the UNHCR step up and do its job of helping to resolve this issue.

It would have been logical for Canada to take this initiative. We played an important role in the formation of the UNHCR and the drafting of the Refugee Convention of 1951, and we were regarded internationally as a key player in the asylum and refugee policy fields because of our historical role in helping resolve refugee problems. Unfortunately, this is no longer true.

***...offshore determination of asylum claims may prove to be the answer to this long-lasting and seemingly insoluble problem.***

For the last 25 years, Canadians have allowed this fundamentally important area of public policy to be completely dominated by the refugee lobby and special interest groups. Governments have abdicated responsibility for formulating rational asylum policies and co-ordinating a Canadian position on global refugee issues.

In order to regain our former standing and to have any hope of being taken seriously in international forums, let alone have influence, Canada will first have to put its own house in order, and that does not appear feasible in the short term.

## The asylum future in Canada

On June 29, 2010, the *Balanced Refugee Reform Act* passed into law. The new legislation was a brave attempt by the Minister of Citizenship and Immigration, Jason Kenny, to initiate sensible reform of our broken asylum system. His proposals, as might be expected, were immediately criticized by the usual suspects in the refugee lobby and by members of the Parliamentary opposition parties.

The reforms concentrated on the introduction of the safe third country concept. Countries that were considered safe could be designated as such by the Minister. While people from those countries could submit a claim, if it was refused, they would be subject to removal without appeal to the newly created Refugee Appeal Division of the IRB. They would still be entitled to seek leave to appeal to the Federal Court.

This provision was a very generous gesture to the lobbyists because asylum claimants coming from safe third countries are not entitled to a full hearing in most other asylum-receiving countries. There, claim would be considered “manifestly unfounded” and would be subject to accelerated procedures leading to early removal. Remarkably, even this key section of the Bill was eventually watered down, and in order to get the Bill passed the Minister was obliged to yield to opposition demands that everyone should be entitled to an appeal to the Appeal Division.

The Refugee Appeal Division is something the refugee lobbyists fought for since the Liberals refused to establish one despite provision for it in the Immigration Act of 2001. The new Appeal Division will have the power to conduct another hearing on

the facts and the law—in other words, a *de novo* hearing. Leave to appeal to the Federal Court will still be available.

The creation of an Appeal Division and granting the right of appeal to it for claimants coming from safe third countries make it unlikely the new legislation will be effective. Indeed, it is highly likely the new provisions will cause even more backlogs.

There are other provisions that may help speed the process along, such as removal of claimants pending an appeal to the Federal Court, time limits on submitting appeals and scheduling hearings, and, more importantly, removing the right of failed claimants to a humanitarian review and a pre-risk removal assessment of their case for a year after the refusal decision. These reviews were responsible for interminable delays in the asylum review process.

However, as other countries have found out and as our political leaders should know, half-measures at reforming asylum laws do not work. As a result, it is likely Canada will continue to have the most abuse-prone asylum system in the world. The numbers will continue to be high, the backlogs will pile up, and the costs will skyrocket.

In the meantime, unless the media and Canadians demand reform, it is likely our political representatives will continue to pretend we are playing our role in helping refugees, and vast sums of money and time will be spent on processing economic or other claimants, thus diverting resources from actual refugees. Problematically, the Department of Immigration and the Refugee Board will continue to look upon the hard-core

lobbyists as stakeholders, and life in the world of Canadian-style make-believe refugee protection will go on.

Nevertheless, over time, and as the numbers and costs reach intolerable levels, it is likely that serious reform will be forced onto Canada. As the world “shrinks,” environmental disaster, drought, crop failure, famine and escalating armed conflict will drive millions of desperate people from the developing countries into the Western industrialized nations.

This is what asylum is really all about: a vast migratory movement of desperate people. The sooner Canadian political leaders face such truths, the better our chances are—not of stopping it—but of at least managing it more effectively. There are much better means of resolving refugee movements than by accepting unlimited numbers of false refugee claims. The steps to be taken are already known, and the experiences of other asylum countries are useful as a guide to what works and what does not. The wise recommendations set out by Ratushny are invaluable and continue to be valid.

The recommendations outlined in a report prepared for Lucienne Robillard, the Minister of Citizenship and Immigration, in December 1997, serve as a model of an effective and dynamic refugee-protection system for Canada. Among other things, it argues for a separation of refugee matters from immigration and the establishment of a single Protection Agency that is responsible for asylum decisions at home and refugee selection abroad as well as relations with the UNHCR.

The report, titled *Not Just Numbers*, contained useful and sensible recommendations, all of which are worthy of serious attention, and they coincide with the Ratushny concern about conserving our resources for the benefit of those who

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truly need protection (Robillard, 1997).

The report also strongly recommends that professional career officers who are trained in refugee affairs and who spend time at home and abroad dealing face to face with refugees should make refugee decisions. The report rejects the practice of refugee decisions being made by amateurs appointed by the government.

Unfortunately the report was shelved.

To conclude, Canada earned a fine reputation at the end of the Second World War by helping to resolve refugee problems. However, we have lost our way and now are only going through the motions in order to satisfy special interest groups that either profit financially from the current asylum system, or are acting out of misguided altruism. In any case, what must not be overlooked as the story unfolds is that there is a dark and tragic side to the asylum travesty. The wrong people are being helped.

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## Further Reading

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### **Culturally-driven Violence Against Women**

By Aruna Papp

<http://www.fcpp.org/publication.php/3351>