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Safe at Third?

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Research on Immigration and Integration in the Metropolis

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Safe at Third?

by

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The US-Canada Safe Third Country agreement is based on a false premise – that there are a substantial number of irregular migrants within the refugee claimant population. The agreement allocates refugee determination of every claim to either the US or Canada. Its basic principle is that a claim has to be made in the country of first presence. A refugee claimant who passes through Canada to the US can be returned to Canada for the determination of the claim. A refugee claimant who passes through the US to Canada can be returned to the US for the determination of the claim.

The Safe Third Country agreement is an attempt to deal with the problems imagined by this premise of irregular migrants. Whether the premise is false is a matter of dispute. Whether the premise exists is indisputable. The Refugee Impact Analysis statement in the Canada Gazette accompanying the pre-publication of the regulations begins with these words:

> "The global growth of irregular migration..."

What is this notion of irregular migration? When is migration regular and when it is irregular? According to immigration officials, migration is regular when migrants come to Canada with immigrant visas, when Canada Immigration chooses the immigrants. Migration is irregular when migrants come to Canada without going through the visa office system abroad, without getting immigration visas before they appear at a port of entry.

One can see that the very notion of irregular migration is antithetical to the notion of refugee protection. Refugees do not come into existence because of a choice made by Canada Immigration. They come into existence because of human rights violations abroad. Refugees choose to flee. Canada does not choose that they flee.

The Regulatory Impact Analysis Statement goes on:

> "....and, in particular, the contemporary phenomenon of mixed flows of migrants, refugees and asylum seekers who move together through the same irregular channels."

The Regulatory Impact Analysis Statement provides no evidence to substantiate the claim of mixed flows. Are there mixed flows? Are there substantial numbers of people using the refugees claim system who are abusing the system as a form of migration?

One element in the flow that the Government considers irregular is economic migration. Even though the Government gives us no statistics and no analysis, one has only to look at the record to see

that the assumption of substantial economic migration within the refugee claimant population does not bear out. Canada has an acceptance rate of about 50%. But we cannot assume that all those rejected are not genuine claimants, and are therefore economic migrants.

Some are rejected in error. No system is 100% accurate. The legislation provides for an appeal, to correct errors. But the government has decided not to bring into force that part of the legislation that provides for appeals. So the error correction mechanism that Parliament devised is not in place.

Though this is not true of the US, some countries have extremely narrow interpretations of the refugee definition, which artificially reduce recognition rates. But that does not change the danger.

Even if we assume that all decisions are correctly made, some claimants are rejected even though they are victims of human rights violations. A refugee is a person with a well-founded fear of persecution for listed reasons. Persecution is not defined as just any violation of human rights, but only a serious violation of human rights. Some claimants are subject to harassment, discrimination and abuse but these breaches do not reach a grave enough dimension to amount to persecution.

Some claimants have been rejected because they did not fit within the one of the five grounds listed in the Refugee Convention – a well-founded fear of persecution by reason of political opinion, race, religion, nationality and membership in a particular social group. In theory, this problem has disappeared under the new law, which came into effect on June 28, 2002. But when the safe third agreement was signed, August 30, 2002, the new law was only two months old.

Some claims are refused because country conditions have changed. The person was in danger when he or she left, but is no longer in danger. Those people, when they left, were surely not economic migrants.

Other claimants are fleeing generalized risk. They do not fall within the protection definition – which excludes generalized risk – that insists that the danger be individualized. But they are nonetheless motivated to move for non-economic reasons.

Some economic deprivation falls within the refugee definition. Persecution is a violation of any human right, including economic, social and cultural rights. Persecution is not just a violation of political and civil rights. For instance, a person who flees denial of all forms of employment by reason of political opinion is fleeing persecution, albeit economic persecution. The person cannot be considered a mere economic migrant.

The statistic that gives us our best shot of understanding economic migrant numbers is the total of those rejections that are accompanied with a finding of no credible basis. Both the present act allows and the previous act allowed for such a finding. The number of such findings is tiny and does not justify doing anything, let alone undertaking a major shift in refugee determination policy.

Even this number, small as it is, exaggerates the number of economic migrants. Some credible basis findings are themselves made in error. Indeed, some board members have adopted an abusive practice of finding no credible basis where the evidence does not justify such a finding. As well, some people justifiably found having no credible basis may be claiming out of an exaggerated fear not grounded in reality, and not claiming solely for economic reasons.

The Regulatory Impact Analysis Statement goes on to say:

> "[irregular migration] has resulted in significant pressures on asylum systems in developed countries, including Canada and the United States."

This worry about significant pressures rings hollow. First of all, shifting some claims from one country in North America to another does nothing to change the overall number of claims in North America. The number of claims remains the same.

The agreement would admittedly prevent some, but not all double claims. Double claims of any person who fits within the exceptions, such as a person with a family member in the receiving country with refugee status, are permitted.

Just how numerous are the double claims? And, if that was the purpose of the agreement, why not restrict its application to those who have already claimed in one country? The fact that the agreement applies to those who have never claimed in either country, but just passed through one on the way to the other, shows that avoiding double claims is not the central purpose of the agreement.

Furthermore, if the purpose of the agreements was to relieve pressure on North American systems overall, then claims would be sent from the country that is more under pressure to the country where pressures are less. But again, the agreement does not work that way.

The general effect of the agreement will be to shift significant numbers of claims from Canada to the US. That sort of agreement would make sense from the perspective of relieving pressure only if the Canadian system were under significantly more pressure than the US. But there is nothing to show that this is so. Statistics show that the Canadian system does not need this agreement in order to relieve an undue pressure on it.

In 2001, there were 13,497 Canadian refugee claimants who came from or through the US. There are an estimated "few hundred" each year who make claims in the US after having been in Canada [*Report of the Standing Committee on Citizenship and Immigration: Safe Third Country Regulations* Section B, Statistics]. Not all of those would be impacted by the Safe Third Country agreement because of its exceptions, especially the exception for immediate family members of those already in the country of destination.

The US system historically has been under far more pressure than the Canadian system. The Canadian system is as capable of managing its case load as the American system. It makes no sense in terms of claims management that large numbers be shifted from Canada to the US.

The Immigration and Refugee Board statistics show that 24,912 refugee claims were referred to the Board from January to September 2003. The claims finalized during the same period were 30,605. Cases referred are cases that have passed eligibility screening. With the Safe Third Country agreement, the number of cases referred would go down substantially, because anyone subject to the agreement would not be eligible.

The Board is finalizing cases at a substantially greater rate than cases are being referred. The out-basket is disappearing more quickly than the in-basket is being filled. So we do not need the Safe Third Country agreement, which would reduce numbers of cases being referred, in order to make Board processing manageable.

The Regulatory Impact Analysis Statement goes on:

> "Migrants attempt to make use of asylum systems to secure entry to a developed country and the attendant economic opportunities."

What are those economic opportunities? In the US, as I understand it, claimants cannot get work permits for the first six months. In Canada claimants cannot get work permits until found eligible and referred to the Board. They lose their work permit eligibility once they are through the claims system. If they are truly only migrants with a no credible basis decision in the claim, they cannot stay and cannot get work permits if they decide to challenge their refusals in Federal Court.

Yet, some of these claimants pay tens of thousands of dollars to come to Canada. It is virtually impossible for a migrant to recoup the cost of coming to Canada by saving money from the money earned through work in Canada during the course of the claim. It is hard to imagine any migrant making money through coming to Canada to make a claim. There may be a self-deluded few who think they can make money despite the figures; but again the numbers are so small that it is hardly worth a major policy shift.

In any case, what we are talking about here is not a choice between Canada and a Third World refugee camp. We are talking about a choice between Canada and the US, countries both of which are part of the developed world. Though it may be true that the developed world attracts Third World migrants for economic reasons, there are no general economic reasons that would prompt Third World migrants to move from Canada to the US or from the US to Canada. If all we are dealing with is an economically motivated Third World migrant population, presumably either Canada or the US would satisfy them. Moving this population from one country will do nothing to discourage economic migration.

It is not just pointless for the imagined economic migrants forced to move. It also seems pointless for the US and Canadian governments. If the US and Canadian governments are truly motivated by a desire to control irregular Third World migratory inflows, shifting parts of this population from Canada to the US or from the US to Canada does nothing. The presumed migratory flow remains within the developed world.

The Regulatory Impact Analysis Statement then adds:

> "Asylum seekers pass up opportunities for protection closer to home in order to claim refugee status in a developed country, again usually for economic reasons."

At least this component of what the government labels irregular migration does not depend on the notion of migration motivated only by economics. It acknowledges the possibility that asylum seekers may be real refugees, that remaining in their home country is not a realistic option.

Instead, here asylum seekers are faulted for not staying in refugee camps without work or school in impoverished Third World conditions and instead seeking protection in a part of the world better able to offer them resettlement. Yet, the Executive Committee of the United Nations High Commission for Refugees concluded:

> "The intentions of the asylum seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account." [Conclusion 15 (xxx): 1979, paragraph (h), subparagraph 3]

The fourth preamble to the 1979 Refugee Convention states:

> "Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation,"

The principle behind the Safe Third Country agreement, if accepted everywhere, forces refugees to remain in or return to countries of proximate refuge. These agreements, which require

refugees to go back to the first country they entered where there was an opportunity for protection, violate the duty to share responsibility for refugee protection. The whole burden is placed on the country of proximate refuge. This in turn prompts those countries to reject refugee obligations altogether and deny protection to those who flee.

Responsibility sharing means accepting those refugees who arrive in Canada. Those refugees who manage to arrive in Canada are a small percentage of the total world refugee population, far fewer than our responsibility sharing obligations would suggest we take. To suggest through the Safe Third Country agreement that we will not even take those means shrugging our shoulders at the world refugee problem.

The Regulatory Impact Analysis Statement adds:

> "In response, the Government has articulated the concept in the Immigration and Refugee Protection Act (IRPA or Act) that where a claimant could have sought protection in another country, it is reasonable and appropriate to require the refugee claimant to return and make use of that opportunity."

The Executive Committee of the United Nations High Commissioner for Refugees defines irregular movement this way:

> "An irregular mover is a refugee/asylum seeker who leaves a country where he/she has found or could have found and enjoyed basic protection, to seek asylum in another country, unless doing so for compelling reasons." [1989 Conclusion 58 (XL)]

Note the difference between the Regulatory Impact Analysis Statement: "could have sought…" and the Executive Committee Conclusion: "found or could have found…" Under the Safe Third Country agreement, if a person could have found protection here, but not in the United States, that person, according to the UN is not an irregular mover. But according to the Safe Third Country agreement, she is. The person will be still be returned to the US.

An example would be a person fleeing a state that offers no protection from spousal abuse. Canada offers protection to such a person. The US sometimes does not. But such a person passing through the US will have to claim in the US even if Canada would offer protection and the US would not.

The fact that the agreement is based on the possibility of seeking protection and not on the possibility of getting protection shows in yet another way that the assumption of mixed flows is false. A person who would get protection in Canada but not in the US and is coming to Canada for that reason cannot fairly be described as an economic migrant. The person is a refugee, according to the Canadian understanding of the refugee definition. When the person is sent back to the US and denied

protection in the US, then Canada has participated in a violation of the Refugee Convention, as that Convention is understood in Canada.

If we face the true definition of irregular movements, the UN definition, rather than the one manufactured by the US and Canada for the purpose of the agreement, we can see that the current Canadian law already addresses the problem. The Safe Third Country agreement is superfluous.

The Immigration and Refugee Protection Act provides that a person is ineligible to make a refugee claim if the claimant has been recognized as a Convention refugee by a country other than Canada and can be sent or returned to that country [section 101(1)]. Those sorts of people are the true irregular movers, and are already encompassed by the present legislation, even without the Safe Third Country agreement. The Safe Third Country agreement embraces a whole group of other people artificially described as irregular movers, but who are anything but.

If one tries to approach the abuse of refugee determination systems by economic migrants from a point of view principle, if one asks why economic migrants from undeveloped countries would make refugee claims in developed countries, surely one answer is the delays in refugee determination systems of developed countries. Any refugee determination system in a developed country that is substantially backlogged – which allows claimants to stay for years pending determination – is going to attract at least some people who know full well that at the end of the day they will be rejected and returned home.

The general answer to this problem is to make refugee determination systems as simple as possible, to have as few steps as possible. The quicker a person goes through the system, the less the incentive to make a claim just for the time it buys in the country of claim.

Viewed from this perspective, the Safe Third Country agreement goes in exactly the wrong direction. It adds another step in the process for everyone coming from the United States to Canada and for everyone coming from Canada to the United States. As Susan Martin [*Ed: a previous speaker at the forum*] has noted, the agreement means that we end up spending time on deciding who will adjudicate claims rather than on the essential – the adjudication of claims themselves.

Once the agreement is in effect, will a person fit within the Safe Third Country agreement or not? There will have to be some determination to that effect. Given the fallibility of human beings, some of those determinations are bound to be made in error. There will develop litigation, jurisprudence, court-ordered reviews and quashing of ineligibility decisions made as the result of the agreement. The refugee determination procedure on both sides of the border will become more complex, more costly, more prolonged.

One also has to take into account the incentive to lawbreaking that the agreement creates. The agreement applies only to those who appear at a port of entry, and not those who cross the border illegally and show up inland. But the true economic migrant, aware of the agreement, determined to abuse the refugee determination system, presumably would do just that.

The problem is not merely that economic migrants might cross the US-Canada border at non-border points. Creating an incentive for illegal crossings is a boon to smugglers. Smugglers will have clients they never had before. The agreement will create a smuggling industry that never existed before. And once that industry is developed or more fully developed, it will not just limit itself to smuggling economic migrants. It will presumably be open for business to smuggle anyone, including terrorists.

The law should create incentives for legality, not illegality. In particular, the law should not be developing incentives for people smuggling. The security of North America may depend on it.

It is fashionable in Canada, indeed even in the US, to criticize US immigration policy. But, from my perspective, there is at least one way in which US immigration policy can be commended. There is at least one way in which US immigration policy is far better than Canada immigration policy – the US foot dragging over the implementation of the Safe Third Country agreement.

The agreement comes into force when the parties exchange notes indicating that each has completed the necessary domestic legal procedures for bringing the agreement into force [Article 10(1)]. Canada has already all but completed its necessary domestic legal procedures. Canada has pre-published draft regulations for comment, in the *Canada Gazette* on 26 October 2002, and received comments and responded to them in May 2003 [Government response to the report of the Standing Committee on Citizenship and Immigration: Safe Third Country Regulations.] One year after Canada did so, the US has yet to pre-publish its draft regulations for comment.

As far as I am concerned, the longer the US takes to make the necessary changes to its laws the better. Never would be too soon.

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Number	Author (s)	Title	Date
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02-02	David Ley	RIIM Annual Report, 2001-2002	04/02
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