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Refugee Rights in Canada
and
the 1951 Geneva Convention

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General Introduction

The present paper is divided into three sections. The first section examines Canada's record in complying with the guarantees provided in the 1951 Geneva Convention Relating to the Status of Refugees. The focus is on three aspects that constitute the foundation of the social protection of refugees in the Canadian context: the right to work, the right to social assistance and the right to health

protection.

The second section evaluates the coherence of the Convention's protection regime by examining certain interpretive difficulties regarding the different categories of refugees and the different guarantees accorded to each category.

The third section addresses recent efforts at reconceiving international refugee law by exploring the possibility of systematizing the temporary nature of international refugee protection in order to encourage host states to provide more extensive overall protection.

Compliance with the 1951 Geneva Convention

Introductory Remarks

Our focus on the right to work, the right to social assistance and the right to health protection is not an arbitrary one. Indeed, for an affluent host state whose population enjoys a high standard of living, the right to work and the right to social assistance generally represent the choice that is offered regarding the means available to assure the initial material survival of refugees. On the one hand, the host state can allow refugee claimants to have access to the job market. Due to

unemployment problems and the unwanted social integration that occurs if refugee claimants obtain jobs before they are recognized as refugees, such a decision can have considerable social and political costs. (This is balanced to a certain extent by the fact that refugee claimants can nonetheless contribute to collective prosperity by working and paying taxes.) On the other hand, the host state can prohibit refugee claimants from working and instead offer a form of assistance (material and/or financial) while waiting for the decision on the refugee claim. However, assisting aliens who do not contribute to the prosperity of a society can also have a political cost.

Health protection constitutes the third aspect of the basic protection regime that assures material survival in an affluent host state. Accordingly, refugees can benefit from a specific regime or from a general regime common to all residents.

As a consequence of its general constitutional jurisdiction over immigration, the federal government of Canada is responsible for the admission of refugees and the refugee status determination procedure on the entire Canadian territory. Since the provincial governments are responsible for most of the social assistance programmes, they have adopted measures intended to provide minimal social protection for refugee claimants. Although the details vary from province to province, these measures enable refugee claimants to meet essential needs regarding welfare and health protection. The federal government remains, however,

responsible for questions regarding the right to work and the possibility of obtaining a work permit.

Right to Work

In the Canadian context, the assistance that resourceless refugees require usually takes the form of a revenue from either of two sources: revenue from gainful employment or revenue from a welfare assistance programme.

The social status obtained by gainful employment is particularly important for refugees who have been traumatized by a forced exile and who are attempting to maintain a minimum of dignity while they are given refuge. Furthermore, participating in the workforce allows refugees to contribute economically to a society and thereby acknowledge the generosity of the host state in providing a refuge.

In Canada, recognized refugees are allowed to work since they almost automatically obtain the status of permanent residents (unless they pose a danger to national security or public health) and while waiting for this status they are authorized to request a work permit. Consequently, the real issue regarding the right to work concerns the policy towards refugee claimants who are waiting for a decision on their claim.

1978-1989

Under the the regulations that accompanied the Immigration Act that entered into effect in 1978, refugees had the possibility of obtaining an employment authorization after having submitted a refugee claim. Even though the granting of the authorization rested on discretionary powers, in practice the provision effectively allowed the majority of destitute refugee claimants to have access to the job market (Grey 1984:121).

1989-1993

A reform of the refugee status determination procedure that was intended to deal with the growing numbers of refugee claimants entered into effect on 1 January 1989. The procedure was thus divided into two stages: a preliminary hearing followed by a second hearing on the merits of the claim.

At the preliminary hearing, the refugee claim was examined by an adjudicator from the Immigration Department and a member of the Convention Refugee Determination Division (CRDD) of the Immigration and Refugee Board (IRB). This panel considered the eligibility of the claimant and examined whether the claim had a credible basis. Between 1989 and 1992, 95% of claimants successfully passed the first stage and proceeded to the second hearing on the merits of the claim (IRB 1993: 20). At the second hearing, two members of the CRDD examined the evidence and decided on

the merits of the claim: a favourable decision by one member sufficed for the claimant to be recognized as a refugee. The acceptance rate at this stage ranged from 88% in 1989 to 60% in 1992 (IRB 1993: 20).

Regarding access to the job market, refugee claimants who could not survive without welfare assistance were allowed to ask for a work permit after having successfully passed the first stage. The permit obtained allowed refugee claimants to work until the final decision on their claim (but did not confer any independent right to sojourn on Canadian territory).

The possibility for refugee claimants to work between 1989-1993 was therefore not grounded in any genuine right to work, but rather in a discretionary decision by Canadian authorities. Likewise, all refugee claimants could not ask for work permits: only those who had been filtered through the first stage were considered to be legitimately present on Canadian territory and thus accorded the opportunity to seek gainful employment.

Yet at the time of the 1989 reform it was anticipated that the preliminary hearing would be completed in several weeks. As of 1992 it was taking at least three months to complete this stage of the procedure (and many more months for the second hearing). Consequently, many refugee claimants had no choice but to seek welfare assistance in order to subsist during the initial period. Despite the various administrative measures introduced to speed up the procedure, the problem

persisted until the new reform of February 1993.

1993

The important modifications to the Immigration Act that came into force on 1 February 1993 considerably changed the situation concerning the right to work by eliminating the preliminary hearing. Refugee claimants now proceed directly to the full hearing on the merits of the claim which presently takes an average of seven and a half months to conclude (IRB 1994: 10). The federal government accompanied this procedural adjustment by deciding to revoke the provision that allowed refugee claimants to ask for work permits, thereby allowing only recognized refugees to work.

The governmental preoccupations justifying the policy change on work permits are explained in the Regulatory Impact Analysis Statement (Canada Gazette 1993: 2369):

"The revocation ... had, as its objective, deterring the flow of economic migrants who make spurious claims to refugee status solely as a means of working in Canada. By removing the incentive that employment authorizations provide to persons making frivolous claims, the operation of the refugee determination system should improve, claimants should be encouraged to appear for their hearings, and processing of the claims of those in genuine need of protection should be expedited."

Although eliminating "spurious claims" and "frivolous claims" is a legitimate objective, the preceding explanation for the policy change is unconvincing since

refugee claimants already could not obtain work permits unless they had successfully passed the preliminary hearing. Therefore, they had established that their claims had at least a credible basis and could not be considered manifestly unfounded or frivolous. This explanation remains, however, a good example of the government's concerns and discourse regarding the possibility of allowing aliens who are not recognized refugees to obtain work permits.

1994-present

Following the federal elections at the end of 1993 and the victory of the opposition party, the government once again changed its policy regarding work permits. As of 21 January 1994, destitute refugee claimants can ask for a work permit as soon as they have presented their refugee claim. The government's Regulatory Impact Analysis Statement reveals the motivation behind this latest change (Canada Gazette 1994: 989):

"[Despite the recent modifications], provinces still incur substantial costs to maintain refugee claimants on public assistance. In recognition of the need for all levels of government to find ways to reduce expenditures, and the potentially damaging effect living on public assistance may have on the individuals concerned, refugee claimants ... will be permitted to work provided they comply with all applicable conditions... The issuance of employment authorizations to refugee claimants should reduce the overall cost of welfare in the provinces as the percentage of claimants applying for welfare and the average length of time claimants receive assistance should decline. However, if one of the effects of allowing work is to increase the number of refugee claimants arriving in Canada and lengthening processing times, then welfare costs may not decrease. Increased claims would also lead to a cost increase for the government. These factors will be monitored in the coming months to determine the impact of the new regulatory provisions."

The reduction of welfare costs appears to be the major concern as the government conveniently (and suddenly) underlines its concern for the well-being of welfare-dependent refugee claimants in order to justify new policy changes. Equally clear is the government's satisfaction with the fact that its recent border control initiatives have resulted in a dramatic drop in the number of refugee claims (from 37700 in 1992 to 20500 in 1993), thus allowing for the moment more flexibility in responding to the uninvited involuntary migrants who actually manage to penetrate Canadian territory. The rights of refugee claimants regarding the possibility of working in Canada still remain very much dependent on domestic politics.

Social Assistance

If refugee claimants cannot obtain a revenue from gainful employment in Canada while waiting for a decision on their claim (whether because of an inability to find jobs or a government prohibition), then their revenue must come from a social assistance programme. In accordance with the constitutional distribution of powers in the Canadian federation, the provincial governments have assumed jurisdiction over social assistance for all residents (including refugee claimants) in their respective provinces.

Example of Quebec

The mechanisms for social assistance and health protection of refugee claimants in the province of Quebec (which along with the province of Ontario receives most of Canada's refugees) are generally similar to those found throughout Canada.

When refugee claimants arrive in Quebec, they must first contact federal authorities who receive their refugee claim and authorize them to stay in Canada until a decision has been rendered on the claim. The documents issued by the federal authorities allow the refugee claimants to proceed to the Quebec Ministry responsible for immigration where they are interviewed in order to establish their needs. Refugee claimants who are destitute and who cannot obtain support from third parties (friends, relatives, ...) are provided with temporary accommodations at the Montreal YMCA (over 90% of claimants in Quebec live in Montreal) and registered for a welfare programme. The various programmes require that applicants be residents of Quebec: refugee claimants are presumed to be residents as long as they have the documents issued by the provincial and federal authorities. The first welfare cheque is sent within fifteen days. In the meantime, the emergency accommodations that are provided include accompanying services (food, clothing, ...) and NGO assistance for finding autonomous accommodations that replace the emergency accommodations twenty four hours after the first welfare cheque is received. If claimants manage to find gainful employment, then welfare assistance is terminated.

Once recognized as refugees, the claimants become eligible for the federal "Adjustment Assistance Programme" which excludes any Quebec welfare

assistance. Quebec welfare assistance becomes available only after the expiration of the federal programme.

Health Protection

The Quebec Health Insurance Act provides that all persons residing in the province can become beneficiaries. A regulatory provision describes the situations in which aliens are considered to be residing in the province: none apply to refugee claimants. The Quebec authorities therefore consider that refugee claimants are not beneficiaries. However, by virtue of a derogative legislative provision, refugee claimants are in fact included in the health insurance programme three months after their initial contact with Quebec authorities. Indeed, since the admission of refugee claimants falls within federal jurisdiction, Quebec authorities consider that the federal government should finance any medical assistance during the initial period following the arrival of refugee claimants. During this period when they are not covered by the Quebec health insurance programme, refugee claimants who do not have the resources to pay for their medical bills can benefit from a federal emergency medical assistance programme.

PART 3

Different Categories of Convention Refugees

Interpretation of the Different Categories

The 1951 Geneva Convention distinguishes between four categories of refugees to whom it grants a differentiated protection: "refugee", "refugee unlawfully in the country", "refugee lawfully in the territory", "refugee lawfully staying in the territory". These distinctions are useful if correctly interpreted.

A "refugee" is any person who meets the Convention definition regardless of whether there has been a formal recognition of refugee status by the host state. Indeed, formal recognition of refugee status is not included as one of the conditions of the Convention refugee definition. Thus, when a country grants refugee status, it only "recognizes" a condition that already existed prior to the country's administrative determination (UNHCR 1979: para. 28). Consequently, a country that mistreats a refugee claimant prior to a decision on the claim runs the risk of violating Convention obligations, if the refugee claimant is effectively a refugee. Otherwise, a key provision such as the protection against *refoulement* that is guaranteed to all "refugees" by Article 33 would lose its significance if it did not apply to refugee claimants. In fact, the restrictive interpretation whereby Convention obligations have to be respected only if refugee status is recognized appears to contradict the text of the Convention.

A "refugee unlawfully in the country" is any "refugee" who is present in the country without actually having been authorized to be present. Along with the basic minimal

protection that is granted to the "refugee" (non-discrimination, freedom of religion, access to courts, protection against *refoulement*), the "refugee unlawfully in the country" is accorded special protection against penalties for illegal entry or presence (Article 31). This additional protection is accorded because of the particularly precarious situation confronted by this category of refugee.

Even more protection is conferred to the "refugee" who is actually authorized to be present in the state and is designated in the Convention as the "refugee lawfully in the territory". This person has either been recognized as a refugee and therefore allowed to be present in the state or has been authorized to be present in the state until a decision has been made on the refugee claim.

Finally, the most extensive protection is granted to the "refugee" who is authorized to stay in the state and whose presence comprises a durable character: the "refugee lawfully staying in the country". This type of refugee benefits from the various provisions concerning the right to work (Articles 17, 18 and 19) welfare assistance and health protection (Article 23 and 24). However, the Convention does not specify the period that separates a simple visit from a more durable stay. A stay exceeding three months seems to be the most appropriate period in order to determine a durable stay: "[A]nyone in possession of some kind of residence permit (or its equivalent) entitling him to remain in a territory for more than three months should be regarded as being "lawfully staying" in that country. The same applies if he is actually lawfully present in the territory for more than three months" (Grahl-

Madsen 1972: 357). Three months is also usually the maximum duration of a tourist visa. A refugee claimant should thus be accorded the protection offered to a "refugee lawfully staying" if there is a presence that has exceeded three months.

It should be noted that Canada has included a reservation regarding its interpretation of the term "refugee lawfully staying in the country" that is used in Articles 23 and 24 of the Convention: it is to be applied only to refugees who have been given permanent resident status (UNHCR 1982: 17). As described above, however, the provincial governments *de facto* apply a less strict standard which allows refugee claimants to be eligible for social protection programmes and health protection once they have established an actual residence in the province (in the common law sense of the term).

The Convention's gradual increase in protective rights does in fact correspond to the actual ties between refugees and the host state. The advantage for host states is that they are not immediately obliged to assume burdensome responsibilities as soon as a person arrives and claims to be a refugee. States are given some flexibility in the implementation of the Conventional refugee protection regime. For example, to be accorded more than the basic rights, refugees must identify themselves to state authorities who then have to authorize the refugees' presence in the state.

Depending on how quickly the authorities can decide on the recognition of refugee status, states can have their obligations increase or not increase. This allows an effective balance between the territorial sovereignty of states and the fundamental

rights of refugees.

In this sense, the Convention acknowledges a classic distinction in the law of aliens by according more additional rights to "refugees lawfully staying in the country" than to "refugees lawfully in the country". Host states therefore have to accord more rights to refugees whose stay comprises a durable character. This in turn can encourage host states to have a greater appreciation for the Convention's protection regime since certain guarantees are granted only to some refugees.

Nevertheless, the distinctions between the various categories of refugees can be misinterpreted and consequently become dangerous. There is a tendency towards an interpretation that increases the arbitrary powers of states at the expense of the necessary refugee protection. This is best exemplified in the position that Convention "refugees" are refugee claimants who have been recognized as refugees (thereby allowing arbitrary treatment of claimants who have not yet been recognized as refugees).

Distribution of Conventional guarantees

Even if the different categories of Convention refugees are interpreted in a manner favourable to refugee protection, the Convention's allocation of guarantees remains subject to criticism. Furthermore, a redefinition of the various categories of refugees

that is based on actual state practice would be a welcomed modification. A distinction between refugee claimants and recognized refugees could be introduced and added to the general regime applicable to all refugees who meet the definition (regardless of any formal recognition).

PART C

The general regime would protect fundamental rights and liberties generally recognized notwithstanding the administrative status in the host state and would be similar to the present protection accorded to "refugees". However, several provisions could be modified. For example, the principle of *non-refoulement* could be made more specific by including expulsions and extraditions. Even though it is not included in the Convention, the right to present a refugee claim should also be included in the general protection regime. The Convention's guarantees concerning expulsion should benefit all refugees even though this will lead to the systematic presentation of refugee claims (thereby changing the refugee category and corresponding protection regime). This measure should nonetheless be adopted since it is the only way to prohibit expedited expulsions which prevent refugees from presenting refugee claims. (A33?)

Yet some of the protection presently reserved for the Convention's general regime could be limited to refugees who have presented a refugee claim: property rights, rationing rights, access to education and access to identity papers. It is not necessary to offer these privileges to aliens who do not claim to be refugees and who are not entitled to them in any other way.

Refugee claimants should also benefit from the right to work if their stay comprises a durable character. This would be logically accompanied by the benefits of work legislation and social security. Since the possibility of obtaining gainful employment would be possible only after a durable stay, public assistance should be available as soon as a refugee claim is presented.

The formal recognition of refugee status could allow three additional guarantees to be offered (if not followed by a Convention-authorized removal): access to public housing, access to non-obligatory public education and access to travel documents. This additional protection would take into account the refugee's temporary social integration with the host society. Even though it is not mentioned in the Convention, it would also be appropriate to include the right to family reunification for recognized refugees.

Proposals Regarding Reconceptualisation and Emphasis on Temporary Protection

The growing reticence on the part of affluent states in providing refuge for involuntary migrants indicates that fundamental questions about refugee protection must be asked. The actual experience of these states under the Convention regime

has been that the admission of refugees on a temporary basis has in practice led to admission on a permanent basis. Although the reasons may be varied (local integration, unchanged circumstances in country of origin, ...) many refugees presently do not return to their homes and are in fact allowed to remain in the host state. Given that forced exile can only truly be compensated by return in safety and dignity, a new emphasis on the temporary nature of refugee protection combined with an effort to eliminate the causes of displacement may lead to positive developments in refugee protection.

To achieve this conceptual adjustment, the status of refugees in host states would have to be reviewed in order to establish a genuine norm of temporary protection. In establishing this norm, an equilibrium would have to be found between three principles: respect for protection needs during their actual duration, the temporary nature of protection, and respect for the dignity of refugees by recognition of any definite integration in the host society.

A possible refugee protection regime could assume the following characteristics. Refugee status would be a temporary status of several years, subject to periodic renewals after verification of the continued need for protection. This verification would either lead to renewal or withdrawal of protection. Moreover, under no circumstances would refugees become permanent residents in the host state. The distinction between refugees and immigrants would thereby be clearly instituted and would help challenge the political confusion involving "economic migrants" and

"bogus refugees".

In order to defend the dignity of refugees, the possibility of seeking the citizenship of the host state could be allowed after two renewals of temporary status. The acquisition of citizenship would make refugees lose *ipso facto* their refugee status. If citizenship were to be refused by the host state, refugees would continue to keep their temporary refugee status until protection was no longer needed. International law would thereby recognize the right of states to choose which aliens it desires to permanently integrate. Although states would have to guarantee the necessary refugee protection, they would also be able to refuse the permanent integration of aliens on their territory. Since refugees are not permanent residents of the host states, it follows that they would not be able to invoke a right to citizenship.

This emphasis on the temporary nature of protection would be difficult to justify if it were not accompanied by a greater willingness on behalf of host states to receive refugees who for the most part would eventually return to their state of origin. In essence, it is preferable to allow the situation of protected refugees to become more precarious in order to assure an effective protection for a greater number of refugees. However, the danger of such a proposition should not be ignored since states might be tempted to make the situation of refugees more precarious while also decreasing the actual number of refugees admitted.

Most importantly, in order for a new emphasis on temporary protection to be fully

effective in enhancing refugee protection, it has to be situated within a global strategy that addresses human rights violations. In this sense, the United Nations' complementary human rights and security systems have to contribute in maintaining the usefulness of temporary protection's palliative function by effectively dealing with the root causes of displacement.

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