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Asylum Law in North America

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Abstract

Canada and the United States of America (United States; U.S.) are both international leaders in the admission of refugees. The chapter first discusses and compares the domestic asylum determination system in Canada with that of the United States, followed by an overview of their respective refugee resettlement programs overseas, which largely take place outside of the rule of law. The Canadian section includes an overview of the 2002 *Canada-U.S. Safe Third Country Agreement* (STCA), which remains in effect but has twice been challenged on constitutional grounds thus far. The chapter makes reference to the tension between domestic constitutional norms, the rights of refugees in international law (Hathaway 2021), and the growing preference of both Canada and the United States to treat refugees as "migrant[s] who the government *may* have reason to select" (Galloway 2014, 38) by securitizing asylum and by deterritorializing their borders throughout. It shows that this preference is at least in part anchored in a much older tradition of admitting refugees via discretionary humanitarian admission schemes, shielded from judicial oversight.

Keywords

Canada; United States of America; refugee resettlement; asylum seekers; STCA; border zone; securitization

I. Introduction

Canada and the US share a similar history of immigration. Until the mid-1960s, due to their exclusionary, white settler mentality, permanent immigrants came almost entirely from Europe, including a significant number of refugees (Kelley and Trebilcock 1998; Martin 2021), who were admitted through various humanitarian admission schemes independent of the ratification of the Geneva Convention for Refugees (in Canada in 1969) and/or the 1967 Protocol (in the U.S. in 1968; the United States did not ratify the 1951 Convention separately. Instead, they acceded to the 1967 Protocol in 1968.). Like other immigrants, refugees were equally screened for their socio-political and racial fit with the "nation," including their potential to contribute economically. After the Second World War, Cold War considerations saw both countries admit thousands of refugees from Hungary and the Czech Republic in 1956 and 1968 respectively; followed by even larger numbers from the conflict in Indochina, as well wars in Africa and Latin America. For example, Canada admitted 7,500 Ugandan Asians after leader Idi Amin came to power in 1972 and later

10,000 Bosnian and Kosovan Muslims in the 1990s (Government of Canada 2021), while the United States welcomed thousands fleeing communist Cuba, China and (predominantly Jewish refugees from) the former Soviet Union over the decades (Bose 2019). However, U.S. involvement in Central American politics in the 1970s and 80s also saw those fleeing persecution from conflicts there, for example from El Salvador and Guatemala, be persistently denied asylum in the U.S. or eventually rebuffed to their home country from Mexico, while being granted protection in Canada (FitzGerald 2019, 127). More recently, despite a trend towards securitizing their refugee and asylum policies and externalizing their borders (Crépeau and Legomsky 2007), both countries have accepted substantial numbers of Syrian and Afghan refugees.

In keeping with their tradition as classic countries of immigration, many of these refugees were admitted through discretionary admission schemes directly from overseas, a humanitarian tradition that both countries have continued to this day and that has made them leaders in refugee resettlement. At the same time, Canada and the United States are now also countries of first asylum with sophisticated refugee status determination procedures (RSDs) in keeping with their international obligations under the 1951 Geneva Convention and the 1967 Protocol. However, in this regard, their humanitarian legacy has led to the creation of two inland refugee determination systems that confine most asylum claims to the realm of administrative law, which is dominated by questions of credibility and procedural fairness but otherwise effectively insulates claimants from domestic, constitutional norms.

Another consequence of this history of discretionary admissions is that if courts become involved, judicial deference remains high in both countries. In the United States, the U.S. Supreme Court has repeatedly asserted that Congress and the Executive are sovereign in their decisions to *grant or deny entry* to any non-citizen (referred to in law as 'aliens'), including those seeking asylum (A. O. Law 2010, 30). This unusual declaration of judicial deference by the Court (also known as the plenary power doctrine) compared to other areas of American law - although somewhat watered down since its first occurrence in case law in a case involving a Chinese immigrant (*Chae Chan Ping v. United States*, 130 U.S. 581 (1889) - has been used in countless court cases to sidestep scrutiny of immigration related legislation and bureaucratic decision making (Schuck 1984). Scholars have argued that this doctrine has led to the growth of "phantom" constitutional norms (Motomura 1990). In Canada, courts were long formally prevented from reviewing immigration matters due to an ouster or "privative" clause, that was put in place by the executive in 1910 and not removed until the mid 1960s (Soennecken 2013). This clause, recently used unsuccessfully in the United Kingdom and Australia, two other common law jurisdictions, in 2004 and 2003 respectively, together with the fact that Canada did not acquire a written bill of rights until 1982 (Russell 1993), created an institutional structure and tradition that has kept immigration and asylum cases away from the courts.

The chapter first discusses and compares the inland asylum determination systems in Canada with that of the United States, followed by an overview of their respective refugee resettlement programs overseas, which largely take place outside of the rule of law. The Canadian section includes an overview over the 2002 *Canada-U.S. Safe Third Country Agreement* (STCA), which remains in effect but has twice been challenged on constitutional grounds thus far. The chapter

makes reference to the tension between the domestic constitutional rights, the rights of refugees in international law (Hathaway 2021) and the desire of states to treat them as "migrant[s] who the government *may* have reason to select" for admission (Galloway 2014, 38) throughout. It shows that this preference is at least in part anchored in a much older tradition of admitting refugees via discretionary humanitarian admission schemes, shielded from judicial oversight.

A. Canada

The current legal basis for granting asylum to individuals in Canada is the 2002 *Immigration and Refugee Protection Act* (IRPA). Canada signed onto the 1951 Geneva Convention for Refugees in 1969 and first incorporated the definition of what it means to be a refugee into its 1976 *Immigration Act*. The IRPA explicitly confers legal protection to individuals who meet the 1951 Geneva Convention definition of a refugee, but also to others who are judged to be in similar circumstances, thereby going beyond the 1951 definition. Added to that, persons who cannot be removed from Canada, including for reasons that fall under the *Convention against Torture* (CAT), are equally granted protected person status.

As a former British (and French) colony, Canada is governed by two written constitutional documents as well as a number of unwritten constitutional conventions. The two written documents are: The 1867 Constitution Act, which was drawn up at the time of Canada's Confederation and the 1982 Constitution Act, which contains the 1982 *Charter of Rights and Freedoms*. Almost all of the rights and freedoms enshrined in the Charter are guaranteed for everyone, not just for Canadian citizens. Although non-citizens, including refugees, who are already on Canadian soil can access domestic constitutional rights enshrined in the *Charter of Rights and Freedoms* (the Charter), which is the most prominent part of the country's 1982 Constitution Act, a prominent refugee and asylum law expert found in her seminal research almost a decade ago that neither international human rights norms - including those granted to refugees - nor constitutional rights rarely ever constitute the foundation of a successful rights claim by noncitizens (including refugees) in Canada (Dauvergne 2012; Dauvergne 2013). In fact, she contended, non-citizens were *less* well protected in Canada compared to other advanced industrial countries with equally powerful high courts (similarly Crépeau 2005).

The sources for Dauvergne's findings, that still hold true today, do not originate in Canada's constitutional rights framework itself but flow from a combination of broader factors: First, despite extensive policy changes under the conservative Harper government between 2010 and 2015, which increasingly securitized Canada's refugee policy (Crépeau and Atak 2013), the Immigration and Refugee Board (IRB), the principal body deciding asylum claims in Canada, remains highly insulated from "legislative tinkering" compared to its American counterpart (Hamlin 2014, 89), which also makes accessing the supervisory courts extremely difficult. Second, jurisprudence tends to sidestep both international human rights and constitutional arguments in favour of administrative law. Third, in keeping with Canada's history of immigration, judicial deference and administrative discretion remain high.

1. Claiming Asylum in Canada

Despite numerous reforms over the decades, there is only one principal way to claim asylum in Canada, even for persons who have entered Canada irregularly. A different process applies to refugees who are still overseas and who want to apply for resettlement to Canada, which is discussed in a separate section. Note that resettlement largely takes place outside of the rule of law (Kneebone 2009; Labman 2019). Canadian inland asylum determinations continue to be made by adjudicators (also referred to as "judges") in the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB), the country's largest administrative tribunal, in a quasi-judicial hearing. While in the past, cases were heard by three-member panels there, most routine cases are now heard by single-member panels.

The IRB was created in 1989, in the aftermath of the *Singh v. Canada (Minister of Employment and Immigration)* [1985] S.C.R. 177 decision by the Supreme Court of Canada (SCC), the first case that dealt with refugee claims after the entrenchment of the 1982 Charter. It mandated that refugees have access to an oral hearing as part of s. 7 of the Charter, which guarantees "everyone ... the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice," and thereby triggering an overhaul of the entire refugee determination procedure at the time (Greene 1989, 133). The IRB operates independently from the Ministry of Citizenship, Immigration and Refugees (IRCC), which is responsible for developing Canada's immigration policy more generally. It also administers Canada's numerous permanent and temporary immigration programs, ranging from economic migration to family reunification. Even though it was supposed to be transferred to the IRB, IRCC also remains responsible for processing so called "pre-removal risk assessments" (PRRAs), which upholds Canada's commitment under the CAT (the transfer was postponed in 2014) (Immigration, Refugees and Citizenship Canada 2016). IRCC is also in charge of processing humanitarian and compassionate claims (H&C). Both of these procedures are typically the last resort for unsuccessful asylum claimants. Each pathway leads to protected person status and therefore, to permanent residency (and eventually, Canadian citizenship) - unlike two other administrative procedures applicable to unsuccessful asylum claimants from certain countries: temporary suspensions (TSR) or deferrals of removal orders (ADR).

The IRB does its work in collaboration with the Canadian Border Services Agency (CBSA), which manages Canada's borders. It is the CBSA that carries out admissibility screenings at Canada's official ports of entry, including those concerning asylum claims. In other words, only if a CBSA agent deems an individual eligible, will their claim proceed to the IRB. While attempts to criminalize migration (Atak and Simeon 2018) and to increase the scope of the ineligibility and exclusionary provisions have increased recently, the central reasons for ineligibility remain serious criminality, national security or arrival via the United States as per the *Canada-U.S. Safe Third Country Agreement* (STCA). As already mentioned, the latter has been contested on constitutional grounds twice so far and will be discussed in a separate section. CBSA is also responsible for executing all immigration enforcement duties, such as detentions in and removals from Canada, including those of failed asylum seekers, plus coordinating most interdiction measures, (except for visa requirements) ranging reviewing advanced passenger information to cooperation with

transportation agencies and foreign law enforcement authorities (Baglay 2017, 275). The remaining two division of the IRB, the Immigration Division (ID) and the Immigration Appeal Division (IAD), deal with detention reviews and first instance appeals of deportation orders, among other responsibilities.

Asylum decisions within the IRB system are rendered on the basis of the IRPA and follow well-established principles of administrative law - that is, they evolve around an assessment of the credibility of the claimant, including their story of flight and persecution, and take place in a well-honed, bureaucratic and quasi-judicial process (Cameron 2018). The central focus is on ensuring procedural fairness, which is a protected right under s. 7 of the Charter ("s. 7, right to life, liberty and security of the person … principles of fundamental justice") and also a recognized principle in British common law (e.g., Heckman 2017). At this stage, other international human rights and constitutional arguments only appear in the background, i.e., to the extent that they are cited in case law and inform decisions by IRB decision makers or are raised by a refugee claimant's legal representative (Tomkinson 2018).

Canada's inland asylum determination procedure at the IRB has received wide-spread praise, including from UNHCR (Anderson 2010, 940). The reasons for this high regard range from the court-like hearing procedures with its consistently high recognition rates of 47.5% (2008-2012) and 65.9% (2013-2016) (IRB data cited in Rehaag 2019, 5) - significantly above, for instance, the EU-27 average of 28.3% (compare Juchno 2009, 5) - the relatively low degree of political interference in its decision making processes (but see Kernerman 2008), in particular, in comparison to the U.S. (Hamlin 2014), and its leadership on key questions of international asylum law, including its interpretation of the refugee definition. For example, Canada was the first country to accept gender-based persecution as a basis for asylum and to issue guidelines on the matter for IRB adjudicators (Macklin 1998) in 1993, and has long consider persecution by non-state actors a ground for granting asylum (affirmed in *Canada (Attorney General) v. Ward* [1993] 2 SCR 689).

But there has also been criticism. For instance, prior to creation of the IRB's newest division, the Refugee Appeal Division (RAD) in 2013, no appeal on the merits beyond the IRB could be filed and the number of cases who managed to obtain the necessary permission from the Federal Court of Canada ('Federal Court'), the court responsible for overseeing IRB decisions, for a judicial review ("leave") of their decision was fairly low (the average federal court success rate was 7.8% from 2005–10) (Rehaag 2008; Anderson and Soennecken 2018). Before the creation of the RAD, there was also wide spread criticism regarding the appointment and training of first instance IRB decision-makers in particular, their widely diverging judgments (e.g. Rehaag 2008), which proved even more detrimental at the time given the lack of an appeal on the merits, underlining one central problem with the high degree of administrative insulation of the IRB.

Today, most applicants rejected by the IRB can file an appeal with the RAD, and request that their case be considered anew. The RAD review process is largely a paper-based process, although an oral hearing may be requested. The RAD adjudicators review the facts of the case as well as the procedure. However, opportunity to present new evidence is limited and some types of claimants

remain excluded from this option (Rehaag and Grant 2016). Some of these exclusions have been successfully challenged in court on constitutional grounds. For instance, a 2015 Federal Court ruling, *Y.Z. v. Canada 2015 FC 892,* declared the exclusion of individuals who arrived from "designated countries of origin" (DCOs), a designation eventually ended by the Trudeau government in 2019, from access to the RAD unconstitutional on equality grounds (s. 15 of the Charter) (Anderson and Soennecken 2018).

Further to that, first studies of the post 2013 process have shown that RAD success rates (the RAD can either agree with the RPD, grant asylum or refer the case back to the RPD) can vary considerably by officer but are still higher than under the old process: The average RAD success rate for rejected refugee claimants was 26.4% in 2013–14 –much higher compared to the pre-2012 system (Rehaag 2019). Going to the Federal Court is also the only option that claimants who remain ineligible for appealing to the RAD can pursue. However, the path to the Federal Court is filled with numerous hurdles:

First, access to judicial review is only by permission ("leave") of the court, which is only infrequently granted (Rehaag 2019). Second, unlike with other appeals, the Federal Court does not re-adjudicate the case *de novo*. The Court only performs a review function (s. 72 IRPA), which means that it focuses on whether the administrative process before the IRB was fair and the law was applied correctly. Third, since 1992, access to the next court in the judicial hierarchy, the FCA, is even further limited by a special "certification" requirement (i.e. the Court must certify, upon request of counsel, that the case contains a "question of general importance" that can only be resolved by putting the matter to the FCA (s. 74(d) IRPA). Fourth, access to the Supreme Court of Canada (SCC) is equally limited by a "leave" to appeal process (s. 40(1) Supreme Court Act, R.S.C., 1985, c. S-26). That is why the vast majority of Canada's inland claims for asylum are settled before the IRB.

For unsuccessful asylum seekers, their only remaining option to obtain protection status, which leads to permanent residency and eventually, to Canadian citizenship, is via a "pre-removal risk assessment" (PRRA), which is carried out by IRCC. While the PRRA is the final way in which Canada fulfills its non-refoulement obligation under the 1951 *Convention* and *Convention against Torture* (CAT), the process is mainly paper based. Success rates for the PRRA are very low (less than 5%) and, since 2012, PRRA applicants have to wait an additional year before applying. A final option is the filing of a Humanitarian and Compassionate (H&C) claim, also administered by IRCC. It is intended primarily for claimants who can prove that returning to their home country would lead to extreme hardship, in particular for those who have family members in Canada from whom they would be separated. Refusal rates for H&C claims ranged between 40 and 60% between 2016 and 2019. However, H&C claims constitute only 1.3 % of all permanent residents in 2019 (Immigration, Refugees and Citizenship Canada 2020, 34). Although negative decisions can be challenged in court, the process is highly discretionary and judicial deference high. Moreover, IRCC officers have undergone very different training compared to their colleagues at the IRB, which may produce different decisions.

Before unsuccessful asylum seekers are deported, their deportation ("removals") and/or detention (the latter can occur upon entry or after admission to Canada), may also trigger court challenges involving constitutional rights claims and analogous principles under the common law, such as violations of the protection against cruel and unusual treatment or punishment (s. 12 of the Charter). This constitutional norm was successfully raised in a prominent court case that challenged the reduction of health care for certain kinds of asylum seekers under the conservative Harper government (*Canadian Doctors for Refugee Health Care v. Canada (Attorney General)* 2014 FC 651, (Anderson and Soennecken 2018). More typically, the right to have one's detention conditions reviewed (s. 10(b) of the *Charter*), which is also reflected in the common law principle, *habeas corpus,* is raised in litigation. The availability of *habeas corpus* for challenging lengthy detentions beyond the options available in the IRPA was affirmed in a recent 2019 Supreme Court decision (*Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29).

With respect to the right for life, liberty and security of the person (s. 7 of the Charter), jurisprudence has swung to the left and right (Eliadis 1994). On the one hand, courts have ruled that deporting someone does not interfere with their right to liberty, as the deportation is preceded by several prior procedural stages (e.g. *Poshtek v Canada (Minister of Employment and Immigration)* 2005 FCA 85). More fundamentally, they concluded that s. 7 rights may not be engaged at all because non-citizens do not possess an unqualified right to enter Canada (*Deghani v Canada (Minister of Employment and Immigration)* [1993] 1 SCR 1053) (Galloway and Liew 2015; Baglay 2017). On the other hand, challenges to Canada's security certificate regime, a way of detaining and removing foreign nationals – including permanent residents –on national security grounds, especially terror suspects, successfully used s. 7 arguments to challenge the limited nature of disclosure (*Charkaoui v Canada (Minister of Citizenship and Immigration)* 2007 SCC 9), which lead to an overhaul of the security certificate regime and saw the introduction of special advocates, lawyers with top security clearance (Hudson 2010).

Considering the effects of lengthy detentions on mental health and what is ultimately at stake for claimants if they are returned to their country of origin, violations of the right to counsel (also part of s. 10(b)) may also constitute grounds for litigation on constitutional grounds. The reality is that it is very challenging for detainees to access counsel in the first place (Silverman and Molnar 2016), plus a number of prominent court cases evolved on the question whether the situation in fact constituted detention (Baglay 2017, 54).

Finally, it is worth pointing out that although detentions of asylum seekers regularly occur in the Canadian system and have been on the rise in recent years (in the case of refugees, mostly because unsuccessful claimants are considered a flight risk (CBSA data cited in Human Rights Watch and Amnesty International 2021, 16), in contrast to the United States, detentions do not occur merely because of irregular entry to Canada. Asylum seekers who increasingly crossed the Canada-U.S. land border irregularly, i.e. at non-official border crossings, over a two-year period between 2017 and 2019, largely as a result of a number of U.S. policy changes (in particular for those in the U.S. on temporary protection statuses, were not detained but only intercepted by the Royal Mounted Police (RCMP) and delivered to either a CBSA or an IRCC office for initial eligibility screenings and subsequent adjudication by the IRB (Damian Smith 2019).

a) The Canada-U.S. Safe Third Country Agreement (STCA)

After September 11, 2001, Canada and the United States signed a number of agreements concerning the integration of their borders, which shifted the focus of their existing cooperation from drugs and weapons to the control and monitoring of migration (Brunet-Jailly 2006). This trend started with the *Smart Border Declaration* (2001) and was extended with the *Canada-U.S. Safe Third Country Agreement* (STCA, 2002). The *United States-Mexico-Canada Agreement* (USMCA), a free trade agreement that has existed since 1989, also has migration policy consequences that extend to Mexico and beyond it to Central America (Young 2018).

Prior to the STCA coming into force in 2004, about 1/3 of refugee claimants arrived in Canada via the United States. Shortly after its introduction, numbers fell sharply by over 50 % (Soennecken 2014, 114). Similar to the European Union's Dublin regulation, the STCA stipulates that refugee claimants cannot choose where they seek protection and need to request asylum in the first of the two countries they enter, unless they qualify for an exemption (chiefly, family ties and until 2009, if they were from a country to which Canada had temporarily suspended removals; these exemptions were significantly reduced during the conservative Harper government period (Anderson and Soennecken 2018). Given its isolated location and international flight patterns, Canada benefits more from the STCA than the United States in terms of a drop in asylum applications (Soennecken 2014, 114).

The STCA has been controversial since its introduction (Arbel 2013), and has been challenge on constitutional grounds twice so far. The more restrictive asylum practice in the United States, in particular with claims involving gender-based persecution and LGBTQI claimants, as well as the significantly higher risk of detention in the United States, including for families with children and unaccompanied minors, have heightened socio-political doubts in Canada about the U.S. as a "safe country" (Amnesty International 2017). In the first court challenge in 2007, the Federal Court (in *Canadian Council for Refugees v Canada*, 2007 FC 1261) accepted arguments by refugee advocates that the STCA violated s. 15 (equality) and s. 7 of the Charter and declared the STCA of no force and effect. However, the FCA reversed this decision in *Canadian Council for Refugees v Canada*, 2008 FCA 229, finding that the Charter did not apply (Arbel 2013). The Supreme Court declined to hear a subsequent appeal. In a second court challenge, a different judge at the FC again declared the STCA unconstitutional in 2020 (*Canadian Council for Refugees v. Canada (Immigration, Refugees and Citizenship)*, 2020 FC 770), this time only relying on s. 7 of the Charter. However, in *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 72, the FCA again side-stepped constitutional arguments and sided with the government and the STCA remains in effect. A request for leave to appeal to the Supreme Court of Canada has not yet been heard.

The STCA is only one example of the securitization of Canada's refugee policy. This "securitization" is further reflected in an increase in visa interdictions and other exclusion measures as well as in the militarization and deterritorialization of its border (Côté-Boucher et al.

2014; Arbel 2016). Although Canada in continues to publicly emphasize its openness and commitment to diversity and multiculturalism (e.g. #WelcometoCanada), the asylum law and refugee policy of both, Canada and the United States, are now permeated by security thinking (Crépeau and Atak 2013).

B. The United States

The legal basis for the United States' contemporary asylum and refugee policy continues to be the Refugee Act of 1980. Just prior to these reforms, U.S. asylum claims had reached an all-time high of 150,000, in part because of the civil wars in Central America, deteriorating human rights conditions in Haiti and repressive policies in China (Meissner et al. 2018, 6). The passing of the Act marked the moment when U.S.' policy towards refugees (i.e., individuals seeking protection from persecution while awaiting resettlement abroad) was distinguished from that for persons seeking asylum in the U.S. in law (e.g. Baugh 2020). Incidentally, shortly before the passing of the 1980 Act, 120,000 Cubans and 25,000 Haitians had left their homes seeking refuge in the United States by sea as part of the so called "Mariel boatlift," which cemented the U.S.'s status as a country of first asylum and not just as a country willing to resettle refugees from overseas in keeping with its history of immigration (Wasem 2009). However, instead of using the newly created refugee provisions, which for the first time, incorporated the *1951 Convention* definition of a refugee into U.S. law, the Carter administration chose to create a new legal admission category called "Cuban-Haitian entrants," which allowed them to be temporarily "paroled" into the country on a discretionary basis. Only after additional legal amendments in 1986 was a path to permanent residency opened.

Notwithstanding this admission category, Haitians that did not arrive in the U.S. as part of the boatlift in 1980, were no longer welcomed and granted entry, although political circumstances in Haiti continued to remain the same (Aleinikoff 1984, 187; Mitchell 1994). In fact, scholars have argued that the "interdiction" of Haitians at sea was the foundation for the U.S.' subsequent large-scale expansion of border control strategies outside of its territory that was adopted by a number of other nation states, notably Australia (e.g. FitzGerald 2019, 80). Moreover, the clear preference of Cubans over Haitians in the 1970s and 1980s also brought constitutional norms, such as equal protection under the law (U.S. Const. amend. XIV, § 2), into prominent dialogue with asylum law, mostly unsuccessfully. In *Jean v. Nelson* 472 U.S. 846 (1985) and a number of similar cases, advocates claimed that the practice of detaining all Haitians pending a decision of their asylum claim discriminated against them on the basis of race and national origin (Mitchell 1994; Kawar 2015; FitzGerald 2019). However, the U.S. Supreme Court declined to apply constitutional norms to such a "discretionary" immigration decision and instead found that legislation and regulations mandated that parole decisions be made regardless of race or national origin, preferring to rely on "phantom constitutional norms" instead (Motomura 1990, 592).

The U.S.' legislative response to the 1980 boatlift further signified a policy preference that continues into the present; namely that of creating discretionary admission pathways for potential

newcomers – even if they are seeking refuge. It is based on a long history of almost complete Congressional and Executive control over the removal and admission of foreign nationals without substantial judicial oversight, encapsulated by the U.S. Supreme Court's "Plenary Power" doctrine (Schuck 1984) and reflected in a long line of decisions following *Jean*. As Hamlin put it: "The legacy of the plenary power doctrine is it that immigrants who are attempting to enter the United States have no access to constitutional rights or international protection treaties"(Hamlin 2014, 76). In contrast, court rulings confirmed that foreign nationals already *in* the U.S. were entitled to due process, a constitutionally protected right (U.S. Const. amend. V and XIV), even those who have entered the United States without authorization. However, this lead to numerous court challenges over where the United States legally began, as was prominently raised in a number of court cases in the 1990s involving the *Golden Venture*, a cargo ship that had carried mostly visa-less Chinese migrants to the U.S., many of whom were detained while still at sea and denied the right to claim asylum based on the argument that they had not yet "entered" the U.S., even though some of the ship's passengers had managed to swim to shore claims and were claiming to have been forcibly sterilized in China (FitzGerald 2019, 74). Government officials also argued that U.S. law prevailed over the international treaty right to *non-refoulement* in this context, citing one of the earliest "plenary power" doctrine cases, *Fong Yue Ting* v. *United States,* 149 U.S. 698, 720(1893) (FitzGerald 2019, 75–76), thereby foreshadowing similar legal maneuvers to sidestep both international law and U.S. constitutional norms in subsequent extraterritorialization and interdiction moves in later decades. The legality of these kinds of actions was upheld by the U.S. Supreme Court in the landmark case of *Sale v. Haitian Centers Council, Inc.* 509 U.S. (1993) involving (once again) Haitian asylum seekers, and affirmed by subsequent U.S. administrations (FitzGerald 2019, 85).

1. Claiming Asylum in the United States

Despite decades of criticism, American domestic asylum procedures have not been fundamentally reformed since the passing of the 1980 Asylum Act, save for amendments passed under the Clinton administration, the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) (Meissner et al. 2018). Criticism has focused primarily on the quality of decisions by asylum officers at all levels (Ramji-Nogales et al. 2009), the high degree of conflict between all three branches of government on the topic, including the judiciary (Hamlin 2014, 67), as well as the recurring high backlog. Instead, continuing the earlier tradition of barring and excluding individuals from seeking asylum on United States territory in the first place, in particular at the Mexican American border, has become the central preoccupation for U.S. policy makers.

There are three basic ways to claim asylum in the United States. Applications via all three pathways have fluctuated substantially over the years, reflecting larger global and regional trends but also changes in U.S. asylum policy. U.S. asylum granting rates have equally oscillated: According to 2019 DHS data, the granting rate dipped under 5 % in the early 1990s and peaked just shy of 30 % in 2001. Currently, granting rates are on an ascent again: For 2019 they reach 25% (Baugh 2020, 7). The first pathway, known as the "affirmative" asylum application process,

is reserved for individuals who are already on the territory of the United States - regardless of whether they are present legally or not. They can apply for asylum in a non-adversarial interview with an officer of the asylum division of the U.S. Citizenship and Immigration Service (USCIS), a government bureaucrat who is trained in international and domestic asylum law. Since reforms in 1998, such claims must be made within one year of entry. Academic research has found that the one year deadline disproportionately disadvantages applicants from certain countries (Ramji-Nogales et al. 2007). Most recently, the number of affirmative asylum claims has surged dramatically: New claims jumped from 28,000 in 2010 to 143,000 in 2017. As Meissner et. al. note, one reason for the dramatic surge in affirmative claims is the fact that requests for cancellations of removals by individuals who do not hold legal status but who have been in the U.S. for 10 years or more are funneled through this pathway, since this the only way for such applicants to be referred to the EOIR (where they can request a cancellation (or withholding) of their removal, even though their claim will automatically be denied by the USCIS). Another reason is a dramatic surge in claims by unaccompanied minors (Meissner et al. 2018, 12). Unsuccessful affirmative claims automatically proceed to a *de novo* review in one of 60 administrative "immigration courts" before an adjudicator (called "immigration judge"), who is a political appointee and works for the Executive Office for Immigration Review (EOIR), a division of the Department of Justice (DOJ). This is a much more adversarial setting, with a lawyer from the DHS presenting the case against the applicant.

The second pathway to asylum in the U.S. is intended for individuals who are subject to removal from the United States (and who did not claim asylum prior to that). They may apply for asylum "defensively," i.e. during their deportation procedure (see also Legomsky 2009). Such defensive asylum claims skip the USCIS and are made directly before an EOIR immigration judge. From there, either side can appeal to the Board of Immigration Appeals (BIA) based in Virginia, the appellate side of the EOIR. As a rule, it (there are up to 23 board members) does not conduct in-person hearings, decides most cases by single-panel member, and only publish some of its decisions (for data, see Baugh 2020).

Beyond the BIA, asylum cases from either pathway may be appealed to the respective regional Federal Courts of Appeals (there are twelve regions or "circuits" across the U.S., appeals are heard in the region the claim was filed) via a petition process, which only occasionally includes an oral hearing. The appeal is a judicial review process; it is focused on ensuring that procedural fairness was observed. While a fair and just process is a constitutionally protected right in both countries, the judicial review process constrains the types of constitutional arguments that can be raised in federal court. For example, a recent case supported by the American Civil Liberties Union (ACLU) evolved around the question whether an asylum seeker should have a right to review the evidence that was presented against her before her (detention review) hearing (Bookman 2021). In other words, judicial review is not an avenue for re-evaluating substantive, factual questions and therefore does also not permit the submission of new evidence. In addition, the process restricts the possible outcome for the parties: U.S. Courts of Appeal have been reminded by the U.S. Supreme Court not to grant asylum themselves but to return or "remand" an erroneous decision to the BIA, who will then re-examine the case, as only the U.S. Attorney General possesses the

discretionary authority to grant asylum as per legislation (or to at least withhold deportation even if asylum was not granted) (Ramji-Nogales et al. 2007, 361).

Aside from that, large scale quantitative research has shown that asylum applicants are subjected to a game of "refugee roulette" throughout both the asylum bureaucracy and the judicial review process: The outcome in the courts depends very much on which federal circuit hears the appeal and beyond that, on the individual judge assigned. If one compares only the outcomes for most similar cases (those most frequently used in studies involve Chinese nationals), remand rates (i.e. rate of returning cases to the BIA) varied widely across the twelve circuit courts, from a low of under 5 percent to a high of 30 percent (D. S. Law 2005; Ramji-Nogales et al. 2007, 367). While rates follow a somewhat predictable, regional pattern (e.g. courts based in the American South had by far the lowest remand rate, while the 9th circuit, which covers the entire U.S. West coast, the 2nd, encompassing NYC, and the 7th, encompassing Chicago, were found to have the highest with 17 to 31 percent) within circuits, judges were often also divided on ideological lines. As a result, the degree of deference to the agency who made the asylum decision varied substantially by judge and court (Hamlin 2014, 77).

Scholars who have studied the immigration jurisprudence and case load of the federal courts (which largely consists of asylum cases) in depth have further argued that, unlike the U.S. Supreme Court, judges took on the role of "error correctors" of the EOIR and even more so, the BIA, after changes to the BIA's operations in 2002 (A. O. Law 2010, 182). The immigration case load of the federal courts surged after that, primarily due to changes made to the operations of the BIA mandated by then Attorney General Ashcroft, which were aimed at reducing the BIA's substantial backlog. Changes included a shift to single-member panels, a move that was seen as leading to a huge number of erroneous decisions (A. O. Law 2010, 148). In addition, BIA denial rates increased to 86 % after additional changes in 2003 (Newman 2009, 431; A. O. Law 2010, 150–151). This trickled down to the federal courts. As Rebecca Hamlin observed, before 2002, only 7 % of BIA cases were judicially reviewed; after 2002, it was a quarter (Hamlin 2014, 78).

Access to the federal courts stands in stark contrast to access to the U.S. Supreme Court. Given it has virtually complete control over its docket, it is interesting that it has chosen to hardly hear any asylum related cases: One empirical study found that between 1991 to 2001, only 16 U.S. Supreme Court cases even contained the word "asylum," compared to 1,892 asylum appeals filed with the 9th circuit, the busiest immigration circuit, alone. Of the 16 Supreme Court cases, only three actually dealt with substantive questions of asylum law (D. S. Law 2005, 833). While this means that the Courts of Appeals are the central players when it comes to bringing constitutional arguments to bear onto the asylum process, without a unifying decision by the U.S. Supreme Court, any decision by a U.S. Court of Appeal remains piece meal because it is not applicable all across the United States. Moreover, even if a decision declares a policy to violate a statute or regulation, the ruling may not directly apply constitutional norms as mentioned earlier.

The third pathway to asylum in the United States was established with the 1996 immigration reforms. It is triggered only under certain conditions in the U.S. "border zone," which was created in 1953 and is - if interceptions of boats at sea, airport pre-clearance zones and other instances of

externalization or interdiction already discussed (FitzGerald 2019) are excluded - substantially larger than its physical land border. Since 2004, immigration officers who encounter a foreign national in the so called "100-mile zone" (of a U.S. land or coastal border) who cannot demonstrate that they have been in the country for more than two weeks, can remove them in an express (or "expedited") procedure (Reyna 2021). The same process applies to persons apprehended even deeper in the interior of the U.S., if they are identified as having previously been ordered removed. It also applies at an official border crossing if a potential asylum seeker presents themselves voluntarily but lacks proper documentation (which most do). Everyone, including families with children, are apprehended, detained and deported in an express ("expedited") procedure. In terms of access to asylum, only if they express a "legitimate" or "reasonable" fear of persecution during these removal procedure with either ICE (Immigration and Customs Enforcement) or CBP (Customs and Border Protection), do they proceed to an interview with a USCIS asylum officer who assesses their fear of persecution upon return to their country of origin according to the U.S.' obligation under the *Convention against Torture* (CAT) (Meissner et al. 2018). If they pass this screening, their case may proceed to a "defensive" asylum hearing at the EOIR. DHS statistics show a sharp rise in credible fear cases between 2010 and 2017 (Meissner et al. 2018, 12) as well as a high passing rate for credible fear interviews: between 2007 and 2018 (most recent data available): between 62 and 86% of cases were passed onto the EOIR during that period. Given that "Operation Streamline," first introduced in 2005, continues to remain in effect at all sectors of the Southern U.S. border except for California (additionally, Attorney General Sessions mandated a zero-tolerance policy when it comes to Operation Streamline in 2018), apprehended individuals are likely to also be criminally charged with illegal entry (or re-entry), sentenced in mass trials and ordered deported. The policy has been repeatedly criticized by human rights advocates and has faced numerous court challenges, at times leading to procedural changes. However, observers note that favourable court decisions follow a previous pattern of only using "phantom" constitutional norms, i.e. ultimately granting rights to immigrants under statutes (Nazarian 2011, 1409).

The U.S. Mexican border zone was the site of a flurry of policy changes under the Trump administration, many of which have been challenged in court but continue to remain in place under Biden (Capps et al. 2019). Prior to the Trump administration taking office, irregular border crossings by Mexicans into the U.S. had significantly decreased (Massey 2020). At the same time, the number of crossings by families and unaccompanied minors from the "central triangle," Guatemala, El Salvador and Honduras, generally considered one of the "most dangerous" regions of the world, increased dramatically (Capps et al. 2019). Officials and human rights observers estimate that many of the individuals caught by the Trump regulations would have had a good chance of being granted asylum in the U.S., had they been allowed to make a claim for protection. First, in 2017, the U.S. ended the Central American Minors Program created under the Obama administration, which offered minors from Guatemala, El Salvador and Honduras (2020), the so called "central triangle," countries, and with parents already in the U.S. a legal route into the country (Martin and Ferris 2017, 25–26). Second, in 2018, then U.S. Attorney General Sessions significantly narrowed the grounds for asylum by excluding domestic and gang violence as valid reasons to seek protection as members of a particular social group. To do so, then AG Sessions vacated (i.e. declared void) and overruled two BIA precedents, *Matter of A-B-* (2018), and *Matter of A-R-C-G* (2014). This policy was reversed by AG Garland in June 2021. Prior to that, some

courts had already rejected the Sessions' interpretation of denying asylum to survivors of gender-based violence, underlining the tension between asylum adjudication and political interference, which, as mentioned before, observers have pointed out, is much more prevalent in the U.S. system (Hamlin 2014). Third, in 2019, the "Remain in Mexico" program was introduced, which limited the number of asylum applications immigration officers at certain border crossings could accept ("metering"), which made asylum seekers wait in camps in Mexico. Fourth, the Trump administration also concluded asylum cooperation agreements with Guatemala, El Salvador and Honduras (2020) that were aimed at deporting asylum seekers there under the assumption that they constituted a "safe third country." While the Biden administration ended the cooperation agreements with the central triangle states shortly after taking office, other Trump administration policies targeted at asylum seekers are still being challenged in the courts.

C. Resettlement Programs: Beyond the Rule of Law

During the past decade, the United States and Canada combined accepted roughly 80 percent of all refugees who were seeking resettlement to a third country from abroad. Out of the roughly one million refugees resettled with the help of UNHCR between 2003 and 2018, approximately 643,000 went to the United States, while Canada accepted 119,000 (UNHCR 2019, 26). Among the 30 countries that currently resettle refugees directly from overseas, the United States has been the consistent stand out: Since 1980, more refugees have been resettled to the U.S. (a total of around three million) than to all other countries combined (Radford and Connor 2019). However, the U.S. government's willingness to accept refugees via overseas resettlement has decreased drastically since the mid-1990s and reached a new low in 2018 (approx. 23,000 refugees resettled – although it hit an unprecedented low in 2020 with barely 12,000 refugees resettled due to the halt of global resettlement efforts as a result of the COVID-19 pandemic), dipping even below the previous bottom in the aftermath of the September 11, 2001 terror attacks when just over 27,000 were resettled (Migration Policy Institute 2021). As a result, Canada suddenly found itself the world leader in resettlement, due to it admitting a total of approx. 28,000 refugees in 2018 (Immigration, Refugees and Citizenship Canada 2019, 21).

While resettlement remains an important aspect of international protection because it provides durable solutions for the world's most vulnerable refugees, it is only an option for a small fraction of the world's refugee population: UNHCR identified 7% of the global refugee population as in need of resettlement. However, only 1% have access to it each year (UNHCR 2019, 26). More importantly, although refugee advocates have long argued that resettlement should be considered a "soft law" protection tool and therefore, part of the international legal regime governing refugee protection (Betts 2010), the reality is that resettlement remains voluntary and largely take place outside of the purview of the rule of law.

In the United States, the President annually sets regional resettlement quotas and upper limits, which are then approved by Congress; in Canada targets are proposed by the Immigration Minister, after consultations with the Canadian provinces, UNHCR and the NGO community, and then approved by Parliament (Labman 2019, 67). Both Citizenship, Refugees and Immigration Canada

(IRCC), and the U.S. Refugee Admissions Program (USRAP) - which is coordinated by a consortium of U.S. ministries - work closely with the UNHCR, IOM and local NGOs in the selection process, but ultimately the decision to admit someone is made by American or Canadian immigration officers. In both countries, NGOs regularly co-sponsor relocation costs and help with integration.

In addition, Canadian NGOs and groups from civil society can also nominate specific refugees directly through additional, private refugee partnerships beyond those refugees recommended to the Canadian government by UNHCR (UNHCR 2018a). Canada has been the leader of such private sponsorships since the mid 1970s, when it resettled 60,000 refugees from Vietnam, Cambodia and Laos. More than half came to Canada with the help of private sponsors (Molloy and Simeon 2016; Bond and Kwadrans 2019). These private sponsorships were the driver behind Canada's rise to the position of global resettlement leader in 2018. Critics have noted that government-funded resettlement targets have remained steadily at around 7,500 (Government of Canada 2016, 14). Critics worry more generally about a "privatization" of resettlement (Hyndman et al. 2016). Canada's resettlement targets In 2021, the Biden administration announced that it, too, would launch a private sponsorship program for resettlement of refugees (Montoya-Galvez 2021).

The U.S. Refugee Act of 1980 added regional quotas and caps for the admission and selection of refugees still overseas to the existing U.S. immigration priorities outlined in the 1965 Immigration and Nationality Act (INA). It further mandates that the U.S. only accepts individuals as part of its refugee resettlement program who meet the definition of a refugee set out in it, which mirrors the *Geneva Convention* definition (Section 101(a)(42) of the INA. The principal exception to this requirement is the fact that the U.S. may also admit individuals who would otherwise meet the Convention definition but are still in their country of origin (Martin 2014, 679). Although UNHCR assesses any candidates using the Convention definition before recommending anyone to be resettled in the United States, this does not create an obligation on behalf of the responsible DHS officer to accept this individual's claim for protection and ultimately, recommend resettlement to the United States (Section 207 Para. 1157 c) of the INA). What is more, "there is no formal procedure for appealing the denial of refugee status, although an applicant may file a Request for Review (RFR) of his case to DHS on the basis of additional evidence or information not available at the time of the interview" (UNHCR 2018b, s. 64).

The Canadian process is quite similar, although the details, including the actual resettlement categories, are somewhat different. Notably, in 1986 Canada was awarded the UNHCR's Nansen Refugee Prize, in part because it was the first country to create private sponsorships for refugee from Indochina in the 1970s (Casasola 2016). As previously mentioned, Canada's overseas refugee resettlement program is administered by IRCC. IRCC's visa officers process applications for resettlement via a referral system (by UNHCR or by a private sponsor) only and admit individuals (or families) who either meet the 1951 Convention definition or a comparable set of criteria, which are determined by Canada. Both Canadian and American immigration officers conduct interviews with candidates in the region. With 88 to 93%, Canadian approval rates are fairly high for government-sponsored applicants, compared to 70% for privately sponsored cases (Thériault

2020, 230). However, in contrast to the American process, in the case of a negative decision by a Canadian visa officer, applicants (or more likely their Canadian advocates) can challenge this denial in court via the judicial review process. Research has found, however, that in practice, resettlement decisions are challenged only very infrequently; and cases are virtually limited to the private sponsorship stream, although leave granting rates are higher compared to those of inland claimants (Thériault 2020, 228, 235).

II. Conclusion

The increasing 'securitization' of North America's refugee policy and the deterritorialization of the Canadian/American/Mexican border contradict the traditional image of Canada and the United States as global leaders in the admission of refugees. In reviewing the domestic asylum determination system in Canada and the United States, it outlined the many hurdles that asylum seekers have to overcome before they can make a formal asylum claim in either system, which is dominated by administrative law and from a constitutional perspective, questions of procedural justice. The Canadian inland refugee determination system in particular, operates in relative isolation from the courts, which makes it challenging for unsuccessful asylum seekers and their advocates to mobilize either international human rights law or domestic constitutional norms in their favour. Although decisions made in the American asylum system are more frequently subject to court challenges and political interference, only seldomly will judges rely on constitutional norms in their rulings. The discussion of the 2002 *Canada-U.S. Safe Third Country Agreement* (STCA) along with the Canadian litigation challenging its constitutionality illustrates the power of national security along with national interest but also the dependency and interplay between the two nations. Overall, the chapter highlighted the tension between domestic constitutional norms, the rights of refugees in international law (Hathaway 2021), and the growing preference of both Canada and the United States to treat refugees as "migrant[s] who the government *may* have reason to select" (Galloway 2014, 38). This preference, it concluded, is at least in part driven by a history of admitting refugees via discretionary humanitarian admission schemes, shielded from judicial oversight.

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