

# ASYLUM POLICY DEBATE

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## PROTECTING BOAT PEOPLE

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### ***Sri Lankan boat people***

I want to talk about Bill C-4. The Bill has the title "The Preventing Human Smugglers from Abusing Canada's Immigration System Act." It was introduced into Parliament on 15 October 2011. It is still at the first reading stage.

Although the legislation is not country specific, its predecessor, Bill C-49 was introduced in October 2010 into the minority Parliament in response to the arrival of Tamil boat people, 76 aboard the MV Ocean Lady in October 2009 and 492 aboard the MV Sun Sea in August 2010. The Minister of Citizenship and Immigration, the Honourable Jason Kenney, on second reading in the House of Commons, justified the proposed legislation by reference to these arrivals<sup>1</sup>. These arrivals were a tiny component of those from Sri Lanka fleeing persecution and seeking resettlement.

The legislation died in the last Parliament because in that Parliament the Conservative government was in the minority and none of the opposition parties would support it. The Conservative government in this Parliament has a majority and has reintroduced the legislation.

Sri Lanka ended in May 2009 a long brutal civil war between the the Government of Sri Lanka and the minority Tamil forces who sought an independent country in the north of Sri Lanka. The war, which went on for twenty six years, resulted in 80,000 deaths. It culminated in a frenzy of killing and mass detention of Tamil civilians.

Tamils in Sri Lanka continue to be victimized by the victors in the war. The systemic discrimination, harassment and persecution of minority Tamils by elements of the majority which sparked the civil war continues with a vengeance now that the Tamil side has lost that war.

Refugee protection and resettlement for Tamil victims, even during the height of the civil war, was never easy. There were too many claimants and there was not enough political will. All sorts of evasive devices were used to prevent the theoretical commitment to protect refugees from translating into the numbers the civil war merited.

As difficult as protection and resettlement for Sri Lankan refugees were before the end of the civil war, they all but collapsed since. Sri Lankan Tamil refugees are now caught between a fiction of change of circumstances ending the threat of persecution and the reality of persecution back home.

The standard refrain from refugee determination tribunals and resettlement officers is that now that the civil war has ended neither protection nor resettlement is necessary. The facts on the ground though tell the opposite story. Persecution for some Tamils has worsened since the civil war has ended, because the protective enclave which once existed for Tamils in the north of the island is gone.

Those who had fled to countries of proximate refuge in the region are stuck. Because of the dangers they face in Sri Lanka, they can not go back home. Resettlement countries will not take them. Yet they can not stay where they are.

Countries in the region where Sri Lankan asylum seekers are found are not signatories to the Refugee Convention and do not respect refugee rights. Malaysia, Indonesia, and Thailand all tell the same sorry tale. Refugees can not work legally. If they work illegally, they are exploited by employers without remedy. Refugees work long hours at low pay at menial tasks in unsafe and unhealthy working conditions for abusive employers. Their children can not go to school. Their movements are restricted. They suffer from food shortages and inadequate medical treatment at high costs. They are denied documentation and are harassed by the police.

Some are detained in crowded, unsanitary, unhealthy conditions. They face the threat of forcible repatriation.

Malaysia introduced an amnesty for illegal migrant workers starting August 1st of this year. Asylum seekers are ineligible.

Tamil refugees have taken as best they can the situation into their own hands. They have become a new boat people, fleeing the countries in the region in which they were caught, seeking at risk to their lives, to get protection in resettlement countries—Australia, New Zealand and Canada. The arrivals on the MV Ocean Lady and the MV Sun Sea were part of this outflow.

### ***B. Vietnamese boat people***

We have seen this sad story many times before, refugees fleeing persecution and seeking resettlement by ship and boat. Before I turn to the details of Bill C-4, I want to go back to how Canada and the world reacted to another group of refugees fleeing persecution and seeking resettlement by boat and ship, the Vietnamese boat people.

The American military withdrew from Vietnam in August 1973 leaving to the South Vietnamese the defence of South Vietnam against the attacks from North Vietnam and the Viet Cong. South Vietnam fell to the Viet Cong and North Vietnam in April 1975. The collapse of South Vietnam led to a massive flight of refugees from Vietnam.

#### *The Indochinese designated class*

The Government of Canada in response created the private sponsorship system, which exists to this day, and the Indochinese designated class. Regulations said that a Canadian organization or group of five individuals could sponsor a person from designated countries in Indochina to come to Canada.

Until September 1990 the countries designated were Cambodia, Laos and Vietnam. According to the regulations, a person from but residing outside these countries could come to Canada, as long as the person had a sponsor here. The Government of Canada also assisted people from this class to come to Canada under the Government refugee allocation for South East Asia.

There was no need for an applicant to prove that he or she was a refugee. The applicant did not have to prove a well founded fear of persecution. Dislocation and sponsorship were enough, provided the person could show likelihood of successful establishment and criminal and medical admissibility.

The Indochinese designated class was one of the most successful programs the Immigration Department ever ran. The class began 7 December 1978. At least in theory, it remained in effect for Vietnam, Laos and Cambodia till 1

September 1990. Most of the large numbers of Vietnamese who came to Canada came by virtue of this class. In 1979–1980 alone, some 60,000 were admitted.

Though it remained in effect in theory till September 1990, it ceased operation after 14 June 1989 for Vietnamese and Laotians arriving in Hong Kong after 16 June 1988 or in any other Southeast Asian country after March 14, 1989. While keeping the program on the books as a regulation, the Government ceased to operate it administratively for new arrivals.

#### *The Comprehensive Plan of Action*

The United Nations held an International Conference on Indochinese refugees in Geneva on June 13 and 14, 1989. Prior to the Geneva Conference, the U.N. held a preparatory meeting in Kuala Lumpur, Malaysia on 8 March 1989.

The Malaysian meeting proposed a draft declaration and comprehensive plan of action on Indochinese refugees. The Geneva meeting accepted the draft. According to the plan, resettlement of refugees from Indochina would cease, except for those who passed screening procedures.

The declaration that accompanied the plan stated that governments were preoccupied with the burden imposed on neighbouring territories by asylum seekers. The declaration also stated that governments were alarmed current arrangements to deal with asylum seekers might no longer be responsive to the size of the problem.

The plan itself had three key components: the establishment of screening procedures, repatriation of those who failed screening, and resettlement of those who passed screening. Early establishment of consistent region wide refugee status determination processes was required under the plan. According to the plan, the status of asylum seekers had to be determined by a qualified national authority, in accordance with established refugee criteria and procedures.

The criteria recognized were not restricted to the 1951 Convention. The Universal Declaration of Human Rights and other relevant international instruments had to be borne in mind and applied in a humanitarian spirit.

The Office of the United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status was to serve as an authoritative and interpretative guide and there was to be a right of appeal, with the asylum seeker entitled to advice on appeal. The UNHCR was to ensure proper and consistent functioning of the procedures and application of the criteria.

Resettlement was divided into two categories one for long stayers, and the other for newly determined refugees. Long stayers were all those who arrived before a cut off date (the date screening was established). Long stayers were eligible for resettlement without going through screening.

For those who arrived after the cut off date, only those who passed screening were eligible for resettlement. The plan said a resettlement program would accommodate all those who arrived after the introduction of status determination procedures and were determined to be refugees.

The plan went on to say that persons determined not to be refugees should return to their country of origin. The Chair of the Geneva Conference that adopted the plan in June 1989, Dato Haji Abu Hassan Bin Haji Omar of Malaysia, in his closing statement, indicated that the plan's purpose was to discourage Vietnamese from leaving Vietnam. He said "asylum seekers could no longer assume that they would be automatically regarded as refugees and therefore entitled to automatic resettlement."

#### *Canadian problems*

There were a number of problems with this structure. One was that it had no reflection in Canadian law for over a year. The second was that it was an abdication of Canadian sovereignty, delegating Canadian refugee determinations to foreign entities. The third was the inadequacy of foreign screening.

Elaborating on these problems here would take me too far afield. If someone is interested in them, I have discussed them at length in an article published in 1991 in the magazine *Refuge*.<sup>2</sup>

#### *The Elysia*

I would not now suggest a designated class for Sri Lankan refugees. Vietnam, Cambodia and Laos, as Communist states, had exit controls. Sri Lanka does not. Vietnamese refugees had to leave Vietnam by boat because the Government would not let them leave. Sri Lankans can leave Sri Lanka, provided they can get visas from the countries of destination.

The imposition of exit controls imposes a limit on the number of people who can and will leave. If there are no exit controls and no or minimal entry controls either, large numbers of people may leave many of whom have no substantive claim to refugee protection.

An agreement akin to the Comprehensive Plan of Action between countries of proximate refuge and countries of resettlement for Sri Lankan and other refugees in the region is a more plausible option. Countries of proximate refuge would screen. Resettlement countries would take the screened in. The screened out would be repatriated. The Office of the United Nations High Commissioner for Refugees would supervise the application of the plan.

That is an option I canvassed with the Office of the United Nations High Commissioner for Refugees in Geneva. I became involved in the plight of Sri Lankan Tamil refugees

because of another boat, 87 Sri Lankan refugees aboard the ship *MV Elysia* at Tanjung Pinang port Indonesia. The refugees had left Malaysia destined for New Zealand, but were stopped July 10th this year en route by the Indonesian water police in Indonesian waters.

The refugees refused to disembark not wanting to end up in a situation in Indonesia as bad as the situation they left in Malaysia. New Zealand refused to take them.

The Government of Indonesia stated that it would not use force to impose disembarkation on the passengers of the *Elysia*. The Government has also stated that it would give access to food supplies and medical care, but neither the Government nor the UNHCR nor the International Organization for Migration (IOM) actually provided food supplies and medical care in a sustained manner to the passengers. After running out of food and water, the refugees on August 26th disembarked and were put into Indonesian detention. They are now going through UNHCR registration and refugee determination. They have been moved so I have been told from detention to IOM reception centres.

I went in early September, on behalf of this group, to Geneva to meet with the Office of the United Nations High Commissioner for Refugees to see what could be done to help them. The officials with whom I met stated:

The Office of the United Nations High Commissioner for Refugees is opposed to detention of asylum seekers. The UNHCR promotes alternatives to detention.

Indonesia had before allowed asylum seekers freedom, but recently enacted legislation which provided for detention and began detaining some of them, as the result of the pressure of other states. I presume they were referring to Australia, Canada and New Zealand although no states were mentioned.

Indonesian reaction to efforts to cease detention is to point to Australia, which also detains asylum seekers.

Releasing asylum seekers to reception centres is considerably cheaper for the Government of Indonesia than keeping them in detention.

Other states in the region do not detain asylum seekers.

The passengers on the boat *Elysia* came from Malaysia. They were not detained there.

The IOM has reception centres in Indonesia which could serve as alternatives to detention. The reception centres may need to be refurbished or expanded. The reception centres can not become detention centres.

Indonesia is not releasing asylum seekers it wants to detain after UNHCR registration or even after UNHCR recognition. Rather it is waiting until there are resettlement offers for the refugees.

There are NGOs who are monitoring the situation in detention of asylum seekers and making reports.

UNHCR registration of asylum seekers whether in detention or not happens almost immediately, within a week. Refugee determination is taking six to seven months.

The UNHCR will accelerate refugee determination for those they identify through registration as vulnerable.

The UNHCR, in addition to pressing for alternatives to detention for all detainees, is asking specifically that women and children be released in conformity with the Convention on the Rights of the Child. Indonesia is not a party to the Refugee Convention but is a party to the Convention on the Rights of the Child. That Convention commits state parties to ensure that children have access to education. Children can not have that access when they are in detention.

The UNHCR is not encouraging a comprehensive plan of action patterned on the Vietnamese boat people model with resettlement states agreeing to resettle those asylum seekers screened in locally. Asia is considerably more developed now than it was twenty five years ago, at the time of the Comprehensive Plan of Action. Today the UNHCR is encouraging states in the region to resettle and integrate refugees.

Malaysia has agreed to regularize the status of some one million migrant workers through a registration process. The UNHCR is encouraging Malaysia to do the same with its asylum seeker population.

### **Respect for human rights**

Human rights violations against Tamils in Sri Lanka should cease. The best solution to any refugee problem is removing the root causes which generate the refugee outflow.

The response to the Tamil refugee situation then should be threefold. One is to promote respect for human rights of Tamils in Sri Lanka. The second is to promote respect for refugee rights in countries of proximate refuge. The third is to contribute to resettlement, sharing refugee responsibility with countries of proximate refuge.

The traditional resettlement countries should not be expected to resettle all Tamil refugees. Yet, they should be part of the solution, resettle some.

The Government of Canada has got part of this message and made an active effort to promote human rights in Sri Lanka. Prime Minister Stephen Harper has said that at the Commonwealth Heads of Government Meeting in Perth scheduled for next week he would advocate a boycott of a 2013 summit in Sri Lanka unless it improves its human rights record. Harper said:

“I have expressed concerns about the holding of the next Commonwealth summit in Sri Lanka ... I intend to make clear to my fellow leaders of the Commonwealth that if we do not see progress in Sri Lanka in human rights I will not as Prime Minister

be attending that Commonwealth summit. And I hope others will take a similar position.”<sup>3</sup>

The Government of Canada has also backed an independent investigation into war crimes committed by the Sri Lankan army in the final phase of the civil war. Foreign Minister John Baird, according to a Globe and Mail report, told Sri Lanka's Foreign Affairs Minister, G.L. Peiris, at the UN in New York in September that Canada wants progress on human rights and post civil war reconciliation, pushing back, according to a summary provided by sources, against Mr. Peiris's 'trust us' assurances<sup>4</sup>.

### **Bill C-4**

The Government of Canada through Bill C-4 is working at cross purposes. The Bill proposes punitive measures against Tamil and other refugees. The proposed legislation would discourage smuggling by punishing the smuggled.

The proposed law provides for mandatory twelve months detention for every member of a designated arriving group of persons unless the refugee protection claim is finally determined earlier or the cabinet Minister responsible decides that there are exceptional circumstances which warrant the person's release<sup>5</sup>. It further prohibits members of the designated groups from obtaining permanent residence until five years after a claim for refugee protection<sup>6</sup>. The delay in obtaining permanent residence would lead to a delay in family reunification. The proposed legislation denies to the designated claimants the right to appeal negative decisions other claimants have<sup>7</sup>.

Designation of a group may occur if the Minister has reasonable grounds to suspect that, in relation to the arrival in Canada of a group, there has been, or will be, smuggling for profit, or for the benefit of, at the direction of or in association with a criminal organization or terrorist group<sup>8</sup>. Smuggling is defined as organizing, inducing, aiding or abetting the coming into Canada of one or more persons knowing that, or being reckless as to whether, their coming into Canada is or would be in contravention of the Immigration and Refugee Protection Act<sup>9</sup>.

Designation of an arriving group would be by the responsible Minister and not the cabinet. The legislation sets out designation criteria, but neither the human rights record of the country fled nor the prior position of the Government on that record is proposed as a criterion.

One can see the problem this sort of legislation poses for human rights promotion. It violates the rights of refugees. The proposed legislation would mistreat people who have already suffered far too much, piling mistreatment in the country of asylum onto the mistreatment in the country of nationality and the country of proximate refuge.

The Refugee Convention prohibits detention of refugees on the sole basis that they arrived in the country illegally<sup>10</sup>. The proposed legislation does just that, holding out the threat of detention of refugees because of the manner in which they arrived.

The Canadian Charter of Rights and Freedoms prohibits arbitrary detention<sup>11</sup>, cruel and unusual treatment<sup>12</sup> and deprivation of liberty in violation of the principles of fundamental justice<sup>13</sup>. Detaining the smuggled to stop the smugglers is all three—arbitrary, cruel and unusual, and a deprivation which is fundamentally unjust.

The criteria the courts have set out to prevent detention which is arbitrary, cruel and unusual and fundamentally unjust suggest that Bill C-4, once legislated, would be vulnerable to Charter challenge. In the case of *Sahin* in 1995 Mr. Justice Rothstein set out a number of factors to consider when determining whether detention violates the Charter as fundamentally unjust. One of these factors is the reason for the detention. Another factor is the length of time in detention. He wrote:

“If an individual has been held in detention for some time as in the case at bar, and a further lengthy detention is anticipated, or if future detention time cannot be ascertained, I would think that these facts would tend to favour release.”<sup>14</sup>

The Government of Canada justifies the legislation as removing the incentives of customers of smugglers. Calling prolonged detention, denial of family unity, unfair refugee determination procedures as disincentives to smugglers is a euphemism. One can assume that if we treat Tamil refugees in Canada worse than they are being treated in Sri Lanka or the countries of proximate refuge, they will not want to come here. However, we should not be violating the human rights of refugees in order to deter smuggling.

I mentioned earlier that refugee determination systems use evasive techniques to prevent a commitment to refugee protection in principle from translating into the numbers the plight of refugees warrant. One of these techniques is a pretense that refugees are irregular economic migrants, queue jumpers, moving from poor countries to rich countries without going through immigration procedures of the country of destination. Some support for Bill C-4 comes from this quarter, a mistaken belief that the boat people are devious queue jumping economic migrants, rather than the desperate victims they are.

The civil war in Sri Lanka was sparked by systematic discrimination and exclusion by elements of the majority against the Tamil minority. The violent Tamil Tiger response does not excuse the mistreatment which generated it. Now that the Government of Sri Lanka forces have won

the civil war, the very mistreatment of the Tamil minority which engendered it has become more cruel. This is a victory without magnanimity.

The Canadian legislation is bad in principle. But it is even worse in context. It says to the Government of Sri Lanka, go ahead, mistreat the Tamil minority. We don't care.

Because the legislation was introduced in response to the Tamil arrivals, the legislation sends a message to Sri Lanka that we are not concerned about the mistreatment of your Tamil population. We are more concerned about our own borders and entry policy than what happens to Tamils back home.

The current Government has expressed concern about human rights violations inflicted on Tamils. Yet, when the victims of the failure to follow Canadian advice arrived on our shores, the response of the Government of Canada was to detain the arrivals *en masse* under the current legislation and propose legislation which would, in the future, impose a host of obstacles to the protection and settlement of such a group. While it is uncertain who in the future would be designated under the legislation, it is apparent that the government of the day, if the legislation had been in place at the time, would have designated the 76 Tamil arrivals aboard the MV Ocean Lady in October 2009 and the 492 aboard the MV Sun Sea in August 2010.

The proposed legislation is retroactive to March 2009. The Bill states that a designation of a group for the purpose of mass detention may be made in respect of an arrival in Canada after March 31, 2009<sup>15</sup>. The Tamil refugees aboard the MV Ocean Lady have, to my knowledge, all been released. Those aboard the MV Sun Sea have for the most part been set free. The enactment of the legislation would give the Government the power retroactively to throw into jail the passengers of both these ships. The very choice of the date March 2009 suggests that this was the intent.

One reason for the mistreatment of asylum seekers in Asia is the pressure put on those countries by resettlement countries. Another reason is the poor example resettlement countries give.

As the Comprehensive Plan of Action at the time of the Vietnamese boat people showed, part of the solution lies with the countries of proximate refuge. The solution now is not necessarily the same as the solution then. All the same, the contribution countries of proximate refuge have to make to the solution can not be ignored.

The logic behind C-4 is to discourage new arrivals like those aboard the MV Ocean Lady and the MV Sun Sea. Aside from the cruelty of the means, it is likely to have a perverse effect, leading countries of proximate refuge to mimic its cruelty and prompting asylum seekers in those countries

to flee in much the same way the passengers of the Ocean Lady, Sun Sea and Elysia did.

At the time of second reading of Bill C-49, the predecessor of Bill C-4, the previous Parliament, in October 2010 Immigration Minister Jason Kenney said:

“we have begun preliminary discussions with our international partners, including Australia, which obviously has a great stake in this issue, and with the United Nations High Commissioner for Refugees to pursue the possibility of some form of regional protection framework in the Southeast Asian region. In part that would entail encouraging the countries now being used as transit points for smuggling and trafficking to offer at least temporary protection to those deemed by the UN in need of protection and then for countries such as Canada to provide, to some extent, reasonable resettlement opportunities for those deemed to be bona fide refugees, which is something we are pursuing.”

The Minister went on to justify the need for the proposed legislation on the basis that this solution was mid to long term and something about smuggling had to be done now. Yet, making matters worse for the customers of smugglers in countries of destination is not a workable shortcut.

The mistreatment the refugees receive in their home countries and countries of proximate refugee is real, immediate, experienced. The threat of mistreatment Bill C-4 holds out, even if realized, will always be for the smuggled only a potential, and one, we can be sure, smugglers will disguise and misrepresent.

One form of abuse refugees in countries of proximate refuge suffer is exploitation by smugglers. That exploitation will not end because the smuggled are mistreated in countries of resettlement. On the contrary, that mistreatment will make the exploitation even more pernicious.

Smuggling customer disincentivization will come only from making matters better for refugees back home and in countries of proximate refuge. If Tamils are not being persecuted in Sri Lanka, if they are being treated humanely in countries of proximate refuge, the incentive for them to hire smugglers will evaporate.

The efforts of the Government of Canada to promote human rights in Sri Lanka are commendable and should be encouraged. The Bill C-4 initiative is deplorable and should be dropped. What should take its place is a Canadian initiative to organize a new comprehensive plan of action with countries of proximate refuge in Asia. This time the plan should provide for respect for refugee rights in countries of proximate refuge and a sharing of refugee resettlement amongst traditional resettlement countries and countries in the region.

#### NOTES

1. Hansard, October 27, 2010.
2. “Private Sponsorship of Indochinese” October 1991 Refuge, Volume 11 Issue 1, page 6
3. “Canada seeks Sri Lanka boycott at Commonwealth meeting”, Amanda Hodge, The Australian, September 14, 2011
4. “In policy shift, Stephen Harper presses Sri Lanka on human rights”, Campbell Clark Sep. 29, 2011
5. Section 12 adding to the Immigration and Refugee Protection Act section 57.1(1).
6. Section 8 adding to the Immigration and Refugee Protection Act section 25(1.01).
7. Section 17 creating in the Immigration and Refugee Protection Act a new section 110(2)(a).
8. Section 5 adding to the Act section 20.1(1)(b).
9. Section 18 replacing Act section 117(1).
10. Article 31
11. Article 9
12. Article 12
13. Article 7
14. *Sahin v. M.C.I.* [1995] 1 F.C. 214
15. Section 34.1

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