

**HYSTERIA AND DISCRIMINATION:
CANADA'S HARSH RESPONSE TO REFUGEES AND
MIGRANTS WHO ARRIVE BY SEA**

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FOREWORD

The recent arrival of two ships carrying Tamil refugee claimants has caused much debate and discussion in the media, and spurred the Canadian government to table proposed new legislation, Bill C-49, Preventing Human Smugglers from Abusing Canada's Immigration System Act on October 21, 2010. This opinion piece looks briefly at the history of boat arrivals of migrants and refugees in Canada over the last 100 years, with a focus on recent examples. The authors decry the disparate treatment and hysteria accompanying these arrivals and underscore the key international human rights standards that must guide any legislative or policy response to smuggling.

INTRODUCTION

What is it about the combination of boats and migrants that triggers such hysteria in Canadian policy and media circles and unleashes a sense of panic among the Canadian public? There are of course many issues in the immigration realm that spark considerable debate and discussion in Canada, and quite legitimately so: setting the right annual levels of immigrants, streamlining the refugee system, dealing with individuals who pose security threats, selecting the best independent immigrants, speeding up family reunification, and many more. Few issues, however, provoke the same intensity of reaction as when a boatload of migrants shows up off one of Canada's coasts.

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It is a bit of a puzzle. For hundreds of years people have arrived in Canada by boat. In fact, other than First Nations and Inuit peoples, whose roots in Canada go back millennia, for most of the millions of immigrants and refugees who have settled in Canada over the past several hundreds of years, coming by boat was the only option.

Over the past twenty-five years in particular, migrants, including refugees, who have come to Canada by open sea, have been viewed and treated with suspicion and even hostility. However, it is not only a recent phenomenon. There are a handful of earlier distressing examples of boatloads of desperate immigrants and refugees being cavalierly turned away from Canadian shores.

This opinion piece will review some of the boat arrivals that have caused such a stir within the Canadian body politic. We lay out the serious human rights concerns associated with the laws and policies that arise with this fixation on boats. In particular, we highlight that the government's most recent legislative salvo, Bill C-49, introduced in Parliament in October 2010, reflects a particularly punitive response and violates many of Canada's key international human rights obligations.

SAD REMINDERS FROM HISTORY

Images of migrants and refugees arriving by sea have dominated the headlines in Canada over the past 18 months, with the arrival of a total of close to 575 Sri Lankan Tamil men, women and children in British Columbia on the *Ocean Lady* in October 2009 and the *Sun Sea* in August 2010.

Amidst public debate that has occasionally been vitriolic, they were allowed to land and advance refugee claims. It is worth noting, however, that almost a century ago, another boat with migrants from South Asia received a hostile welcome, and were in fact turned away. On 23 May 1914 the *Komagata Maru* arrived in Vancouver with 376 Passengers, mostly Sikhs from India (which was at that time, of course, still under British rule).¹ They were not allowed to land in Canada and on 23 July 1914 the ship was forced to return to India. This was not just reflective of hysteria about boats of non-European origin, however. Rather this was but one of several incidents in the early 20th century involving blatantly racist Canadian immigration laws, policies and practices designed to keep out immigrants of Asian origin.²

Twenty-five years later, a particularly shameful example of hostility and racism in response to the arrival of a boatload of refugees played out on Canada's

¹ Sharon Pollock, *The Komagata Maru Incident* (Toronto: Playwrights Canada, 1985).

² Hugh Johnston, *The Voyage of the Komagata Maru: the Sikh Challenge to Canada's Colour Bar* (Vancouver: University of British Columbia Press, 1989).

east coast. In May 1939 the passenger ship, the *St. Louis*, carrying more than 900 Jewish refugees sailed from Hamburg, Germany in search of a safe haven for those on board. The ship was refused permission to land in both Cuba and the United States. The hostility in this case this may also in part have been reflective of prevailing anti-Semitism at that time. A final attempt was made in June to persuade Canadian officials to let the ship land in Halifax. The Canadian government refused permission. The *St. Louis* was forced to return to Europe. Those on board ended up being dispersed in a number of different countries, including France, Belgium and the Netherlands which were all subsequently invaded by Hitler's forces. Many of those who had been on board the *St. Louis* and hoped for safety in Canada were swept up in the eventual roundups of Jews in those countries and were killed in the Holocaust.³

There is also a very positive experience when it comes to Canada, boats and refugees. In the late 1970s and early 1980s Canada accepted over 100,000 refugees from Southeast Asia, primarily Vietnam, for resettlement to Canada. They had become known as the "boat people" because of their desperate escape from Vietnam to neighbouring countries in overcrowded, dangerous boats. Canada's remarkable generosity led to receipt of the UN High Commissioner for Refugee's Nansen Medal, in 1986, the only time that medal has been awarded to an entire nation.⁴

This stands notably apart from the restrictive and suspicious response experienced by other ocean-bound refugees and migrants headed for Canada. The key and obvious difference is that the Indochinese "boat people" only traveled to nearby countries by ship. Their subsequent voyages to Canada were by air and therefore under the control and approval of the Canadian government.

MORE RECENT ARRIVALS: WHY THE HYSTERIA?

Over the past twenty-five years there have been 8 arrivals of ships carrying more than 25 migrants to Canada. Each time, a wave of paranoia and negative public debate was unleashed. This has included:

- 152 Tamils who arrived in Newfoundland in 1986;
- 174 Sikhs who landed in southeastern Nova Scotia in 1987, prompting an emergency summer recall of Parliament;

³ Sarah Ogilvie & Scott Miller, *Refuge denied: the St. Louis passengers and the Holocaust* (Madison: University of Wisconsin Press, 2006).

⁴ Archive of Past Nansen Winners, "1986 The People of Canada" (12 November 2010), online: The UN Refugee Agency <http://www.unhcr.org/pages/49c3646c467-page_5.html>; "Nansen Medal Awarded to the 'People of Canada'" (12 November 2010), online: The Immigration and Refugee Board of Canada <<http://www.irb.gc.ca/eng/media/newsnou/2009/pages/nansen.aspx>>.

- 4 boatloads of just under 600 Chinese migrants who arrived in British Columbia during the summer of 1999; and
- 575 Tamils who arrived when the *Ocean Lady* and the *Sun Sea* docked in British Columbia in October 2009 and August 2010 respectively.

So there we have it: eight boats, carrying approximately 1500 people over a span of twenty-five years. Not exactly an invasion. It is not even a drop in the bucket compared to the total number of refugees arriving in Canada through other modes of transport. Taking a ballpark estimate⁵ of 25,000 refugee arrivals per year in Canada over those twenty-five years, the 1500 who have arrived on these eight ships reflect just over 1/5 of 1%, .2% of the total. It is as many as would otherwise arrive over the course of just three weeks in any one of those twenty-five years.

Time for some perspective, perhaps? Certainly time to tone down the rhetoric and ensure that the core principles of humanitarianism, human rights and refugee protection are not trammelled in the rush to hysteria.

THE CURRENT DEBATE

The arrival of the 575 Tamil refugees on the *Ocean Lady* and the *Sun Sea*, over the span of ten months, has sparked the latest wave of intense public debate about what to do when migrants arrive in Canada by boat.⁶ That was compounded by reports that Canadian officials may have worked closely with authorities in Thailand on two separate occasions in October 2010 to arrest and detain as many as 250 Tamil migrants who were allegedly making arrangements to travel to Canada by boat.⁷ The prospect of Canadian collaboration in overseas enforcement of this issue raises its own worrying human rights concerns, particularly since Thailand is not a signatory to the UN Refugee Convention. There is no indication that Canada took steps to ensure that any refugees or other migrants arrested and detained by Thai authorities would be treated in accordance with international human rights and refugee standards.

There has been a decidedly negative tone to the debate, including the terms used to describe the desperate women, men and children on board. Rarely have they

⁵ Based on rough averages of numbers of refugee claims lodged in Canada on an annual basis, taken from figures of the Immigration and Refugee Board of Canada.

⁶ The debate has, of course, also touched on wider issues related to smuggling and trafficking, but there has clearly been a focus on ships as the mode of transport, which does not arise in the same way, for instance, when individuals may be smuggled or trafficked into Canada by land or through airports.

⁷ Heather Scofield, "More than 100 Tamil migrants headed to Canada arrested: reports" *The Toronto Star* (29 October 2010), online: Canadian Press <<http://www.thestar.com/news/canada/article/883056--thailand-arrests-tamil-migrants-heading-to-canada-kenny>>.

been described as refugee claimants or potential refugees. Instead, much of the media coverage and certainly the bulk of the government's public commentary has talked of illegal migrants, queue jumpers, mass arrivals, and smuggling.⁸

And now, at the end of the day, legislation has been drafted and tabled for parliamentary debate, promoted as necessary to combat human smuggling. As we will discuss in the next section, the proposed legislation does not only punish those individuals who may be characterized as "human smugglers." It very harshly goes after those who turn to smugglers for assistance, which certainly includes refugees.

In presenting the proposed legislation the government has not made the case as to what the current gaps are in Canadian law that would require such an approach, which is severely punitive and rights-violating. Academics and practitioners have argued that Canadian laws with respect to smuggling are already more than adequate and stress that the weaknesses lie in the resources devoted to enforcement, and the fact that smuggling is inherently a difficult offence to investigate and prosecute.⁹ Refugee lawyer Lorne Waldman highlights that the penalties for smuggling are, in fact, already particularly onerous:

The government has also talked about increasing the penalty for people smuggling. It's worth noting that for anyone smuggling more than 10 people into the country, the penalty is already life. Yet people smugglers provide 97% of clientele at Lorne Waldman and Associates. This shows that going tough on people smugglers only makes sense if you provide an alternative process of resettlement that works. Currently, there is none.¹⁰

Also absent from the government's proposal is any demonstrable commitment to a number of core, binding international legal principles, including:

- the right to be free from discrimination and to be treated equally before the law;
- fair hearings into claims for refugee protection;

⁸ Norma Greenaway & Douglas Quan, "Tories take aim at 'refugee fraudsters' and smugglers" *The Vancouver Sun* (21 October 2010), Online: Postmedia News, <<http://www.vancouversun.com/news/Tories+take+refugee+fraudsters+smugglers/3706975/story.html>>; CBC News, *Tories fortify human smuggling laws* (21 October 2010), online: CBC <<http://www.cbc.ca/politics/story/2010/10/21/human-smuggling-refugee-kenney-toews.html>>.

⁹ James Hathaway, Audrey Macklin & Lorne Waldman, "Is None Still Too Many? Asylum Seekers on Boats, Then and Now, Here and There" (28 October 2010), online: University of Toronto Faculty of Law <http://www.law.utoronto.ca/visitors_content.asp?itempath=5/5/0/0/0&specNews=865&cType=NewsEvents>.

¹⁰ *Ibid.*

- protection against refoulement, ensuring that refugees are given access to protection and not sent back to face grave human rights abuses in their country of origin; and
- a range of fundamental rights that apply fully to refugees and migrants, as they do to all individuals, including liberty rights, family reunification, and access to healthcare, education and livelihoods.

BILL C-49

Out of the recent frenzy of concern about boatloads of migrants poised to swamp Canada's immigration system, Bill C-49, the Preventing Human Smugglers from Abusing Canada's Immigration System Act, was tabled in Parliament on October 21, 2010.¹¹ The Bill does not explicitly go after those arriving by boats, and talks only generically about "irregular arrivals" of "groups of persons"¹² – neither of which terms are defined in the Bill. That is quite obviously, however, the impetus. The legislation has not been sparked by concerns about those refugee claimants and other migrants who arrive by air or cross over at land borders. And while the proposed legislation's title targets human smugglers, the Bill itself targets those who turn to smugglers for assistance. In doing so, it falls far short of Canada's international human rights and refugee protection obligations, and will result in serious violations of the rights of refugees and migrants.

The Bill severely restricts a number of essential rights of refugees and migrants if they arrive as part of a group of persons that the government designates to be an "irregular arrival."¹³ In effect, their rights are restricted primarily on the basis of how they have traveled to Canada and how many others have traveled with them. The restrictions include harsh powers of detention without timely review, denials of access to appeal processes, and serious limitations on freedom of movement and family unity.

This discriminatory treatment, acting with respect to such a range of important rights, contravenes the well-established right to be free from discrimination, enshrined in several treaties binding on Canada, including the 1951 Refugee Convention and the International Covenant on Civil and Political Rights.¹⁴ The proposal not only violates rights, but also ignores the reality that many refugees, who have a well-founded fear

¹¹ As of writing, Bill C-49 had passed through First Reading in the House of Commons and had not yet been scheduled for Second Reading. The Bill can be accessed at: <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=4708783&Language=e&Mode=1>

¹² Bill C-49, clause 4, proposed new section 20.1 of the Immigration and Refugee Protection Act.

¹³ *Ibid.*

¹⁴ *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150 [*Refugee Convention*]; *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 [*JCCPR*].

of persecution, turn to smugglers for assistance in reaching a country of safety such as Canada, because of desperation and a lack of other options.

Particularly troubling is the proposal that all refugees arriving with a group that the government decides to designate as an irregular arrival would face mandatory detention for up to one year, with very little opportunity for review.¹⁵ This constitutes a serious violation of Canada's international and constitutional obligations not to subject individuals to arbitrary detention. As well, using detention to penalize refugees for irregular entry into a country clearly contravenes Canada's obligations under Article 31 (2) of the Refugee Convention.¹⁶

The detention of refugee claimants should always be a measure of last resort and must be for reasons clearly recognized in international law, such as demonstrated concerns about security or an inability to confirm an individual's identity. Organizations, such as the Canadian Council for Refugees, have expressed grave concern about this approach to detention:

The bill also provides for mandatory conditions imposed on release, and for persons to be indefinitely detained, beyond 12 months, without possibility of release, if the Minister is of the opinion that their identity has not been established. Both these additional measures deprive persons of liberty, without the opportunity for an independent tribunal to review whether they are necessary in the individual case, contrary to the Charter and international law.¹⁷

Punishing refugee claimants through automatic detention based solely on the mode of transport and the number of fellow travelers is unconscionable and, under both international law and the Charter, impermissible. Detention should never be used as a means of deterring other refugees from seeking safety.

If an individual does arrive in an irregular group that is designated by the Minister, and makes a refugee claim that is later accepted, under the Bill their right to apply for permanent or temporary residency in Canada would nonetheless be restricted for five years.¹⁸ They are also denied the right to apply for a refugee travel document during that time.¹⁹ This would make it virtually impossible for the individual to travel

¹⁵ Bill C-49, clause 9, proposed additions and amendments to sections 55 – 58.1 of the Immigration and Refugee Protection Act.

¹⁶ *Refugee Convention*, *supra* note 14, art 31(2).

¹⁷ Canadian Council for Refugees, Bill C-49: Key concerns, Bill C-49 imposes arbitrary detention (December 7, 2010), online: <<http://ccrweb.ca/en/c49-key-concerns>>.

¹⁸ Bill C-49, clause 4, proposed new section 20.2 of the Immigration and Refugee Protection Act.

¹⁹ Bill C-49, clause 8, proposed new section 31.1 of the Immigration and Refugee Protection Act.

anywhere outside of Canada during that time, including simply across the border into the United States which is often necessary for employment purposes. The Refugee Convention requires States to provide refugees lawfully staying in their territory with travel documents so that they may travel outside the country, unless compelling reasons of national security or public order require otherwise.²⁰ That is not possible without a permanent or temporary resident's permit.

The Bill will also lead to violations of the right to family life, which is protected in both the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child.²¹ Individuals who arrive as part of a designated "irregular arrival" will not be able to apply for family reunification for five years, even though their claim for refugee status in Canada is accepted by the Immigration and Refugee Board.²² Keeping families apart for such lengthy periods impedes the ability of newcomers to integrate and begin new lives in Canada. It is mean-spirited and violates their rights.

Individuals arriving in Canada in this way will also be denied equal access to justice. Unlike other refugee claimants, they will not be allowed to appeal a negative refugee decision to the Immigration and Refugee Board's Refugee Appeal Division.²³ An appeal is a fundamental safeguard in refugee decision-making, where a person's life and liberty is at stake. To withhold the opportunity to appeal solely on the basis of how an individual has arrived in Canada is punitive and discriminatory.

Countries should take action to discourage human smuggling that is dangerous, exploitative and involves criminal elements. Smugglers often abuse the rights of the individuals to whom they provide passage. Measures to tackle smuggling must, however, ensure that the rights of refugees and migrants relying on smugglers are protected. Bill C-49 does not get it right in drawing the line between tackling crime and upholding rights. It goes after smugglers, in large part, by punishing the individuals who turn to them – in desperation – for assistance.

CONCLUSION

The policy basis behind Bill C-49 leads to a very disturbing prospect: a system premised on acceptable and less acceptable categories of refugees. Those who come by land or air are acceptable; but those who come by boat somehow not? Lying

²⁰ *Refugee Convention*, *supra* note 14, art 28.

²¹ *ICCPR*, *supra* note 14, art 17; *Convention on the Rights of the Child*, 20 November, 1989 1577 UNTS 3, art 16.

²² Bill C-49, clause 7, proposed new subsection 25(1.01) of the *Immigration and Refugee Protection Act*.

²³ Bill C-49, clause 16, amending section 110 of the *Immigration and Refugee Protection Act*.

unexplored behind all of that is the question of race and the possibility of racism. Would a boatload of Bosnians or Albanians from Kosovo, crossing the Atlantic in the 1990s, have evoked the same hysteria? How much of the intensity of reaction stems from the nationalities of those aboard the ships?

Bill C-49 takes Canadian refugee policy in a dangerous direction. As the Canadian Council for Refugees has powerfully put it, under this bill “refugees will be victimized three times: first by their persecutors, secondly by the smugglers and finally by Canada.”²⁴ It is time for Canada to get over the hysteria about refugees arriving by sea, and restore basic human rights principles to the heart of Canadian refugee policy..

²⁴ Canadian Council for Refugees, Bill C-49: Key concerns (1 November 2010), online: <<http://ccrweb.ca/en/c49-key-concerns>>.