Refugee Policy after September 11: Not Much New

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Abstract

Conventional wisdom holds that the terrorist attacks of September 11 have "changed everything." In the case of refugee policy, it would appear the salience of security and enforcement aspects has increased at the expense of human rights and humanitarian concerns. In the light of actual practices in the immigration and refugee security field in recent years, there is actually more continuity than discontinuity resulting from the current crisis. Existing standards and procedures are confirmed, rather than altered, by new legislation and practices. Refugee policies have increasingly been understood within a national security discourse, well before September 11.

Résumé

La sagesse traditionnelle prétend que les attentats terroristes du 11 septembre ont « tout changé ». Pour ce qui est de la politique ayant trait aux réfugiés, il semblerait que les considérations de sécurité et d'application de la loi ont pris le pas sur les droits de la personne et les préoccupations humanitaires. En fait, si l'on considère la pratique sur le terrain en ce qu'il s'agit des mesures de sécurité liées à l'immigration et aux réfugiés, on retrouve bien plus de continuité que de discontinuité à la suite de la crise actuelle. La nouvelle législation, ainsi que les nouvelles procédures, confirment les normes existantes plutôt que de les changer. Les politiques concernant les réfugiés sont de plus en plus comprises à l'intérieur d'un discours de sécurité nationale et cela était le cas bien avant le 11 septembre.

In the aftermath of September 11, it was conventional journalistic wisdom that the world had changed forever. Certain events do have profound repercussions. Pearl Harbor brought the U.S. into a global military and diplomatic presence from which it has never really retreated. September 11 has obviously precipitated a "war on terrorism," the attack on and overthrow of the Taliban regime, and a new global counterterrorist campaign that steps up U.S. intervention in a host of countries to unprecedented levels. September 11 has dramatically reconfigured government agendas in the U.S. and among its allies, including Canada. New laws that redraw the lines between individual and group rights on the one hand and security on the other have been rapidly passed in a number of Western countries.

There is no point in denying the depth and the scope of the changes that September 11 has wrought. But there is a danger of exaggerating the transformation. It further bloats the already overblown reputations of Osama bin Laden and al Qaeda to speak as if this handful of suicide bombers caused by themselves the wholesale transformation of Western societies and governments. To revert for a moment to Pearl Harbor, the forces that compelled America into a new global role were not only external, but arose from within America itself. Pearl Harbor discredited the isolationists overnight and empowered the interventionists, but this was made possible by the very real strength and reach of the interventionist and expansionary forces themselves. Pearl Harbor precipitated a resolution of a deep conflict within the U.S. state and society, rapidly accelerating and compressing a process that was already underway, and had been for some time.

As a formative event, September 11 displays similar contours. There were forces and processes at work within the U.S. and the West, some previously impeded, that have been unblocked and accelerated by September 11. Septem-

ber 11 precipitated the resolution of a number of conflicts already in existence. But the long-term changes effected by September 11 were those that corresponded to interests and forces that had shown considerable strength before September 11. In that sense we might say that September 11 was more a precipitating than a formative event.

Let me be more specific. The post-Cold War world had been witnessing a gathering set of contradictions surrounding the process of globalization. There are a number of such contradictions, but I wish to focus on one particularly salient set: the contradiction between the licit and illicit, the legal and the illegal, the above ground and the underground, the bright and dark sides of globalization. Increasingly, the world of transnational capitalism was being shadowed by its dark doppelgänger. Transnational corporations are shadowed by international criminal mafias; national armies by terrorist cells; global commerce by the illegal arms, drugs, and sex trade; global finance by money laundering networks; legal migration of people by organized illegal human traffic. A globalized world is being undermined by borderless threats. And the forces of the dark side are not only taking full advantage of the latest technologies that make the licit global economy possible, but they mimic the organizational forms and strategies that have proved so potent in internationalizing enterprise. This is the old Hobbesian problem of competitive individual rational maximizing behaviour leading ineluctably to general insecurity, the war of all against all, now extended to the global stage. The Hobbesian answer was the transfer of individual power to Leviathan, the common power. In the era of globalization and borderless threats, the problem has to be redefined: How to police not national territory but what Castells has aptly dubbed the "space of flows"? How to reconstitute Leviathan, preferably as a multilateral enterprise, or perhaps, more ominously, as directed by the U.S., the world's only superpower.

There were many powerful forces already working toward a global solution to the policing problem. Generally, this could be seen as a hybrid between a multilateral and an American Leviathan, with awesome surveillance capacities. But these forces also faced numerous contradictions. Take money laundering – general agreement that something should be done and that a U.S.-led global surveillance regime was the answer began to fall apart when individual corporate actors realized that Uncle Sam was going to be peering into their financial transactions and those of their clients. Progress faltered, stuttered, became bogged down. Then September 11 unblocked the process when President Bush noted that the financing of terrorist cells could be tracked and stopped by pursuing the money laundering trail, and that it was the firm resolve of his government to do exactly that. Since the terrorists had destroyed the very citadel and symbol of global finance, the World Trade Center, transnational capital quickly lost its scruples about maintaining the sanctity of its clients' financial information. September 11 simply accelerated a process already well in place but not fully up to speed.

How does this translate into the treatment of refugees in Canada? September 11, it is said, has caused a reversal of Canada's priorities. A human rights and humanitarian discourse surrounding refugee movements has quickly been superseded by a national security discourse, with dire consequences for genuine refugees. Harmonization of immigration security policies and practices with the U.S., as part of a perimeter security agenda to avert economically costly border controls, would, some have argued, undermine Canadian sovereignty, and make us less liberal, less tolerant, more like the security-conscious Americans.

I would argue on the contrary that we are not seeing a reversal but an acceleration of trends already evident well before September 11. Refugee policies post-September 11 are pretty much like refugee policies pre-September 11, but more so.

Let me quote from Audrey Macklin's fine assessment of C-36, the Anti-Terrorism Act: She argues that C-11, The Immigration and Refugee Protection Act , which preceded September 11, already "casts a wide net over non-citizens rendered inadmissible on security grounds, expands the detention power over designated security risks, and reduces access to independent review of Ministerial security decisions." She goes on to note that "the immigration law has long done to non-citizens what The Anti-Terrorism Act proposes to do to citizens – without public outcry and with judicial blessing."[1]

Take some of the contentious aspects of C-36. As I testified myself before the Justice Committee of the House of Commons on C-36, the evidence provisions of the Act, which drew criticism for severely restricting the rights of the individual and expanding unreasonably the rights of the state, are actually nothing new, and have been operating in immigration security cases for some time, plunging the defendants into Kafkaesque situations in which the Crown's precise case and its supporting evidence can be speculated about but never known for certain. I have myself seen this happen time and again when appearing as an expert witness in a series of high-profile immigration security cases. C-36 was simply trying to *Stinchcombe*-proof the practice of non-disclosure of evidence that might damage national security, following that Supreme Court decision.[2] It was not clear that they even needed to do this, since *Stinchcombe* dealt with criminal intelligence rather than security intelligence information, but the attitude was obviously: better safe than sorry.

On the matter of non-disclosure of security evidence, Canada actually has a record of greater restrictiveness than the U.S. Indeed, one of the contributing factors in the U.S. to the unfortunate decision to institute offshore military tribunals to try al Qaeda suspects was the apparent inability of the court system to guarantee that sensitive intelligence information might not be disclosed. In Canada, military tribunals would be unnecessary, not because Canada is more liberal than the U.S., but because it is more restrictive in the protection of national security information in court.

Or take the matter of the indefinite detention of refugee claimants and other non-citizens about whom security doubts need to be resolved. The U.S. has been moving toward a wider net of detentions on suspicion alone. If U.S. pressures force Canada into following suit, it has been argued that Canada would have to reverse the Singh decision,[3] and that this would radically alter Canadian practices and the liberal philosophy that lies behind them. But detention of refugees under threat of deportation on security grounds is a practice widely used already; see *Suresh*,[4] and earlier *Baroud*[5] (both cases in which I have been involved), in which the defendants were detained for lengthy periods awaiting court decisions. There are many other examples. To be sure, Canada, to its credit, continues to insist that detention must be for cause, and has resisted American and British trends toward detention on suspicion alone. But the non-disclosure of much of the evidence on which security certificates are based make this a somewhat hollow example of liberalism.

Refugee policies in Canada have long been formulated within a discourse that gives a privileged place, an overriding priority, to national security. Humanitarian considerations have never been absent, but neither have they ever been dominant, in the past or the present. Post-war refugee resettlement policies were firmly set, both internationally and nationally, within the political context of the Cold War. The very definition of a legitimate refugee claimant was coloured by Cold War ideology, and Canadian policy, relatively admirable from a humanitarian perspective in comparative context, was always subject to an ideological double standard as between refugees from Communist regimes and those fleeing right-wing, anti-Communist regimes. In the post-Cold War world, this four-decade old frame of reference has more or less disintegrated, but in its place there are new definitions of risk, and some old responses. The Cold War pooling of intelligence on immigration has been updated and made more sophisticated in the current era, but the targets are more varied, depending on which regions of the world are generating violent refugee-producing conflicts. Domestic and international security considerations continue to play a leading role in the formulation of rules for granting asylum. This continues to be contested terrain, with conservative critics charging that security rules are too lax, while refugee advocates and liberal critics assert that security considerations are impeding the fulfillment of humanitarian obligations.[6]

In this context, the effect of September 11 has been to strengthen the conservative critics, while weakening the liberal case. It must be said that this is not entirely without justification. September 11 was above all an attack on civil society, indeed was designed by its perpetrators as a message to spread terror and insecurity throughout civil society. With the carnage at the World Trade Center, the terrorists have clearly demonstrated that they operate under no constraints about the mass murder of civilians. The technical potential exits for the use of chemical, biological, or nuclear weapons of mass destruction. Thus there has been a very strong populist reaction to the evidence of the abuse of the refugee system by terrorists intent upon turning the West's liberal institutions against it in particularly horrendous ways. That these have been very few in number set against the far larger numbers of genuine and deserving refugees is an argument with relatively little purchase on the popular imagination, even though it is an argument that must be reiterated in the interest of fairness.

It is not efficacious under present circumstances to disregard or decry as unfounded the contemporary imperative to tighten up requirements for refugee acceptance. To do so is not only to fly in the face of public opinion, but to fly in the face of a rational public policy response to a grave security threat. Some asylum seekers have abused the good faith and generosity that Canada has shown, in ways that go far beyond the manipulation of the system by economic migrants or other bogus claimants who have been condemned so often in the past by conservative critics. Given the potentially catastrophic consequences, the risk of even a few terrorists slipping into North America via the refugee route must be assessed as high by those whose responsibilities are primarily the protection of homeland security.

This does not mean that humanitarian standards should be, or need be, thrown out the window. It does mean that the terms of the debate have shifted significantly. Liberal arguments that fail to take reasonable account of security requirements will not get far, but liberal arguments that seek to balance security requirements with humanitarian objectives will still be heard. Yet this situation is really not qualitatively different than it has been at any time in the post-war era. Perhaps anxieties are more pronounced than in the immediate past, but there was an earlier panic, during the initial stages of the Cold War in the late 1940s and early 1950s, and this resulted in permanent institutional and legal residues that continue to shape policy down to today.

In short, the shift in the terms of debate today is nothing new. A cyclical process responding to perceived external threats to domestic security is still at work, and can be expected to yield some security ground to liberal and humanitarian values once again when the immediate impact of the crisis recedes.

Some liberal critics see the effect of September 11 as force-feeding Canada an American-style security consciousness that is alien to a country with more tolerant, progressive traditions. While Canada, peripheral to the imperial centre that is, and long has been, the primary target of hostile forces, has slightly more space to develop modest liberal, humanitarian practices, the difference is one of degree, and the margin has always been small. Moreover, pressures to intensify American-style security standards come not only from the United States, but, very importantly, from forces inside Canada, some bureaucratic, but many emanating from sections of civil society that find insistent expression in Parliament from the right-wing parties, from provincial premiers, and from the conservative media. These forces, more favourable to national security than to humanitarian considerations, are every bit as enduring an aspect of the Canadian political culture as those more favourable to the "human security" agenda of recent years.

Canadian refugee advocates sometimes counterpose to the American model an *imagined* Canadian community – liberal, tolerant, progressive – that is, to some considerable degree, an *imaginary* Canada. Would a harmonized immigration security system with the U.S., as envisaged in the schemes for "perimeter security" of North America, compel rending changes in the Canadian way? It is hard to see how. We have for some time operated on much the same assumptions about who are admissible and who not. We have common databases on who are the bad guys, and which the bad countries and organizations. Our basic motivations are the same – to retain legitimate humanitarian considerations, while not permitting these to seriously undermine the protection of national security from terrorism and crime. Besides, there is much that is distinctive in Canadian immigration policy that will remain untouched by the harmonization of security rules and practices. One example: the long-standing desire of Quebec to use its constitutional role in immigration to actively support francophone immigration is a distinctive feature of Canadian policy. The U.S. has no security or other interests that would in any way challenge this distinctive priority.

If there has been a gap between the Canadian and U.S. records in immigration security, it is not one of rules and standards, but simply of enforcement, due to the allocation of fewer resources in the past to this area in Canada. That was already changing before September 11, pushed by the case of Ahmed Ressam, the al Qaeda terrorist from Algeria, apprehended attempting to enter the U.S. in late 1999 with explosives on his way to an operation to bomb the Los Angeles airport. C-11, the new Immigration Act, had already posed tougher admission requirements. Critics had argued that the problem with C-11 security provisions was with inadequate enforcement resources, not content. When the enforcement gap closes, as it will, with further infusions of cash into policing and security, there will be even less difference between the two countries, at least in this one area of immigration security. In any event, exploratory talks on perimeter security among Canadian and American officials had begun even before Ressam, let alone September 11, and the impetus came as much from the Canadian as from the American side.

Having made these points, are we implying that Canada, in its post-September 11 refugee policies, is abandoning, or severely curtailing, its humanitarian commitments to genuine refugees? Not necessarily. The refugee security discourse has itself been premised upon humanitarian considerations. Cold War refugee policies derived in part from genuine concerns about the humanitarian costs of Communist totalitarianism. True, less attention was paid to the humanitarian costs of right-wing anti-Communist dictatorships, but such instances of hypocrisy should not be allowed to obscure the original humanitarian roots of the post-war policy of opening the door to those fleeing repressive regimes. In this regard, we should take seriously Irwin Cotler's argument that post-September 11 anti-terrorist laws and actions can be seen as part of a human security, or human rights, agenda.[7] This involves a number of compelling points. First, civil society must be protected against acts of mass murder. Second, immigrant groups and individuals in Canada must be protected against the kind of violence and intimidation practised by terrorist groups organizing support (or what sometime amounts to little more than protection money) among their expatriate communities. Finally, on a global scale, the climate of insecurity resulting from the violence of lawless and borderless non-state actors has to be reduced if other parts of the global human agenda are to be achieved.

Of course, there is always a price to be paid when security outweighs liberalism, even if momentarily. In the post-September 11 world, there is a serious humanitarian (and multicultural) price tag attached to the inevitable appearance of ethnic profiling as a tool in the policing of terrorism. Young Arab and Muslim men – especially those coming from countries like Egypt, Algeria, Saudi Arabia, and Yemen, where al Qaeda recruiting has been most effective, will certainly get more attention than other, low-risk

groups. In part this is an inescapable result of cost-effective policing. What looks to those on the receiving end as racism or cultural victimization appears to police and security forces simply as sensible risk management.

There are some mitigating circumstances. There is a point of contrast between September 11 and past experience that reflects favourably on the behaviour of governments today. In the immediate aftermath of the attacks, the American President and his Attorney General were at pains to indicate that the Arab and Muslim communities in the U.S. were in no way to blame, and that any retaliatory violence directed against these minorities would be met with the full force of the law. These statements were not given as asides, but were delivered as important front and centre assertions of government policy. They were echoed forcefully in Canada by Prime Minister Jean Chrétien. C-36, despite its condemnation by Arab and Muslim groups who testified against it before the Justice Committee of the House of Commons, does not direct anti-terrorist attention toward any identifiable ethnic or religious group. It does include strengthened hate provisions directed against those who would attack mosques or other minority cultural institutions. It is safe to conclude that North American governments have learned some things from the mistakes of history. The shameful treatment of the Japanese communities in the Second World War will not be repeated for Arab and Muslim communities in the aftermath of September 11.

Mitigating circumstances will not, however, be much appreciated by those on the receiving end of risk-aversive policing that in practical terms does amount to ethnic profiling. Both Canada's humanitarian obligations with regard to refugees and the integrity of its multicultural social fabric will be under some stress from the differential impact of September 11 on people from Middle Eastern countries.

So far the "war on terrorism" has been relatively successful. If no further attacks on North America are forthcoming, the repressive implications of September 11 will tend to recede, and long-term damage to pluralist tolerance should be minimal. If, on the other hand, more attacks like September 11, or worse, do occur, we can be assured that national security will rapidly overwhelm liberal humanitarian considerations, in refugee policy as elsewhere. That is a future we all wish devoutly to avoid. But to prevent such a dismal scenario, some compromises between security and freedom have to made in the present.

Notes

1. Audrey Macklin, "Borderline Security." In *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill*, ed. Ronald J. Daniels, Patrick Macklem, and Kent Roach (Toronto: University of Toronto Press, 2001) 384, 394.
2. *R.* v. *Stinchcombe* [1991] 3 S.C.R. 326.
3. *Singh* v. *Canada (Minister of Employment and Immigration)* [1985] 1 S.C.R. 549.
4. *Suresh* v. *Canada (Minister of Citizenship and Immigration)* [2002] SCC 1.
5. *Baroud* (Re), (1995) F.C.J. No. 829, May 1995.
6. Reg Whitaker, "Refugees: The Security Dimension," *Citizenship Studies* 2:3 (November 1998) 413–34.
7. Irwin Cotler, "Thinking Outside the Box: Fundamental Principles for a Counter-Terrorism Law and Policy." In *The Security of Freedom*, *op. cit.*, 11–30.

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