SPOTLIGHT ON MIGRATION

‘Safe’ countries and ‘fraudulent’ refugees: Tools for narrowing access to Canada’s refugee system

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Refugee protection is an exceptional form of surrogate protection reserved for those who are outside of their country of origin and who have a 'well-founded' fear of experiencing persecution upon return (Refugee Convention, 1951). The vast majority of countries in the world – 145 – are signatories to the International Refugee Convention (1951) which recognizes the rights of refugees, the responsibilities of states to provide protection to refugees, and the necessity of international cooperation to strengthen access to protection for refugees globally. In the absence of a legally binding framework however, states are able to interpret through domestic legislation the quality and extent of their participation in the international refugee regime (Milner, 2016). In this Spotlight on Migration, we discuss how the discourses of 'safe' countries and 'fraudulent' refugees underpinning past and current refugee policies, including the Safe Third Country agreement, the Designated Country of Origin policy, and recent changes to the *Immigration and Refugee Protection Act* through Bill C-97, have been used to limit access to Canada's refugee system.

Background on policies

Canada's Safe Third Country Agreement with the United States (U.S.), signed in 2002 and implemented in 2004, is a mutually beneficial policy premised on the notion of "burden sharing" in the context of accepting refugees (Government of Canada, 2002). The agreement contends that Canada and the U.S. have similar systems of refugee protection and traditions of assistance to refugees, and therefore asylum seekers arriving at the Canadian or U.S. border directly "could have found effective protection" (Government of Canada, 2002) in that territory. Under this agreement, both countries' governments have the power to transfer such claimants to have their claims examined by the other country's refugee determination system. Claimants with family members who have legal status – including a pending refugee claim – in the country where they submit their claim are exempt from this agreement (Government of Canada, 2002).

In July 2020, recognizing that this agreement has often resulted in asylum seekers being transferred to the U.S. and subsequently imprisoned, a federal judge declared the Safe Third Country Agreement to be in violation of rights protected by the Canadian Charter of Rights and Freedoms (*CCR v. Canada*, 2020). The agreement will remain in place for a period of six months, during which time the Government of Canada may prepare its response to the ruling (*CCR v. Canada*, 2020).

The Designated Country of Origin list was introduced in 2012 by the Conservative government as part of the Bill C-31 *Protecting Canada's Immigration System Act*. Modelled off of the Safe Country of Origin policies previously implemented in Europe, the list included countries that the Canadian government considered 'safe' and unlikely to produce refugees (Atak, 2018). The primary stated objective for the development of the DCO list was to deter abuse of the refugee system. The implications for asylum seekers coming from DCOs included: an expedited Immigration and Refugee Board (IRB) hearing process, no access to the Refugee Appeal Division, no automatic stay of removal for failed claimants, and no eligibility for a work permit or associated benefits while awaiting a decision on their claim (Government of Canada, 2012). Designation as a safe country was dependent on a combination of qualitative observations about countries' levels of democratic process and human rights records and two quantitative thresholds, including when 75 percent or more of previous claims by nationals of a country had been rejected by the IRB or 60 percent or more of previous claims by nationals of a country had been withdrawn (Government of Canada, 2012). The initial DCO list included 25 countries and was eventually expanded to include 42 countries. On May 17, 2019, following a Federal Court ruling in which specific provisions of the DCO policy were struck down for not complying with the Canadian Charter of Rights and Freedoms, the Government of Canada announced that it would remove all countries from the DCO list (IRB, 2019a).

Most recently, in April 2019, amendments were made to the *Immigration and Refugee Protection Act* in Bill C-97. These changes introduced new grounds of ineligibility for refugee claimants if they made a previous claim in the United States, United Kingdom, Australia, or New Zealand, ultimately deeming them ineligible to claim refugee status in Canada (CCR, 2019). Those who are found to be ineligible to make a claim to the IRB will only be able to submit applications for a pre-removal risk assessment which has both a shorter time frame and a decreased success rate (CCR, 2019).

Constructing 'safe' countries

The international refugee regime relies on international cooperation, in terms of determining both who is eligible for refugee protection, and who will accept responsibility for providing that protection. Barring extreme cases of countries in a state of collapse, embedded in this cooperation is the presumption of countries as being capable of protecting their own citizens. On this point, while recognizing that "no state offers perfect protection, and there will always be instances of persons who were not able to obtain adequate or any protection," the IRB bases its consideration of adequate protection on whether an asylum seeker is more likely to receive protection from their country than not (IRB, 2019b). The onus is ultimately on asylum seekers to rebut this presumption through the provision of 'clear and convincing' evidence of a lack of state protection (IRB, 2019b).

The IRB (2019b) asserts that democracy is not considered a proxy for protection in refugee determination proceedings, rather it is looked to as an indicator of the likeliness of a claimant's access to state protection. Thus, in order to establish their fear of experiencing persecution without protection from their country of origin as 'well-founded,' claimants coming from countries with democratic political systems face a higher burden of demonstrating the ineffectiveness of the state and its institutions in providing protection in the context of their particular situation (IRB, 2019b). In practice, however, Canada's refugee system endorses a clear dichotomy between countries which provide protection and countries which produce refugees. The Safe Third Country agreement, the DCO list, and Bill C-97 embody this dichotomy.

The designation of an entire country as 'safe,' either legally or practically, ignores both the regional differences of the country, and the disparate experiences of individuals within that country based on intersections such as sexual orientation, ethnicity, and gender, among other factors (Diop, 2014). The notion of 'safety' is a construct unfree of political bias, and long-standing political alliances mean that Canada is not objective when making this determination. The continued existence of the Safe Third Country agreement with the U.S. is illustrative of the Canadian government's resistance to recognizing that the U.S. is not necessarily a 'safe' country for refugees and holding the U.S. to account for its commitments to international refugee laws. Similarly, with the DCO list, the government argued that Canada's asylum system was broken and being overwhelmed by an ever-increasing number of unfounded refugee claims. The DCO list was purported to address this backlog by dividing claimants into two pools which could be processed simultaneously – claimants from 'safe' countries, and 'bona fide' refugees (Diop, 2014). That the DCO policy did not fulfill its objective of deterring future asylum claims and expediting existing claims undermines the assumptions of 'safety' and 'fraudulence' upon which it hinged. Additionally, the DCO policy was not a self-reflexive system because, by relying on the success of previous refugee applicants, it took for granted both the 'fraudulence' previous applicants and the integrity of previous IRB decisions.

Finally, there are many reasons why an individual may have claimed refugee status in another country and failed to receive state protection, thus seeking refuge in a second country (CCR, 2019). These include delayed processing of claims in other countries; grounds for protection not being universally acknowledged; or, a continued feeling of

persecution or fear, among other reasons. However, Bill C-97, similar to the DCO list and the Safe Third Country agreement, assumes that the claim for refugee status in Canada must be 'fraudulent' because if a claim was not successful in a prior country, or the country of origin is designated as 'safe,' then there is no basis for fearing or experiencing persecution – thus rendering all claims false.

Constructing the 'fraudulent' refugee

Discourses at the state-level of the fraudulent claimant are directly tied to the notion of 'safe' countries. 'Fraudulent' refugees are refugees from 'safe' countries who do not need Canada's protection. The international refugee regime, and by extension Canada's refugee system, has a very narrow mandate for providing protection to a limited pool of people; and given this narrow mandate, it is unsurprising that many claims are unsuccessful. However, the government's insistence on conflating unsuccessful claims with 'false' claims has reinforced the discourse of the 'fraudulent' refugee who claims asylum in an attempt to 'skip the line' on regular immigration proceedings.

With their credibility already in question, asylum seekers must also contend with the construction of the 'good' refugee versus the 'bad' refugee. This is the idea that the 'good' refugee is one who resides in a refugee camp and is identified as vulnerable abroad and brought to Canada by the government, whereas the 'bad' refugee is one who unwelcomingly presents themselves at ports of entry, claiming asylum on their own volition (Diop, 2014). In turn, the tools used by the state, such as the DCO list, are positioned in a way that deems them as necessary in order to preserve state sovereignty and to protect the borders from incoming threats, who are portrayed as taking advantage of the Canadian immigration system. Particularly, it is suggested that the DCO policy specifically targeted Roma refugees: Hungary was the first country to be listed on the DCO list in 2012, later followed by the Czech Republic (Rehaag, Danch & Beaudoin, 2015). The government used the Roma as prototypical fraudulent refugees who are portrayed as the undesirable abject Other in order to justify legislative change (Diop, 2014). By placing Hungary and the Czech Republic on the DCO list, this spurs the question: Do Roma have a real and legitimate basis on which to structure their refugee claim since these countries are deemed 'safe?' Although persecution against the Roma has been long-established and documented, this policy tool effectively bolstered the rhetoric that associates the Roma with the 'fraudulent' discourse. The policy was also heavily scrutinized for impacting individuals fleeing persecution from Mexico, Israel, and some Central and Eastern European countries. In addition, policies such as the DCO list result in increased demands on refugee claimants to prove credibility, or rather, to prove that they are a 'good' refugee (Gojer & Ellis, 2014). In this way, it becomes the individual's responsibility to prove that their story is one that makes them worthy of state protection.

It has been argued that credibility is always an issue, whereby the majority of claims are actually determined on the basis of a subjective analysis. The refugee claimant must be able to adopt the characteristics associated with the 'good' refugee. In turn, the adjudicator within the receiving country must be satisfied that the refugee claimant meets the criteria of what is means to be a refugee (Macklin, 2009). This becomes particularly difficult when the humanitarian mandate that is associated with providing assistance to refugees that are identified as particularly vulnerable by governmental agencies, is replaced with policies that are based on the discourses that portray refugee claimant's fleeing particular 'safe' countries as 'fraudulent.'

Conclusion

This piece has sought to outline and unpack the discourses of 'safe' countries and 'fraudulent' refugees that underpin and that continue to be perpetuated by past and current

refugee policies. In doing so, it becomes evident that because refugee protection is deemed an exceptional form of surrogate protection, it is necessary for the refugee claimant to present evidence demonstrating that the state is ineffective in providing protection in the context of a particular situation, and that they meet the criteria of what it means to be a 'good' refugee according to an adjudicator at the IRB. These factors raise certain questions: What, then, is adequate protection? What is deemed a safe country and for whom? What characteristics are associated with being a 'good' refugee? Past and current refugee policies have shown that answers to these questions are based on varying interpretations of domestic legislation and discretionary participation in the international refugee regime. Although the DCO list has been removed, and the Safe Third Country Agreement has recently been deemed unconstitutional, the discourses of 'safe' countries and 'fraudulent' refugees are sustained through new amendments to Canada's refugee policy.

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