

GOVERNANCE, GLOBALIZATION AND SECURITY
THE HARMONIZATION OF IMMIGRATION POLICY
Canada and the United States

by

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Introduction

Within the context of issues of governance, this paper begins by examining the forces of globalization and regional integration with respect to security issues that in turn effect immigration policy, particularly in the light of 9/11. One presumption is that globalization, reinforced by regional security issues, reduces the capacity of nation-states to have an independent immigration and refugee policy. This paper will explore the degree to which this presumption is correct and whether, in response, higher (as well as lower) levels of shared jurisdiction – otherwise called multilevel governance - are being developed and incorporated into domestic law to deal with immigration and refugee issues in response to threats to Canadian security. If new forms of jurisdiction are being developed at the interstate level, are they effective and/or responsive to the citizens of the two states?

The paper begins with a discussion of the issue of governance and the pressures and effects of globalization on immigration and the creation of new transnational identities. The paper then discusses what happened in the aftermath of 9/11 in the debate on security as that discussion impacted on immigration and refugee issues. Finally, the paper attempts to assess whether and to what degree Canada is developing trans-state institutions in relationship to immigration and refugee issues to respond to security threats and, if so, the degree to which they are or could be both effective and accountable.

This paper argues that the trends are not going in that direction whatever the rhetoric. In the tension between the state and two very different types of non-state actors – global terrorists and human rights and anti-globalization NGOs – instead of the development of an organized system of multi-leveled governance, the contradictions between the goals and activities of these three main agents produces greater demands on the state bureaucracy which both expands and fragments at the same time in response to those pressures. The bureaucracy grows but becomes less effective **and** less accountable. Further, the courts try to adjudicate between the contrary pulls of terrorist threats and those who stand up for human rights; instead of reinforcing the authority of international law, the court delivers rulings that enhance the realist view of state sovereignty and the authority of the bureaucracy. Finally, the legislative branch, that should be providing leadership to provide coherence to these problems, flails about, zigging and zagging in different directions unable to provide a moral and functional compass to guide the society.

The Historical and Conceptual Context

One of the major stories in the fall of 2001 post-11 September 2001 in Canada was the discussion of a common security perimeter around Canada and the United States. The common security perimeter was connected to the ostensible harmonization of Canadian immigration and refugee policies. Since non-state actors – immigrants, refugees, refugee support groups, terrorists and business interests – are as important determinants of policy and practices as the actions of government both for good and for bad, and since the issue involved proposals to shift jurisdiction over immigration and refugees to a trans-state level, the issue of governance comes to the fore insofar as non-state actors and super-state agencies develop significant influence and authority. This paper begins with the exploration of the issue of governance.

In examining the issue of governance, within the context of enhanced globalization, three competing sets of factors are at work. A tension exists between a concern with the protection of Canadian citizens and a competing concern with the protection of refugees. A second area of tension exists between the pattern of Canadians taking shelter under the American security umbrella and Canada’s role as a lead player internationally on a multilateral stage in the human security agenda, and, more specifically, in refugee policy. A third area of concern, and probably the driving tension, is the Canadian desire to guard its political sovereignty as that vies with economic pressures to make sure that the Canada/US border plays a minimal role in interfering with the transport of goods and the movement of citizens across the same border. In examining these tensions, the analysis will be restricted to immigration and refugee issues in relation to security concerns and will not examine such issues as the action plan of the smart-border declaration signed by Foreign Minister Manley and Paul Ridge, the U.S. Director of Homeland Security, that included provisions for the long-standing efforts of Canada to create joint customs pre-clearance for commercial cargos and jointly operated customs facilities at remote border points.

The conceptual framework can be represented by the following triangle.



Governance¹

Governance deals with the exercise of power among the different segments of society and the institutional structures and relationships within and among governments and other social sectors to foster civic freedoms, commerce and the arts. Decisions in a democratic society are the result of material, intellectual and moral influences. People expressing their concerns and commitments and investing their energy into an issue have an impact on decision-making. The idea is to ensure that coercive force and might will **not** determine policy.² This is the ideal of a democratic society. In that ideal, influence is the sole determinant of policy, influence that translates into the rule of law. Coercion is not intended to have any effect in the decision-making process in democratic societies. There is an exception, however. When a whole society is threatened by outside coercive forces, and even more so, when coercive forces have infiltrated the domestic fabric, issues of rights and accountability may be sacrificed on the altar of efficaciousness.

Those who make decisions on behalf of a collectivity generally have positions of formal authority. Hopefully, decision-makers in positions of formal authority either possess or are informed by those who have authentic authority – expertise. Thus, there are two senses of authority – formal and authentic – at work in any polity that affect the decisions taken, including those with respect to immigration and refugee issues (Adelman 1976). Authentic authority will not have the exclusive impact on decision-making; two senses of influence - material and mental (both intellectual and moral) - are critical. Insofar as these influences are driven by the energy and commitments of the citizens of a state, they are intended to offset threats from coercion.

With respect to immigrants and refugees, governments are the primary decision-makers determining who can and who cannot become a member of a polity. Though governments are the most critical agents of governance, nevertheless they still only represent one aspect of governance. Governance is about who has influence on those who make decisions and how they go about making that decision and are subsequently held accountable. Governance goes beyond the realm of formal decision-making structures and players to include the plurality of actors who guide public opinion and choices. Since the 1975 Green Paper, a cadre of ethnic and religious groups, NGOs and support groups, lawyers and academics, have developed with a significant interest in immigration and refugees. Immigration lawyers have even developed a vested interest not only in higher numbers of immigrants, but also in the existing system that provides their living and in which they may have invested capital. For this reason, governance is really about a process concerning how influence, both material and mental, is exercised and authentic authority is utilized, to effect how decisions are made and the content of those decisions on the local, national, regional and international levels with respect to migration issues.

Within the formal decision-making apparatus, the democratic *abcs* of government decision making include the assembly or legislature in which laws are passed, the bureaucracy that administers those laws, and the courts that interpret them. The challenge of governance is to construct a system where as many as possible, both with authentic authority as well as with an interest and commitment concerning an issue who want to

use not only their moral and intellectual influence, but their material influence as well, to enhance their power and control over the decision-making process.

Though the assembly or legislature and the courts usually receive the greatest attention among the triad of decision makers making up the *abc's* of a democracy, in most fields the bureaucracy is probably the most important element. Max Weber (1948) provided a functionalist depiction defining the economic rationalism of the anonymous functionaries in the state bureaucracy according to six characteristics: a) a set of functionaries with a recognized social status and prestige whose duties are officially fixed by laws, rules or regulations and by administrative guidelines; and b) whose functions are organized hierarchically and integrated into a system of command with ever higher degrees of power and corresponding responsibilities with each role in the hierarchy controlled by higher authorities; c) as it records its activities in written documents to, at the very least, demonstrate and justify each member's function to every other member in the hierarchy; d) as each member identifies with his/her position and performs his/her activities with total commitment and dedication as society in turn guarantees them economic and job security and a salary scale corresponding to status in the hierarchy; e) at the same time as it recruits new members with the requisite skills and integrity; f) with each sphere of the civil service having a particular set of techniques and requiring mastery of a particular body of knowledge.

However, critics of bureaucracy focus on another aspect, whether found in the state or in private corporations - the propensity to expand as the bureaucrats protect their privileges and multiply exponentially. As instances of coordination and supervision proliferate, activities become more fragmented and specialized, and departments are diversified and compartmentalized. Further, contrary to Weber's functional account, civil servants at the bottom of the hierarchy, who are the first line of contact with the public, prove to have rudimentary or non-existent qualifications. Third, instead of a hierarchy of responsibilities and authentic expertise corresponding to those responsibilities, the system of control and power is more concerned with hierarchical relations than any horizontal service to the public; socialization ensures that new recruits focus on the position they occupy in the hierarchy and the position to which they aspire. Fourth, power is measured by a set of external accessories, the size and location of the office and the number of supervised employees (administrative assistants, secretaries and clerks) at one's direct beck and call. Fifth, the members of this hierarchy are not so much engaged in disinterested service to the public as in a competition with one another for greater prestige and power at the same time as responsibility is deflected as each member tries to protect his or her status. When the security guarantees are removed under the pressures of neo-liberal doctrine, the fight for survival of the fittest simply turns a purported smoothly functioning hierarchy into a mad scramble of the insecure as the true colours of the proliferation of unproductive functions are revealed in the determination to protect formal authority and roles.

Between the ideal depiction of bureaucracy and the degree of reality touched upon by its critics, bureaucracy has been under competing tensions to stick with its ideal and to be reduced in size (consistent with the degree of validity of its critics). Pressures to have

civil servants share responsibility with parts of the civil society are received as both a threat and as an opportunity to displace real responsibility onto unaccountable individuals working in non-governmental organizations. However, as responsibility is diffused, it becomes less accountable as well as less effective. Thus, the increasing involvement of non-governmental sectors in governance can enhance participation but often at a cost – a cost in accountability and situating responsibility, particularly when the non-governmental sector is at odds with the bureaucracy.

Finally, we come to the most contested concept of all in governance – *rights*. Human rights are said to be universal in three different senses: all humans possess them; no one is entitled to violate them; and all humans should be able to exercise them (Adelman 1994, 165). But there are three paradoxes that plague the sense of rights. First, there is what Jack Donnelly (1989) calls the possession paradox; rights claims increase in proportion to the inability to operationalize a claim for rights. To the degree that we possess rights, to that degree can we ignore them and not cite them. To the degree that we lack rights, to that degree we appeal to them for protection. Secondly, rights are valued independently of their utility; they set boundaries for other utilities. In Ronald Dworkin's words (1977), "rights trump utilities". But the paradox is that their utility can best be demonstrated and are most valued when they cannot be used. Thirdly, and paradoxically, unlike any other utilitarian tool, the use of human rights does not use them up, but expands their range and strength. That is why the frontier of human rights has broken out among people who lack membership in a state that protects their rights and flee to states and apply to live there *as a matter of right*. The more they knock on the door, the more rights they acquire, and the greater the attraction to come to the door for others who lack rights. In the process, rights protection has been expanded to all those residing in the state and not just its members. Paradoxically, citizens have fewer distinctive rights. Further, as more choose to come and it takes longer and demands greater legal resources to assess their claims, citizens are less willing to extend those rights. In the process, the rights to claim membership in a state are reduced, and it increasingly appears that so-called human rights are simply derived from rights of membership.

Globalization, Immigration and Transnationalism

In assessing the impact of the new security agenda on immigration and refugee policy within a larger context of governance, the even larger context of globalization has initiated fundamental changes in the world. Driven by scientific discovery, accelerating technological innovation, the transportation and communication revolutions, and the diffusion of this knowledge resulting in expanded and more rapid exchanges of information, all enhanced by corporate, governmental and institutional imperatives, globalization entails the rise and spread of global markets and the increased movement of goods, capital and people, including the spread of the impulse to move to the far corners of the world.

Globalization is not only a phenomenon of our time; it is an object of widespread criticism. There are three types of critics of globalization. For economic dissidents, globalization is equated with the exploitation of the majority of the world's population by the few rich countries using capitalist markets under the control of multilateral

corporations, and aided and abetted by complicit international organizations. For cultural dissidents, globalization is the effort to impose Western culture and secularization on the world's non-Western peoples and undermine established religions, profoundly held cultural values, traditional communities, and tribal ways. For utopian dissidents, globalization is a radical and revolutionary change in the human condition whereby all the peoples of the world have become interdependent economically, environmentally, in terms of disease control, etc., that require an international legal and political regime to manage the situation.

Widespread and increasing scales of migration foster that interdependence. The acceleration and diversification of international human movement is a global phenomenon. Humans may migrate from a rural to an urban area, from one part of a country to another, or from one part of the globe to another. Immigration is a form of migration involving the movement of human beings from one country to another country in which they wish to seek membership or citizenship. For those who favour globalization, immigration is a key component for moving around and transferring skills.

In the expansion of immigration, the number and variety of both sending and receiving countries has increased. The composition and pattern of that movement has also shifted with increases in refugee, irregular and temporary labour movements. As a result, traditional countries of immigration are faced with a wide spectrum of competitors concerned with attracting the highly educated so critical to the knowledge revolution. At the same time, globalization has had an impact on the polity that has to deal with these issues. A larger and expanding global population has produced greater numbers of people on the move in the world with larger numbers of asylum seekers and a freer movement of people with high skills and financial capital. Heavy flows from less developed to more developed countries constitute the majority of immigration (south-north versus east-west flows) as early stages of development bring strong population growth and out-migration pressure. Competition for labour market talent and entrepreneurial immigrants has meant greater attention by immigrant receiving countries to persons with high education, especially in information technology. On the other hand, although Canada is one of a select few countries that manages immigration levels through active recruitment and selection, only some 15% - 20% of migrants are directly selected. Others come as family members or as refugees. Many others arrive through irregular movements in addition to refugee asylum claimants.

The large immigration flows that are a phenomenon of our time are taking place just when conceptions of citizenship are under transformation by transnationalism. In a transnationalist environment, individuals enjoy more than one membership or one set of loyalties, including loyalties to regional and global non-state entities. In one version, transnationalism is the increased tendency of immigrants to simultaneously maintain multi-faceted attachments to their country of birth, country of re-settlement and even other countries to which their compatriots have migrated.³ In this form of transnationalism, international immigration is not the definitive departure from one place, followed by immersion into another; but increasingly a dynamic process of ongoing demographic, familial, economic, cultural and political links between movers, stayers, returnees and visitors in two or more settings. In this fashion, international immigration

creates transnational social spaces stretched across great distances. In addition to bi- or tri-state transnationalism, the term has also been used to describe the multiple loyalties of even native-born citizens to institutions that transcend the state, whether it be an international corporation or a global environmental movement or a non-governmental humanitarian agency, as well as to their country of birth or country in which they have acquired citizenship. Thus, transnationalism exists in two forms – as multi-state and global or even cyber-space transnationalism.

The ability of migrants to maintain transnational ties are affected by economic forces (from the price of airfares to lower trade barriers), technological improvements (particularly in the communication and transportation sectors), political freedoms and social pressures for assimilation and integration. Transnationalism also depends on, and is shaped by, the actions of migrants themselves; their movements, commitments and values impart a specific texture to transnational networks. The choices and actions of newcomers utilize technology and can trump and transform structure. Immigrants are not passive objects of economic, government and cultural systems or effects of technological pushes. They often exercise significant choice in determining whether to leave their homeland, where to re-settle, what attachments to their homeland they wish to preserve, and which attachments to their new country of settlement are most significant to them.

Transnationalism originates from globalization, yet the two terms have significantly different meanings. Global migration and unprecedented opportunities for sustaining global connections through travel and technology go a long way to explain why we are now living in the “transnational moment” (Tololyan 1996). Yet, transnationalism and globalization embody different dynamics. Globalization typically presumes the end of geography, including particular spaces such as national territories, in which states no longer constitute autonomous or distinct economic systems and even political spheres of authority and cultural expressions of identity. Instead, goods, services, production, policy development, law-making, ideas, values, culture and the arts are regarded as increasingly traversing the world, unfettered by barriers of national borders.

Thus, transnationalism challenges and redefines citizenship. Fundamentally, global migration and transnationalism raise questions about who belongs as a full member of society, with what rights and responsibilities, and within which borders?⁴ What becomes the terrain of citizenship when millions of migrants live transnational lives with deep and active ties to more than one country at the same times as transnational institutions like the International Monetary Fund and the World Bank take on authority previously held by national governments or when trade agreements like the North American Free Trade Agreement establish economic rules beyond the control of national governments?

In inter-state transnationalism, links are developed and retained with more than one country, including dual and multiple citizenships; movement may be temporary rather than permanent. There may be an interest in moving on to third countries or to returning to the country of origin. Rather than eliminating geography, this form of transnationalism emphasizes how the movement of peoples at the end of the twentieth century has made geographies more important than ever. While globalization and

cosmopolitanism imply the dawn of a borderless world, transnationalism emphasizes the growing commitment people feel to more than one bordered political community or country. This form of transnationalism is to be distinguished from global transnationalism or cosmopolitanism. In cosmopolitan transnationalism, rather than settling in a community, transnationals are hooked to the world that they identify as their community, a pattern particularly prevalent among people at the highest levels of skills (Simmons 1999b; Castles 2001). Cosmopolitans are people who have no roots in any particular country or culture, but feel equally at home and attached everywhere in the world. Dual-state (as distinct from global) transnationalism, on the other hand, attributes primary importance to multiple attachments to specific national spaces. In this use, transnationals are like “old-fashioned nationals”, except they have two or more particular attachments to place. Global transnationals enjoy an attachment to a universal space as well as a particular space. Transnationals of both types may be less dependent on social policy, and more interested in family and networks as sources of support. Inevitably this disrupts traditional or “mythic” ideals of citizenship and has a significant impact on the role and expectations of immigrants.

In transnationalism, the primary emphasis is placed not on country or nation, but on the commitments, networks and choices that immigrants forge for themselves. In this regard, transnationalism may be thought of as “populist globalism” or “globalism from below”, in attempting to understand how migrants transform their lives and their worlds. Transnationalism favours multiplicities, not uniformity. Immigrants from different countries establish different kinds of transnational communities and attachments. Moreover, within any immigrant community there are important differences of transnational experience based on such factors as age, gender, income, and immigrant status.

Canada: Immigration in the Context of Globalization and Transnationalism

As one of the world’s most advanced economies, embedded in a peaceful and secure civil society, Canada remains one of the leading per capita immigrant-receiving countries. The period since the late 1980s stands out as the third “great wave” of migration to Canada since 1867 (joining the pre-WWI, and post-WWII periods as peak stages of newcomer arrivals). A host of push and pull factors operating at micro, meso and macro scales underpin this massive recent movement of populations. One distinguishing feature of this current wave of migration is its global character, and its occurrence at a period of unprecedented compression of time and space due to technological advances; the majority of immigrants in recent decades have arrived from Asia and Africa. On the other hand, immigration is highly regulated; Canada establishes its own goals as to how many newcomers are admitted annually to the country, and on what criteria. Nevertheless, Canada has one of the most inclusive approaches of any country in the world to extending formal citizenship (along with passport) to immigrants.

Taken together, Canada offers particularly fertile soil for the flourishing of transnationalism. A number of historic and contemporary dynamics promote the legitimacy and likelihood of newcomers sustaining cross-border attachments after migrating to Canada. Canada was founded in 1867 as a transnational project. Canada’s founding constitution, the *British North America Act*, was legislated by the British not a Canadian Parliament. Confederation consolidated most of the remaining British in North

America to unite the vast majority of the population outside of Quebec sharing British origin. This transnational attachment was expressed in the defence of the empire and took Canada into the Boer War, the First World War, and even the Second World War. Canada's participation in two world wars stemmed from our transnational attachments. There is no homogeneous ethnicity that can lay claim to "pure" Canadian status. Rather, Canadian demographics have evolved from many aboriginal nations to two primary colonizers (French and English) to immigrants from every corner of the world. Nor is there a compelling, monolithic national identity or narrative which newcomers are compelled to embrace. The federal system, moreover, institutionalizes the legitimacy of at least dual jurisdictional loyalties: provincial and federal. Canada's multicultural policy respects and promotes pluralistic expression of cultural differences. Thanks to global migration, many immigrant-receiving countries, but particularly Canada, are now characterized by unprecedented population diversity. Immigrants have transformed the landscape of Canada's leading cities. They have constructed economic, political and cultural bridges from Canada to homelands around the world; they have given Canada new economic, political and cultural players and voices. Common identity – of ethnicity, race, language, religion or heritage – can no longer (if ever it was) be the foundation for common citizenship. Transnationalism has made diverse identities and dual (even multiple) citizenship status increasingly common and has prompted reassessments of citizenship principles and policies in Canada and abroad; the Citizenship Act of 1977 explicitly recognized this fact and removed the automatic loss of citizenship if a Canadian took out citizenship in another state.

Globalization and the transnational revolution have had four major impacts on Canada - the loss of power of states, the enormous expansion of non-governmental organizations in the international, national and local context intervening on immigration and refugee issues (the broadening number of concentric circles of zones and layers of governance involved in immigration), the rights revolution⁵ as instantiated in the *Canadian Charter of Rights and Freedoms* that has played such an important part in changing Canada as a whole and, in particular, in the way Convention refugees are handled, and, finally, at the same time as society has become more bureaucratized to deal with the multiplication of actors (provincial, municipal, NGO's), bureaucratic hierarchies have been replaced by flat, lean and flexible networks (Stein 2001, 230), particularly the electronic assemblies that meet in cyberspace, networks that "constitute the new social morphology of our societies" (Castells 1996, 469) in order to deal with and manage social and political problems. I want to discuss each of these in turn, but in reverse order beginning specifically with the networks developed by transnationals in general, but more specifically the transnational networks that appear to threaten Canadian security.

International Terrorists as a Specific Type of Transnational Migrant

If we pull these various conditions, agents and issues together in the context of contemporary security concerns, we can identify *global* terrorists as also global transnationals with an attachment to a cosmopolitan ideal that they identify with a particular form of militant Islam. For them, Islam is THE transnational community that will create a borderless world. The transnational terrorists use modern communications and transportation links and all the developments of new technology, along with reduced

barriers to the movement of goods and people, to take advantage of the political freedoms of western states and the tolerance and welcoming of multiculturalism. They adopt the outward appearance of integration as they pursue their vision of a homogeneous world united under a particular brand of Islamic fundamentalism.

Shaul Gabbay of the Institute for the Study of Israel in the Middle East, University of Denver at the Denver Roundtable, "New Directions in US Foreign Policy" 2 November 2001⁶ presented a paper entitled, "Networks and Terrorism" in which he defined the strength of a social network according to the duration of the relationship among the nodes, the frequency of interaction, and the feeling of closeness. Closed social networks are tightly inter-linked while open social networks are characterized by communication gaps in which social capital is created if there is an input of authentic authority or expertise. Lacking any formal structure, terrorists coordinate through networks that are both strong and closed because, at one and the same time, they are able to function in isolation while they are bonded by both ideology and deeply rooted ties.

To combat the terrorist threat, President George Bush did not create a super state structure but a counter-terrorism network of individuals, organisations and countries, including Muslim states to prevent bin Laden's terrorist attacks from fostering a war of civilizations. Held together by economic and security ties as well as empathy for what the United States had been through, the network lacked the inner strength and tightness of the terrorist one. However, the network was open enough to allow the input of many voices and a great deal of expertise. The issue was whether the US through its use of overwhelming force could open structural gaps in the terrorist network, or whether the inherent weaknesses of the anti-terrorist network would burst the coalition asunder.

Another and very different network was created by the plethora of NGOs and lawyers reinforced by anti-capitalist cosmopolitan, cultural particularist and utopian anti globalization forces, whatever the vast differences among these various segments. All had reasons to empathize with the alleged causes that have presumably led these terrorists to sacrifice their lives for militant Islam, even if none of these very different people share an iota of sympathy whatsoever with either terrorism as a strategy or militant Islam as a goal. The terrorists are individuals with rights. Interference with rights, in any case, will have reverberations of the rights of other immigrants and genuine refugees to make claims for protection. In any case, isn't global capitalism and imperialism the real root of their frustration and grievances? Doesn't the very force of globalization threaten indigenous local cultures and traditional beliefs? Are the militants not at heart concerned with the ideals of equality and a more equitable sharing of the world's resources among the peoples of the world?

Further, the terrorists arrive as part of the global movement to upgrade skills. So there are moral, intellectual and material influences all fostering the easy entrée of terrorists into western societies. The protection of these migrants (if not refugees) is reinforced by a concern with a multilateral outreach to the rest of the world, and even a commitment to demonstrate Canadian independent sovereignty against the encroachments of American hegemony on this continent. All these factors work against

efforts to protect citizens through an enlarged security regime led by the United States, already the dominant economic partner in Canadian life. On the other hand, the pressures for the free movement of goods and people all work very powerfully in the other direction. Since *all* these groups connect on the issue of rights, issues of rights become the central focus of the debate.

Recall, however, the three paradoxes outlined above connected with rights. In the possession paradox, to the degree there is an absence of rights, to that degree do we appeal to rights for protection. Secondly, rights are valued independently of their utility; so that the utility of rights can best be demonstrated and are most valued when they cannot be used. Thirdly, the use of human rights does not use them up, but expands their range and strength. If we apply these paradoxes to the situation of the terrorists, they all come from societies that lack rights protections and, more importantly, espouse a totalitarian utopia in which there would be no rights protections. Thus, following the logic of the possession paradox, the terrorists are ideal candidates to rally around on the issue of rights. Further, because a democratic state generally places the protection of its own citizens above all other priorities, lobbying for the full gamut of rights protections when citizens are threatened will mean that the utility of rights are indeed most valued when they cannot be used. Finally, precisely because terrorists or alleged terrorists offer the most extreme and least deserving case, the belief will be widespread among rights advocates that rallying around the protection of the rights of these “victims” of lack of due process will expand the whole gamut, range and strength of all rights protection measures. Thus, intellectual, moral and material resources become focused on the rights and protections of the alleged or potential terrorists.

If this thesis is correct, then one result of the terrorist attack will, on the one hand, not be a closing down of the border, but an increase in the numbers of those flocking to enter Canada *as a matter of right* and an increase in the protection of non-members within Canada. At the same time, there will be a *decline* in the rights and privileges of Canadian citizens and a large increase in the costs in processing the claims of those who are not citizens and, thus, a corresponding backlash against extending those protections. Monitoring the legislative developments will indicate how Canadian lawmakers respond. Similarly, key court decisions will indicate the direction of the judiciary in this unintended alliance of human rights defenders, anti-globalization activists and terrorist networks. Finally, there should be a noticeable propensity of the bureaucracy to expand as well as to become more fragmented and specialized. Disjunctions should be developed between those on the front lines and the privileges and powers accrued by higher-ups. In other words, because the activist civil society and the state are so at odds, the result will **not** be the development of multi-level governance but the expansion of state governance in a confused and counterproductive way.

We can now turn to the documentation of document the security problem as it has emerged in Canada before and after 9/11.

Attitudes of the General Public to Security and 9/11

Though the 9/11 terrorists evidently entered the United States legally as visa students and not as immigrants or even refugee claimants, and a few had resided there for some years, according to a nation-wide poll in the US, two-thirds of those polled (68 per cent) believed that enforcement of immigration laws and the border has been too lax and that not enough was being done to control the border and vet prospective immigrants, thus allowing terrorists to enter the country easily. The weak link thesis often focused on Canada.

The media reinforced these perceptions. D.L. Brown conjoined the refugee and security issue in his article, "Attacks Force Canadians to Face Their Own Threat," in *The Washington Post* (23 September 2001: A36). J. Bagole et al echoed the same perception in *The Wall Street Journal* on 24 September 2001. In Canada, many media reports shared the same sentiments. Stewart Bell wrote an article in the *National Post* entitled, "A conduit for terrorists" (13 September 2001). Diane Francis wrote about, "Our neighbour's upset over our loose refugee system" in the *Financial Post* (22 September 2001). A poll conducted for the Council for Canadian Unity indicated that the support for reduced immigration rose after 9/11 from 29% to 45%. However, an even larger percentage, 80% according to Léger Marketing, demanded stricter controls over immigration.

The Standing Committee on Citizenship and Immigration reported on the effects of 9/11 on border and immigration issues to the House of Commons in a report entitled, *Hands Across the Border* (henceforth *Hands*) subtitled, *Working Together at our Shared Border and Abroad to Ensure Safety, Security and Efficiency*, with an additional subtitle: *Co-operation, Co-ordination and Partnerships*. *Hands* uses the term partnerships to avoid worries that Canada was selling out its sovereignty on the altar of harmonization and security fears. The report noted that just because immigration and border security were being examined together, that fact should not be taken to imply that immigrants or refugees pose a particular risk to Canada. Chapter II of the report went on to say that, "Evidence to date indicates that the attacks of September 11th were largely orchestrated and carried out by a group of people who entered the United States legally," and had nothing to do with individuals attempting to enter Canada to win status as refugees. This fact did not inhibit a *Toronto Star* from totally misinterpreting the report with a headline, "MPs urge crackdown on refugees" (7 December 2001, A7).

However, the opposition parties in the House of Commons generally endorsed the *Hands* Report. The Progressive Conservative/Democratic Representative caucus fully endorsed the argument of *Hands* that the conjunction of refugee and security issues was fallacious. Even the official opposition Canadian Alliance Party, widely and erroneously perceived as an anti-immigration party, affirmed its support for both immigrants and genuine refugees. "The Official Opposition will continue to work with the government to maintain Canada as a nation that welcomes immigrants, and is a country that accepts its internationally fair share of genuine refugees." However, the Canadian Alliance qualified its overall endorsement of the report with the following criticism: "Capacity creates its own demand, for where there is a weakness it will be exploited. The 'refugee system' continues to be exploited by non-refugees and is a grave security concern." In other

words, in both the media and among *some* parliamentarians, refugees seem to be one group of migrants that were focused upon when the security issue comes up.

Efforts were subsequently made in the Canadian media to show that the refugee and security issues were **not** conjoined. Bill Schiller, in *The Toronto Star* of 23 November 2001 cited the case of Ary Hussein who came to Canada to file a refugee claim. He ditched his papers before landing at Pearson airport and landed behind bars after confessing to having once participated in a kidnapping. Besides Ary Hussein, a half dozen other Middle Eastern people were detained: Palestinians, Mohammed AlMuttan, 19, on 27 September, together with 35 year old Ribhi Jamel Sheikha (subsequently released); Hisham Essa an Egyptian detained 2 August trying to cross from Windsor into the US at Detroit while hidden in the back of a truck; Mohamed El Shafey another Egyptian subsequently deported after living in Canada illegally for four years; Ziyad Hussein, a Palestinian with a Jordanian passport detained 22 September at Pearson when an immigration official did not believe his story that he had come to attend a trade show, but wanted to remain in Canada or go to the US where he has family; and a Palestinian woman from Syria, Reema Nakhleh. The fact is, one of these individuals was detained pre-911 and the others would have been handled the same way. These few cases hardly substantiate the widespread charges made by civil libertarians and spokespersons for the Arab community in Canada that Arab men were being held simply because they were Arab.

Thus, there was a cognitive dissonance between expert knowledge, public misperceptions and the emphasis and efforts of human rights non-government organizations. A large level of incoherence among the perceptions and actions of these three key elements provided the ground for dysfunctional state actions.

Legislation and Human Rights Protections

Initially, this did not seem to be the case. The legislature seemed determined to pass legislation that would have a direct impact on reducing terror. In the fall of 2001 in the aftermath of 9/11, Parliament passed into law *An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism*. Part 1 of the Bill amended the Criminal Code to implement international conventions related to terrorism, to create offences related to terrorism, including the financing of terrorism and the participation, facilitation and carrying out of terrorist activities, and to provide a means by which property belonging to terrorist groups, or property linked to terrorist activities, can be seized, restrained and forfeited. After passage of the Bill, the Cabinet approved new regulations freezing the assets of 22 groups and individuals with links to Middle Eastern terrorism. Part 2 transformed the *Official Secrets Act* into the *Security of Information Act* to address threats of espionage by foreign powers and terrorist groups, economic espionage and coercive activities against émigré communities in Canada. It also created new offences to counter intelligence-gathering activities by foreign powers and terrorist groups, including the unauthorized communication of special operational information. In contrast with all these provisions that raised the possibility of infringements on human rights, Part I also

provided for the deletion of hate propaganda from public web sites and created an offence relating to damage to property associated with religious worship.

Part 3 contained the provisions that truly frightened civil libertarians. These amendments to the *Canada Evidence Act* were criticized extensively by human rights lawyers and organizations for obligating parties in legal proceedings to notify the Attorney General of Canada if they anticipate the disclosure of sensitive information, the disclosure of which could be injurious to international relations, national defense or security. Moreover, it gave the Attorney General powers to assume carriage of a prosecution and to prohibit the disclosure of information in connection with a proceeding for the purpose of protecting international relations, national defense or security. Part 4 updated a previous Act and renamed it the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* that provided for assisting law enforcement and investigative agencies in the detection and deterrence of the financing of terrorist activities, facilitating the investigation and prosecution of terrorist activity financing offences, and improving Canada's ability to cooperate internationally in the fight against terrorism. Part 5 amended a number of other Acts to strengthen the Security apparatus of the Canadian government while Part 6 enacted the *Charities Registration (Security Information) Act*, and amended the Income Tax Act to prevent those who support terrorist or related activities from enjoying the tax privileges granted to registered charities.

This legislation was criticized because it seemed to undercut much of the *Privacy Act* (1980-81-82-83, c. 111, Sch. Ii) intended to protect the privacy of individuals with respect to personal information about themselves held by a government institution and to restrict access to that information. In Article 1 of the *Privacy Act* a government institution could only collect personal information *directly* from the individual to whom it relates, unless otherwise authorized by that individual or under subsection 8(2). Article 2 required a government institution to inform any individual from whom the institution collects personal information of the purpose for which the information is being collected. The new legislation took the position that the laws that protected the privacy of citizens also hindered law enforcement. Human rights defenders argued that the new laws that enhanced law enforcement infringed on rights of privacy. For example, information under previous laws could not be shared between Revenue Canada (the department that collected income tax and the information on the income tax filing forms) and the RCMP without administrative warrant.

The expansion of law enforcement powers to arrest, detain, force those arrested to talk, and other initiatives, all challenge the core tenets of civil liberties and the restrictions to police powers at the center of our conception of democracy. (For a more systematic analysis of these fears concerning infringement on civil liberties, see the vast majority of essays in the volume: *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill*, Daniels et al 2001). However, although Canada witnessed a great deal of formal movement in law, there were few changes in practice.

Contrast this with the approximately 1,000 detained in the United States since 911 under the *Foreign Intelligence Surveillance Act* of 1978, which allowed the government

to seal warrants of those detained for national security reasons permanently with a judge's consent. Men arrested were allegedly being kept from their attorneys and confined in jails without proper food or protection. In contrast to the United States, Canadian civil libertarians have only been exercised about those detained at the border, and the number of even alleged abuses can be counted on the fingers of one hand.

Borders, Sovereignty and Economic Integration

If the anti-terrorist legislation raised the ire and fears of civil libertarians, the terrorist acts themselves raised the much greater fears in the economic sector of the civil society, not so much because of the effect of the terrorism, but because of how the American response impacted on the Canadian economy. Before 9/11, anxious Canadians and barely interested Americans had been moving to integrate their economies even more than they had been. Other than the outpouring of sympathy for Americans, post-911 effects were most acutely felt at the long delays at border points for both people and goods. The pressure to enhance border harmonization to ease the obstacles to the free flow of goods, services, and *trustworthy* people between Canada and the United States had never been greater, and seemed far more important to most Canadians than the security issue itself. As Lunman reported in *The Globe and Mail* of 17 October 2001, "Waits at U.S. border hurting economy, B.C. Premier says – He urges PM to push for North American security perimeter." Kuitenbrouwer in the *National Post* of 29 October 2001, wrote, 'Perimeter will save trade: CEOs – 74% say we need common security rules as worries mount over access to key market.'

Economic pressures tried to make sure that the Canadian/US border played a minimal role in interfering with the transport of goods and the movement of citizens across the border. This concern was evident in the smart-border declaration signed by Foreign Minister John Manley and Paul Ridge, the US Director of Homeland Security, that included provisions for the long-standing efforts of Canada to create joint customs pre-clearance for commercial cargos and jointly operated customs facilities at remote border points. The real effort, however, was being expended elsewhere. Instead of making the free flow of goods and services across the border easier, reinforced security measures are being implemented along the border dividing Canada and the United States. What was once the longest undefended border was becoming a security barrier. As United States Border Patrol official, Robert Finley, chief agent for a nearly 500-mile stretch of the United States-Canadian border from the Continental Divide in Montana to North Dakota, was quoted in an article by Sam Howe Verhovek in the 4 October 2001 *New York Times* as saying, 'There are all kinds of means to get across the prairie illegally. People use bicycles here; they drive in on snowmobiles. They come over by horseback.' The result was that a border that previously had very few guards was manned; agent numbers along the border initially were tripled (from 300 to 900 in contrast to the 8,000 American agents along the US-Mexican border) to close up the open prairie and to step up security checks at busy border crossings, with enormous resultant delays. By March 2002, there were 6000 trained and armed agents assigned to the American side, a force scheduled to grow even larger. The longest undefended border had become very defended indeed.

This contrasts with the previous emphasis under NAFTA (the North American Free Trade Agreement) on making the border as unobtrusive as possible to create what the Canadian Minister of National Revenue in 1996, David Anderson, dubbed ‘a hassle-free border for honest travelers and businesses’ to facilitate the world’s largest bilateral trade reportedly now at \$420 billion a year. The installation of retinal recognition imagery to facilitate the fast movement of those who cross the border frequently is being planned but has still not been launched. However, even as moves are implemented directed at facilitating faster movement of goods and people, the priority has focused on tighter security *between* the two countries.

Border Security and Immigration

The beginning of American interest in the security of the Canadian border actually had its origins when the World Trade Center bombers of 1993 appeared to have used forged Canadian immigration papers to gain access to the United States, and after Ahmed Ressay was captured by US customs officials in December 1999 trying to enter the US with a carload of explosives as he tried to cross into Washington State on a ferry from Victoria, British Columbia in a plan to bomb the Los Angeles airport. However, pre-9/11, the concern seemed to be more with Canadian laxity on organized crime than on lax security concerning potential terrorists. A year later, a December 2000 headline read, ‘President Clinton singles out Canadian immigration policies for making it easier for international gangs to conduct illegal activity in the US’ (*Siskin’s Immigration Bulletin*, December 22, 2000). As Doris Meissner, former Commissioner of the US Immigration and Naturalization Service (INS), wrote, ‘Immigration as a threat to national security was not at or near the top of anyone’s list’ (2001: 1).

Just before 911, the Mexican President, Vincente Fox, met with George Bush to declare that integrating and harmonizing the migration issue was a top priority for his country, a view that President Bush endorsed. This was at the same time that a meeting with Canadian immigration officials to discuss co-ordination and integration with respect to border issues was cancelled by the United States. Harmonization with Canada was indeed not a priority. The radical shift in emphasis from the Mexican to the Canadian border took place only after 911 and can be illustrated by an article by Sam Howe Verhovek in the 4 October 2001 *New York Times*. He began by contrasting the former focus on preventing people from wading across the Rio Grande or hiking across the scorching desert that borders the US and Mexico, to a new focus on securing the longest unguarded border in the world, the border between Canada and the United States, against terrorists. In contrast to pre-911, George Bush on 29 October 2001, ordered his officials to begin harmonizing customs and immigration policies with those of Canada as well as Mexico to ensure ‘maximum possible compatibility of immigration, customs and visa policies.’ According to Bush’s spokesperson, Campbell Clark, as quoted in the *Globe and Mail* article, ‘Bush aims to tighten continent’s borders – U.S. bid to harmonize immigration and customs puts heat on Chretien,’ (30 October 2001).

On 31 October 2001, Allan Thompson of the Ottawa Bureau of *The Toronto Star* reported that Canada and the US were edging towards establishing a common security perimeter by establishing joint screening procedures to stop security threats at the source. But all the Immigration Minister, Elinor Caplan, had said was that, ‘We need to be able

to develop a network where we share information overseas so that we can better protect our continent” in implementing a common objective, “stopping those who pose any kind of security threat from coming to Canada or the US to begin with.” In fact, Caplan insisted that current Canada/US discussions stop short of harmonizing all policies and focus instead on information sharing. “Let there not be any misunderstanding. Canadian laws will be made right here in the Canadian Parliament,” Caplan said. “This directive from the President of the United States to his people is completely consistent with what our approach has been and that is to share information, to stop people from coming.” The evidence suggests that this expression of Canadian nationalism had no part in her demotion from Minister of Citizenship and Immigration to Revenue Minister. The fact is, the Prime Minister and other ministers have been very skittish even about the phrase, ‘security perimeter’. Audrey Macklin, after examining the issue, concluded that, the ‘security perimeter’ is a discursive security blanket, “one that furnished comfort by conjuring up a visual image around which people can deposit their anxieties” (Daniels et al 2001: 386).

The issue of a common security perimeter linked with the refugee and migration issue has generally been traced to Paul Cellucci, the United States ambassador to Canada. He became the most vocal exponent who initially was interpreted as urging the two countries to harmonize their immigration and refugee laws. However, in *The Globe and Mail* of 1 November 2001, Paul Cellucci was quoted as saying: “As people come from overseas, we want to have these common security efforts, and the compatibility on security efforts would be helpful. But I don’t think anyone is saying you have to have exactly the same immigration policies” (A10). In fact, there have been no efforts to harmonize immigration policies. And 9/11 has had virtually no impact on Canadian immigration policies. The overall total for immigrants remained the same though there was a small shift within the categories to increase the numbers of skilled workers as well as parents and grandparents within the family class.

Enforcement

The migration enforcement bureaucracy consists of two components: a sign system for identification of legitimacy (eg., passports, visas, identifications cards) and a signal system to detect irregularities (intelligence, monitoring and inspection). The sign system is undermined by the forging and theft of passports, corruption used to buy visas, and the absence of a system of identity cards prevalent in continental Europe. On 27 September 2001, a report released by Canadian immigration officials indicated that 2,200 misuses of passports occurred between 1998 and 2000. These misuses included altering passports fraudulently, using stolen passports, borrowing passports, and obtaining legitimate passports illegally, the favorite method. Bertoliny Eugene, described in the press as an enterprising student, testified at Ressam’s trial that he had obtained five other passports ‘easily’ in addition to the one he supplied Ressam, and only received \$300 for each of them. Another supplier also testified that passports were very easy to obtain and he sold them for \$800 each. There is no evidence that this situation has been improved.

Individuals arrive at Canada’s doorstep having destroyed the false documents used to get this far. Where are they from? To which country can they be deported if there

is no proof that they belong there? To some degree, this confusion is offset by the fact that origins can usually be determined by the language and accents of the individuals. But the absence of a universal mode of identification to determine origin and rights of passage handicaps the administration of any system designed to manage the movement of migrants. At the same time, the only way that genuine refugees can escape persecution in their own countries and seek asylum abroad is via false documentation. Thus, there is a tension between the need for legitimate signs and the rights of genuine refugees to seek asylum.

Other provisions include intelligence information sharing. This is directly relevant to those intent on becoming refugee claimants. For if the provisions of the smart border accord are implemented, then joint security clearance of those seeking refugee status will be implemented as a follow-up to the smart-border declaration. Since the Americans have an enormous capacity for collecting intelligence information abroad and Canada has virtually none, the effect will be that security clearances will largely be relegated to an American determination. Will Canadian sovereignty concerns eventually sabotage such cooperation? There are other areas of cooperation and coordination planned: intelligence and law enforcement coordination, visa screening abroad, pre-clearance of flights abroad, and the sharing of passenger information before planes arrive at an airport. We wait to see what develops.

One important area of coordination is the intent to work towards a common list of countries exempt from visa requirements. Already, eight countries have been added to the Canadian list of those countries whose citizens require visas before entering Canada. Though even with the addition of those eight countries, the Canadian list of countries exempt from visa requirements is still over 50% larger than the American one. A day after Canada and the US signed a joint border and immigration accord, 4 December 2001, Canada imposed visa requirements on the following countries: Dominica, Grenada, Kiribati, Nauru, Tuvalu, Vanuatu, six small island states, Zimbabwe and Hungary. The inclusion of tiny island states may seem odd as a link to any threat to Canadian security. Their inclusion seems to have been motivated by the fact that one of them is the island state where Australia deposited the 'refugees' from the boat it intercepted on the high seas. In another case, the island was allegedly a place being set up to be used by criminals to buy passports and even citizenships so the island could be used as a transit point for these 'refugees' to move onto Canada or the US.

Two inclusions stand out, however. Hungary was included because, although a small percentage of Roma have been accepted as refugees, Roma from Hungary continually arrive in Canada to become refugee claimants. However, a majority of Zimbabweans who reach Canada to make a refugee claim are successful. The introduction of a visa requirement has already deterred many Zimbabweans from arriving, many of whom may well be genuine refugees. Note that both Hungary and Zimbabwe were among the top ten countries producing claimants between January and September of 2001. Hungary with 2,759 refugees was, in fact, first both nationally and in Ontario; Zimbabwe with 1,652 ranked fifth nationally, and fourth in Ontario.

Finally, a renewed effort has been made to implement the safe third country provision already in Canadian legislation. Though the Chrétien/Clinton *Canada-USA Accord on Our Shared Border* of February 1995 had a provision for implementing a safe-third country provision, the 9/11 attack gave the absence of any true effort in that area a new impetus. On 3 December 2001, Canada and the US signed a *Joint Statement of Cooperation on Border Security and Regional Migration Issues* that included a commitment to work towards a safe third country agreement that would significantly reduce or bar access to Canada for refugee claimants passing through the US. The agreement stated that, “We plan to develop the capacity to share such information and to begin discussions on a safe third-country exception to the right to apply for asylum. Such an arrangement would limit the access of asylum seekers, under appropriate circumstances, to the system of only one of the two countries.” This provision requires that if claimants passed through a country where they were entitled to make a refugee claim, then they would not be allowed to make a claim in the country of arrival but, instead, would be sent back to that country to make his or her claim. Few refugee claimants, especially Central and South Americans, are likely to get to Canada as a result of security pre-clearances but especially if the safe third country provisions are actually implemented. However, there is still no news of substantive progress on this front.

The Conjoining of Refugee and Security Concerns and Legislation

Before 911, Canadians had already developed a concern with refugees and security issues. The House of Commons Report, *Refugee Protection and Border Security: Striking a Balance*, was tabled in the House of Commons in March 2000. *Bill C-11: The Immigration and Refugee Protection Act* contains clauses related to refugees and security issues, such as provisions for condensing the security certificate protection procedure. These clauses were drafted before 911 though the Bill received Royal Assent on 1 November 2001 to come into force in June 2002. Thus, in Canada, the *Immigration and Refugee Protection Act* already evinced a significant concern with security. The same could be said of the United States. The *Krouse-Perla Report* to the American Congress on terrorism and recognition technology was tabled on 18 June 2001, almost three months before 911. It specifically referred to refugees as potential terrorists.

In addition, the *Public Safety Act* passed in the post 9/11 period includes in Part 9 amendments to the current *Immigration Act* as a way of implementing some of the provisions before Bill C-42 comes into effect. These include provisions for stopping a refugee proceeding if a claimant is discovered to be a member of an inadmissible class or under a removal order. According to a Transport Canada Backgrounder on the Bill, under the amendments, refugee determination proceedings before the Immigration and Refugee Board (IRB) could be suspended or terminated if there are reasonable grounds to believe that the claimant is a terrorist, senior official of a government engaged in terrorism or a war criminal. The changes also implement the requirement for airlines to provide information on passengers before arrival and for penalties for those engaged in trafficking or assisting illegal entrants. The Bill provides stiff increases in penalties for those who engage in human trafficking and smuggling; those convicted would face fines of up to \$1 million and/or prison sentences for life. Aggravating factors would be considered in sentencing, such as whether the offence was undertaken for profit or in association with a

criminal organization, and whether it resulted in bodily harm or degrading treatment.

Paul Martin's budget tabled on December 10th seemed to explicitly conjoin refugee and security issues. Only \$1.2 billion allocated over five years was included under the direct rubric of upgrading border security. However, of that, only \$646 million was actually to be used to enhance border security; \$600 million was for improvements in border infrastructure, including technology, new truck processing centers to pre-clear vehicles, and access highways. Of the \$646 million for security, \$58 million was allocated to allow those crossing the border frequently to do so more quickly, something Canadian mandarins had been trying to implement for years. The most important item regarding harmonizing security was the \$135 million to establish a new integrated border force, not with the United States, but among the Royal Canadian Mounted Police (RCMP), customs, immigration and local police; \$107 million was allocated for x-ray machines, ion scanners and other detection equipment. In other parts of the budget, however, the Canadian Security and Intelligence Service (CSIS) and the RCMP received \$1.18 billion over six years. Another \$200 million was allocated to information sharing, marine patrols and the efforts to stop funds flowing to terrorists, having little to do with refugees. Other funds, however, directly targeted the refugee/security issue: \$395 million was allocated to speed up and enhance refugee and immigration screening; \$500 million was set aside for detention and speeding up the removal process. New immigrant and refugee claimants will be required to carry a fraud resistant Maple Leaf identity card, and they themselves will be responsible for covering the \$50 fee. If all the security/immigration issues are put together, then just over \$3 billion dollars of the budget increase were allocated to the juncture of immigration/security concerns.

However, events went awry in both Canada and the United States. Let us begin with the latter case. First, as Jack Donnelly of the Graduate School of International Studies at the University of Denver stated in his 2 November 2001 presentation at the Denver Roundtable, "New Directions in US Foreign Policy," there is a disconnect between policy statements/initiatives and programming. Raising issues of human rights violations falls under policy statements while in programming the Bush administration is not particularly concerned about human rights and relies to a large degree on the bureaucracy. "When foreign policy becomes ordered around an ideological goal, it is likely that human rights, both domestic and international, will be trampled on."

If policy and programs move in opposite directions rather than in synch, the situation is even more telling with respect to legislation. President George Bush announced a plan to create a new border security agency in which the Border Patrol, currently part of the immigration service, would be merged with the Customs Service, now a part of the Treasury Department, and both placed under the Justice Department. Merging the beleaguered U.S. Immigration and Naturalization Service and the Customs Service into a single agency was intended to tighten border security in response to the Sept. 11 attacks. However, after an immigration service contractor in that same month sent visa extensions to the Florida flight school where Mohamed Atta and Marwan al-Shehhi, two of the dead 9/11 hijackers believed to have piloted the planes that hit the World Trade Centre, had received instruction, the Republicans and Democrats joined

together in a vote of 405 to 9 to split the Immigration and Naturalization Service (INS characterized as one of the government' s fastestgrowing agencies with 37,000 employees and a \$6.2 billion annual budget) to create a Bureau of Immigration Services and Adjudications, responsible for handling matters like visa petitions, citizenship and asylum applications, and a Bureau of Immigration Enforcement to oversee the Border Patrol, immigrant detention centres and immigration inspectors. Though the initial plan had called for consolidation to make it easier for the federal government to oversee the nation' s border, limit border crossings in response to specific threats, and cut out bureaucratic hurdles and wasteful spending by federal agencies with overlapping functions, as predicted, the bureaucracy expanded and fragmented at one and the same time. Instead of opting for a larger trans-state security regime, the border system is being broken up and strengthened, without realistically assessing whether such efforts will have any real impact on screening out would-be attackers while not slowing down the approximately 500 million people, over one million trucks, and over two million railway cars that cross the American border each year. As Representative Jim Kolbe, a Republican Senator from Arizona and one of the very few to vote against the Bill and to note that the Emperor had no clothes, said in the Senate: "Unfortunately, the bill brought to us today simply rearranges the boxes on the existing organization chart of the I.N.S." In fact, the new associate attorney general would have less authority than the current commissioner of immigration and naturalization under the legislation.

Canada simply had a different version of the same incoherent phenomenon; its policies were also in disarray. Although the Immigration Refugee Board (IRB) had reported on 13 January that in the first 3 months of 2002 there were 6,754 refugees compared to 10,130 in 2001, a reduction of one-third⁷, claims made in Canada, by April had grown enormously; the IRB was in fact faced with a mounting number of claims: growing from 22,714 in 1997 to 34,253 in 2000 and expected to reach 47,000 in 2002. By considering the condition of the home country and the trends related to that type of claim, the IRB proposed to streamline to enable applicants with potential security problems to be identified early by "triaging" refugee claims into four different streams according to the nature and characteristics of the case: a security stream, an expedited stream for well-founded claims, a stream for straight-forward cases with only one or two issues for short hearings, and a regular case stream for a full hearing.⁸

The NGO refugee support community went along with this streamlining initiative, that would also reduce the number of officers hearing a case to from two to one, believing that they would receive as a trade off in the new legislation a right to appeal. The *Immigration and Refugee Protection Act*, scheduled to come into force on 28 June 2002, was withdrawn in the last week of April on the apparent basis that an appeal process would introduce inordinate delays into the system particularly with the larger case load. However, the provision to stop a refugee claim proceeding if a claimant is discovered to be a member of an inadmissible class, was under a removal order, or if there were reasonable grounds to believe that the claimant was a terrorist, senior official of a government engaged in terrorism, or a war criminal, also fell by the wayside. The changes requiring airlines to provide information on passengers before arrival and for penalties for those engaged in trafficking or assisting illegal entrants also died as did the

right to detain foreign nationals *within* Canada. If the government was not in enough hot water with the NGO community and with its own security objectives, the provinces were also up in arms. British Columbia, Ontario and Quebec had been carrying the costs of providing legal assistance to refugee claimants and threatened to pull the financial plug unilaterally unless they received federal assistance.

The Courts

Each state was trying to solve the problems of security and immigration on the state level rather than on multi-levels of governance and ended up bloating its bureaucracy, alienating the lower levels of the provinces as well as the NGO sector, and facing larger numbers of pressures. In Canada, the Courts also ended up handing off the problem. Three cases will be discussed to illustrate the point.

First, in the Suresh case (*Suresh, Appellant, v. The Minister of Citizenship and Immigration and the Attorney General of Canada, Respondents*, File No.: 27790), the Supreme Court of Canada on 11 January 2002 overruled the decision of the Lower and Federal Appeal Court that Manickavasagam Suresh, a Convention refugee from Sri Lanka, who had applied for landed immigrant status but in 1995 was turned down on security grounds and deportation initiated based on the opinion of the Canadian Security Intelligence Service ("CSIS") that he was a member and fundraiser of the Liberation Tigers of Tamil Eelam ("LTTE"), an organization alleged to be engaged in terrorist activity in Sri Lanka. The decision was made on a technicality that Suresh had not been provided with a copy of the Immigration Officer's memorandum, nor with an opportunity to respond to it orally or in writing. However, although the request for appeal was accepted and the Department was ordered to rehear the case on the grounds of procedural concerns, the government won on the key issues. The Court held that the *Immigration Act* was constitutional provided that the Minister exercised her discretion in accordance with the Act, the right to life, liberty and security and that freedoms of expression and association were not violated. Engagement in acts of violence was not protected by the freedom of expression and freedom of association safeguards of the *Charter*. The phrase "danger to the security of Canada" and the term "terrorism" were not perceived by the Court as unconstitutionally vague. Procedural protections did apply when a refugee established a *prima facie* case that there was a risk of torture on deportation, a threshold that Suresh met. Thus, although the Court ruled that Suresh had been denied the required procedural safeguards and should have been provided with the material upon which the Minister based her decision and an opportunity to respond in writing, the Court also held that a discretionary decision in this sphere may only be set aside if it is patently unreasonable in the sense that it was made arbitrarily or in bad faith, cannot be supported on the evidence, or the Minister failed to consider the appropriate factors. Likewise, the Minister's decision on whether a refugee faces a substantial risk of torture upon deportation should be overturned only if it is not supported on the evidence or fails to consider the appropriate factors. The court should not reweigh the factors or interfere merely because it would have come to a different conclusion. So as long as the Minister follows the procedural instructions, Suresh is highly likely to be deported on the next round. The Court strengthened the hands of the bureaucracy.

The media response to the ruling was even more interesting. For example, the

Vancouver Sun of 14 January 2002 applauded the ruling for loosening the “deportation knot” in determining that refugees facing torture can be deported in exceptional circumstances and that the pattern of the Court placing obstacles in the way of the government had been reversed. Presciently, the editorial also opined that the length of the refugee determination process was a security threat in itself.

In the case of Mansour Ahani (*Ahani v. Minister of Citizenship and Immigration* 2002 SCC 2 File No.: 27792), the issue was more straightforward and the case is really a footnote to that of *Suresh*. The appellant was a citizen of Iran who entered Canada on 14 October 1991 and was granted Convention refugee status based on his fear of persecution due to his political opinions and membership in a particular social group. However, the Canadian Security Intelligence Service (CSIS) suspected that Ahani was a member of the Iranian Ministry of Intelligence Security (MOIS), which sponsors a wide range of terrorist activities, including the assassination of political dissidents world-wide. CSIS also believed that Ahani received specialized training in the MOIS that qualified him as an assassin. Ahani was contacted by an Iranian intelligence official, allegedly a commander of the MOIS, whom he met in Zurich, Switzerland, traveling on a false passport. Both traveled separately, and met again in Fermignano, Italy, apparently home to a number of Iranian dissidents. Ahani returned to Switzerland, then traveled to Istanbul, Turkey, where he obtained another false passport and returned to Canada. Upon his return to Canada, Ahani met with CSIS agents. CSIS alleges that during those meetings, Ahani admitted that his military training was part of his recruitment into the MOIS, and that the intelligence officer he met in Europe was a previous associate. The Minister of Citizenship and Immigration filed a security certificate (s. 40.1) with the Federal Court Trial Division, alleging that Ahani was a member of the inadmissible classes described in the anti-terrorism provisions of the *Immigration Act* [ss. 19(1)(e)(iii), 19(1)(e)(iv)(C), 19(1)(f)(ii), 19(1)(f)(iii)(B) and 19(1)(g)]. Ahani was arrested under s. 40.1(2)(b) of the Act and has remained in custody ever since. The Court determined that Ahani has not cleared the evidentiary threshold required to access the s. 7 protection guaranteed by the *Canadian Charter of Rights and Freedoms*. Further, as in the case of *Suresh*, the provisions allowing the Minister of Citizenship and Immigration to deport a refugee for membership in a terrorist organization were determined not to unjustifiably infringe *Charter* rights of freedom of expression and association because the appellant failed to make a *prima facie* case that there was a substantial risk of torture upon deportation. Unlike *Suresh*, the Minister provided ample evidence in the record to support the discretionary decision that the appellant constituted a danger to the security of Canada. The Minister's decision was found to be reasonable, and no error was committed that required the intervention of the court.

The third case is now a cause for the NGO community was that of Muhammad Zeki Muhammad Mahjoub who was allegedly imminent risk of being forcibly returned to Egypt by the Canadian authorities where he would be at grave risk of torture, an unfair trial as well as being subject to other serious human rights violations. The Egyptian Government claimed he was part of the leadership in exile of the armed Islamist group Tali' at aFatah (Vanguard of the Conquest); he was so charged and was sentenced in absentia in April 1999 to 15 years' imprisonment by the Supreme Military Court. Mahjoub has been in custody in Canada since June 2000 under a Ministerial security

certificate in which Mahjoub was named as a threat to Canada and detained pending possible deportation. Thus, in spite of the Suresh ruling, or perhaps as much in response to it, the NGO refugee support community is totally at odds with the government in the tension between human rights protection and security concerns.

Conclusion

Immigration and refugee policy has not been harmonized between Canada and the United States. Nor are there any indications that they will be. The various elements of governance have fragmented both with respect to the relations between various parts of the state sector as well as between the state and different elements in the civil society. The state sector – in particular, the bureaucracy – has been expanded at the expense of the role of sub-state actors, NGOs and super-state institutions. Further, that bureaucracy had grown but it has fragmented as well. The legislative foundation for reconciling security and immigration is in disarray. The courts have reinforced the role of bureaucracy, but the bureaucracy has an even larger challenge while it has itself become divided. There is little sign that the governments of the United States and Canada have in the works proposals to develop a multi-level system of governance in response to the challenges of reconciling human rights with security concerns.

ENDNOTES

¹ This and other segments of this article dealing with globalization and transnationalism are drawn from a text on which I served as editor-in-chief and wrote some of this material. The volume put out by Metropolis of Canada Immigration and Citizenship is entitled: *Immigration Policy and Practice in Canada*, Ottawa 2002.

² In the characterization used here, the term power is restricted to *Macht*, forceful might or coercive force; *Kraft*, the active capacity to bring something about because one possesses skill or an idea, is characterized as authentic authority or moral and intellectual influence respectively. The raw material and technical capacity are referred to as material influence.

³ Thomas Faist defined transnationalism as the "sustained ties of persons, networks and organizations across the borders of multiple nation-states" (1999, 2).

⁴ Transnationalism represents a third historic stage of citizenship beyond membership in the city-state and the nation-state. As David Miller (2000) noted, traditional citizenship was bounded, first restricted within the walls of the city-state. Only later did citizenship develop within the cultural limits of the nation-state (Heater 1990; Riesenber 1992).

⁵ Cf. Ignatieff 2001. The rights revolution includes the achievement of civil rights (freedom of expression, religion, etc.) in the eighteenth century; attaining political rights (the right to vote and run for office) in the nineteenth century; and gaining social rights (universal education, health care and income security) in the twentieth century. (Cf. Marshall 1964)

⁶ This was the last roundtable of a series sponsored organized by the Canadian Centre for Foreign Policy Development and the Institute of International Education (Denver). Cf. <http://www.ecommons.net/ccfpd/>

⁷ Part of the decline in numbers was attributed to the imposition of a visa requirement on Hungary and Zimbabwe; there were 147 claims from Hungary in 2002 compared to 1,034 in 2001 and 57 claims from Zimbabwe in 2002 compared to 359 in 2001.

⁸ Cf. the Press Release of the IRB dated 28 March 2002 and signed by Peter Showler, Chairperson Forcible Return/ Risk of Torture.

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