The Immigration and Refugee Protection Act: One Step Forward Two Steps Back

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ABSTRACT

The Immigration and Refugee Protection Act (IRPA): One Step Forward Two Steps Back

Karine Arakelian

Refugee laws, as well as national security policies, have recently been an area of focus for both international communities, and governments of nation-states. With an increase in terrorist threats covering a wider geographical territory than previously thought, shifts in national policies have focused on an increase in defence and security parameters, while tighter controls are put in place for refugee admissibility. The 1951 International Refugee Convention definition, put in place to aid refugee flows, has been increasingly taken out of context and manipulated severely enough to allow nation-states high degrees of independence in matters of refugee controls. This has been demonstrated by a gradual decrease in human rights standards in the past 50 years.

Internationally developed nations systematically manipulate and control refugee laws, and Canada follows similar plans of action. With the recent introduction of the new Immigration and Refugee Protection Act (Bill C-11), higher security measures, as well as tighter refugee controls are apparent. Will the objectives of the Act in attempting to increase security while protecting genuine

refugees be successful, or will it be just another move towards limiting the rights of refugees?

The goals of this thesis are, firstly, to understand how refugee protection was first put in place internationally, and secondly, how Canadian policies have evolved in terms of refugee protection, with particular attention given to the Immigration and Refugee Protection Act. By plotting an evolutionary perspective on policies dealing with refugees, one is better able to understand the historical influences of certain political decisions. Compiling some of the past influences and trends surrounding refugee laws will shed some light on how best to formulate policies for the near future, with hopes of conserving human rights standards in matters of refugee protection, as well as maintaining the objectives of tighter security measures.

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INTRODUCTION

This thesis seeks to understand the background and nature of international refugee law and how Canada and its policies have evolved within a global context. The first part consists of an historical analysis of the evolution of refugee rights during the twentieth century. Special focus is given to the limitations of the 1951 International Convention definition, the way in which nation-states have increasingly manipulated this definition, and how legal barriers have led to a decline in human rights standards, including refugee protection standards. The second part focuses on the Canadian refugee regime and its evolution. With recent increases in national security standards accompanying restrictive measures, security provisions are examined, with special focus on the Immigration and Refugee Protection Act. An analysis of the debates about the act are presented, including differing opinions and perceptions on Canadian refugee and security laws from varying perspectives, including church groups, non-governmental refugee organizations, and opposition parties in Parliament. Finally, future policy options are discussed, with specific focus on finding viable solutions, both internationally and nationally, for refugee protection matters and security issues.

CHAPTER 1: EVOLUTION OF INTERNATIONAL REFUGEE POLICIES

1.1. Introduction

Although refugees and mass movements of people are not new events on this planet, the phenomenon has been met with increased awareness and precaution, especially during the twentieth century. This chapter examines the shifts in the way governments and international bodies have dealt with the problem of refugees, and seeks to explain the reasons behind the decision-making processes that guide policies. Focusing on the last century narrows the timeline to a logical unit of analysis. However, given the importance and weight of the 1951 International Convention definition, this chapter will primarily analyze international events after 1951 to the present. The Canadian response is discussed in subsequent chapters.

1.2. First half of the Twentieth century

Before World War I, churches and the Red Cross gave assistance in Europe and the Middle East to people in refugee-like situations. Immediately after World War I, the first awareness and subsequent need for protection of people considered to be "refugees" was made real with the formation of the League of Nations. This organization helped millions of World War I refugees as well as several millions

who fled from the Russian revolution and others who sought refuge from the upheavals in Turkey.

The League of Nations High Commissioner for Refugees (HCR) was founded in 1921 under the direction of Fridthof Nansen. It was intended to be a temporary relief organization dealing with Russian refugees. The HCR never adopted a general definition for the term "refugee", but instead applied a category-oriented approach based on group affiliation and ethnic origin. This approach was quickly replaced in 1933 with *The Convention Relating to the International Status of Refugees*. This convention provided a definition that based refugee status on lack of protection and non-nationality (Barnett. 2002: 242).

> It was the general policy of the League of Nations to extend protection to groups of persons whose nationality had been involuntarily withdrawn. As well, the League recognized that persons who could not obtain valid passports were entitled to international protection. Both of these groups received League of Nations identity certificates which contracting states agreed to recognize as the functional equivalent of passports…only persons applying from outside their country of origin were eligible for refugee recognition (Hathaway, 1991: 4).

Although the League of Nations provided a measure of security for some asylum seekers, those who were not able to leave their country, for whatever reason, were not entitled to the protection the League offered. Laws would discriminate between those who were able to leave their country and apply for refugee status, and those who were unable to leave the turmoil of their country.

According to the noted scholar of refugee law James Hathaway, who has developed three categories, or approaches, to the refugee issue, the League of Nation's method is known as the *judicial method,* and was the primary functional tool in refugee determination before 1935.

The *social approach* followed, and dominated the international regime from 1935 to 1939. According to Hathaway, refugees defined from this perspective are said to have been the helpless victims of widely defined social or political occurrence, which separate them from their home society. The social perspective allowed refugees assistance to ensure their safety and well being, whereas the judicial perspective's primary goal was to correct an anomaly in the international legal system. For the most part, these arguments sought to protect persons caught up in the upheaval and dislocation caused by the National Socialist regime in Germany in the 1930s (Hathaway, 1991: 4).

The situation in Europe reached such a point that in 1938, the *Evian Conference* in France was convened in order to bring together several countries to discuss solutions to refugee movements. The meeting failed to meet its important objectives (Barnett, 2002). Germany refused to let Jews leave with their assets and countries of resettlement refused any financial responsibility. As Barnett states, " Receiving nations who could not support their own people were unwilling to undertake new financial obligations (Barnett, 2002: 243)." The outcome of the Evian Conference follows:

> The Evian Conference established the Intergovernmental Committee on Refugees (IGCR) as a new, permanent organization, the objectives of which included...assisting persons who have not already left their country of origin but who must emigrate because of their political opinions, religious beliefs, or racial origins, and persons so defined who have already left their country of origin but who have not yet established themselves elsewhere (Dirks, 1997: 48).

According to Hathaway, the *individualist perspective* followed and dominated in the 1940s. In this system, the determination of refugee status was largely based on political and social categories. Focus was directed towards the merits of each applicant's case and a move toward a personalized evaluation of incompatibility between state of origin and refugee set the stage for contemporary refugee law (Hathaway, 1991: 4).

The Second World War marked a new era of displacement on the international front. By 1945, 30 million people from Europe were left uprooted, including more than twelve million ethnic Germans who were expelled from the USSR. The League of Nations was dismantled and the United Nations Relief and Reconstruction Agency (UNRRA) was formed by the Allies in 1944 to deal with the refugee flows resultant from the war. The UNRRA's mandate came to an end in 1947 and the International Refugee Organization (IRO) was established in 1948 as a temporary, intergovernmental United Nations agency to aid refugees from the Second World War (Barnett, 2002: 244).

It was with the establishment of the IRO that a case-by-case basis of refugee determination was applied. As Barnett puts it; "Although it was still very Euro-centric, the IRO provided a neutral framework through which to comprehensively identify refugees (Barnett, 2002: 244)."

Established after World War II, the Office of the United Nations High Commissioner for Refugees (UNHCR) was set up in 1951 to provide international protection for refugees, and to seek permanent solutions to their problems by assisting governments to facilitate their voluntary repatriation or their assimilation within new regions. Emerging from the devastation of World War II, Western European States wanted to resolve the problem of war refugees as quickly as possible. With the foundation of the United Nations, the *1948 Universal Declaration of Human Rights* and the adoption of the *1951 Refugee Convention*, coupled with the appointment of a High Commissioner for Refugees as part of the United Nations system, postwar efforts to grant refugees a legal basis for protection began to emerge.

According to the 1951 Refugee Convention definition, a refugee is defined as any person 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 avail himself of the protection of that country; or who, not having a nationality and

> being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it (Hathaway, 1991: 6).

The basic principles of the Convention included the principle of "non-refoulement". As stated in Article 33:

> No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion (Hathaway, 1991: 7).

Signing governments agreed that they would make an assessment of individuals who claimed to meet this criterion and, if found to do so, they would not send them back to the initial state from which they fled, at least not while the danger of persecution continued.

The *1951 Convention* definition also introduced a new element into the refugee regime, highlighting the fact that a refugee is someone who is 'outside the country of his formal habitual residence'. This clarification focused on the territorial nature of the refugee regime, reinforcing respect for sovereignty, and the inability of an international organization to look within a nation's borders (Barnett, 2002: 246).

For the most part, it is the 1951 Convention which still determines and governs international standards of the treatment of refugees. The principal body

administering these laws is the UNHCR. Its Executive Committee, more commonly known as EXCOM, oversees the work of the UNHCR. EXCOM is comprised of 57 states. At its annual meetings, the Committee makes decisions, which are adopted by consensus, by over 40 states. Although its decisions carry persuasive authority, they are not legally binding (Amnesty International USA, 1999: 7).

In recent years, other Conventions and international agreements have adopted the principle of *non-refoulement* into their texts and laws. These organizations include the *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 3), The United Nations Declaration on the Protection of All Persons from Enforced Disappearance (Article 8), and the United Nations' Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (Principle 5).*

It is now widely accepted that the recognition of *non-refoulement* is part of international customary law, meaning all states, regardless of their acceptance of the 1951 Refugee Convention, must respect the principles of *non-refoulement.* Given the serious consequences the expulsion of refugees may have, it is commonly accepted that *refoulement* should only be applied in exceptional matters directly affecting national security or public order (Fellar, 2001: 132). This last consensus proves to be an important element in later manipulations of the legal definition. As Plaut puts it, "Nation-states had replaced the multitude of

principalities and bishoprics of former centuries and these new political entities now zealously guarded their territories" (Plaut, 1990: 75).

1.3. Limits of the 1951 Convention

Although the *1951 Convention* is still the basis for international refugee law, many authors (Chimni (2000), Dirks (1977), Goodwin-Gill (2001), Hathaway (1996), Millibank (2000), Nash (1989), Skobla (2001) and White), still see many limitations. They have suggested that the *1951 Convention* reflects Western ideals of rights established after the end of the Second World War and is severely outdated and no longer applicable. Even the UNHCR has stated that the 1951 Convention is of limited capacity today.

> The main international instrument of refugee law is a 45-year-old treaty whose only protocol came into force nearly three decades ago. During that time, the causes of many refugee movements have shifted (UNHCR, *who is a refugee?* http://www.unhcr.ch/un&ref/who/whois.htm).

According to Hathaway and Millibank, political rather than economic concerns were initially given importance in the *1951 Convention*. They argue that, the original definition was a product of the Cold War. The strategy of the *Convention's* definition rested on the successful efforts of Western states to give priority to cases where flight was motivated by pro-Western capitalist and individualist values (Hathaway, 1991: 6; Millibank, 2000: 14). Hathaway argues

that the drafting of the *Convention* took into account the national self-interest of receiving states. He argues that States were granted wide-ranging authority to deny status to criminals and persons perceived to endanger national security, and this is clearly based on a temporary protection model (Hathaway, 1996: 1-2).

> The definition had temporal and geographic limitations, only covering refugee movements provoked by events that occurred before January 1951 and giving signatory nations the option to limit the Convention refugees it accepted to those from Europe (Barnett, 2002: 246).

> International migration was no longer to be a function of the particularized needs or ambitions of the would-be immigrants, but was instead to be closely controlled to maximize advantage for sovereign nation-states (Hathaway, 1991: 1).

Even during the drafting of the 1951 Convention, self-interest and control on behalf of the participating nation-states were of primary importance. Assistance to asylum-seekers would only be granted if a state was able to retain these two primary objectives. Limits, therefore, were already being imposed on the rights of would be refugees.

It is important to realize that the *1951 Convention* was developed in a different era. This realization further sheds light on how dangerously the criteria limit the definition still in use today. The types of solutions emanating from that era still continue to shape the global response to refugee flows.

For example, a number of resultant problems in this *Convention's* implementation have been identified by academics. Firstly, the Convention definition focuses on exile as the proper solution to the refugee problem. According to Goodwin-Gill, the *1951 Convention* was not intended specifically to deal with large scale refugee flows, the question of asylum, the details of international cooperation or the promotion of solutions other than those related to the status of the individual as a refugee. Refugee law was and remains theoretically misconceived as a response to involuntary migration. It was anchored in the assumption that exile was the appropriate solution to abuses of national authority (Goodwin-Gill, 2001: 1).

Millibank defines the reason why exile would have been the only option at the time. "This is attributed to its judgmental and polemic Cold War origins, and the notion of irredeemably oppressive regimes (Millibank, 2000: 18)". He further states that the perspective of the international community today is very different.

A second major problem pointed out by scholars is the discrepancy in the application of the Convention as it refers to country of origin.

> Most asylum seekers are now from the poorer countries of the Middle East, Asia, Africa, and Eastern Europe rather than Western Europe. They are less welcome. There is no longer a need for unskilled labour in developed countries and no longer any ideological or strategic advantage attached to conferring asylum (Millibank, 2000:14).

It is the opinion of a number of scholars that Canada, along with other Western countries, has imposed control mechanisms to thwart the *1951 Convention* obligations. These include measures to prevent people from reaching borders and thus entitling them to protection. More specifically, these include visa controls, safe third country legislation, sanctions on airlines, immigration officers at overseas posts and extended use of detention.

As Nash clearly states:

> The need to maintain control over sovereignty and rights of citizenship preoccupies bureaucrats in their implementation of policies concerning refugees and asylum-seekers -- a preoccupation heightened by fears of a human inundation should these controls be compromised (Nash, 2000: 1).

Skoblas' theory also supports this perspective. According to him,

> After the collapse of communist regimes, the pragmatic instrumentalism of the Convention was rendered useless. The Western World started to face an influx of immigrants from destabilized and poverty stricken countries. The fear of political and social costs of asylum significantly changed the attitudes of Western population and modified the political agendas of governments (Skobla, 2001: 2).

A third problem presented by some authors is the evergrowing concern of returning asylum-seekers back to danger. In addition to Western notions conceived during a Cold War era, according to some scholars, the *1951 Convention* also allows nation-states to manipulate its narrow definition and limited obligations. Key to these manipulations is the obligation of nation-states

to not return anyone who might face danger (*non-refoulement*). However, this does not necessarily mean the right to grant asylum. As Nash states:

> It is important to recognize that states have steadfastly refused, and have no obligation to grant the right of asylum to refugees. Such a right is not found within the 1951 Convention...As a result, the gap between *non-refoulement* and the right of asylum often creates a situation where refugees find themselves in legal limbo, not rejected at the frontier yet not allowed rights of residence or protection (Nash, 1989: 7).

The *1951 Convention's* lack of a more detailed and precise definition lends itself to high levels of manipulation by immigration officers and governments alike. To take it a step further, Millibank adds that the 1951 Convention also prevents the development of better responses toward the refugee problem.

> The problem with the 1951 Convention, the basic instrument of refugee protection, is that it offers neither a comprehensive nor a flexible response to the diversity and complexity of forced population movements that are occurring today. It is distorting the responses, and diverting the resources of Western countries from developing coherent and ethical responses to these movements (Millibank, 2000: 23).

It is not only the presence of this Convention that ironically prevents proper responses from ever taking place, but its generalized definition also contributes to its weakness. Several authors discuss this problem.

> A strength and a weakness of the 1951 Refugee Convention and its Protocol lie in their individualized approaches to the criteria of status and protection. Insofar as they encapsulate the notion of individual human rights they are strong, but they are weak insofar

> as they ignore other less well-defined situations of need...Because of the limited scope of the 1951 Refugee Convention and Protocol, the protection they offer has long been accompanied (even preceded) by standards of reception and assistance founded upon more generalized concepts of need or distress. The essentially moral obligation to assist has, over time and in certain contexts, developed into a legal obligation, albeit on occasion at a relatively low level of commitment (Goodwin-Gill, 1990: 28).

> The Convention itself does not even specify any procedure by which the entitlement of a refugee is to be determined, so it may be said that the document is only a minimum response (Plaut, 1990: 78-79).

Looking back, the drafters of the *1951 Convention* could not envisage the complex subsequent development of refugee matters, and the interrelated factors which contributed to these developments. It is precisely this limited capacity of the 1951 Convention that needs to be brought out into the open in order to conceive new and more practical international treaties for today's world issues.

1.4. The 1960s

By the 1960s, the movements of refugees, as well as the problems they were perceived to carry with them, were extending beyond Europe. The Third World faced the problem of decolonization, where the individualized and persecution-based approaches to defining beneficiaries and their rights in the 1951 Convention were not very helpful anymore. This is because, with the onset of generalized conflicts, such as in Africa, and the subsequent flow of mass refugees from these regions, the General Assembly of the UN saw the need for change -- a first step

that the recognition of mass exodus was not covered by the *Convention* definition. As a result, the 1967 Protocol followed shortly.

This document waived the temporal and geographic limitations that obstructed the expansion of the *1951 Convention's* refugee definition in the post-War period, allowing more global application. However, some have argued that the true nature of the Protocol was Eurocentric, and still generates results to this effect.

> While it certainly expanded the scope of the regime and provided the UNHCR a greater humanitarian mandate... this expansion was dictated to a large extent by the Cold War strategic mission. The objective was to bring those who fled the communist system within the scope of the definition of the 1951 Convention...Those who fled the communist system were valuable by the West. It was not necessary to determine the causes of their flight, the very act of flight was enough (Bose, 1998: 5).

Some observers have suggested that the West's receptivity for such refugees may have been motivated in part by a desire to draw attention to the oppressive nature of left-wing governments. They point out that people fleeing non-communist countries now found the West's door more open (Janzen, 1998: 11). Refugees were now categorized as beyond victims of generalized conflict and violence. There was a recognized need for the refugee system to be more inclusive, and viewing refugees as people fleeing war, violence, and serious public disorder. With the 1967 Protocol also came a specific focus on solutions, particularly on voluntary repatriation. The need for long term care in refugee camps and

permanent refugee settlements in countries away from the wars causing refugee movements was recognized (Barnett, 2002: 248).

Meanwhile, on the international front, soon after their independence, most African countries sought to resolve the problem of refugees from countries not yet independent. This led to the formation of the *Organization for African Unity* (OAU) Convention in 1969. The OAU adopted an expanded definition, seeing refugees as:

> Every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality (Barnett, 2002: 248).

This regional agreement widened the definition of refugee to include people who suffer the abuse of human rights by forces of foreign occupation. However, given the state of affairs in the Third World, including Africa, solidarity among nations was hardly expected. The *OAU Convention* aimed at problems caused mainly by occasional conflict, yet an array of interrelated causes is more likely to explain the nature of conflict in Africa.

1.5. The 1970s

The 1970s saw an increase in refugees from destabilized regions. Western states, fearing mass inflows, chose to build more barriers. This was done to ensure control and security. As one noted scholar opines:

> There is a consensus among a large section of Western scholars, policy analysts and practitioners that the massive escalation in the refugee flow since the mid-1970s is responsible for the hardening of attitude of the Western nations, which have been reconceptualized as the "North" after the end of the Cold War. It is claimed that this massive increase in refugee flow from the less industrialized countries in the "South" to the industrialized States in the "North" created an asylum crisis. As a result of this crisis, Western Europe and North America abandoned their relatively liberal asylum policies of the Cold War period and initiated steps to restrict entry of potential asylum seekers, first individually and then collectively (Bose 1998:1).

By the mid 1970s, there was a decline in the global economy, and unemployment was growing. Western countries no longer wanted outside labour help, and began raising restrictions against refugee access.

> By now it was clear that the refugee regime was dependent on economic and ideological considerations. The economic collapse of the 1970s led to the tightened restrictions throughout the West, and refugees from the developing world were often seen as disguised immigrants claiming refugee status to facilitate access to receiving nations (Barnett, 2002: 249)

By the late 1970s, as the Cold War was nearing its end, massive political instability on a global scale contributed to an increase in migrations. Borders were

more open and accessible, given cheap transport rates, and the disintegration of Cold War rigid policies. As a result, asylum claims increased. In 1974 UNHCR saw 2.4 million refugees; by 1984 this number had increased to 10.5 million, and by 1996 UNHCR was dealing with 27 million refugees, IDPs (Internally Displaced Person), asylum seekers, and returning refugees (Barnett, 2002: 249).

On a more positive note, the 1970s were also a decade of repatriation -- where a number of refugees returned home. Many were guest workers from Third World countries. Although the encouragement of this practice by governments in times of economic crises denotes a deeper and hidden meaning linked to economics, the decade also saw concerted efforts toward international burden sharing strategies. The most important remains the *International Conference on Refugees and Displaced Persons* in Southeast Asia, which was a response to the Vietnam War. This took place in Geneva in 1979. The results were that the Association of Southeast Asian Nations (ASEAN) promised to provide temporary asylum; Vietnam undertook to promote orderly departures in place of illegal exits; and third countries agreed to accelerate the rate of resettlement (Fellar, 2001: 133).

1.6. The 1980s

> Since 1980, refugee movements have been more likely to be the result of civil wars, ethnic and communal conflicts and generalized violence, or natural disasters or famine- usually in combinations -- than individually targeted persecution by an oppressive regime (Millbank, 2000: 15).

The convergence of growing political and economic instability in many parts of the world, as well as the increased availability of international communications and travel, meant that many more people were moving across continents by the 1980s -- some to escape economic privations, others to escape conflict and human rights abuse. This trend coincided with the closure of some legal immigration channels into Western Europe from the 1970s onward. Some of the restrictive barriers included *non-entree* regimes, where laws are put in place to prevent asylum-seekers from ever reaching their territories. The scope of these regimes focused on visa restrictions; carrier sanctions against ships and airplane companies transporting refugees without proper papers; readmission agreements with states of origin; application of safe third country principles; and speedy expulsion of asylum seekers. The principle of the "safe third country" empowered the receiving States to expel asylum seekers without assessing their legal claims on the ground that the asylum seekers could have sought similar protection in some of the countries they passed through before reaching their ultimate destination. Consequently, as one example of this practice, a number of airports were designated as international zones.

As asylum countries became increasingly worried about the state of refugees without early repatriation, abuses of human rights and breaches of law were also escalating on the international front. Governments resorted to closing borders or returning refugees back, as large-scale refugee flows threatened the political,

economic and social stability of developed countries. As John Ratigan, a U.S. government employee states:

> The problem of the 1980s, which is almost certain to continue in the 1990s, is that persons in search of a better life have taken to entering attractive resettlement countries as tourists -- with or without authorization -- and requesting refugee or asylum status. Some destination countries began to feel that refugee laws and programs were being used as a tool for immigration, for which the applicant could not otherwise qualify.
>
> We are all familiar with the examples: the Tamils and the Eastern Europeans arriving directly in Atlantic Canada; the Cubans arriving directly in Florida during the Mariel boatlift in 1980; and the Indochinese arriving on the shores of Australia.
>
> Disorderliness increased in the 1980s, partly as a result of the tremendous expansion of international communications and the ease of travelling great distances by air, often at nominal or no fare. By requesting asylum, the new arrival is often able to use the legal process to buy time in the intended country. Disorderliness is a challenge because it can lead to a sense in the receiving country's population that things are out of control; this in turn undermines support for established refugee programs (Ratigan, 1990: 14).

This example hints at some of the attitudes of the time, especially from the governments of receiving states. Maintaining control and order preceded any form of compassionate or humanitarian gesture.

In the meantime, the Third World suffered heavy internal and inter ethnic conflicts due to superpower rivalry. Prospects for long-term political solutions remained low as prolonged aid programs were set in place by the UNHCR. Recognizing that long-term refugee resettlement was no longer a viable option,

the UNHCR attempted to provide care for refugees in situ, emphasizing international presence to encourage potential refugees to stay where they were (Barnett, 2002: 251).

Another plan of action, taking place on a global scale, and through a variety of agencies, was the reintegration and repatriation of former refugees into their former countries.

Also, there was a major reshaping of asylum policies, provoked by a shared concern in the industrialized countries about overburdening the structures they had set in place to handle claims, rising costs of various types associated with running their systems, problems stemming from various difficulties in applying refugee concepts to mixed groups of arrivals, and by a significant misuse of the systems (Fellar, 2001: 135).

Some states, such as Canada also resorted to applying restrictive laws and applications of the *1951 Convention* and 1967 Protocol, with formidable obstacles preventing legal and physical access to territories. Such measures affect the mobility of asylum seekers by focusing on the countries of origin or their means of transport and are characterized as "geographical controls" (Nash, 2000: 2).

As large-scale movements of people were becoming more frequent, bodies of power initially set to aid asylum seekers began to feel the pressure of losing control. Consequently, barriers emerged as a response.

> With the end of the East-West tensions, governments and international organizations failed to control and manage themselves to respond to large movements or to deal with the changing character of causes, to take decisions, to set strategic goals or to determine tactical means (Goodwin-Gill, 2001: 2).

1.7. The 1990s

Since the nation-state retains the sovereign right to decide who can or who cannot not reside within its borders, (particularly since most refugees and asylum seekers are granted de facto rather than Convention status), there are significant variations in the strictness or liberality of these national regimes (Levy, 1999: 4). Receiving countries exercised inconsistent and illogical forms of refugee law.

In the 1990s, more and more states were implementing policies aimed at deterring asylum seekers. The principles of restrictionism were laid out in a variety of control mechanisms. These policies concentrated on making it more difficult to enter a particular country or by denying access to social rights. Some European examples of these accords included the *Schengen Accords; The Dublin Convention on the Crossing of External Frontiers; the Third Pillar of the TEU*

(Maastricht); and the Community based agreement *of the Treaty of Amsterdam.* (Levy, 1999: 2-6).

> Already, many developing countries are emulating the restrictive policies of their wealthier neighbors and finding ways to obstruct the entry of potential asylum-seekers (Miyamoto, 1996: 218).

> In 1992 and 1993, the UN Transitional Authority in Cambodia managed to repatriate 360,000 refugees who had been living on the Thai-Cambodia border for more than twelve years. The reintegration of displaced persons into their former countries and communities had thus become another component of the UNHCR's strategy (Barnett, 2002: 252).

In 1998, the Austrian European Union presidency suggested changing the *1951 Refugee Convention.* This proposal implied the abolition of the individual right of political refugees for asylum and proposed that decisions concerning refugee status should be decided by the receiving country on the basis of good will. The Austrian proposal thus challenged a Western tradition in asylum policies framed around the principle of individual human rights (Skobla, 2001: 2).

On the other side of the globe, the security perspective also dictated refugee policy. Safe zones were expanded and military action was implemented to eliminate the root causes. The United States largely influenced this policy shift (Bose, 1998: 4).

Contrary to popular belief, improvements have been made in refugee determination systems in the past decades. However, *non-entrée* regimes block refugees' access to these improved procedures.

> The UNHCR has already abandoned the practice of obtaining each individual refugee's free consent to voluntary repatriation. The new policy is that of imposed repatriation (Levy, 1999: 8).

These changes block any improvements from taking effect and, are rather another step toward increased control on behalf of receiving states.

By the 1990s, the vast majority of refugees and asylum seekers in Europe were unrecognized under the *1951 Refugee Convention* because this enabled states to conveniently avoid their international obligations. Instead of being Convention refugees, which would have given them equal access to the welfare state and labour markets of their host nations, the majority of refugees were either waiting for the determination of their status or were given de facto status that gave them varied access to the welfare state and the labour market. For example, in certain instances in the 1990s, the French and German governments did not grant asylum to refugees from Somalia, Liberia and Sierra Leone because those states had ceased to exist and therefore it was argued that they were under no obligation to receive the victims of non-state violence by factions (Levy, 1999: 7).

1.8. The general policy directions in the past decade

While the international asylum regime has been under heavy criticism for the past four decades or so, neither governments nor refugee advocates have been willing to call for a meaningful review of the system. Refugee advocates are fearful of government downsizing in matters concerning refugee rights, while governments are shying away from increased obligations. An increase in asylum seekers in the late 1990s, linked with the emergence of people smuggling on a global scale would appear to be sending governments into a defensive frenzy.

Increasingly, Western governments are applying to the extent possible all measures to deter asylum seekers. Previous measures have been applied even more rigorously. As mentioned previously, some of the more important ones include *non-entrée* regimes (Hathaway, 1996: 3).

Instead of utilizing the *1951 Refugee Convention* and its temporary protection measures, such as resettlement projects, the Western response has been to avoid receiving claims altogether. Seeing no need to accept the risks from the widely accepted Convention system, nation-states have taken the more rigid tactic of keeping asylum-seekers as far as possible from their borders. As Barnett puts it,

> Thus despite the impressive changes to the responsibility and scope of the refugee regime, national political and economic priorities are blocking benefits from the improved system. As the refugee

> situation worsens and population flows increase on a globally significant scale, effective implementation of international policies is obstructed at the national level (Barnett, 2002: 254).

Slowly but surely, control mechanisms referred to as the "security model", as described by Goodwin-Gill, were reinforced. In this model, refugees are perceived as threats to national security, and there is a deliberate disregard of individual dignity and worth. In addition to legal measures to stop inbound refugee flows described previously, this model is generally accompanied by a certain rhetoric in public discourse, " which serves to heighten a sense of national alarm, or claims to protect new and established communities, or raises the specter of social tensions" (Goodwin-Gill, 2001: 2).

This type of mass alarm was recently witnessed in the United States in response to the terrorist attacks of September 11, 2001. The US government, coupled with media giants, consistently drilled into the American public the threats to their national security, and reinforced nationalist and patriotic thought into its people. This technique also instills into the insecure masses the elements of racism and hatred toward the "enemy", whoever it may be. This pattern demonstrates a control mechanism is being applied by governments to achieve increased support. Governments have the ability to control and manipulate laws, as well as guide the general thought patterns of the masses. A case in point would be the appearance of the best selling US author Michael Savage on CNN several

times shortly after the World Trade Center bombings. A quote from his best seller reveals the racist ideals that were being broadcast nationwide.

> But then you got the immigrants who sneak, cheat, or lie their way into America. Once they've set foot on the soil, they immediately apply for welfare benefits. These leeches make no effort to learn English. In fact, they take pride in not learning our language...There's another class who come to America. These dirty thieves come here not to mooch, not for the ACLU-care benefits, not to study, not for the host of other liberal handouts. They come to kill us. They come to poison your daughter's lunchbox. They come to fly planes into buildings...If America is going to survive, we must close our borders to those who come to mooch and to those from all terror-sponsoring countries (Savage, 2002: 122).

This last quote can best be associated with the ideas generated by Goodwin-Gill's "security model". In contrast to the "security model" stands the "individual rights model" outlined by Hathaway. The latter emphasizes that refugees, asylum seekers and migrants are considered as individuals. These individuals should each have the right to claim protection, whether from persecution or in respect of other relevant human rights and that each individual claim should be determined as a separate and unique case (Goodwin-Gill, 2001: 2).

Today, the consequences of the measures taken by the North have manifested themselves in confining more of the world's refugees to their regions of origin in the South. Africa shelters more than double the number of refugees protected in all of Europe, North America and Oceania combined. The Ivory Coast alone protects nearly twice as many refugees as are presently in the United States. Yet

refugee policies introduce no burden-sharing measures to offset the uneven distribution of refugees (Hathaway, 1996: 4).

In summary, it can be stated that the international response to the asylum crisis has been increasingly restrictive. The convergent international policies and various political measures crucial to the advancement of these restrictive regimes have had unfortunate consequences for refugee protection. To better understand how newly emerging refugee policies are framed around security issues, a more in depth analysis of the term "security" is necessary.

1.9. Policies for a new millennium (national security vs human security)

In this section, refugee policy is discussed as it is linked to security discourse, and how the enforcement of one may lead to the deterioration of the other. A shift toward state-centric decision-making has also guided these new policy shifts, thus minimizing the presence and power of international treaties. Nationalism and sovereignty have begun to emerge from the ashes of 9/11. What is ultimately desired and needed are policies focusing on human rights and human security instead of national security. These terms are discussed in this section.

> Real security can be a difficult concept to grasp; we are so immersed in the rhetoric of security that it becomes hard to differentiate what is real and false. Many of the new policies and laws put into effect shortly after 9/11 were done in the name of ensuring security. The paradox then becomes; do you want security

> or human rights? Being forced to choose between two ideas that are one and the same can cause dissonance in the minds of many. How can one have security without human rights (Homes, 2004: 1).

The growing distinction between these two different types of security has aggravated the difficulty of defining such a core concept. The next section looks into the different types of definitions that surround the security discourse.

1.9.1. Human Security

The United Nations Institute for Disarmament (UNIDIR) states:

> Freedom from fear and freedom from want have become the catch phrases of an approach to security called human security. Often referred to as 'people-centered security' or 'security with a human face', human security places human beings – rather than states – at the focal point of security considerations. Human security emphasizes the complex relationships and often ignored linkages between disarmament, human rights and development. Today all security discussions demand incorporation of the human dimension (UNIDIR, 2004: 1).

"Human security", contrary to state focused ideals, entails the logic of universal rights to minimum standards of life, placing the individual instead of the state as the referent object of security. The centre of concern regards physical, economic, social, environmental, and human rights security (Freitas, 2002: 35).

From the Canadian perspective, "human security" is defined as:

> a people-centred approach to foreign policy which recognizes that lasting stability cannot be achieved until people are protected from violent threats to their rights, safety or lives (Canadian Department of Foreign Affairs and International Trade, 2003: 1).

Scholars have indicated a number of concerns with the concept of "human security". A major problem is its Western bias. In Freitas' article published in 2002, entitled "Human Security and Refugee Protection after September 11: A Reassessment", the term "human security" is described as being universal and indivisible, and because of these characteristics, is also said to be indefinable. But as Freitas puts it:

> The ambition of universalism has been contested by authors who argue that the concept of human security is not universal but rather a Western construction and that appropriating the nation-state based security model for use in regions with different history and culture may add to the problems instead of solving them (Freitas, 2002: 36).

Other criticisms include that of the United Nations Development Programme (UNDP), where they argue that the term "human security" is too vague, not objectively measurable and too woolly, too encompassing and lacking specification (Freitas, 2002: 36).

The term "human security" can also have a geographic component. Although the UNDP points out that the term is too vague, it also recognizes the global

challenges to human security, which arise because the threats are international in nature. According to the UNDP, global threats to human security include: unchecked population growth, disparities in economic opportunities, excessive international migration, environmental degradation, drug protection and trafficking and international terrorism (Canadian Global Change Program: 1997: 1).

1.9.2. National Security

Trying to explain the basic meaning of the very vague term of "national security" can be very problematic. In trying to keep with the relevance of refugee issues, the next paragraphs attempt to bring together the discourse around "national security" and refugees. State sovereignty and terrorism emerge in the discussions, and as will be seen, these terms also add to the confusion in policy making.

> The essence of any sovereign community is in its ability to determine who can and who cannot become members. In the area of public policy concerning refugees, communities come face to face with the conflict between the rights of outsiders to claim membership and the right of communities to control their own destinies and to determine who cannot become members (Adelman, 1991: 172).

By moving the discourse of refugee protection from the realm of human rights to that of national security contributes to a switch in perspectives and

wordings and also changes the focus from refugees to the receiving states (Freitas, 2002: 37). As Goodwin-Gill states:

> We focus increasingly on the security dimensions to the movement of people between states. In resolutions adopted under Chapter VII, the UN Security Council has linked situations of internal disorder and resulting population displacement to threats to international peace and security (Goodwin-Gill, 1999: 3).

The state thus becomes the centre of attention, and state sovereignty a desired option. National laws take effect and international treaties take second place to national interests. Freitas warns that, if left without international standards, states will redefine security issues to suit their own interests.

Links between human rights and security issues have acquired a renewed relevance for Western countries since the September 11, 2001 attacks on the World Trade Center. The prospect of losing security is being met head on by nation-states. Governments worldwide have taken on the hard task of ensuring national security within their borders, sometimes at the expense of human security and human rights. Sometimes, however, human rights abuses become just another consequence of security enforcement, especially on the borders of a receiving country.

> When the danger comes from international terrorism then attention often shifts to migration control, and with it more intense scrutiny of the regulation of entry and monitoring of migrants who are

> already present. What is sometimes neglected is that this does not take place in a legal vacuum (Harvey, 2002: 2).

The fact remains that terrorism is a real threat to national security, and the need for defensive measures include enhanced refugee controls. Also, there seems to be no conclusive evidence linking global terrorism with refugees. There is more evidence, however, that the security threat has been used as a cover to cut down on the entry of refugee claimants (Adelman, 2002: 8). As Whitaker states,

> Refugee policies in Canada have long been formulated within a discourse that gives a privileged place, an overriding priority, to national security. Humanitarian considerations have never been absent, but neither have they ever been dominant, in the past or in the present (Whitaker, 2002: 31).

Using the Canadian example as evidence to this statement will further shed light on its importance and in understanding how policy making takes place in a context of nationalistic resurgence.

Many scholars observe that the direction refugee law has taken in Canada calls for concern. The notion that in order to establish and ensure security we must restrict human rights has negatively affected asylum seekers around the world and also in Canada. Some of these laws include the new IRPA of 2002, as well as the *Anti-Terrorism Act* from 2002. The latter created measures to deter, disable, identify, and prosecute those engaged in terrorist activities or supporting these activities. The intent of the legislation makes it an offence to knowingly support

terrorist organizations whether through overt violence, or by providing support through documentation, shelter or funds. (Canadian Security Intelligence Service (CSIS), 1999: 1-2). Many scholars have suggested that control mechanisms set in place to stop terrorism are interfering directly with refugee processes. For example, the noted Canadian authority on refugee studies has said,

> Refugee and immigration support groups tend to view the terrorism scare after September 11 as having been used as an excuse to restrict and limit refugee entry into Canada and with very little justification (Adelman, 2002: 6).

Aiken also sees the recent restrictive measures taken against refugee claimants as being a controlling device. She states,

> immigration measures aimed at protecting the security of Canada are but one tool in an increasingly sophisticated arsenal, to contain and manage refugee admissions (Aiken, 2002: 55).

The 2002 Roundtable Report by Canadian experts in refugee matters, entitled "Migration and Security: September 11 and Implications for Canada's Policies", concludes that policy makers should use the human security model to guide future policy making. This model, as introduced by Hathaway, sees the individual migrant's security as needing protection, rather than a state's security. The report summarizes that Canada should develop a systematic approach to address the root causes of migration, and in so doing redress the gap between policy and practice. The report adds that Canada should concentrate on improving its intelligence

system in order to detect these threats more effectively. It was agreed by the panel of experts that tougher measures against would-be migrants would not resolve security problems (Bhattachayya, 2002: 51).

Despite the recent awareness of the decline in human rights in refugee policies and the newly established security issues, certain authors state that these changes are not very different from policies pre September 11. According to this school of thought, refugee policies were already changing, and these were justified by earlier security issues. Such earlier issues included the fears of being swamped by boat loads of refugees and human smuggling rings bringing in asylum seekers. September 11 has just accelerated and further established the present-day policies, making that date a precipitating rather than a formative event. As Whitaker puts it,

> In light of actual practices in the immigration and refugee security field in recent years, there is actually more continuity than discontinuity resulting from the current crisis. Refugee policies have increasingly been understood within a national security discourse, well before September 11 (Whitaker, 2002: 29).

It is the general suspicion, according to Harvey, that many governments, including the Canadian government, have used tragic terrorist events to justify the accelerated implementation of policies already in place (Harvey, 2001: 97).

According to a CSIS statement made 13 years ago, the geopolitical developments of the 1990s have created dangers for democratic governments

around the world. Without the presence of superpower rivalry (USA and the former USSR), many regions have become unstable owing to intense nationalist and related pressures. Internal conflicts with ethnic and religious dimensions are commonplace and will continue to produce instability, disruption and terrorism (CSIS, 1991: 3).

If the Canadian government's views mirror those of CSIS, then Canadian policy was already being formulated with more focus on security issues and less so on human rights issues well before September 11. Indeed, the new Canadian Immigration and Refugee Protection Act, begun as Bill C-11, was already being tabled before September 11, 2001. The intense criticism it got was overshadowed by the tragic terrorism events which helped accelerate and further justify the procedures to sign the Bill into law.

To better understand how refugee policies have evolved in Canada, a historical analysis is presented in Chapter 2. An in-depth analysis of the IRPA is provided in Chapter 3 of this thesis.

CHAPTER 2: CANADIAN REFUGEE LAWS: A HISTORICAL PERSPECTIVE

2.1. Introduction

Given that the general trend of restrictive measures against refugees is an international one, as shown in the previous chapter, it comes as no surprise that Canada also follows relatively the same path in history. Based on the indications, we will see that the underlying legislative changes appear to be enforcement in the aspects of the law dealing with refugees. To respond to a supposed need for greater security for Canada, the very real security of refugees and other non-citizens is compromised. Relatively little attention is paid in recent legislation to the challenge of resolving problems and injustices faced by refugees and immigrants.

Canada's refugee laws and related areas of concern are covered in the following paragraphs, with focus on controversial aspects of refugee law throughout last century, including racism and xenophobic attitudes. This chapter brings into light the recent important and significant steps taken by Canada in immigration and refugee matters, leading to the new legislation, the IRPA, especially its inadmissibility and security clauses.

2.2. The beginning

Canada's history is littered with episodes, each very different from the next, of movements of people seeking to better their lives in some form or another. In its earliest instances, French settlers, followed by British conquerors, colonized Canada. The first real mass movement can be traced back to when the British Loyalists left the United States after 1783 to enter Canada. They were not really refugees, but could be classified more as displaced loyal subjects. The first real wave of refugees emigrated from the former colonies and was comprised of minorities and non-conformists (Dirks, 1997: 17). By Confederation (1867), Canada's policies were to settle newly acquired land from the Hudson Bay Company, to complete the transcontinental railroad and to encourage immigration and settlement. As a consequence, Canada's first *Immigration Act* came into force in January of 1870. Its primary objectives were focused around the ideology of settlement being linked to agriculture (Dirks, 1977: 25).

The first important restrictions in Canada's immigration laws were introduced in the nineteenth century when Canada brought Chinese workers to help build the railways. With the task completed, the Canadian government erected legal barriers to stop more Chinese from coming into the country. As racist restrictions were being put in place for Chinese newcomers, other laws were permitting access to land for other groups, migrating from Europe. This was the case with the 1872 Dominion Lands Act (Knowles, 1997: 51).

Between 1901 and 1914, an open door policy encouraging settlement was adopted, but certain groups were excluded from the offer. The next quote demonstrates the language used in such matters.

> As unwelcome as black settlers were, no law was passed to exclude them, although administrators devised careful procedures to ensure that most applications submitted by black people were rejected (Knowles, 2000: 10).

In 1906, another immigration act was drafted. According to Frank Oliver, the purpose of this Immigration Act was to deal with undesirable immigrants through means of control. The Act focused on measures of restriction and enforcement. Prohibited categories were also expanded (Dench, 1999: 4).

The second act in restrictive immigration legislation, the *Immigration Act of 1910* followed shortly, and allowed the government to prohibit landing of immigrants under the "continuous journey" rule. (In 1908 an Order in Council was issued imposing a "continuous journey" rule, prohibiting immigrants who did not come by continuous journey from their country of origin.) Also, the government had the authority to exclude "immigrants belonging to any race deemed unsuited to the climate of Canada" (Dench, 1999: 4).

An article dating back from 1914 remarks upon the attitudes toward newcomers, especially from distant places, as they 'infringe' upon Canadian societies:

> They are the classes of people who are creating slum conditions in our cities similar to those that prevail in the cities on the United States and in the old world...The people in the cities do not know where their next meal is coming from. The newcomer is giving birth to a degenerate race who are filling the hospitals and asylums for the insane with brain fidgets who are rapidly stratifying social classes, complicating social intercourse, impeding development, and placing an endless burden upon the state...it is to be hoped Canadian winters will prove severe enough to discourage the coming of classes of people who will not add to the strengthening of Canadian Citizenship (Brown, W.J., 1914, from Dirks, 1977: 37).

It was after World War I that Canada's restrictive measures toward new migrants really began to emerge, excluding immigrants deemed undesirable because of Canada's social, educational, or labour requirements or because the prospective immigrants' customs might hinder their assimilation (Janzen, 1998: 4). *The Immigration Act of 1910* allowed the government to refuse immigrants belonging to any nationality or race deemed undesirable.

In 1914, the *War Measures Act* was introduced. This act allowed the government wide powers to arrest detain and deport. Enemy subjects who had immigrated into Canada were forced to register themselves and subjected to many restrictions. This Act was abolished after World War I (Dench, 1999: 6).

In 1919 amendments were proposed to the *Immigration Act of 1910.* This set of amendments added new grounds for denying entry and justifying deportation (e.g. constitutional psychopathic inferiority, chronic alcoholism and illiteracy). Section 38 allowed the Cabinet to prohibit any race, nationality or class

of immigrants by reason of "economic, industrial, or other condition temporarily existing in Canada", because of their unsuitability, or because of their "peculiar habits, modes of life and methods of holding property" (Dench, 1999: 7).

In the 1920s, the Canadian government was able to bypass existing legal measures, and as an act of goodwill was able to admit more than 20,000 Mennonites from Russia. In the 1930s, however, when people were fleeing Nazism in Europe, Canada was not prepared to make such an exception, and its record in accepting Jews was worse than that of other Western countries (Janzen, 1998: 4). Also in the thirties, deportation of the unemployed became a widespread practice, especially during the years 1930-35. Following public outcry and pressure, this policy was modified to suspend deportations against those who had managed to find work by the time deportation orders were ready (Dench, 1999: 11).

By the 1930s, escalating political and racial intolerance had led to an increase in refugee movements. However, by way of response, Canada opted to close its doors to the oppressed peoples of Europe during the Great Depression.

> Discouraging immigration so as to not aggravate further the instability of the domestic economy became an unchangeable doctrine in the minds of government officials and advisers (Dirks, 1997: 42).

> The inimical attitude could be attributed to at least three broad factors: personal economic insecurity resulting from the depression, indifference to the world beyond Canada's borders, and the phenomenon of nativism which often took the form of anti-semitism (Dirks, 1997: 50).

As can be noted, the Canadian government believed that an increase in the population would result in economic hardship and threaten job security. Domestic issues were given widespread importance, and global matters were dealt with indifference.

In July of 1938, the *Evian Conference* on Refugees was held. Canada participated, almost reluctantly. Prime Minister Mackenzie King briefed representatives of the Canadian government. They were told to not support the creation of a permanent response in refugee matters or to submit to any initiatives to commit countries to quotas of refugees (Dench, 1999: 12).

> The Canadian government participated in the Evian Conference on refugees, but did so with ambivalence. Prior to the convening of the Conference, the Prime Minister informed his delegates of the position they were expected to take. This country should remain cool toward any idea of creating a permanent structure to handle refugee matters. While remaining "correctly cool", Canada should be prepared to participate in the dissemination of refugee information. If the United States should press for specific promises or quota admission obligations, it would be necessary for Canada to differ but, not desirable that Canada should take a lead in this opposition. Prime Minister King preferred a resolution and good intentions rather than a draft convention (Dirks, 1977: 56).

The attitude that the government conveyed demonstrates its reluctance toward change that might affect social order, but a desire for change should political interests coincide with self-interest.

One of the first Canadian Orders in Council providing for refugees and Displaced Persons was PC 3112, passed on July 23, 1946. This made provisions for the selection and placement of a variety of European Displaced Persons. On November 7, 1946 the Prime Minister announced that the government would henceforth approve the adoption of emergency measures to assist in the resettlement of refugees and displaced persons by co-operating with the Intergovernmental Committee on Refugees (IRO) (Jakobsen, 1997: 8-12).

By the end of World War II, policies still reflected attitudes of xenophobia. Prime Minister Mackenzie King said in 1947 "the people of Canada do not wish, as a result of mass immigration, to make any fundamental alteration in the character of our population. Large-scale immigration from the Orient would change the fundamental composition of the Canadian population..." (Janzen, 1998: 4).

However, shortly thereafter, an improvement in Canada's economy brought with it changes in other sectors of Canadian life. As a result, the range and volume of Canadian industrial production increased dramatically. One consequence of Canada's newfound individualism was a vigorous nationalism, which was

reflected in the *Canadian Citizenship Act of 1947.* This act created a Canadian citizenship separate from that of Britain (Jokobsen, 1997: 5).

The years between 1947 and 1951 also brought a more relaxed attitude and new labour laws, which permitted over 100,000 displaced Europeans to enter Canada. However, this flow of migrants was seen more as a circumstance of economic and political efforts than humanitarian concern (Chimni, 1999: 2) .

> The only conclusion that one can draw from this episode in the evolution of the international refugee regime is that humanitarian factors did not shape the refugee policies of the dominant states in the international system. It underlines the need to be alert to the non-humanitarian objectives which are pursued by these actors from time to time behind the façade of humanitarianism (Chimni, 1999: 3).

Canada's restrictive policies continued, even after the *Citizenship Act of 1947* was passed. Immigration barriers continued to deny entry to refugees from war-torn Europe, as well as people who had fled communist or totalitarian regimes. To justify its inflexibility, the government frequently cited a lack of suitable passenger vessels to travel the oceans and transport people (Knowles, 2000: 66).

Eventually, the requirements of this country's booming economy, a call from the Senate's Standing Committee on Immigration and Labour for a more open immigration policy, and mounting pressure from ethnic organizations, religious groups, transportation companies, and returning diplomats who had seen first

hand conditions in Europe forced the government's hand. In reaction to all these pressures, Mackenzie King's Liberal government began to slowly open the doors to Europe's homeless.

In 1951, as we have seen the International Convention Relating to the Status of Refugees was adopted. And despite Canada being a very active participant in the negotiations, this country did not immediately become a signatory nation because at the time the RCMP feared this would hinder with its powers to deport refugees for security reasons (Dench 1999: 17).

2.3. 1952 Immigration Act

Since 1910, Canada had not seen a new Immigration Act. This was changed with the adoption of the *1952 Immigration Act.* In its major provisions, the Act simplified the administration of immigration and defined the wide-ranging powers of the Minister and his officials. The Act also provided for the refusal of admission on the grounds of nationality, ethnic group, geographical area of origin, peculiar customs, habits and modes of life, unsuitability with regards to climate, and probable inability to readily assimilate (Dench, 1999: 17).

The provisions provided by the new Act were designed to exclude non-white immigrants, and the Act's most powerful provisions rested on the discretionary powers of the Minister and his officials. This resulted in often negative and

restrictive applications of the law. For example, during the beginning of the Cold War years, Canada admitted more than 186,000 refugees (between 1947-1952) (Knowles, 2000: 71). This effort must be viewed against the international background of the times.

Canada's response was directed toward refugees in Western Europe against the backdrop of the Cold War. For example, Canada refused to accept Palestinian refugees for the very reasons it had earlier been unwilling to take the Jews: they were seen to be alien and unacceptable for adaptation to Canada (Adelman, 1991: 189). However, the law also left room for the provisions to be used creatively by well meaning and compassionate officials. One well-meaning minister was Jack Pickersgill. He used his ministerial powers to make real needed changes in immigration policy when he was Minister of Citizenship and Immigration from 1954 to 1957. In many instances, he manipulated the law and used his influence to approve immigrant applicants who suffered illness such as epilepsy and tuberculosis (who were also controlled by medication), and people with history of mental illness, provided the person was not a danger to society (Knowles, 2000: 73).

The fifties also saw the beginning of the Cold War, as well as a post-war boom in the economy. This need to satisfy the growing economy resulted in a relaxed attitude in Canadian refugee admissibility. Greater efforts were made to distinguish legitimate political refugees from those seeking to improve their

economic situation. Large numbers of refugees with diverse occupational skills were able to enter Canada (Knowles, 2000: 76).

During the 1950s, refugees had still no rights in Canada. As we have seen, even when the International Refugee Convention was drafted in 1951, Canada refused to sign. There were still signs of trying to prevent unwanted refugees from flowing into the country. Issues of control and self-interest dominated refugee discourse. As Adelman states:

> Canada wanted to control who came into the country. Though clearly humanitarianism and some sense of obligation to clear out the camps of Europe were factors in Canadian policy, the key that unlocked the door to Canada was self-interest, for labour was needed to feed a rapidly expanding and industrializing economy. Racism, too, was a factor (Adelman, 1991: 190).

In the 1960s, Canadian immigration policy attempted to keep up with the global trend of increasing humanitarianism in the face of refugee and immigrant matters. In 1962, new immigration regulations, introduced by the Honourable Ellen Fairclough, largely removed racial discrimination from Canada's immigration policy. The concept of selection, however, still remained a determining factor. In this new approach, selection criteria shifted away from country of origin of the applicant to the individual's skill (Green and Green, 1996: 17).

This new policy, although demonstrating a leap forward towards humanitarianism and a step away from racial and ethnic discrimination, was not without its drawbacks. According to Green and Green, the new regulations generated three problems.

> First, the long standing position limiting the numbers admitted to the absorptive capacity of the economy was not covered under the new rules. Second, the statement on sponsorship rights opened questions on the impact of their universal application on an immigration policy that now focused on skills. Third, the new policy placed even more discretionary power in the hands of overseas immigration officers. There were no clear guidelines on which types of skills were needed or how the officer was to judge whether the applicant met these skill requirements (Green and Green, 1996: 17).

These left the newly created Department of Manpower and Immigration with many problems, but reinforced the idea that immigration and labour needs remained linked (Jakobsen, 1998: 3).

The solution came in 1967 with the introduction of the points system. It was the first major step to limit the discretionary powers of immigration officers by providing them with specific guidelines (Green and Green, 1996: 18; Jakobsen, 1998: 4). With the points system finally introduced, the last element of racial discrimination was finally eliminated from the immigration system. However, another element remained consistent in terms of discrimination against refugees.

> It is worth emphasizing that the creation of the point system reflects the fact that immigration was and is an economic policy tool in Canada. If immigration were a tool exclusively of demographic policy, nation building or foreign policy (to the extent these could be separated from economic policy) there would be no need to control the skill composition. Indeed, an objective assessment system could complicate policy making in other realms. The lack of a permanent place for refugees in the system indicates, at the very least, that humanitarian goals were not at the forefront (Green and Green, 1996: 20).

Later the same year, in November of 1967, The Immigration Appeal Board Act was passed, giving anyone ordered deported the right to appeal to the Immigration Appeal Board, on grounds of law or compassion (Dench, 1999: 20).

In 1969, a most important step was achieved. Canada acceded to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol. Gunther Plaut, a Canadian rabbi and refugee advocate, who was commissioned by the Trudeau government to draw up models for a reconstituted refugee determination system, states his opinion on the government's intentions:

> It is important to remember that when Canada ratified the Convention in 1969, we did so with some reluctance...Apparently, we were prepared to do only the minimum in legal terms, while in practice we are often far more magnanimous -- especially with regard to selecting refugees abroad... It has been suggested that this liberality is directly related to our own capacity to select the refugees and to our continued opposition to any movement which would interpose international agencies or principles into this process of selection (Plaut, 1990: 79).

All in all, the 1960s were very encouraging, and as a result of immigration many ethnic groups grew considerably in size. Although the focus on a humanitarian mandate could be debated, many ethnic groups profited from new policies that shifted focus away from racist ideologies.

In 1975, the *Green Paper* was drafted. This was a government document that was the basis of the major changes that came in the *1976 Immigration Act.*

> The Green Paper proposed a move away from precedents of the 1952 Act, by placing a great deal of emphasis on the immigration needs of the 1970s. In opposition to the 1966 White Paper, which called for skilled workers to meet the needs of an increasingly urbanized and industrialized society, the Green Paper emphasized the need for unskilled labourers willing to work in geographically remote areas for low pay and in harsh conditions... Overall, the Green Paper maintained the link between immigration policy and Canadian labour needs, welcomed ethnic diversity, but warned that excessive immigration to urban centres could aggravate housing and transportation shortages (Jakobsen, 1996: 6).

In all its improvements on immigration details, the *Green Paper* strayed far from the escalating refugee problems. Self-interest and economic betterment was more at the forefront of policies rather than humanitarianism. As Adelman states:

> The Green Paper strayed far from a liberal policy which would facilitate refugee access, and make of Canada a dumping ground for refugees...The immigration mandarins wanted to strictly limit the admission of Convention refugees and to ensure that Canada not adopt a policy of political asylum. Since Canada was an immigration country, refugees had to be considered for their ability to adapt to and resettle in Canada and could not be considered

> simply from the perspective of their need for protection (Adelman, 1991: 201-2).

2.4. 1976 Immigration Act

The *1976 Immigration Act,* incorporated the 1951 International Convention's definition for "refugee" into Canadian law for the first time, and granted refugees legal access to Canada in two different ways; by an inland determination system for those applying from within Canada; and by either the *1951 Convention* rules or the Designated Classes system for applicants outside the country.

For those applying within Canada's borders, an inland determination system was introduced. This was the first legal system established for applications made from within Canada. The process consisted of four stages:

1. The examination of the applicant by a senior immigration officer;

2. The review of the transcript of that examination by the Refugee Status Advisory Committee (RSAC) and recommendations by the Minister;

3. The decision by the Minister in granting refugee status or not; and

4. The review and possible re-determination of the Minister's decision as made by the Immigration Appeal Board (Nash, 1989:41).

For the Convention refugees, selected by Canadian visa officers abroad, eligibility was based on different criteria. The criteria demanded that:

1. The claimants meet the Convention definition of a refugee;

2. For persons not permanently settled, immigration regulations restrict eligibility;

3. The claimant must not belong to any of the inadmissible classes established in the *Immigration Act of 1976*; and

4. The claimant proves successful establishment in Canada as required by section 19 in the *Immigration Act 1976* (Nash, 1989: 41; Hathaway 1988).

Lastly, for those applying under the Designated Classes, the selection criterion was broadly similar. Applicants must be outside Canada and show capabilities of successful establishment in Canada. The big difference with this program is that applicants need not satisfy the Convention definition, they need only be in a refugee-like situation (Nash, 1989: 41).

> About three-quarters of all refugees arriving in Canada since 1979 have been admitted under the rubric of "Designated Class", a category that is far more flexible because it does not require the application of UN Convention criteria. This quasi-points system applies only to persons selected outside Canada; they do not take into account those who arrive at Canada's borders to seek asylum. As a result, the system of refugee determination, in accordance with the UN Convention for applicants disembarking at Canadian

> airports, borders or shores, appears unusual in that it does not conform to the procedures used for selection of immigrants or "Designated Class" refugees overseas (Lanphier, 1990: 82)

In the 1980s, the refugee question dominated the Canadian debate about immigration. This was due to the phenomenal upsurge in the numbers of the world's refugees, and the increasing phenomenon of 'illegal' or 'undocumented' migrants arriving on Canada's borders. These were the people who arrived on Canada's doorstep claiming refugee status, but who all too frequently did not qualify as refugees under the *1951 Refugee Convention* and its 1967 Protocol (Knowles, 1997: 180). Consequently, the government commissioned reports to understand and alleviate the problems.

The report of the *Task Force on Immigration Practices and Procedures, Refugee Status Determination Process* (the Robinson Report) was submitted to the Minister of Employment and Immigration. This was the first in a series of such reports on the refugee determination system. The Ratushny Report followed in 1984 and the Plaut Report in 1985 (Dench, 1999: 25).

All in all, the Mulroney era (1985-1992) adopted what could be called an "anti-immigration bias", where refugees and immigrants competed for jobs. Economic interest would see an attempt to reduce intake of refugees. Free trade, the introduction of the Goods and Services Tax (GST) and attempts to bring Quebec

into the constitution were of priority – not refugees or human rights. As Adelman states: "No longer was self-interest to be balanced with humanitarianism and international obligations. Self-interest was to be the preeminent guide" (Adelman, 1990: 207).

In April of 1985, the Supreme Court of Canada recognized that refugee claimants would require an oral hearing in the determination process to satisfy their entitlement to fundamental justice, as opposed to the old system of written records. This major technical shift is known as the Singh decision (Dench, 1999: 26). The most important consequence of this Supreme Court ruling is that asylum seekers cannot be excluded from the full protection of the Canadian Charter of Rights and Freedoms because they are not Canadian. The Singh decision established that anyone, once in Canada, is entitled to the full protection of Canadian law. This decsision meant that the government could not deny asylum seekers a full hearing of their refugee claims, and that any attempts to streamline the determination system would be against the Charter. Because of the Singh decision, the government felt more pressure being applied on an already unwielding refugee determination system.

By the mid 1980s, neither humanitarian no economic factors manifested as the most important of considerations in immigration policy, although they did still maintained a major influence. The decade saw social and political factors, as well

as structural, organizational and bureaucratic influences as occupying important roles in the content and implementation of policies.

Also in the eighties, new revised procedures for refugees to claim and defend their cases were established. Previous procedures were cumbersome, time-consuming and multilayered, according to Adelman. Further delays resulted because of the Singh decision. As a result, a large backlog of refugee claimants began to build. This permitted abuse of the system, because claimants could wait years before a decision was made and still continue to live in Canada (Adelman, 1990: 203).

> Change came shortly after September 1984 as the new government established the Task Force on Program Review. This led to the Nielson report, which was released in 1985 and set the tone for future policy in its volume on citizenship, labour and immigration. Apart from concern about refugee claims abuse, the Task Force focused on immigrant selection and the cost of resettlement programs as it called for positive immigrant selection (Veugelers, 2000: 101).

Reports presented to Parliament by the Minister of Immigration in 1985 stated the primary concerns, of which the most important was Canada's declining population levels. In response to this, immigration levels would increase and economic restriction lifted. The emerging policy seemed to favour the long run approach to immigration (Green and Green, 1996: 23).

This long run policy approach, although favouring increased immigration, can be easily subject to influence. Beyond the fact that positive immigration would prevent a declining population rate, no definite number or level was ever indicated. "The immigration level becomes even more clearly a number to be set purely by the political process, and thus a number subject to the influence of lobbying" (Green and Green, 1996: 25).

However, interest groups showed little interest and thus little influence when a long-term approach to immigration was adopted. The largely dominant policy fell into the hands of the state, where favouring a steady increase in immigration to meet the demographic needs was chosen.

In May 1987, Bill C-55 was tabled. The bill completely revised the refugee determination system and also created the Immigration and Refugee Board. It proposed a two-stage process, with a "credible basis" screening. It also provided for refugee claimants to be excluded from the process if they had passed through a "safe third country". These rules were among the aspects of the Bill that were vigorously opposed by refugee advocates (Dench, 1999:26).

> Canada's work on behalf of refugees in the first half of the 1980s was astounding. During the decade, the government accepted the Nansen medal for the Canadian people for their work on behalf of refugees. But it was during the same decade that the same government that had accepted the Nansen medal called a special summer session of Parliament in 1987.This session was to pass Bills C-55 and C-84 after a boatload of Sikhs had landed on the

> shores of Nova Scotia to claim refugee status. Those Bills were fought by the refugee support communities as draconian anti-refugee legislation. Yet one year after the legislation became operative on January 1, 1989, Canada was being celebrated as having the most advanced and just refugee determination in the world (Adelman, 1990: 174).

In 1989, Bills C-55 and C-84 also known as the *Refugee Deterrents and Detention Bill* came into effect. They introduced many changes to immigration law, put forth a new refugee determination system and created the Immigration and Refugee Board.

Bill C-55 provided for an initial screening of a claim 72 hours after arrival on Canadian soil. A two person panel was appointed, consisting of an immigration adjudicator and a member of the Refugee Board. The panel basically decided if the cases presented were strong enough to be heard before a three-person refugee board. If the two person hearing was unanimously negative, the person is not granted asylum and is ordered to leave the country (Lanphier, 1990: 85).

Bill C-55 was widely criticized as unfair to refugees, with wide political powers granted to Canadian officials in deciding the fate of asylum seekers. For example, one of the measures proposed would have prevented those who, while not refugees under the narrow Convention definition, to stay in Canada on humanitarian or compassionate grounds. In short, Bill C-55 showed that reforms

were being made at the expense of asylum seekers' rights and safety (Nash, 1989: 57). As Adelman states: "Bill C-55...was designed to reduce radically the arrivals of both abusive claimants and genuine Convention refugees" (Adelman, 1990: 208).

Bill C-84 was also highly criticized for many of its provisions and the danger they presented to refugees. Hastily drafted by the government, it contained many severe provisions. One, later dropped, even allowed the government to turn away ships in waters suspected of carrying bogus refugees on the pretext that they were on the high seas and therefore not in Canada (Knowles, 1997: 181).

In general, the policies introduced in the 1990s appear distorted. As immigration laws were becoming increasingly detailed and potentially helpful to many, refugee laws were taking a turn for the worse. This was apparent with the introduction of Bill C-86, which came into effect in 1993. The bill proposed revisions to the refugee determination system, mostly restrictive. "The first level screening process with the credible basis test was abandoned and "eligibility" determinations transferred in part to immigration officers. Other measures proposed were fingerprinting, harsher detention provisions and making refugee hearings open to the public. New grounds of inadmissibility were added. The bill also included a provision requiring Convention Refugees applying for landing in Canada to have a passport, valid travel document or "other satisfactory identity document" (Dench, 1999: 28; Knowles, 1997: 197).

Bill C-86 also introduced a new form of criminality into the *Immigration Act of 1976*; provisions to render refugees and immigrants inadmissible where there are reasonable grounds to believe they will engage in terrorism or are members of a terrorist organization. As will be seen later in Bill C-11, Bill C-86 did not provide further definition of what constitutes a terrorist, leaving the doors wide open for objective and manipulative decision-making (Aiken, 2001: 3).

Bernard Valcourt, Minister of Employment and Immigration at the time defended the Bill and argued that mounting international and domestic pressures were severely testing the existing refugee and immigration system. He argued that 16 years prior, when the *1976 Immigration Act* was drafted, times were different and that the country now needed a new and more effective tool to deal with current issues (Knowles, 1997: 197). These provisions set the stage for future legislation, and also provided new and restrictive measures toward asylum seekers.

> Of all the provisions contained in the new legislation, however, it was the "safe country" provision that unleashed the most controversy. Like its counterpart in Bill C-55, this provision would prevent refugee claimants from entering Canada if they arrived from a "safe" country which was prepared to grant them refugee status. In short, it was designed to curtail a practice commonly known as "asylum shopping", in which potential refugee claimants move around, looking for the country that offers the best benefits (Knowles, 1997: 198).

Also in the early 1990s, important steps were taken in gender sensitive issues. The Chairperson of the Immigration and Refugee Board issued *Guidelines on Women Refugee Claimants fearing Gender-related Persecution.* Canada was the first to issue such guidelines.

By 1995, the government had lowered overall immigration levels, and had imposed the Right of Landing Fee to immigrants and refugees alike. The fee was $975 per person, a sum that could feed a family for over a year in certain refugee producing nations. Only five years later did the government abolish this tax for refugees, but kept it for immigrants (Dench, 1999: 26).

The initial need for a new Immigration and Refugee Act was present for a long time. The first steps in establishing a new legislation started in 1996 with a major review of policies and an aim of making fundamental reforms. Between 1996 and 1998, consultations with the provinces, territories and all major stakeholders lead to the publication of the governments report entitled 'Not Just Numbers' in 1998 (Citizenship and Immigration Canada (CIC) News Release, 2002: 8).

By January 1999, the government released the white paper entitled *'Building on a Strong Foundation for the 21st Century: New Directions for Immigration and Refugee Policy and Legislation'.* In April of 2000, Bill C-31 was tabled and was later reintroduced as Bill C-11 and finally brought into law as the

Immigration and Refugee Protection Act (IRPA). Between December 2001 and March 2002, almost 1,700 submissions were received during the public comment period (CIC News Release, 2002: 8).

What follows is an analysis of Bill C-11, as it pertains to the issues discussed in this chapter, obtained through an analysis of the parliamentary debates on the legislation.

CHAPTER 3: The IRPA: CONTROVERSIAL ASPECTS ANALYZED

3.1. Introduction

In February 2001 Bill C-11, also known as the Immigration and Refugee Protection Act (IRPA), was tabled in Parliament. After lengthy debates in the House of Commons and the Senate, the Bill passed into law with the signature of the Governor General on June 13th, 2002. The Act and its Regulations came into force on June 28th, 2002. The IRPA is the result of many years of public consultation and reform, which began in 1996. The act, according to the general statements made by the government, is intended to discourage immigrants and refugees from entering Canada illegally, while encouraging others to choose Canada as a place of residence. The act provides, among other things: front-end security screening of refugee claimants; new grounds for deeming individuals inadmissible to Canada; streamlining the procedures of removal for serious criminals; strengthened authority to arrest criminals and people who are security threats; and, severe penalties for possession of false documents.

Many aspects of the act have created debate in areas of human rights issues, national security, refugee matters, and other areas of public policy. Many critics have argued that the act does little to meet the needs of refugees. Furthermore, these critics, such as the Canadian Council on Refugees (CCR) have pointed out how the act fails to meet some of the most important suggestions of almost a

decade of UN international treaty committee reports. As the Canadian Broadcasting Corporation (CBC) reported in 2002, "Bill C-11 has been condemned by many credible organizations and individuals for its overarching sweep and potentially draconian impact."

The Minister, in response to the recommendations made by the House of Commons Committee, introduced, at three separate occasions, amendments to correct some of the many flaws of this legislation. Unfortunately, little was done regarding basic rights issues.

Until the many areas of weakness are corrected, the act, according to many proponents of refugee matters, will contribute little in helping genuine refugees and only minimally strengthen national security.

According to critics, the IRPA embodies many unfair processes and favours increased restrictive measures in immigration and refugee policies. It denies access to justice to those most in need of fair and proper decisions, removes existing fair decision-making and accountability in matters of deportation and sponsorship, removes existing procedures that ensure a full consideration of circumstances and a proper balancing of interests, gives immigration officers broad powers to determine inadmissibility, diminishes the rights of permanent residents, and allows future amendments of law to be controlled by regulation without parliamentary oversight (Trister, 2001: 2).

On the other hand, supporters of the legislation state a differing perspective. " A new immigration law proposed by the federal government would give security forces a better shot at tracking potential terrorists before they become threats" states the head of the Canadian Security and Intelligence Service (CSIS) in a recent national newsletter (Brown, 2001: 1).

In this chapter, the most debated aspects of the IRPA are discussed, especially where areas of refugee and immigration coupled with human rights, are concerned. These include detention provisions, inadmissibility provisions, and security and human rights issues. Some of these components contribute to a very elaborate and sometimes contradictory set of rules that are found in the IRPA. Compounded by recent events in terrorism worldwide and a heightened sense of protecting our borders, the new legislation could lead toward what some see as the denial of fair and proper treatment of asylum seekers.

A quote by Howard Adelman summarizes the need for such an analysis:

> Decisions on membership in our body politic determine the future of what will become of Canada. Decisions on who should be excluded, made inadmissible, deported or given a departure notice are not only of immediate interest in protecting Canadians, but the method of making such decisions reflects who we are as Canadians and our sense of procedural justice. Such decisions affect our identity, our economy and our ability to maintain the civility and quality of life for which Canada has become so justly renowned (Adelman, 2001: 1).

In this chapter, detention, inadmissibility, security, and human rights are discussed, as they pertain to the IRPA. In each case, the act and regulations are used, along with government papers, Senate Committee reports, House of Commons reports, opposition critic reports, and scholarly commentary. Recommendations and helpful insight by some experts and organizations aid in pinpointing weak areas of the act and, more importantly, help in future policy development.

3.2. Detention

> The right to liberty is a fundamental human right set out in universal and regional human rights instruments. The detention of asylum-seekers is therefore inherently undesirable, and should normally be avoided (UNHCR, 2001 :4).

> Canada accepts between 20,000 to 30,000 refugees a year. In 2000-2001, Canada detained 8,790 people for an average of sixteen days. While the new laws are intended to speed up the application process, they are also expected to detain refugees for longer periods of time, and deport them at a greater frequency (Segal, 2001: 1).

Formerly, according to the *Immigration Act of 1976*, persons could have been detained only if they were unlikely to appear for a hearing or removal, were a danger to the public or had not yet established their identity. Controversial in itself, the old laws have sparked criticism in the past regarding asylum-seekers and violating human rights treaties. The IRPA not only retains these norms, but also expands the grounds for detention. Under the new law, an immigration

officer could also detain someone at the port of entry (a border or airport) if the officer considered it necessary or suspected that the person was inadmissible because of security and human rights violations.

The expansion in matters of detention include detention on the basis of administrative convenience, and suspicion of criminality. More specifically, sections 55 and 56 of the act state that people are to be detained: pending completion of an examination for an inadmissibility hearing; if there are reasonable grounds to suspect they are inadmissible to Canada on grounds of security or for violating human rights; if there are reasonable grounds to believe the person is inadmissible and a danger to the public or unlikely to appear for future proceedings; and if the person has failed to establish identity (IRPA, clause 55-56).

In addition, the IRPA greatly expands the discretionary powers of immigration officials to detain refugee claimants and immigrants. "Immigration agents are to be given the power to immediately expel anyone they suspect of being a security risk to Canada without even the benefit of a hearing" (Legras, 2001: 3). The government has indicated that it intends to detain more people mostly it seems in order to make themselves look tough, states a CCR news release. Indeed, the Immigration Minister has boasted that the law includes very harsh measures, a statement that supports the fears of many critics (CCR News Release, 2001: 2).

According to the government, the provisions for detention will maintain the integrity of the refugee determination system for security cases, and to keep those who pose a security risk off the streets (CIC Backgrounder 1, 2000: 2).

The four aspects of detention which have generated the most criticism from the Senate as well as from human rights groups are: failure to establish identity, danger to the public, risk of flight and detention of minor children.

3.2.1. Identity

The IRPA states the grounds for detention based on identity.

> An officer may, without a warrant, arrest and detain a foreign national, other than a protected person, if the officer is not satisfied of the identity of the foreign national in the course of any procedure under the Act (IRPA, clause 55(2)(b)).

In their background papers, Citizenship and Immigration Canada (CIC) try to reassure the public and justify the reasons for such a clause by including a safeguard mechanism.

> Bill C-11 introduces a safeguard to ensure that those who cannot establish their identity, for reasons beyond their control and despite reasonable efforts by the Minister, will not be detained under this provision. This approach provides an incentive to cooperate and responds to a legitimate public expectation that persons claiming Canada's protection will cooperate in establishing their identity (CIC Issue Paper 6, 2001: 11).

Clause 171 of the Regulations further states that the use of a statutory declaration, accompanied by identity documents outside Canada is required before a person's entry into Canada. As well, if any misrepresentation is discovered, both refugee and permanent resident status may be revoked (*Building a Nation*, 2002: part3: 1).

The House of Commons, in its Third Report to CIC, provided its own views specifically relating to the IRPA's proposed Regulations in matters of detention based on identity.

> Those who are granted status by the IRB, either as a Convention refugee or, under the Board's soon-to-be expanded mandate, as a 'person in need of protection', can apply for permanent residence in Canada. A problem that has consistently arisen in the past is that obtaining permanent resident status is often delayed, as the rules require applicants to establish their identity for a second time. Many applicants do not have documents that are considered satisfactory by CIC and, thus, some refugees remain in a 'legal limbo' for years. Although they have established their identity and a fear of persecution, CIC does not land them because they lack satisfactory identity documents (*Building a Nation*, 2002: part3: 3).

The Canadian Council on Refugees (CCR) argue that some refugee claimants are fearful of presenting their real identities, given many of the unfortunate circumstances refugee-producing nations have probably subjected them to before their arrival. In response, the CCR suggests that the fears of a refugee claimant to provide personal data to authorities be considered as real and legitimate. The CCR also states that special consideration be given to people seeking refuge protection,

since their status alone may explain why they do not have proper identity papers (CCR, 2001: 8).

The UNHCR, in their submissions to the Standing Committee on Citizenship and Immigration suggest that the concept of refusal to cooperate must involve elements to deceive on the part of the refugee claimant, and should not extend to individuals who, in good faith, are unable to secure evidence or documentation. Furthermore, reasonable explanations for contradictory information on identity should be considered (UNHCR Comments, 2002: 12).

The Toronto City Council also echoed this argument. Canada should clarify detention provisions on identity by consulting non-governmental organizations, to ensure that they do not deter genuine refugees without proper identity documents from entering Canada (Toronto City Council, 2002: 12).

A citizens' group called MOSAIC (Multilingual Orientation Service Association for Immigrant Communities) attempted to provide some logic where identity papers were missing. They submit the idea that the lack of identity documents particularly affects refugees from the most disintegrated countries where state systems have completely broken down. They add that in these countries, public identification records are sometimes inaccessible, where the administrative processes make it difficult, if not impossible, or where circumstances exist, in which a person must flee a country with little planning. As

such, many arrive with little or no identification. This is particularly relevant for women and children because many of them arrive from countries where they do not enjoy the same legal and social recognition that they might enjoy in Canada (MOSAIC, 2001: 7-8).

3.2.2. Danger to the public

The legislation explains the criteria for detaining those arriving as part of a criminally organized smuggling operation, as well as to those who are suspected of being security risks, war criminals and violators of human rights.

For danger to the public resulting in detention, the IRPA reads:

> An officer may, without a warrant, arrest and detain a foreign national, other than a protected person, who the officer has reasonable grounds to believe is inadmissible and is a danger to the public or is unlikely to appear for an examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44 (2) (IRPA, clause 55 (2) (6)).

> A permanent resident or a foreign national may, on entry into Canada, be detained if an officer has reasonable grounds to suspect that the permanent resident or the foreign national is inadmissible on grounds of security or for violating human or international rights (IRPA, clause 55 (3) (b)).

The general theme in these detention clauses, described by the government as a policy of "closing the back door", will help in capturing some criminals

attempting to make their way into Canada. These clauses are also interpreted by many organizations such as the CCR as violating certain human rights issues. These can include detaining innocent victims for long periods of time, and even detaining nationals of terrorist producing countries.

The most important issue focuses around the detention of asylum-seekers that have used a smuggling operation to enter the country. The government justifies the new measures in the legislation, by assuring that these laws are meant to, in fact, protect the refugees and not harm them.

> Detention of foreign nationals who arrive as part of a group organized by human traffickers and who are likely to go underground, is an important deterrent to this criminal activity. By detaining the victims, we are also protecting them from the criminals who want to extort payments and indentured labour from them. To deter traffickers from using Canada's generosity for criminal purposes we have to protect them from gaining access to their source of profits. This will send a strong signal, both to human traffickers, and to their frequently naïve victims (CIC Backgrounder 4, 2000: 1).

The CCR paints a different picture. According to them, these specifications take little or no account of the special circumstances of refugees. For example, being a fugitive from justice in a foreign jurisdiction is listed in the act as a factor to be considered, but a refugee might be fleeing a trumped up charge made against him or her as a persecutory tactic (CCR February 13, 2002: 7).

The most important discrepancy relates to the mode of arrival of refugees in relation to the smuggling operations. "The fact that someone is involved with an organized human trafficking operation does not necessarily make them a danger to the public", comments the CCR. "The wording here is very loose and could be interpreted to mean that anyone who is involved with a smuggling operation merely by using its services to come to Canada is a danger to the public "(CCR February 13, 2002: 8). Likewise, the UNHCR cautions against establishing a policy of detention based on the mode of arrival of claimants. Many have no options but to resort to people smugglers to reach safety (UNHCR March 5, 2001: 30).

In short, many refugee organizations such as the CCR and the UNHCR see this particular smuggling provision as one that is unfair to legitimate refugees, and most likely to affect the most unfortunate of refugees.

3.2.3. Risk of flight

Section 252(f) of the Regulations included arriving as part of a criminally organized smuggling or trafficking operation as a factor to consider when assessing flight risk. Nevertheless, the government said in its comments, "The definition of warranted fear of flight will include explicit reference to claimants

arriving as part of a criminally organized smuggling or trafficking operation (CIC Backgrounder #4, 2000: 2). The current Act, along with its regulations, thus far, does not define what constitutes flight risk beyond the aforementioned statements. UNHCR notes with concern that the flight risk ground for detention goes beyond the grounds for detention of asylum-seekers set out in the UNHCR Executive Committee Conclusion 44(XXXVII) (UNHCR Comments: IRPR January 23, 2002).

According to CIC, in order to increase transparency and promote consistency, further regulations will outline factors that officers of the IRB must consider when making detention decisions. Factors to be considered in determining whether a person is a flight risk could include information that a person: is a fugitive from justice in another jurisdiction; had previously left Canada pursuant to a deportation order; previously appeared voluntarily at immigration and criminal proceedings; previously complied with conditions imposed for entry, release or stay of removal; has already eluded or attempted to elude examination or escaped custody; is involved with, or is under the influence of criminally organized smuggling and trafficking operations (CIC Issue Papers, 2000: 12).

The UNHCR, in its submission to the House of Commons Standing Committee on Citizenship and Immigration, comments:

> Refugees and asylum-seekers are in a different situation than other foreigners. Circumstances often compel refugees to enter a country illegally in order to escape persecution. Article 31 of the Refugee Convention prohibits the punishment of refugees for illegal entry or presence under specified circumstances. Where asylum-seekers have not committed crimes, their detention raises significant concerns. This concern is heightened in the case of unaccompanied women, children, and persons with special medical or psychological needs, and when detention results in the separation of families. Detention should not be imposed as part of a policy to deter future asylum-seekers or to discourage those who have commenced asylum procedures from pursuing them (UNHCR, March 5, 2001).

Canada, in December 2000, signed the *UN Convention against Transnational Organized Crime (CTOC)* and its two Protocols, the *Protocol Against the Smuggling of Migrants by Land, Sea and Air and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.* Both Protocols acknowledge that refugees can also be considered trafficked and smuggled persons. In regards to these particular refugees, the Protocols have included a clause, designed to safeguard the rights of asylum-seekers and refugees under the *Refugee Convention*, in particular the right to protection against refoulement (UNHCR Comments, 2001: 31).

It will be the hope of many critics to see Canada respect and abide by these Convention clauses, and ultimately protect the refugees in need. Amongst the neediest of these refugees are considered to be children, the most innocent of the victims, caught in the grips of a system in mid transition and in the shadow of an

ever-growing transnational problem. The last of the aspects to be considered in the analysis of the detention clauses will therefore be the detention of minors.

3.2.4. Detention of minor children

> It is affirmed as a principle that a minor child shall be detained only as a measure of last resort, taking into account the other applicable grounds and criteria including the best interests of the child (IRPA, clause 60).

At a first glance, it would seem reasonable to detain children only as a last resort. However, this clause can be misinterpreted and wrongly applied, in fact, to detain children unnecessarily and subject them to psychological trauma that could otherwise be prevented.

In government background papers, released before Bill C-11 was signed into law, CIC stated that they want to take children's rights seriously, and protect them from any unwanted hardship. Their statement comes off as honest and compassionate.

> These children are vulnerable to exploitation and coercion by the traffickers; in these cases, detention is truly a last resort. The Government of Canada will make every effort to make arrangements with provincial social services to protect these children effectively, while seeking to ensure that they are not deprived of education and other basic needs (CIC Backgrounder #4, 2000: 4).

In the Regulations, specific considerations that apply to the detention of minors are addressed. These considerations, presented in clause 256 address such issues as: the availability of arrangements with local agencies, the anticipated length of detention, the possibility of continued control by smugglers, and the type of detention facility where they would be held.

The Standing Committee on Citizenship and Immigration, in its report to the Government, wrote:

> The Committee heard the view that the regulations do not appear to incorporate the last resort principle. Witnesses suggested that the impression is given that if detention facilities are adequate, minors can be detained. They were also opposed to detention on the ground of identity alone, and to the suggestion that if children were brought by smugglers, that it would be a good reason to detain them (Building a Nation, 2002: 3).

In their comments, the CCR points out the apparent problem with the definition, and try to suggest some kind of adequate solution.

> Special considerations for minor children do not fulfill the promise of the Act to make detention of minors a measure of last resort. The factors listed seem to suggest on the contrary that if there are adequate detention facilities and services, minors can be detained... Detention of minors suspected of being controlled by smugglers or traffickers is completely unacceptable. Detention cannot be used as a form of protection. If there are protection concerns for minors as a result of traffickers, safe houses should be used instead (CCR Comments 2002: 9).

To better understand and apply detention measures, all the while maintaining an acceptable level of human rights, it would be wise to understand how the UNHCR views the general phenomenon and applies its own logic. The use of prisons should be avoided. If separate detention facilities are not used, asylum-seekers should be accommodated separately from convicted criminals (UNHCR, *Revised Guidelines* p10).

Also, it should be noted that the current formalities of the IRPA go against several conventions, placing the Canadian government in a state of contradiction against its own convictions. For example, in the most important of refugee conventions, Article 31 of the *1951 Refugee Convention* prohibits punishment of refugees for illegal entry or presence. As noted, the IRPA defines these terms and creates new provisions, above the legislative powers of the *1951 Convention*, and applies them to the national context of the new immigration and refugee laws. Further time is required to see how events will unfold in the future.

In summary, detention is a concept that has introduced into the refugee system the realities, on the one side, of security threats, national protection issues and terrorism, while also bringing with it the real concern of genuine refugees wrongly classified as criminals. Human rights issues, as well as the *1951 Convention* requirements must be met if this Act is to reflect Canada's efforts in aiding the needy, while at the same time, trying to fulfill the hard task of stopping criminals from coming into the country. The answer is not obvious, yet respecting human

rights in terms of detention issues should not be overlooked, and genuine refugees should not be imprisoned consequently.

3.3. Inadmissibility

The IRPA introduces new grounds that make a person inadmissible to Canada: security, human or international rights violations, criminality, health grounds, financial reasons, misrepresentation and non-compliance. Sections 34 through 38 inclusively of the IRPA clarify each provision. As before, the government's and the critics' views about these new grounds will be examined and analyzed.

G.C.J. Van Kessel, Director General of CIC, states the reasons for the new provisions in the law:

> Our citizens have the right to expect that we manage the immigration program in a way which promotes the interests and needs of the country and that we are able to protect them from those who place their security and interests at risk. Failure to enforce immigration laws creates public concern about the value of immigration. That is why in recent years we in Canada have expanded great energy in becoming more effective in removing inadmissible persons. We owe it as well to those immigrants who comply with our laws to remove those who do not. Public confidence is dependent on the belief that those who have established in Canada are here because they complied with our laws and not because they successfully evaded them (Van Kessel, CIC 26 November 1998).

As the background papers on the IRPA state,

> we are barring access for serious criminals, security risks, organizers of criminal operations, or violators of human rights to prevent abuse of the refugee protection system by those who are not deserving of protection (CIC background Paper1, 2000: 3).

The IRPA provides that individuals who fall into one of four inadmissibility categories (security, human rights, serious or organized criminality, and health grounds) are not entitled to a refugee hearing.

According to the government, these provisions give immigration officers the tools they need to prevent entry to persons who are engaging in transnational crimes; to foreign nationals who commit an infraction against specific Canadian laws as they enter the country; and to foreign nationals described in travel sanctions imposed by an international organization of states, including Canada. In addition, persons who commit fraud or misrepresentation of identity will also be inadmissible (CIC, *Overview Bill C-11*, 2000-08: 16).

Critics, such as the Standing Committee on Social Affairs, Science and Technology, the CCR, and the UNHCR, have pointed out two major concerns with the inadmissibility clauses. Firstly, these procedures take us beyond the limits called for in the *1951 Convention* (Article 1F). Secondly, the IRPA's lack of definition for the terms listed leads to the subjective interpretation on behalf of the immigration officers. Consequently, genuine refugees might be denied their human rights. Let us now consider each aspect of the inadmissibility provision, as presented in the IRPA.

3.3.1. Security

> As the Act specifies, a permanent resident or a foreign national is inadmissible on security grounds for (a) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada; (b) engaging in or instigating the subversion by force of any government; (c) engaging in terrorism; (d) being a danger to the security of Canada; (e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or (f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a) (b) or (c) (IRPA, clause 34(1)).

In many of the criticisms, an underlying concern emerges pertaining to the terms in the provision and the defining of these terms. The problem is that the term 'terrorism' -- the crucial criteria which may be used to deny someone status and deport them -- has yet to be defined. This lack of definition and clarification leaves the door wide open for biased decision-making and application of the law. "Even the Federal Court has ruled that terrorism is not capable of a legal definition that would be neutral and non-discriminatory in its application" (The Globe and Mail, 2001).

The Standing Senate Committee on Social Affairs, Science and Technology, in its Ninth report to the government, presented some concerns about inadmissibility and security as they are applied in the act.

> Various witnesses expressed concern about the Bill's lack of definitions of "terrorism" and what constitutes being a "member"

> of a terrorist organization. The concern derives largely from the use of these terms in clause 34, the provision dealing with inadmissibility on security grounds. The Committee was told that without explicit definitions, the decision whether a person is a "terrorist" would be a subjective one left to the discretion of immigration officers." (Ninth Report Standing Committee on Social Affairs, Science and Technology, 2001: 3).

Similarly, the York University Centre for Refugee Studies, in its submission to the House of Commons Standing Committee on Citizenship and Immigration, comment,

> The absence of legislative definition in Bill C-11 for the terms "terrorism", "membership in a terrorist organization" and " security of Canada", leaves refugees and immigrants impermissibly susceptible to unprincipled, arbitrary and even unconstitutional decision making with wholly inadequate opportunities for meaningful review or recourse.
>
> Although there has been substantial consensus on the need for a coordinated effort to combat international and transnational crimes, the international community has consistently rejected a generalized definition of terrorism on the basis that the term is ambiguous and subject to political manipulation. One scholar notes that the term has been used as a synonym for "rebellion, street battles, civil strife, insurrection, rural guerilla war, coup d'état and a dozen other things with the result that it has "become almost meaningless, covering almost any and not necessarily political, act of violence (UNHCR, 2001 March 5).

Higgins, a member of the International Court of Justice, has observed that "terrorism is a term without legal significance" (Centre for Refugee Studies, 2001: 4).

These critics further point out that ill-defined terms for "terrorism" can also have as negative an impact on genuine refugees as a non-defined term. To better understand the implications of these terms, or lack thereof, Aiken and Brouwer argue that according to the government's definitions.

> Nelson Mandela is a terrorist. Sure, he may be a Nobel laureate. He may have brought down one of the most repressive and racist regimes in modern history. Ironically, he's even expected to be named the second-ever-honorary Canadian citizen. But he was a member -- indeed, the leader -- of the African National Congress (ANC), and the ANC, which is accused of engaging in violence as part of its anti-apartheid struggle, was a terrorist group. For that matter, Mr. Mandela's friends and most of his supporters are terrorists too. At least that's what Canada's proposed new immigration legislation says (Aiken and Brouwer, 2001: 3).

By creating a new category for organized criminality, critics believe that dramatic impacts on people's rights will be felt, without any specific requirement that the person actually has committed a crime. As exemplified in their statement, Aiken and Brouwer believe that the proof needed to label someone a member of a terrorist organization is merely reasonable belief. That means that mere association with suspects or sympathizing with local groups will be enough to get a person labeled as a member of a terrorist group. By allowing such evidence of guilt by association, they argue that the provisions violate international standards and principles of criminal law (Aiken and Brouwer, 2001: 1).

As a compromise, the CCR urges that security and criminality inadmissibility categories be limited to crimes actually committed (rather than barring people on

the basis of association) and that persons affected be entitled to a fair hearing in which they can defend themselves (CCR News Release, 2002: 1).

Despite the international consensus that these terms are undefinable, certain human rights groups, as well as well-meaning scholars and critics of the IRPA have attempted to put forth some solutions, in an attempt to find some type of acceptable definition to "terrorism". Even the Standing Senate Committee on Social Affairs, Science and Technology, in their report to the House of Commons, attempt to provide a solution. Here are some of their suggestions.

> The Committee recognizes that the international community has hesitated to endorse a precise definition of terrorism because the term is so ambiguous and open to political manipulation. However, the Committee heard that workable definitions of terrorism do exist, such as that set out in the United Nations Conventions against the Suppression of Financing of Terrorism. Some witnesses suggested using the definition of "threats to the security of Canada" set out in the Canadian Security Intelligence Act (Ninth Report of the Standing Committee on Social Affairs, Science and Technology, 2001: 23).

Despite genuine efforts by credible organizations to clarify these terms, it is amid these unclear definitions and the finalized absence of certain important terms, that the IRPA retains the references to terrorism as a basis for inadmissibility.

If kept in its present state, this label could be used to: deny asylum-seekers the chance to make their case for protection before the Immigration and Refugee

Board; deport those who are not citizens or landed immigrants without a hearing; detain non-citizens without a warrant; and deport asylum-seekers and other non-citizens to places where they might be tortured without an oral hearing before an independent decision-maker.

The last point needs to be looked at with caution. As a signatory to the *1951 Convention* and the *UN Convention Against Torture,* Canada has an obligation to respect the fundamental principle set out in both treaties: that of *non-refoulement*, the absolute prohibition against deporting refugees to circumstances where they will be tortured or persecuted. That is why Canada avoids getting to the point of ever having to determine if they are refugees -- what is now commonly referred to as cases "in limbo".

To the problem of refugees in limbo (recognized refugees who wait years to get permanent residence) the CCR suggests a simple solution, namely that refugees become permanent residents by operation of the law (CCR News Release, 2002: 2).

It seems that two clear aspects can be summarized from the analysis of the parliamentary committee's hearings. Firstly, no clear definitions are stated for the mentioned terms, and secondly, that some asylum-seekers might suffer unfair judgments consequently. As the CCR states, the current provisions for removing people on the basis of alleged security risks are unfair, both in terms of the broad

definitions used and the lack of procedural protections for the individuals (CCR Brief, 2001: 1).

3.3.2. Human and international rights violations

According to the IRPA,

> A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for (a) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the Crimes Against Humanity and War Crimes Act; (b) being a proscribed senior official in the service of the government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the Crimes Against Humanity and War Crimes Act; or (c) being a person, other than a permanent resident, whose entry into or stay in Canada is restricted pursuant to a decision, resolution or measure of an international organization of states or association of states, of which Canada is a member, that imposes sanctions on a country against which Canada has imposed or has agreed to impose sanctions in concert with that organization or association (IRPA, clause 35).

The government states that barring access for violators of human rights will prevent abuse of the refugee protection system by those who are not deserving of protection (CIC News Release Backgrounder 1, 2000: 3). Indeed, the *1951 Refugee Convention* (Article 1F) permits nations to exclude some individuals from certain categories from protection as refugees. The rationale is that certain acts are so grave as to render their perpetrators undeserving of protection as

refugees, and to safeguard the receiving country from persons posing a security threat to that country.

However, the UNHCR argues that certain elements of this clause violate Canada's obligations in human rights. For example, UNHCR points out the flaw with one of the clauses, a newly introduced aspect to the IRPA, that was not present in the *1976 Immigration Act.* In the new act, the inadmissibility provision extends to senior officials in the service of foreign governments involved in terrorism, systematic or gross human rights violations or war crimes or crimes against humanity and *nationals* of a country against which Canada has imposed or agreed to impose sanctions.

UNHCR comments,

> The exclusion of individuals on the basis of nationality would clearly run counter to Canada's fundamental protection objectives, and be in sharp conflict with Article 1F of the 1951 Convention. UNHCR reiterates its convictions that exclusion must be an individualized determination and not based merely on a person's status or associations (UNHCR Comments, 2001: 17).

However, section 34 of the IRPA also includes an exception clause. The subsection reads: " The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest" (IRPA, clause 35(2)).

The Coalition Against War and Racism state that this is too broad and vague, and clarification cannot simply be left to regulations. They suggest that act should restrict this by specifying government representatives or those specifically targeted in the instruments that impose the sanctions. Under such restrictions, for example, some Iraqi refugees may be denied refugee status (Protect our Civil Rights in Canada Petition, 2002: 2).

UNHCR has previously expressed concern about the inadmissibility of "senior officials" as set out in section 35 (1) (b) of the Act. Section 221 of the Regulations clarifies that this is intended to encompass persons who were able to exert a significant influence on their governments. However, this section also renders senior officials inadmissible on the basis of "benefit" derived from their position. Without further clarification, this may lead to exclusion based on what may amount to be purely economic factors (UNHCR Comments: IRP Regulations, 2001: 10).

To this, the UNHCR makes two recommendations. First, the reference to the phrase "benefit from their position" should be deleted. Second, the Regulations should set out the procedure and criteria according to which persons may apply for ministerial relief pursuant to sections 34-36 and 40 of the Act (UNHCR Comments: IRP Regulations, 2001: 11).

3.3.3. Criminality, and organized criminality

Section 36 of the IRPA deals with criminality and section 37 with organized criminality.

> Section 36 states that a foreign national or a permanent resident is inadmissible on grounds of serious criminality for (a) having been convicted in Canada with a sentence of at least 10 years; (b) having been convicted outside Canada of crimes which would equal a sentence of 10 years in Canada (IRPA, clause 36)).

For organized criminality, the IRPA reads as follows:

> A permanent resident or a foreign national is inadmissible on grounds of organized criminality for (a) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance on the commission of an offence punishable under the Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; or (b) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering (IRPA, clause, 37 (1)).

Citizenship and Immigration Canada justify these measures with the following remarks:

> We have amended our immigration legislation to reflect current realities. In the old legislation, factual evidence of a conviction was required to deny admission to Canada. Now we have in our inadmissibility categories persons who there are reasonable grounds to believe are or were engaged in organized criminal activity or terrorism. As many of the higher-level organized crime

> figures are able to avoid actual conviction, this allows us to refuse admission to members of organized crime on the basis of reasonable grounds and not factual evidence as was previously the case (CIC Backgrounder 1, 2000: 3).

3.3.4. Health grounds and financial implications

> Refugees selected overseas are exempt from inadmissibility on the basis of excessive demand on health and social services. They can still be inadmissible if their health condition means they are likely to be a danger to public health or safety (IRPA Training 2001: 4).

As under the *Immigration Act 1976*, the IRPA provides that immigrants can be excluded from Canada if they are expected to place an excessive demand on health and social services. The regulations consider demand to be excessive if the estimated cost the applicant would place on health and social services would exceed that placed by the average Canadian.

The Canadian HIV/AIDS Legal Network recommended that an applicant's potential economic and noneconomic contributions should be considered when deciding whether a given applicant's demand on health and social services would be "excessive". This provision also violates human rights treaties described previously, and goes against the 1951 Convention rules of granting a claimant refugee status due to political and religious considerations- not economic and financial (HIV/AIDS Legal Network, 2002: 2-3).

The IRPA insists, in several sections, that economic and financial considerations are relevant in determining whether to grant a person Convention refugee status overseas. Citizen's groups, including MOSAIC, submit that those considerations are irrelevant in determining whether a person meets the definition of a refugee under Canada's international obligations. It is pointed out that such considerations are inconsistent with the humanitarian principles that are supposed to underlie Canadian human rights and refugee laws.

> At its heart, the refugee application process should not include the considerations of factors such as education level, professional experience, and training. Canada's international obligations regarding refugees require Canada to focus on humanitarian and compassionate grounds rather than on acquiring marketable skills (MOSAIC, 2001: 12).

The IRPA's primary focus on guaranteeing that refugees become economically independent ignores international law that refugees need immediate protection because of humanitarian considerations. Their admissibility into Canada should not depend on their monetary and intellectual capacities at all, but because Canada shows compassion for those caught in oppressive circumstances abroad and respects its international commitments.

In summary, these statements from government officials and critics have shown that refugee law is far from simple. It encompasses not only the regulations to entry, but also the regulations to non-entry. Because refugee matters involve human beings at the core of their discussions, human rights issues also end up in

the spotlight. The controversial question is then brought out on the table. Should refugee policies be focused on human security or national security? By reviewing the content of this thesis, it can be noted that throughout history, national security prevails. The IRPA, only recently introduced (2002), has also opted for the national security model.

In hopes of assuring a tight control on its borders, the IRPA also retains the potential of turning back some innocent asylum seekers, and wrongly and unfairly detaining others. Only time will tell if the IRPA will ever accomplish its security goals, but as the critics have pointed out, asylum seekers will undoubtedly pay the price along the way.

With the ultimate goal of simultaneously respecting human rights and establishing strict barriers to protect national security, let us now future policy options will now be considered.

CHAPTER 4: CONCLUSION AND FUTURE POLICY OPTIONS

In summary, it can be stated that there is a historical trend in Canada's refugee law. This thesis has shown that, by reviewing the history of Canadian refugee law and examining the debate about IRPA, a series of traditional concerns are revealed. As this thesis has shown, some of these outdated concepts continue to reappear in Canada's legislation, regardless of international treaties advising otherwise. In a general sense, these concerns include, but are not limited to, xenophobic ideas, power and control issues, economic interests, and political legitimacy. The IRPA proves the presence of such a trend. In a time where refugees need help the most, the Canadian government, citing national security as a determining variable, justifies the presence and use of some of these outdated measures.

This thesis has summarized the most important and controversial aspects of refugee policy in Canada in the twentieth century. The evidence has shown that there is a growing trend toward nationalistic policy-making. While national security measures have occupied an important place in government, human rights concerns have seen a steady decline. In Canada, the IRPA has established a blueprint for future refugee policy-making – one that is restrictive and unforgiving in nature. Critics have cleary pointed out the weak areas of such policies as they pertain to human security issues. Will international treaties one day overrule

nation-state laws? Will borders all over the world get tighter to assure security and guarantee self-interest? Some authors have made several interesting suggestions.

The current immigration and refugee systems draw on and reaffirm national security and economic security discourse. In turn, human insecurity for asylum seekers is reinforced. As Canada's new Immigration and Refugee Protection Act comes into play, it also contributes to this trend of justifying barriers through security or national interest measures. Can asylum law be made more 'people-centred' and still fulfill security interests?

Some solutions have been proposed by experts in the refugee field. A common theory in the proposed solutions includes the abandonment of the state and a move towards a more universal policy view. In the following paragraphs, some of these recommendations are reviewed.

> The present system of unilateral, undifferentiated state obligations is unfair, inadequate, and ultimately, unsustainable. As states have no reliable means of looking to their neighbours or the international community at large for assistance and solidarity, there is a perverse logic to the option of simply closing borders and pre-emptively avoiding any responsibility for providing protection (Hathaway, 1997: 2).

Hathaway proposes his set of solutions to combat this trend in policies. He suggests that the mechanisms of the international system of refugee protection should be based on five key principles: interest convergence groups; common but

differentiated responsibility; solution-oriented temporary protection; residual solutions; and finally, viable repatriation (Hathaway, 1997: 3). To him, decent and applicable ways of curtailing refugee problems worldwide can exist. Hathaway's underlying theory supports the already existing mechanisms of refugee policy, and depends upon the human and national variables in changing the way these mechanisms treat refugee matters.

"We ought to dispense with the 1951 Refugee Convention's unnecessary rigid definition of state responsibilities (Hathaway, 1996: 5)." A renewed refugee system, according to Hathaway, would be based on a common yet differentiated system of responsibilities. This flexible framework would set the stage in the race to resolve refugee concerns. "We should be open to the enhanced flexibility that a robust system of solution oriented, temporary protection could provide (Hathaway, 1996: 5)."

Hathaway also encourages a collectivized approach on responsibility. In order for this to be possible, the institutions of international refugee protection need to be reorganized. The UNHCR, according to Hathaway, would be the primary organization to implement such change (Hathaway, 1996: 6). As Hathaway states,

> These interstate associations are an effective forum for the design and delivery of mechanisms of common but differentiated responsibility for refugee protection. The impetus for states to

> share refugee protection responsibilities should come from an appreciation that cooperation through an interest convergence group offers them a form of collective insurance should they, or a state with which thay have close ties, ever be faced with a refugee influx (Hathaway, 1997: 4).

Barnett elaborates on Hathaway's concept:

> In order to properly regulate the international refugee regime, UNHCR must go beyond its traditional state-centric focus to assume a more universal perspective that goes some way towards rejecting absolute notions of state sovereignty (Barnett, 2002: 259).

Finding legitimate solutions to ensure refugee rights brings with it questions of state sovereignty and control.

Indeed, scholars suggesting global type solutions, where an international effort is crucial, are also aware that political constraints can hinder their proposals at the national level. As the noted Canadian politician and former Minister of External Affairs, Lloyd Axworthy explains,

> The challenge is in reconstructing a statehood that is best able to deliver social goods, security, prosperity, and freedom in the context of a global community with its myriad of cross border associations, interests and ideas. For this we need institutions that encompass a higher degree of integration, and a wider degree of public involvement than presently encompassed in the accepted notion of multilateralism (Axworthy, 2001: 6).

Chimni (2001) proposes a similar model. She states that a dialogue is required, and should be conducted between states at several overlapping levels. This

dialogue should bring together states, international organizations, non-governmental organizations and the refugees themselves in the pursuit of common goals (Chimni, 2001: 152). She adds that this type of dialogue should include the refugees' input. She argues, "in conducting the dialogue these actors must of course ensure that they do not always speak on behalf of, but in conversation with, refugees (Chimni, 2001: 152)". This type of dialogue, according to Chimni, requires that common goals are met through compromise and that power be deliberated to all entities involved – not easy challenges to say the least.

Other proposals by Hathaway are the solution-oriented temporary protection and viable repatriation. Hathaway emphasizes that return for refugees would be a realistic and positive option if it was supported by empowerment and assistance. To Hathaway, refugee protection should be seen as a human rights remedy in which returning refugees home when conditions become truly safe is a vital element. To him, a temporary protection system could regularly regenerate the asylum capacity of host states. "If the protection of refugees is both durable and respectful of human dignity, it need not be permanent (Hathaway 1996: 5)."

> Rather than isolating refugees and denying them opportunities for meaningful employment and education, a solution orientation requires that refugees use their time abroad to develop skills and abilities that will enable them to play productive roles in their home countries. In all ways, protection must anticipate the needs and challenges of repatriation and reintegration, in a way that empowers both refugees and their communities (Hathaway, 1997: 5).

Also worth noting is that the solution of voluntary repatriation has not been adequately researched and that there are situations and contexts in which it is far from being the best suited solution. For example, the reality that the countries of origin are very often poorer than the receiving countries puts them in no position to assume responsibility of reintegration (Chimni, 2000: 16).

Although these proposed solutions do have some good points, it should also be noted that it will be hard to resolve refugee situations until the ideals of international burden sharing are accepted on a global scale and the granting of asylum and the proper treatment of refugees becomes a primary concern to the international community. As Aiken puts it, "implementation of any of these recommendations would require a degree of political will that appears to be lacking at present (Aiken, 2001: 128)."

As to the question of human rights vs security, at the moment, it is clear security issues dominate at an international level. Future policy options would need to compromise some security issues in order to formulate policies geared at protecting the individual first and foremost. Will a global system of shared responsibilities and burden sharing ever be implemented? This seems like an unlikely proposal for the near future, but perhaps a feasible goal to look forward to for the long term.

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