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Safe Country of Origin: Constructing the Irregularity of Asylum Seekers in Canada

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ABSTRACT

This article discusses the role of Canada's Designated Country of Origin (DCO) policy in the illegalization of asylum seekers. The policy allows the government to designate countries in which it is presumed that citizens do not face risks of persecution, torture, or similar abuse. Refugee claimants from DCOs are thus subject to accelerated processing timelines with reduced rights. Canada has implemented the policy as a way to deal with a backlog of asylum applications, increase efficiency, and exclude fraudulent refugee claims. Based on a primary field research conducted between October 2015 and May 2017 in three provinces, Quebec, Ontario, and British Columbia, this article argues that the DCO policy is likely to have the unintended effect of shifting asylum seekers into an irregular status.

INTRODUCTION

Irregular migration has been a major political concern for countries in the global North, which consider it a threat to sovereignty, public welfare, and national security, as well as to the integrity of their immigration and refugee systems. Irregular migrants are non-nationals who enter, reside in, or work in a country without that country's legal permission (Vollmer, 2011; Hudson et al., 2017). The phenomenon has been attributed to migrants' individual choices and opportunities; this notion of human agency, however, is constrained by overarching legal, social, economic, political, and environmental factors. As noted by Portes, the causes of irregular migration are related to "structural determinants in both sending and receiving countries" (1978: 477). In addition to the pull and push factors in these countries, "various determinants in-between such as networks and smugglers" also play a role (Triandafyllidou & Ambrosini, 2011: 272). States then provide the legal tools to define legal and illegal migration (Düvell, 2011). The term 'illegalization of migrants' draws attention to these factors that contribute to the migrants' "illegality" (Bauder, 2013).

Laws and policies play a major role in the illegalization of asylum seekers, i.e., persons who seek safety from persecution or serious harm in a country other than their own, and await a decision on the application for refugee status under relevant international and national instruments (Castles, 2004; Dauvergne, 2008; Koser, 2009; IOM, 2010). Canada, like other states signatory to the 1951 *Convention relating to the Status of Refugees* (Refugee Convention), has an obligation to provide asylum seekers access to its refugee status determination system without discrimination. Since the 1980s, however, asylum policies have increasingly become restrictive and the criteria for granting refugee status has been tightened (Rehaag and Grant, 2015; CARL, 2016; Olsen et al., 2016).

This article focuses on Canada's Designated Country of Origin (DCO) policy, which was modeled on the Safe Country of Origin (SCO) schemes implemented in Europe since the 1990s.

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Introduced in Canadian legislation on December 15, 2012, as part of a major overhaul of its refugee status determination system, the policy authorizes the Minister of Immigration, Refugees and Citizenship (henceforth referred to as 'the Minister') to designate countries in which it is presumed that individuals do not face risks of persecution, torture, or similar abuse (The *Balanced Refugee Reform Act*, 2012; IRPA s. 109). The Immigration and Refugee Board (IRB) processes refugee claimants from DCOs through accelerated procedures with reduced rights.[1]

Drawing on the results of a qualitative primary research, the purpose of this article is to foster a better understanding of the asylum seekers' illegalization through restrictive asylum measures in Canada. Its specific objective is to explore whether and how in Canada the DCO policy has been conducive to irregular migration. To this end the article discusses several conditions and factors that are at play during various stages of the refugee system, and their impact on irregular migration.

The article starts with presenting the research methodology. It then provides a brief overview of irregular migration in Canada. The aim is to contextualise the phenomenon and draw attention to the role of asylum laws and policies in its emergence. The article goes on to discuss the implementation of the DCO regime in Canada before offering a critical analysis of how the relationship between the DCO and irregular migration plays out.

METHODOLOGY

The primary field research was conducted between October 2015 and May 2017 and included 64 research participants from Quebec, Ontario, and British Columbia. It involved 54 semi-structured interviews (one-on-one or in group) with stakeholders from various professional perspectives and profiles. The participants were drawn from four main groups:

1. Civil servants from: Immigration and Refugee Board (IRB) [6]; a member of the Crown Attorney's Office; Immigration, Refugees and Citizenship Canada (IRCC) [5] and Public Safety Canada [1]; elected members of the City Council of Toronto [1] and Federal parliament [1]; and city staff in the City of Toronto [2].
2. Practitioners: Refugee, immigration, and criminal lawyers, as well as lawyers working in legal clinics [21]; Intergovernmental Organization (IGO) representatives [2]; and Non-Governmental Organization (NGO) workers and representatives [22]. This last set included NGO service provider organizations working with migrants and refugees, and health professionals that operate "on the ground" in Toronto, Ottawa, Montreal, Victoria and Vancouver.
3. Academics and researchers in Canada [3].
4. The irregular migrant community [2].

The interviews lasted, on average, one hour. They took place either in the researcher's office or in the offices of the interviewees. Each interview was audio-recorded, and the data collected was treated according to the relevant Research Ethics Board guidelines. All interviews were transcribed and coded in NVivo.

IRREGULAR MIGRATION IN CANADA

In Canadian law, there is not any reference to the concept of "irregular migrant". Instead, the *Immigration and Refugee Protection Act* (IRPA) defines the categories of individuals with an immigration status – such as permanent resident (s. 21(1)), protected person (s. 21(2)) and temporary

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resident (s. 22(1)) – who are entitled to reside, study, or work in Canada. Immigration Regulations provide for any matter relating to the rights and obligations of these individuals.

Those non-citizens without immigration status are considered to be irregular migrants. Bou-Zeid (2007) contends that over the past decades, Canada has been successful in limiting the number of irregular migrants on its territory without explicitly enacting laws that refer to this category of migrants. The government maintained a sense of control, notably through a strategic use of regularization programs. McDonald (2009: 67) explains how, from 1994 to 1998, the government regularized several thousand failed refugee claimants from moratorium countries, such as China, Iran, and Algeria, who were stuck in limbo. However, there have not been any such regularization programmes since 2004.

In addition, Canada, like several other global North countries, has adopted laws that criminalize, *inter alia*: illegal entry, residence, and work; migrant smuggling; employers who knowingly hire irregular migrants; and transportation companies that bring undocumented individuals in Canada (Crépeau and Nakache, 2006; Guild, 2010). The Designated Foreign National scheme enacted in December 2012 by the federal government is one of the most punitive deterrence measures. It imposes mandatory detention on migrants aged 16 and more who arrive in Canada, in a group and with the help of smugglers (IRPA s. 20.1). Such policies are also meant to reduce the arrivals and stay of unwanted migrants.

Unlike the United States (US) and Europe, irregular migration is relatively unexplored in Canada. Goldring et al. remark that the phenomenon emerges in public debates periodically, in connection to *crises*, and is considered an occasional aberration (Goldring et al., 2007: 8). Although there are no official statistics, it is estimated that between 200,000-500,000 irregular migrants live in Canada, most of who reside in Toronto, Montreal, and Vancouver (Goldring et al., 2007; Khandor, 2004). Activists and researchers have highlighted the profound implications of living without status, including social and legal isolation, poor working and living conditions, the degradation of mental and physical health, and vulnerability to abuse and exploitation (Hudson et al., 2017). This alarming situation was acknowledged by local authorities in 2013, when Toronto became the first "sanctuary city" in Canada, enabling irregular migrants to access municipal services without fear of being arrested, detained, and/or removed. Hamilton, Vancouver, and Montreal followed suit in 2014, 2016, and 2017, respectively. The phenomenon has recently attracted considerable political and media attention following the sudden increase in illegal border crossings after the US presidential elections; 2,145 individuals crossed the land border via the US to claim asylum in Canada in the first two months of 2017. This was in defiance of the 2004 *Canada-US Safe Third Country Agreement* – another legal instrument to manage asylum movements (Keung, 2017), which bars most third country nationals in the US from making an asylum claim at a Canadian land border. Arbel (2013) and a report by Amnesty International and Canadian Council for Refugees (2017) highlighted how this agreement enhances both irregular migration and migrant smuggling.

Despite these developments, there has been little evaluation of how asylum seekers can become irregular migrants in Canada. As previously mentioned, the laws and practices of states are major determinants of the migrants' irregular status. Dauvergne describes irregularity as "a consequence of laws and regulations, which label certain forms of mobility as legal and desirable, and others as illegal and unwanted" (2008: 54). Goldring et al. (2007) examined various policies that construct and consolidate the precarious immigration status in Canada. Similarly, Marsden (2012) and Ellis (2015) discussed how some of the recent changes in Canada's immigration and asylum system are conducive to irregular migration. In effect, the fewer avenues provided for international protection, the greater seems the incentive for engaging in irregular migration.

The Clandestino project, one of the most comprehensive studies conducted in Europe to date, provided a comparative inventory of data and estimates on irregular migration, identifying the main paths into irregularity in 11 selected EU countries. In descending order of occurrence, these main paths are:

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- legal entry and overstaying;
- legal entry and stay whilst working or engaging in self-employment in breach of immigration regulations;
- refused asylum seekers who do not return;
- refused asylum seekers who are not removed and/or who are de facto nonremovable;
- over-abundance of bureaucratic red tape that deters residence and work permit applications; and
- inefficient procedures for renewing permits and for appealing against negative decisions (Clandestino, 2009: 118).

These findings illuminate various asylum-related policies that contribute to the irregularization process. Indeed, harsher asylum policies are likely to have the unintended effect of shifting asylum seekers into an irregular status (Massey and Pren, 2012). Research points to the illegalization effect of policy gaps, such as lack of implementation and enforcement, as well as unrealistic policy goals (De Giorgi, 2010; Koser, 2005). Czaika and Hobolt explain the ways in which asylum policies can influence the likelihood of a person preferring to abstain from making a refugee claim; or not complying with a deportation order, and thus remaining in an irregular situation (Czaika and Hobolt, 2016: 348). One of the primary legal tools to manage the volume of asylum seekers is the Safe Country of Origin or DCO policy.

DESIGNATED COUNTRIES OF ORIGIN: CANADA'S SCO POLICY

In Canada, DCO is a relatively new concept. DCO claimants are asylum seekers from countries that the Minister has designated as "safe," as they are deemed to possess formal state institutions commensurate with democratic principles and the rule of law including: an independent judicial system; basic democratic rights and freedoms, and mechanisms for redress if those rights or freedoms are infringed (IRPA, s. 109). In addition, the Minister may designate countries based on quantitative criteria such as the past statistics of rejection, withdrawal, and abandonment rate of asylum claims. After the publication of a first list in December 2012, the previous government issued two more orders designating a total of 42 countries as DCOs. These include Mexico and Hungary, which, prior to 2012, were the two main countries of origin for asylum seekers in Canada. Rehaag and Grant (2015) remark that 75.6 per cent of the recognized refugees from DCOs from 2003 to 2012 came from Mexico and Hungary alone (2015: 29). They also detail how the assessment of the above-mentioned criteria is ultimately left to the Minister's discretion, which risks politicizing the refugee determination process (Rehaag and Grant, 2015: 28).

The policy establishes an exceptional legal framework whereby asylum seekers from DCOs face shorter timelines to prepare for an Immigration and Refugee Board (IRB) hearing than non-DCO claimants. This measure is intended to reduce refugee backlogs. The backlogs at the IRB had reached a high of 62,000 claims by 2009 and it took an average of 21 months for the IRB to finalize a claim. As a result, the system had come to be viewed as "inefficient," "costly," and "slow" (IRCC, 2016: iv and v). It was presumed that part of the strain was attributable to persons who "abused" the system. By restricting access to the refugee system, the government aimed to enhance efficiency of the refugee system while preserving its integrity and credibility. As Macklin (2013: 101) explains, the system was introduced in response to "a disproportionate representation of Hungarian Roma among asylum seekers in Canadian refugee statistics, and the government's targeting of Roma as "bogus" asylum seekers bent on abusing Canada's asylum and social welfare system". Macklin also highlights the political considerations behind the policy. She suggests that Canada adopted a SCO provision in order to "placate the EU irritation about visa requirements and facilitate the conclusion of the Canada-EU Comprehensive Economic Trade Agreement" (2013: 104).

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DCO claimants have reduced rights to challenge the rejection of their claim and the deportation order against them, as well as delayed access to work permits. Initially, DCO claimants were denied the right to appeal a negative decision before the IRB's Refugee Appeal Division (RAD). They also had a limited access to the right to healthcare. The lack of appeal before the RAD and restrictions to healthcare services were successfully challenged before courts and struck down (*Y.Z.*, 2015 FC 892; *Canadian Doctors,* 2014 FC 651).

In addition to backlogs, safety and security were another set of factors used to rationalize the adoption of the DCO scheme (IRCC, 2016: 17). The longstanding security discourse in Canada stretches back to 9/11 and before. It however gained new momentum after the irregular arrival off the Canadian west coast of nearly 600 Tamil asylum seekers from Sri Lanka aboard the *MVs Ocean Lady* and *Sun Sea* in 2009 and 2010 respectively. The government portrayed these asylum seekers as terrorists, migrant smugglers, and "queue jumpers", as opposed to refugees and immigrants who file paperwork and wait in line overseas (Government of Canada, 2010). Implicit within this narrative was a focus on managing the volume of unwanted migrants, in particular rejected asylum seekers and irregular migrants. These developments justified the adoption of harsher measures such as the DCO.

EXPLORING THE CORRELATION BETWEEN THE DCO AND THE ILLEGALIZATION OF ASYLUM SEEKERS IN CANADA

The correlation between the DCO policy and irregular migration is not easy to demonstrate, as several factors – political, economic, legal, social, environmental and individual – intersect in the construction of migrants' illegality. In Canada, it is even more complicated to prove such correlation. The Canada Border Services Agency (CBSA) does not collect data on foreigners exiting the country. Irregular migrants remain a hidden population and there is little research on the phenomenon. Moreover, the policy has been in force only since December 15, 2012. It is therefore challenging to assess its consequences accurately. Nevertheless, drawing on our primary research results and based on previous research (Clandestino, 2008; Hatton, 2009), the following indicators can be identified on the interplay between the DCO regime and irregular migration:

1) The DCO policy may have a deterrent effect and encourage individuals to remain, at least temporarily, in an irregular status rather than, or before, making a refugee claim.
2) The policy creates systemic conditions and various barriers that heighten the risk of false negative determinations by the IRB; i.e., where an asylum claim fails. In particular, DCO claimants face obstacles in accessing the refugee status determination and an effective remedy (Macklin, 2013: 103).
3) Some refused asylum claimants from DCOs may not want to use the existing remedies, such as the Pre-Removal Risk Assessment (PRRA) and Humanitarian and Compassionate application (H&C), due to the recent limitations and the deterrent effect of the new system.
4) Some refused asylum claimants may choose to go underground to avoid deportation.
5) Not all refused asylum claimants are effectively deported, and those who are not removed are likely to become irregular migrants.

The remaining sections of this article expand upon each of these indicators to explore the association between the DCO policy and irregular migration in Canada.

DCO policy: An incentive to remain in illegality

The DCO has had an immediate deterrent effect on asylum seekers. Pursuant to the entry into force of the 2012 refugee reform, claims from citizens of countries on the DCO list declined by 69 per

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cent: from 5,170 in 2012 to 1,625 in 2014. Indeed, of all the refugee reform measures, the DCO policy was seen by some participants in our research as having encouraged people not to file a refugee claim, believing that their chances of being accepted as a refugee are very low. The IRB suggests that this drop may be the result of quicker processing times for claims and increased restrictions in access to certain steps in the system (IRB, 2016). Indeed while for most claimants, hearings at the Refugee Protection Division (RPD) are supposed to be held no later than 60 days after the refugee claim is referred to the IRB, claimants from DCOs have shorter timelines to prepare for an IRB hearing: 30 days for inland claims and 45 days for claims made at a port-of-entry. As previously stated, although the IRB suspended the implementation of these timelines "due to operational limitations" in February 2018, the law has not been changed and the IRB is expected to revert to them when the backlog has been cleared. It should be noted that this situation creates a legal uncertainty and confusion for all stakeholders.

The timelines are generally considered to be challenging for the majority of refugee claimants from DCOs. A lawyer in Toronto noted that the expedited timelines were unrealistic. They "sometimes wondered whether the speeding up of the process had been deliberately designed to make the process, in the end, fail" (Participant 33, Toronto). Another refugee lawyer added that the changes in timelines represent "an effort to expedite the removal process" (Participant 10, Toronto). A study by the University of Ottawa's Refugee Assistance Project (UORAP) shows that the timelines for DCO hearings create challenges in gathering evidence from the home country and having them translated prior to disclosure (Bates et al., 2016). In most cases, they do not allow sufficient time for claimants to retain counsel and prepare their case, especially when expert witnesses such as psychologists and doctors need to be retained.

These obstacles create a disincentive for asylum seekers from DCOs to make their claim upon arrival in Canada, and result in individuals preferring to remain in an irregular situation until they compile evidence needed to support their claim. Some of the participants pointed out that inland claimants delay their application because they know that once they made the claim, they might not have enough time to prepare for the hearing. As explained by a refugee lawyer:

> Now if you come in, either illegally or as a visitor, you control the timeframes. So until you put in your set of documents, the clock doesn't start ticking, and you can kind of buy time to gather up personal corroborative evidence that way
>
> (Participant 1, Toronto).

Some participants also highlighted how service providers and legal counsels have had to adapt to claimants' preferences and develop resistance strategies to the new rules that are seen as unjust.

> I think it's about 80% of asylum seekers now, who are not presenting themselves at the borders; asking for asylum inland. At least it buys them time to do more preparing before the clock starts ticking... we don't hurry them up to run out and make their appointment, because we want to help them get as prepared as they can before they even present themselves
>
> (Participant 16, Toronto).

The deliberate choice of delaying to make a refugee claim however may, according to some participants, later result in a valid claim's refusal (Participant 16, Toronto; Participant 62, Vancouver).

The socio-economic deterrents against claimants from DCOs constitute another set of reasons why an asylum seeker would prefer remaining in an irregular situation. DCO claimants are ineligible to apply for a work permit until their claim is approved by the IRB, or until their claim has been in the system for more than 180 days and no decision has been made (IRPA, s. 24(4)). Some scholars described this type of measures as "attrition through enforcement", intended to marginalize and disempower migrants to the point of making their life unliveable, and ultimately with the goal of deterring them or spurring self-deportations (Vaughan, 2006). One such measure limited DCO

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claimants' access to healthcare, with some exceptions, under the Interim Federal Health Program. The Federal Court struck it down on July 4, 2014. Justice Mactavish highlighted that:

> . . .the executive branch of the Canadian government has intentionally set out to make the lives of these disadvantaged individuals even more difficult than they already are. It has done this in an effort to force those who have sought the protection of this country to leave Canada more quickly, and to deter others from coming here to seek protection
>
> (para. 10).

For many refugee claimants who fear to return to their countries, the above factors may serve as effective deterrents; irregularity could then become a strategy to be able to work illegally and to avoid detention and deportation.

Research in Europe provides evidence on the unanticipated consequences of such deterrents. Schuster (2011) studied how the measures to combat "abuses of the asylum system" in France and Greece turn refugees into irregular migrants. She found that asylum applications from Afghan nationals are low in Greece both because the authorities make the process very difficult, and because those who have tried to claim asylum and failed inform newcomers that they have no chance of recognition if they do apply (2011: 1401). Similarly, Samers (2004) explains that one of the effects of restrictive policies is that in "some European countries, migrants who may actually be entitled to asylum, are entering and staying clandestinely because they believe Europe is indeed a Fortress" (2004: 29). Bloch & Chimienti (2011) discuss how irregularity can be a process and/or migration strategy in the sense that individuals make choices and develop ways to cope with restrictive and punitive refugee policies, rather than a defined end-state.

The DCO regime and the likelihood of negative determinations

The DCO regime – and its short timelines, in particular – comport a risk that many valid claims are denied because of insufficient or improper preparation. Indeed, several interviewees explained how accelerated timelines discriminate against the most vulnerable claimants, such as those from failed or dysfunctional states, or those suffering from serious trauma who need time to build trust before they can tell their story. The representative of an NGO noted the disadvantage faced by LGBTQ refugee claimants where the proof can be particularly difficult to obtain, "because claimants often have to hide their identity, then people who know their orientation do not want to talk about it, because it would put the claimant at risk" (Participant 45, Montreal).

As the short timelines may hinder an individual's ability to retain appropriate counsel, this may lead to a rise in the number of unrepresented claimants or legal counsels who are unprepared and ill equipped to present claims. A study by Rehaag (2011), which investigated over 70,000 refugee decisions from 2005 to 2009, highlighted the vital role of counsel in successful outcomes. Moreover, the new system imposes exceptional pressures on legal aid programmes to provide effective legal services for refugee claimants. Legal aid in Canada varies from province to province. Immigration and refugee lawyers that we interviewed in British Columbia and Quebec invariably complained about the legal aid level, which is largely insufficient to represent complex cases in these provinces. This, in turn, is likely to result in experienced refugee counsels refusing DCO cases due to time restrictions (Bates et al., 2016). Some interviewees argued that reduced timelines exacerbate the risk of inferior legal representation and have incentivized volume-based practices, which could result in claims being rejected. A community legal clinic representative in Toronto said:

> Since 2012, I've definitely had an increase in clients from so called "DCOs". Hungarian, Czech, Slovak, clients of Roma origin, whose refugee claims were very poorly done. There were a number of lawyers who had really high volume of Roma caseloads over the last several years. And the

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> quality of the representation was really poor at the IRB. I think that people fell vulnerable to more kind of unscrupulous practices, in certain law offices, because the system made that really attractive
>
> (Participant 18).

Consequently, claimants, especially those without a legal counsel, are susceptible to missing deadlines, which can lead to an increase in declarations of abandonment or withdrawals. The rate of the abandoned and withdrawn cases by claimants from countries such as Hungary and Mexico have declined since they peaked in 2011; however, they still remain steadily high, especially when the decline in the total cases finalized is considered (Chart 1). It is reasonable to expect that at least some of these individuals go underground.

Another issue is the increased hardship to access justice faced by claimants from the DCOs who are in immigration detention. An NGO representative in Montreal noted:

> If you're from a designated country, there's a real risk that you're still in detention at the time of the hearing, or if you were released for the hearing, it's just a few days before. So we saw at least one case like that . . . Well, the person came out of detention, but it's just 5 days before the hearing. There is no way to do anything, so he has been denied, and he certainly feels he has not had a fair hearing
>
> (Participant 45).

Moreover, the DCO regime creates an institutional bias for decision-makers in terms of a country of origin's presumptive safety. It often places a huge burden on the applicant to rebut that presumption. Costello suggests that safe country-of-origin practices have implications for the decisional autonomy of asylum adjudicators. Tinkering with procedures may, she notes, undermine the ability to rebut any formal or informal presumption that the person does not warrant recognition as a refugee (Costello, 2016: 602). Macklin concurs that "the 'safe country' badge of approval signals to first-level decision makers the executive's prejudgment of the merits of individual cases, thereby weakening the appearance (if not reality) of adjudicative independence" (Macklin, 2013: 103).

The onus on the claimant may even be higher in complex cases involving individuals with dual citizenship, one being from a DCO. To illustrate, some of the service providers in Toronto referred to cases of claimants from Colombia, who fled to Spain because of persecution by the Revolutionary Armed Forces of Colombia (FARC) and obtained Spanish citizenship. But they noted that as the FARC also has quite a presence in Spain, these individuals were not safe and chose to claim refugee status in Canada. Given the various barriers highlighted above and the presumption of safety in countries such as Spain being particularly difficult to rebut, the DCO scheme appears highly punitive for such claimants.

CHART 1

Mexico:

Year	positive	negative	abandoned	withdrawn	total finalized
2011	1,027	4,194	280	618	6,119
2012	570	2,157	113	210	3,050
2013	182	686	64	93	1,025
2014	94	188	10	45	337
2015	47	95	7	25	174
2016	29	53	7	39	128
2017	111	221	59	49	440

Source: IRB, Refugee Protection Claims Statistics, available at: http://www.irb-cisr.gc.ca/Eng/RefClaDem/stats/Pages/index.aspx

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In the above-mentioned *Y.Z.* case (2015), Justice Boswell of the Federal Court of Canada drew attention to the discriminatory nature of the DCO regime and how it "perpetuates a stereotype that refugee claimants from DCO countries are somehow queue-jumpers or 'bogus' claimants who only come here to take advantage of Canada's refugee system and its generosity, and that their fears of persecution or discrimination are less worthy of attention" (para. 128). Against this background, the elements of the DCO scheme operate collectively to limit claimants' access to refugee protection in Canada and exacerbate the risk of some valid claims being refused. Yet research in Europe shows there is a strong correlation between the rejection rates and irregular migration. In their study investigating the interplay between asylum policy and the number of irregular migrants in 29 European states over the period from 2008 to 2011, Czaika and Hobolt suggest that a 10 per cent increase in asylum rejections raises the number of irregular migrants by an average of 2 per cent to 4 per cent. They argue that these results support the hypothesis that a significant number of rejected asylum seekers seem to opt for irregular stay (2016: 357). Interestingly, the authors remark that this effect counteracts the 'deterrence effect,' implying that the decline in asylum applications – realized by implementing relatively restrictive immigration regulations and procedures – "produces" a subsequent increase in the number of irregular migrants as a consequence of those restrictive measures (2016: 361). One can infer from the analysis above that while DCO may act as an effective deterrent and reduce the number of claims from the "safe countries of origin", the accompanying refusal rates, and increase in abandoned and withdrawn cases, are likely to boost irregular migration in Canada.

LIMITATIONS ON THE REMEDIES AVAILABLE TO FAILED REFUGEE CLAIMANTS FROM DCOS

Reduced legal options available to failed refugee claimants from DCOs, as well as legal remedies that are perceived as ineffective, may also have an effect on irregular migration. Claimants who receive a negative decision from the RAD of the IRB can file an application for leave and for judicial review of the RAD decision with the Federal Court. If judicial review is granted, the claim is returned to the RPD or the RAD (IRCC, 2016: 1). However, the rate of success for leave and a judicial review is alarmingly low (CARL, 2016; Rehaag, 2011) and could explain why failed claimants may be reluctant to use them.

In addition, a refused refugee claimant who is ordered to be deported from Canada has the right to a PRRA, during which new evidence can be presented of the risk of danger or persecution. PRRA assesses the risk of return in accordance with the principle of *non-refoulement*, which prohibits deportation of individuals to places where they may face persecution or the substantial risk of torture or similar abuse (Article 33(1) of the Refugee Convention; IRPA s. 115). Pursuant to the 2012 *Balanced Refugee Reform Act*, failed DCO claimants are allowed to access PRRA only 36 months after the negative IRB decision (IRPA s. 112(2)(b.1)). During these 36 months, they can be removed from Canada.

The PRRA process is assessed by IRCC, but is initiated by the CBSA that consider whether the individual may apply to IRCC for a PRRA. A service provider representative explained how these two conditions have served as a deterrent for failed claimants.

> some people actually have gone underground for three years, until the bar on accessing the PRRA is up, and then have tried to access that application. You have to go into CBSA and be given a PRRA. Well, if you've been underground for the past few years and you go to CBSA, good chances are you're going to be detained. You'll still be able to fill out a PRRA, but from within detention, and so if it's not successful then you'll be deported. So there's lot of people who've thought, "I'm going to get over the three-year PRRA bar by not having status." And we've had people come in and say like, "Okay, now I want to do a PRRA." And then we explain to them

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> what they actually have to do to access a PRRA – to go and present themselves to CBSA – and they say, "There's no way I'm going to do that"
>
> (Participant 17, Toronto).

Moreover, some participants confirmed that many rejected claimants refrain from making a stay of removal request to the CBSA for the same reasons. A refugee lawyer underlined the counterproductive effect of repressive policies implemented by the CBSA:

> What CBSA has started doing is calling them in, two or three weeks before the claimant goes to court to get a stay of their removal. CBSA calls them in before the court makes a decision and they detain them. So if you're going to go underground, you have to go underground before the court makes a decision on the stay order, because they always make the appointment before the court. And then, if you don't come for the appointment, they tell the court you didn't come, and then the court refuses the stay because you don't have clean hands. They're almost playing games with them
>
> (Participant 2, Toronto).

These quotes illustrate how irregular migrants may be unwilling to come forward to regularize their situation because they are scared of being detained and deported (Atak et al., 2017). Several non-governmental interviewees expressed discontent with CBSA's enforcement mandate, which they see as unsympathetic to the Canadian values system, including the principle of prioritizing the best interest of children and of other vulnerable groups such as individuals with mental health issues. Some described the CBSA as a hardened and militarized group, and their use of detention as a tool to intimidate or exert power over migrants. A lawyer in Montreal said:

> sometimes we hear stories, they arrive six agents, bulletproof, mask, and enter in the apartment of people with precarious status, vulnerable, who rarely complain. There are practices that are not controlled by anyone. . . .The cases of deportation are even more serious because people are expelled and they are no longer seen. There has been abuses of power, hasty evictions, use of exaggerated force, so it is a big problem
>
> (Participant 46).

The CBSA's hostile organizational culture seem to deter refused asylum seekers from exhausting the existing legal remedies or complying with deportation orders, thereby enhancing irregular migration in Canada.

The low enforcement levels of deportation orders

Law enforcement practices are another factor that contributes to processes of irregularization. Following the 2012 refugee reform, the government was not able to meet the target for the removal of failed refugee claimants. It is worth noting that the CBSA's expenditures for the in-Canada asylum system reforms, including removals, went up considerably from $9,372,000 in FY 2010 to over $258 million in FY 2015 (IRCC, 2016: 27). However, removals decreased after the changes: 13,869 in 2012; to 10,743 in 2013; and 7,852 in 2014. In 2013 and 2014, only 14 per cent (2,674) of those who claimed asylum after December 15, 2012 were deported. Just over half of the failed claimants that received an IRB decision in 2013 were removed within one year and the target of 80 per cent was not reached. According to the Government, 62 per cent of failed new system claimants (DCOs and non-DCOs) who received an IRB decision in 2013 were not removed within the 12 months target (IRCC, 2016: 20).

The CBSA, which enforces removal orders, faced a number of challenges to achieve the removals targets. Difficulties in obtaining travel documents, due to lack of co-operation by the home country, accounted for 76 per cent of all impediments. Other obstacles to the CBSA's

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removal process include: lack of documentation to prove nationality; inability to locate foreign nationals; foreign nationals who are medically unfit to travel; and failure of some countries to accept the repatriation of their nationals (IRCC, 2016: 15-16). Non-enforcement of deportation orders may also be related to scarcities of resources; complex relationships between local, regional and national governments; or the fact that a certain level of irregular migration is economically desirable (De Giorgi, 2010). The high cost of deportation is among the factors explaining the low enforcement levels. For instance, total removal costs in FY 2013-2014 were $43,120,600.

These obstacles are not unique to Canada and seem to be inherent to the forced removal process. Indeed research in Europe shows that, in practice, states can only enforce a limited number of deportation orders effectively. As Cvajner and Sciortino suggest, "the operational limits of states' action enable the stay of migrants who are easy to identify but difficult to deport — a fact that is a well-known secret among the European police forces" (2010: 397). In 2015, around 36 per cent of the irregular migrants who had been issued with an order to leave the territories of EU Member States were returned to their country of origin (Eurostat, 2016). In addition, certain constitutional and international legal norms, such as the *non-refoulement* principle, limit the states' capacity to remove non-citizens. These refused asylum seekers who are not deported join the ranks of irregular migrants.

CONCLUSION

The DCO policy is inherently a political tool, based on a particular conception of asylum seekers from certain countries as undeserving of international protection. Whether the policy has reached its goals to manage the volume of asylum claims, to protect the integrity of the refugee system, and to expedite removals is unclear. However, as discussed in this article, an unanticipated effect of the DCO regime has been the enhancement of conditions conducive to irregular migration in Canada. These conditions are at play during various stages of the refugee system, including:

1) prior to making a refugee claim: the DCO policy has a deterrence effect on potential refugee claimants, which could delay their application or avoid lodging it;
2) during the refugee status determination: the new timelines pose a heightened risk for many valid claims being denied, due to insufficient or improper preparation;
3) when the claim is rejected: the restrictions on the remedies available to failed refugee claimants from DCOs may create incentive to remain underground; and
4) deportation from Canada: low enforcement levels of deportation orders and concerns about the CBSA's harsh treatment of refused asylum seekers may make it more appealing for these individuals to test Canada's commitment to deport them.

In particular, the compressed timelines and reduced procedural safeguards make the policy discriminatory for claimants from the DCOs, depriving them of substantive equality vis-à-vis those from non-DCO countries and expressly imposing a disadvantage on the basis of national origin alone (Y.Z. 2015 FC 892). This is not only contrary to Canada's international obligations – notably those under Article 3 of the Refugee Convention, providing for access to asylum procedures without discrimination as to race, religion, or country of origin – but it is also counterproductive to their stated aims. The new timelines for refugee hearings have proven unworkable and unfair, as shown by the IRB's decision to suspend them since February 2018. However such decisions are also a source of legal uncertainty and may impact the decisions made by asylum seekers at various stages of the refugee status determination process.

The current Liberal government promised to improve the DCO policy, in particular by instituting an expert human rights panel that will have control over the mandate of designating countries (Office of the Prime Minister, 2015, p. 19). Even with this improvement, the policy would continue

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to be problematic in terms of the Refugee Convention and Charter rights. In *Y.Z*, Justice Boswell clearly stated how flawed the policy is: "the reason a DCO claimant is treated differently is because of the country from which such claimant originates. This distinction is made without regard to claimants' personal characteristics or whether that country is actually safe for them" (para 121). The best solution would therefore be to repeal it entirely, in order to provide equal access to the asylum system for everybody without discrimination. This would reduce the pathways into irregularity for asylum seekers, thereby ensuring the refugee system's fairness and integrity.

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NOTE

1. The IRB has changed its scheduling practice for refugee hearings on February 20, 2018. It now hears claims primarily in the order in which they were received, in order to deal with the growing backlog and the increasing number of new refugee claims (IRB, 2018). We will return to this issue later.

REFERENCES

Amnesty International and Canadian Council for Refugees
2017 19 May *Contesting the Designation of the US as a Safe Third Country*. *Retrieved from* http://ccrweb.ca/sites/ccrweb.ca/files/stca-submission-2017.pdf

Arbel, E.
2013 "Shifting borders and the boundaries of rights: examining the Safe Third Country Agreement between Canada and the United States", *International Journal of Refugee Law*, 25(1): 65–86.

Atak, I., Hudson, G., and Nakache, D.
2017 *Making Canada's refugee system faster and fairer: reviewing the stated goals and unintended consequences of the 2012 refugee reform*, CARFMS Working Paper No. 2017/3, Toronto.

Balanced Refugee Reform Act, S.C.
2010 c. 8.

Bates, E., J. Bond, and D. Wiseman
2016 "Troubling signs: mapping access to justice in Canada's refugee system reform", *Ottawa Law Review*, 47(1): 1–72.

Bauder, H.
2013 *Why we should use the term illegalized immigrant*, RCIS Research Briefs No. 2013/1, Toronto.

Bloch, A., and M. Chimienti
2011 Irregular migration in a globalizing world, *Ethnic and Racial Studies* 34(8): 1271–1285

Bou-Zeid, Z.
2007 *Unwelcome but tolerated: irregular migrants in Canada*, York University (Canada), UMI Dissertations Publishing.

Canada-U.S. Safe Third Country Agreement, signed on December 5, 2002.*Canadian Doctors for Refugee Care v. Canada (Attorney general)*
2014 FC 651.

Canadian Association of Refugee Lawyers (CARL)
2016 July *Reform Proposals for Canada's Inland Refugee Determination System and Other Aspects of the Immigration System*. Retrieved from http://www.carl-acaadr.ca/sites/default/files/CARL%20brief%20FINAL_July2016.pdf

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Castles, S.
2004 "Why migration policies fail", *Ethnic and Racial Studies*, 27(2): 205–227.
Clandestino Project
2009 *Overview*. Retrieved from http://irregular-migration.net/typo3_upload/groups/31/4.Background_Information/4.2.Policy_Briefs_EN/ComparativePolicyBrief_PathwaysIntoIrregularity_Clandestino_Nov09_2.pdf
Convention relating to the status of refugees, 189 U.N.T.S. 150, *entered into force* April 22, 1954.Costello, C.
2016 "Safe country? Says who?" *International Journal of Refugee Law*, 28(4): 601–622.
Crépeau, F., and D. Nakache
2006 "Controlling irregular migration in Canada: reconciling security concerns with human rights protection", *IRPP Study*, 12(1).
Cvajner, M., and G. Sciortino
2010 "Theorizing irregular migration: the control of spatial mobility in differentiated societies", *European Journal of Social Theory*, 13(3): 389–404.
Czaika, M., and M. Hobolth
2016 "Do restrictive asylum and visa policies increase irregular migration into Europe?", *European Union Politics*, 17(3): 345–365.
Dauvergne, C.
2008 *Making people illegal: what globalization means for migration and law*, Cambridge University Press, New York.
De Giorgi, A.
2010 "Immigration control, post-Fordism, and less eligibility: a materialistic critique of the criminalization of immigration across Europe", *Punishment & Society*, 12(2): 147–167.
Düvell, F.
2011 "Paths into irregularity: the legal and political construction of irregular migration", *European Journal of Migration & Law*, 13(3): 275–295.
Ellis, B.D.
2015 "The production of irregular migration in Canada", *Canadian Ethnic Studies*, 47(2): 93–112.
Eurostat
2016 *Statistics on enforcement of immigration legislation*. Retrieved from http://ec.europa.eu/eurostat/statistics-explained/index.php/Statistics_on_enforcement_of_immigration_legislation
Goldring, L., C. Berinstein, and J. Bernhard
2007 *Institutionalizing precarious immigration status in Canada*, The Center for Comparative Immigration Studies, University of California, San Diego.
Government of Canada
2010 March 30 *Speaking notes – Remarks by The Honourable Jason Kenney, P.C., M.P. Minister of Citizenship, Immigration and Multiculturalism*. Retrieved from http://www.cic.gc.ca/english/department/media/speeches/2010/2010-03-30.asp
Guild, E.
2010 "Criminalization of immigration in Europe: human rights implications" *Issue Paper, Commissioner of Human Rights*, Council of Europe, Strasbourg.
Hatton, T.
2009 "The rise and fall of asylum: what happened and why?", *The Economic Journal*, 119(535): 183–213.
Hudson, G., I. Atak, M. Manocchi, and C.A. Hannan
2017 February (No) Access T.O.: A Pilot Study on Sanctuary City Policy in Toronto Ryerson Centre for Immigration and Settlement Working Paper No. 2017/1, Toronto.
Immigration and Refugee Board of Canada
2016 March *Executive evaluation report of the refugee determination system of the Immigration and Refugee Board of Canada: Policy, planning and corporate affairs branch*, Ottawa. Retrieved from http://www.irbcisr.gc.ca/Eng/transp/ReviewEval/Pages/ExecEvalRep2016.aspx
2018 February 20 *The Immigration and Refugee Board of Canada changes how refugee hearings are scheduled*, Ottawa. Retrieved from http://www.irb-cisr.gc.ca/Eng/NewsNouv/NewNou/Pages/hearing-schedule.aspx

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Immigration, Refugees, and Citizenship Canada (IRCC)
2016 April *Evaluation of the in-Canada asylum system reforms*, Ottawa. Retrieved from http://www.IRCC.gc.ca/english/pdf/pub/E4-2014-icas.pdf
Immigration and Refugee Protection Act (IRPA), S.C. 2001, c. 27.International Organization for Migration (IOM).
2010 *Key migration terms*. Retrieved from https://www.iom.int/key-migration-terms
Keung, N.
2017 March 22 "Refugee board's plea for assistance with growing backlog ignored" *Toronto Star*.
Khandor, E. et al.
2004 "The regularization of non-status immigrants in Canada 1960-2004: past policies, current perspectives, active campaigns *Status Campaign*, Toronto.
Koser, K.
2005 "Irregular migration, state security and human security" *Global Commission on International Migration*, Geneva.
2009 "Dimensions and dynamics of irregular migration", *Population, Space and Place*, 16(3): 181–193.
Macklin, A.
2013 "A safe country to emulate? Canada and the European refugee", in H. Lambert, J. McAdam, and M. Fullerton (Eds.), *The Global Reach of European Refugee Law*, Cambridge University Press, Cambridge: 99–131.
Marsden, S.
2012 "The new precariousness: temporary migrants and the law in Canada", *Canadian Journal of Law and Society*, 27(2): 209–229.
Massey, D.S., and K.A. Pren
2012 "Unintended consequences of US immigration policy: explaining the post-1965 surge from Latin America", *Population and Development Review*, 38(1): 1–29.
McDonald, J.
2009 "Migrant illegality, nation-building, and the politics of regularization in Canada", *Refuge*, 26(2): 65–77.
Office of the Prime Minister
2015 15 November *Mandate Letters from the Prime Minister to ministers on expectations and deliverables*, Ottawa. http://www.davidmckie.com/Ministers%20Mandate%20letters%20Consolidated%20with%20Index%20Nov%2016%202015.pdf (accessed 8 March 2018).
Olsen, C., R. El-Bialy, M. Mckelvie, P. Rauman, and F. Brunger
2016 "'Other' troubles: deconstructing perceptions and changing responses to refugees in Canada", *Journal of Immigrant and Minority Health*, 18(1): 58–66.
Portes, A.
1978 "Toward a structural analysis of illegal (undocumented) immigration", *International Migration Review*, 12(4): 469–484.
Rehaag, S.
2011 "The role of counsel in Canada's refugee determinations system: an empirical assessment", *Osgoode Hall Law Journal*, 49(1): 71–116.
Rehaag, S. and A.G. Grant
2015 "Unappealing: an assessment of the limits on appeal rights in Canada's new refugee determination system" Osgoode Legal Studies Research Paper Series, Toronto.
Samers, M.
2004 "Emerging geopolitics of illegal immigration in the European Union", *European Journal of Migration and Law*, 6(1): 27–45.
Schuster, L.
2011 "Turning asylum seekers into 'illegal migrants': Afghan asylum seekers in Europe", *Ethnic and Racial Studies*, 34(8): 1392–1407.
Triandafyllidou, A., and M. Ambrosini
2011 "Irregular immigration control in Italy and Greece: strong fencing and weak gate-keeping serving the labour market", *European Journal of Migration and Law*, 13: 251–273.

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Vaughan, J.
2006 April "Attrition through enforcement: a cost-effective strategy to shrink the illegal population", Center for Immigration Studies Backgrounder.
Vollmer, B.
2011 "Irregular migration in the UK: definitions, pathways and scale" *Migration Observatory Briefing*, COMPAS, University of Oxford.
Y.Z. and the Canadian Association of Refugee Lawyers v. The Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness, 2015 FC 892.

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