CANADA COULD BE A LEADER ON INTERNATIONAL MIGRATION GOVERNANCE

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International human rights law plays a pivotal role in shaping the rights and freedoms of migrants. The 75-year-old *Universal Declaration of Human Rights* stands as a seminal milestone in this endeavour. Over time, the legal protection of migrants has evolved significantly, progressing toward the recognition of fundamental rights inherent to every individual, irrespective of their migratory status.

All migrants in Canada benefit, as a matter of principle, from a comprehensive array of rights and freedoms granted under the UDHR and various

international human rights treaties that the country has ratified. These encompass prohibitions against racial and gender discrimination, protection for children, women, and persons with disabilities, among others. Additionally, Canada's commitment to protecting refugees stems from its international legal obligations under the 1951 Refugee Convention and the 1967 Protocol. These instruments are deeply grounded in the UDHR and provide a framework for offering refuge to those fleeing persecution.

Canada, often celebrated for its inclusive approach to immigration and refugee protection, finds its values intertwined with the principles reflected in international human rights law. These principles are not just abstract ideals but serve as relevant and persuasive sources for interpreting and upholding the *Canadian Charter of Rights and Freedoms* (*Baker* SCC 1999). However, despite progress, there is still ongoing work needed to fully extend the protections afforded by international human rights law to all migrants. Numerous obstacles and challenges persist in the advancement of the human rights of migrants.

FORCED MIGRANTS' ACCESS TO PROTECTION

A key issue experienced by forced migrants is access to international protection and its ensuing impact on the effective enjoyment of their rights. In the past decades, Canada has moved toward the criminalization of asylum seekers through legislative changes and international cooperation. A poignant illustration of this shift can be found in the treatment of some 600 Tamil asylum-seekers from Sri Lanka who arrived irregularly in Canada aboard two vessels in 2009 and 2010. The government, rather than offering support and protection, stigmatized these passengers by labeling them as "terrorists", "migrant smugglers" and "bogus refugees". Several asylum seekers on board these vessels faced criminal prosecution. Efforts were deployed to exclude them from refugee protection (Grant 2018). Furthermore, in a bid to deter future irregular arrivals, the Canadian government implemented a series of changes that further restricted access to protection and significantly impacted the rights and freedoms of asylum seekers. The changes encompassed mandatory detention and the elimination of procedural rights, including the right of appeal, for asylum seekers arriving in Canada irregularly, as part of a group, and with the assistance of a migrant smuggler.

Another case in point is the 2004 Canada-United States Safe Third Country Agreement (STCA). According to this Agreement, refugee protection claims must be made by asylum seekers in the first safe country — the U.S. or Canada — they pass through. Most third-country nationals in the U.S. are thus barred from making an asylum claim in Canada. The STCA had initially applied to those who present themselves at official ports of entry along the land border and who, with some exceptions, were to be returned to the U.S. In March 2023, Canada and the U.S. expanded the STCA implementation across their entire land border. As a result, asylum seekers who cross the border irregularly outside of official ports of entry are no longer permitted to file an asylum claim in Canada for two weeks after their entry.

This expansion happened despite the Agreement

being subject to fierce criticism for exposing asylum seekers to arbitrary detention, gender-based discrimination and denial of access to a fair refugee process in the U.S. (*Canadian Council for Refugees* 2020 FC 770, paras. 135 and 146). It is also known to compound the vulnerability of migrants by pushing them to irregular, and often dangerous, crossings of the U.S.-Canada border. As a burden sharing instrument, the Agreement aims to prevent and deter the secondary refugee movements between the U.S. and Canada. The government pursued its close cooperation not only with the U.S. but also with some other destination countries, with a focus on (biometric) information sharing to track and block asylum seekers.

Moreover, Canada has provided capacity-building assistance to countries from which asylum seekers originate or through which they transit, in the name of cracking down on migrant smuggling — systematically depicted as international organized crime — and preventing the arrival of asylum seekers in Canada. Alliances and agreements reached with several countries further obstruct the mobility of asylum seekers at the earliest point possible away from Canada's borders. These policy developments infringe upon the freedom of movement and the right to seek and enjoy asylum from persecution, rights that are enshrined in the UDHR. They have also cast a negative spotlight on certain groups of asylum seekers, particularly those who, for lack of legal pathways, enter Canada through irregular means, thereby impeding their access to international protection and fundamental human rights, including the principle of *non-refoulement* (the return of asylum seekers to endangerment in the country from which they've fled).

EXPLOITATION OF MIGRANT WORKERS

Another key challenge Canada — and most other countries — will be facing in the coming decades is the progressive eradication of exploitative labour markets where migrant workers are shamelessly being exploited.

Basing the profitability of several economic sectors with low profit margins (agriculture, care, construction, hospitality, to name only a few) on the exploitation of migrant labour results in the violation of Canadian labour law, Canadian constitutional guarantees and Canada's international human rights and labour rights obligations.

Politicians and policy makers know very well that large numbers of undocumented migrants are employed in those sectors with unacceptable labour conditions in underground labour markets. (Although estimations are fraught, there may be just under a million such individuals in Canada, and perhaps close to a hundred million in the world.) Such undocumented migration is entirely *policy induced*, resulting from the combination of repressive migration policies preventing such migrants to come legally despite a huge demand for such labour, and the absence of enforcement of labour law with respect to such migrants.

Politicians pretend that the "fight against migrant smuggling" is a fight against international criminality, when they perfectly understand that the essential pull factor for undocumented migrants is the fact that all such migrants actually work in countries like Canada: no one dies of hunger, even if living conditions are harsh. Millions of employers

across the Global North are ready to employ those migrants at minimal wages and in subpar conditions, which those migrants accept for lack of alternative. As long as there is a huge demand for exploitable labour and as long as migration policies will not facilitate the legal mobility of such workers, other actors — smugglers — will help migrants irregularly find an employer.

Migrants are thus pushed into the underground, allowing employers (and smugglers, recruiters, lodgers, moneylenders, etc.) to exploit them; if a crime is committed, it usually is against the migrants themselves. And migrants in precarity will rarely risk complaining, for fear of detection, detention and deportation. Labour law complaint mechanisms are therefore useless for such migrants, and labour inspections — in Canada as in most other countries — do not protect the rights of all workers equally, often collaborating with immigration enforcement to hunt down some undocumented migrants.

Single-employer temporary migrant worker programs also create a precarious environment, as such migrants will hesitate to complain against their employer and risk being fired — which entails the loss of residence and work permits — or being blacklisted for next year as a "troublemaker".

The only way to considerably reduce the number of undocumented migrants is through the repression of their hiring by employers, i.e. through heavily fining such employers and shutting down the businesses of repeat offenders. Reducing the demand for undocumented migrants will send a message through the channels of undocumented migration: If migrants cannot survive or send money home from that country, they will avoid it or move on. Migrants are smart; they do not go to places where they cannot build a future for themselves and their family.

However, repressing employers is politically difficult for State authorities, for two reasons. First, employers are most often electors and taxpayers, whereas undocumented migrants do not vote and do not pay income tax (they pay all indirect taxes). The political pressure to make employers happy is not counterbalanced by political pressure to protect migrant workers. Second, such repression would lead to a considerable increase in the price of goods and services in the affected economic sectors, as employers would have to considerably raise wages and provide much better labour conditions to attract workers in "regular" labour markets. The price of food, in particular, would be multiplied.

Forty years of "cheap labour" thus cannot be erased from one day to the next. States will need to support those economic sectors through a long and painful transition towards progressively much saner labour markets, in which all workers — citizens or foreigners — can equally work in fair labour conditions. This will require economic strategies, subsidies, and support for mechanization in favour of employers, as well as effective labour inspections and better protection for migrant workers' rights.

THE NEED TO FACILITATE MOBILITY

In order to achieve such a transition, governments will have to include progressively facilitating mobility in their strategic planning for the decades to come. This means being able to publicly debate such a transition. The dominant discourse

of migration as a threat — to jobs, to public health, to values, to way of life, to national security, to identity — must be deconstructed, and replaced by a discourse of migration as opportunity. All the advantages of mobility must be put forward, and the fantasies pelted by the extreme right — which stand uncontradicted by mainstream politicians for fear of electoral disaster — must be denounced.

Moreover, such a transition cannot be achieved by any State in isolation, for fear of attracting too many migrants if neighbouring countries do not also facilitate mobility. At least at a regional level, it must be a collective effort to concurrently change the mindset of the citizenry and the policies that govern mobility.

Unfortunately, the current populist political climate does not allow any government to plan such a transition. Anti-immigration sentiment, racist stereotypes, and utter fantasies regarding one's self-proclaimed "identity" are part of the anger-fueled "post-fact" rhetoric against a convenient scapegoat.

It will take great courage, and probably another generation, to tackle the issue upfront and start treating migration governance rationally. Current labour shortages and impending environmental catastrophes might hasten the emergence of a saner debate — or not.

In line with the 2018 Global Compact on Refugees, Canada should aim to improve refugee self-reliance and broaden their access to third country solutions. Facilitating mobility is an essential condition for the achievement of these durable solutions for refugees. As an official "champion" of the Global Compact on Migration — in which 152 States used the word "facilitation" 62 times! — and considering its experience in migration, Canada could and should play a significant leadership role in the transformation of the political discourse on migration and of the policy framework of its governance.