

REFUGEES ARE (NOT) WELCOME HERE: THE PARADOX OF PROTECTION IN CANADA*, AZAR MASOUMI (VANCOUVER: UBC PRESS, 2024)*I. HISTORICIZING REFUGEE LAW IN CANADA**

While refugee law is supposedly meant to be derived from international law, any meaningful understanding of it requires careful attention to the particular national context in which it is operationalized. Different states will interpret the *Convention relating to the Status of Refugees* differently.¹ Some states take strict and narrow constructions of the *Convention*, or apply reservations to the general international regime it contemplates, while other states offer more expansive and generous interpretations, or offer protection beyond the scope of the *Convention*.² Still others have not ratified the *Convention* at all, and instead develop their own processes for accepting and managing asylum seekers.³ These processes may or may not align with those of other states or the *Convention* and frequently seek to minimize the obligations to migrants that those states are willing to accept. There is no proper understanding of refugee law without a proper grounding in the localities where it is developed, interpreted, applied, undermined, or simply ignored.

On this basis, it would be challenging to learn about refugee law generally, or in one country even, by learning about refugee law in another country. History, geography, and a dozen other hyperlocal factors will affect the trajectory or even existence of formal refugee law in a particular place. Transposing insights from that place to another would be presumptuous.

Yet it is also the case that states borrow liberally from another, especially liberal states, and so understanding how one such state manages refugees can offer insight into what other states might adopt, adapt, or reimagine for their own purposes.⁴ By focusing on Canada in her book *Refugees Are (Not) Welcome Here*, Azar Masoumi manages to do just that.⁵ While Masoumi is careful not to make assertions about the broader applicability of her work, any

¹ 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) [*Convention*].

² On the long-standing variations between jurisdictions, see e.g. Melanie Randall, “Refugee Law and State Accountability for Violence Against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Persecution” (2002) 25 Harv Women’s LJ 281; Susan Kneebone, ed, *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives* (Cambridge: Cambridge University Press, 2009); Bruce Burson & David James Cantor, eds, *Human Rights and the Refugee Definition: Comparative Practice and Legal Theory* (Leiden: Brill Nijhoff, 2016); Karen Musalo et al, *Refugee Law and Policy: A Comparative and International Approach*, 6th ed (Durham: Carolina Academic Press, 2025); Jill I Goldenziel, “When Law Migrates: Refugees in Comparative International Law” in Anthea Roberts et al, eds, *Comparative International Law* (Oxford: Oxford University Press, 2018) 397.

³ These processes are nonetheless often influenced by the *Convention*. See Maja Janmyr, “The 1951 Refugee Convention and Non-Signatory States: Charting a Research Agenda” (2021) 33:2 Intl J Refugee L 188.

⁴ As Alison Mountz argues, states share and refine techniques of exclusion in particular, leading to the physical, political, and ontological death of refugees: Alison Mountz, *The Death of Asylum: Hidden Geographies of the Enforcement Archipelago* (Minneapolis: University of Minnesota Press, 2020).

⁵ Azar Masoumi, *Refugees Are (Not) Welcome Here: The Paradox of Protection in Canada* (Vancouver: UBC Press, 2024).



critical reader will recognize that her book offers not only what is claimed — a useful explanation of why Canada’s specific refugee law regime looks open and welcoming but is decidedly not — but also the potential to understand refugee law in other parts of the world.

Masoumi’s structuring of her book reflects the bipolarity of refugee law development. Each of its three parts contains two chapters. The first part outlines the growth of refugee law’s protective ambit, but also contextualizes the second chapter, which outlines how this apparent increase in protection is inevitably — or even simultaneously — restricted by legislative, procedural, and bureaucratic machinations. In the short history of modern refugee law, this happened first when Canada was initially a major proponent of the *Convention* but then refused to ratify it.⁶ Later, once it ratified the *Convention*, Canada failed to implement a structured refugee determination system for many years. Once such a system was implemented, it was immediately in induced crisis through under-resourcing, poisonous rhetoric about “real” and “fake” refugees, and attempts to deter refugees and then reduce refugee acceptance rates in response to global crises.⁷

These themes continue to play out in the next two parts. Development of globally leading, expansive grounds on which to claim asylum — including gender-based persecution — was accompanied by a set of procedural changes that made it harder for anyone to succeed on an asylum claim, gender-based or not.⁸ The Immigration and Refugee Board (IRB) itself prioritized administrative efficiency, often in ways that aligned with governmental desires to control and reduce refugee acceptance rates.⁹ The Federal Court system resisted some of these changes, indicating a cleavage between the restrictionism of the administrative state and the acceptance that the judicial system was willing to offer.¹⁰

This attitudinal dissonance led to a similar contretemps. The recognition of gender-based persecution was extended by the judiciary to encompass sexual orientation- and gender-identity-based persecution as well. Yet these changes did not have a significant impact on refugee acceptance rates, even though the IRB’s guidelines for handling such claims were developed in consultation with affected groups and hailed as progressive.¹¹ The changes being made mainly affected adjudication, but ceaseless procedural changes made it difficult for claimants to access the system and present their cases to adjudicators. As Masoumi notes, “the IRB’s *Gender Guidelines* offered substantial jurisprudential and symbolic value without engendering noticeable practical change.... [They] were, in effect, a negotiated settlement that did not, and were not meant to, increase women’s access to refugee protection.”¹²

⁶ Masoumi, *supra* note 5 at 31–39.

⁷ *Ibid* at 45–57, 63–64, 82–90, 97–99, 114–22.

⁸ *Ibid* at 61–66, 107–08.

⁹ *Ibid* at 111–18.

¹⁰ As an example, in 2006, the Federal Court of Appeal found that a reasonable person would think that the IRB’s approach to establishing a precedent for dealing with claims by Roma fleeing Hungary was biased: *Kozak v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124 at paras 58–65 [*Kozak*]. This was in part on the basis of collaboration between the management and adjudicative branches at the IRB, the participation in the hearing by a designer of the lead case strategy, the lack of consultation with or notice to the refugee bar about the lead case strategy, the lack of evidential foundation for the need for a lead case approach, and the leak of the unfavourable IRB decisions to the media in Hungary to dissuade Roma from fleeing to Canada (*ibid*).

¹¹ See e.g. Masoumi *supra* note 5 at 108–09.

¹² Masoumi, *supra* note 5 at 76.

Masoumi's narrative thus is one of multiple players — governments, bureaucracies, courts — adopting shifting positions over time. As one stakeholder proposed or promulgated changes that seemed to favour welcoming more asylum seekers, another — or even a different branch of the same one — would respond with measures designed to make it harder for those asylum seekers to arrive in Canada, to have their claims adjudicated if they were here, or to succeed if they did manage to have a hearing.¹³ As one door opened, another closed.

This push and pull is the product of competing priorities, in particular from within the IRB itself. Overwhelmed by demand (from asylum seekers) and resistance (from the state itself), the IRB's persistence is best understood, Masoumi suggests, as a successful, perpetual failure.¹⁴ The failures include acquiescence to the neoliberal logics of administrative efficiency and optimization as well as the prioritization of case resolution rather than the deliberate dispensation of asylum to those in humanitarian need.¹⁵ Another element of failure includes active connivance in litigation and policy strategies to limit the ability of IRB adjudicators to hear cases or decide them in ways that favour the claimants.¹⁶ This story plays out repeatedly over the course of the history of refugee law in Canada.¹⁷

If one measures success by the rightness or wrongness of decisions reached by those individuals tasked with hearing and adjudicating claims for asylum, then it is hard to see how this pattern of non-performance might be understood as a success. Yet if the barometer of success is recalibrated, such that the mere existence of the system is seen as the true victory, then the oscillations of the refugee determination system — between humanitarian acceptance and administrative exclusion — are crucial to its continued viability. By pandering to competing interests but never succeeding enough in the pursuit of any such interests, the Canadian refugee regime treads that narrow path between acceptance and rejection. This continual failure is, Masoumi suggests, the reason the system still operates. What is really being protected then is the system, not the people who rely upon it.¹⁸

Masoumi engages these questions through a careful study of specific episodes in modern Canadian refugee law history. In doing so, she raises important questions about law's relationship to society. This gives the book an intriguing complexity. It can be read by those who are relatively new to the subject as a critical history, and invites the reader to seek out more detailed information about specific episodes or periods of time. It can also be read by those with an interest in race, criminalization, institutional legitimacy, and even international law and relations. In many ways, her work enriches and reinforces the relevance of these lenses when applied to refugee law. For those with greater familiarity with the field,

¹³ *Ibid* ("the Canadian regime has articulated its expansionist impulses mostly in the field of law and much of its restrictionist desires in the field of bureaucracy" at 134).

¹⁴ *Ibid* at 90–91.

¹⁵ Masoumi, *supra* note 5 at 45–47, 63–64, 82–90, 97–99, 114–18.

¹⁶ See *Kozak*, *supra* note 10 and accompanying text.

¹⁷ This pattern is exemplified by the IRB's prioritization of claims from Chile in order to reject them more quickly, and by the IRB's apparent collusion with Canadian and Hungarian officials in respect of Roma claimants to dissuade future asylum claims from Hungary: Masoumi, *supra* note 5 at 85–89.

¹⁸ *Ibid* at 145.

Masoumi's book confirms and nuances several critical understandings of refugee law. In what follows, I take up several of these questions.

II. WHY REFUGEE LAW?

The fundamental demand of the rise of international human rights as both a discipline and a set of legal commitments is that states cede exclusive control over the shaping of laws and policies that implicate the rights of individuals and sub-national communities. In this light, there is nothing exceptional about either the core claims made by the *Convention* or the basic concerns expressed by Canada.¹⁹ This is clear from the dialectical opposition between the state and all aspects of migration law. What makes refugee law unique in the realm of migration law generally is that it is not just governed by international human rights norms, but it is based on a human rights obligation. For example, so-called economic migration is understood internationally as a privilege, creating a wide opportunity for legalized discrimination by states, with domestic law being the primary regulatory force.

States are entitled to choose which economic migrants to admit, and on what criteria, without much regard to international law. Refugee law, on the other hand, is *grounded* in concerns about the rights and, crucially, the safety of the individual. This creates obligations independent of domestic law, which constrain states in ways that do not arise with other forms of migration. At its core, the problem with refugee law is that it undermines the state's presumed right to choose whom to admit to its territories and on what conditions. Virtually all commentary on state refugee policy, whether favourable or not, is about the extent to which that state entitlement should be limited.²⁰

If that is true, then the question is: why does refugee law exist at all? After all, states could simply avoid this problem by not ratifying the *Convention*. In fact, many states have done exactly that. Most of these states are in the Global South, geographically positioned such that they have a history or strong likelihood of receiving large numbers of refugees from neighbouring states.²¹

Like most international law concerning human rights violations, the primary purpose of refugee law and its administration (including, in some cases, its adjudication) is not to provide protection, but merely to explain why applicants are ineligible for protection. If Masoumi is right about this — that the primary purpose of refugee law is protect the system and thereby

¹⁹ On the tension between state sovereignty and international law generally, see Hans Kelsen, "Sovereignty and International Law" (1960) 48:4 *Geo LJ* 627 (arguing that there is no proper relationship between national and international law other than that presented by proponents of one view or the other). On the centrality of the refugee to the creation and justification of modern state sovereignty, see Emma Haddad, "The Refugee: The Individual Between Sovereigns" (2003) 17:3 *Global Society* 297. On the development of refugee law from one of resettling individuals to one that protects the state through restricting movement, see T Alexander Aleinikoff, "State-Centred Refugee Law: From Resettlement to Containment" (1992) 14:1 *Mich J Intl L* 120. See Robyn Lui, "State Sovereignty and International Refugee Protection" in Trudy Jacobsen, Charles Sampford & Ramesh Thakur, eds, *Re-envisioning Sovereignty: The End of Westphalia?* (Aldershot: Ashgate, 2008) 151 at 152. On how the sovereignty debate in refugee law is used by Western states to justify exclusion of refugees, see BS Chimni, "The Geopolitics of Refugee Studies: A View from the South" (1998) 11:4 *J Refugee Studies* 350.

²⁰ See Robyn Lui, "State Sovereignty and International Refugee Protection" in Trudy Jacobsen, Charles Sampford & Ramesh Thakur, eds, *Re-envisioning Sovereignty: The End of Westphalia?* (Aldershot: Ashgate, 2008) 151 at 152. On how the sovereignty debate in refugee law is used by Western states to justify exclusion of refugees, see BS Chimni, "The Geopolitics of Refugee Studies: A View from the South" (1998) 11:4 *J Refugee Studies* 350.

²¹ Janmyr, *supra* note 3 at 189.

the state that administers it — could we not obviate that hypocritical approach and the resulting dysfunction by not establishing a regime at all?

In a way, this is the question to be asked of all humanitarian law, given how many demands and restrictions are placed on state sovereignty by full compliance with the letter and spirit of the law. There is a vast literature assessing, for example, why Western and African states alike ratified the *Rome Statute of the International Criminal Court* at very high rates.²² Ratification entails the risk that a state's military and political leaders might be arrested and prosecuted. It also carries the less personalized risk that a state which does not adhere to the International Criminal Court's views on who should be prosecuted and for what offence will lose the legal right to respond to those violations of law in a way that the state sees fit. Instead of retaining control over the legal and adversarial systems, governments can be forced to defer to the International Criminal Court in ways that might frustrate the local management of transitional justice, truth-telling, and accountability measures.

Given these and other potential risks, all of which are forms of loss of sovereignty, the most plausible explanation for widespread ratification of the *Rome Statute* is that states saw some reputational or other value to be gained. Signing on to human rights agreements is another way of signalling a state's values and political alignments, if not necessarily its tangible commitments. In some situations, ratification might be a requirement or an obligation for states to receive foreign aid or access to preferential trade treatment. In this understanding, the ratification of legal instruments serves the goals of self-legitimation.

Masoumi suggests something similar happened with Canada's ratification of the *Convention*. Canada had been a major proponent of the need for such a treaty, and took the lead in drafting the *Convention*, but at the last minute refused to sign because of concerns about how the treaty would diminish state sovereignty.²³ The eventual ratification of the treaty centred on legitimacy concerns. While opponents offered the standard concerns noted above about loss of sovereignty and control, those who advocated for ratification had serious concerns about the impact on Canada's reputation.²⁴ Again, this hesitancy around the *Convention* is germane to understanding Canada's intermittent attentiveness to other international human rights commitments, including those now associated with the International Criminal Court.

²² 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) [*Rome Statute*]. See e.g. Robert Cryer, "The Boundaries of Liability in International Criminal Law, or 'Selectivity By Stealth'" (2001) 6:1 *J Confl & Sec L* 3 at 4; Beth A Simmons & Allison Danner, "Credible Commitments and the International Criminal Court" (2010) 64:2 *Intl Organization* 225; Jay Goodliffe et al, "Dependence Networks and the International Criminal Court" (2012) 56:1 *Intl Studies Q* 131; Daragh McGreal, "A Rationalist View of Rome Statute Ratification in the Pacific Region" (2013) 11:5 *J Intl Crim Justice* 1091; Terrence L Chapman & Stephen Chaudoin, "Ratification Patterns and the International Criminal Court" (2013) 57:2 *Intl Studies Q* 400; Daley J Birkett, "Twenty Years of the Rome Statute of the International Criminal Court: Appraising the State of National Implementing Legislation in Asia" (2019) 18:2 *Chinese J Intl L* 353; Marco Bocchese, "After Ratification: Predicting State Compliance with ICC Treaty Obligations" (2019) 19:4 *Intl Crim L Rev* 635; Konstantinos D Magliveras, "The Withdrawal of African States from the ICC: Good, Bad or Irrelevant?" (2019) 66:3 *Nethl Intl L Rev* 419.

²³ Masoumi, *supra* note 5 at 34–37.

²⁴ *Ibid* at 38.

III. LEGISLATING REFUGEE DETERMINATION

This ambivalence toward international human rights law helps explain in part the fact that when the *Convention* and its additional protocol were finally agreed to by Canada, no formal refugee determination system was established.²⁵ The *Convention* requires that a process for determining if someone satisfies the substantive criteria of the refugee definition exists, but it neither guarantees that a claimant will be granted asylum nor does it mandate a specific process that states follow in assessing claims.²⁶ That procedural aspect, which in many respects is the substantive aspect of refugee law, is left to be determined by states. It is therefore unsurprising that the Canadian government continued to make decisions on whom to admit as a refugee on an ad hoc basis instead of relying on an independent assessment body.²⁷ It was not until 1976 that this situation started to change when the *Immigration Act* established the IRB.²⁸

The passing of the *Immigration Act* and the establishment of the IRB heralded important legal and policy shifts. First and foremost, the burden of refugee status determination was moved out of the government's hands and onto the backs of a group of (eventually, independent and trained) adjudicators. This started to establish some degree of consistency of treatment of claims (at least on its face) that was independent of governmental priorities (again, at least on its face). It also increased capacity for adjudication, ostensibly allowing for more claims to be processed more quickly. Alongside the earlier ratification of the *Convention*, this signaled the genuineness of Canada's commitment to refugee rights. However, it also gave Canada a ready-made tool for deflection through the establishment of a body that could be held responsible for domestic frustration with the state of refugee regulation and reception. Establishing the IRB gave the government meaningful political distance from public discontent while frequently legitimating Canada's policies under the guise of law and adjudication.

Perhaps most importantly, establishing modern Canadian refugee determination through the *Immigration Act* and the IRB substantively and discursively conflated refugees with all categories of migrants, and fused asylum with migration writ large. Masoumi refers to the potent statement of then-federal immigration minister J.S.G. Cullen, who when explaining the *Immigration Act*, warned against opening Canada's borders "to all economic refugees,

²⁵ *Ibid* at 40.

²⁶ States are effectively obligated to determine if an individual "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it": *Convention*, *supra* note 1, art 1(A)(2). See also UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate* (26 August 2020), online: [perma.cc/2A66-QUB6]; *Agreement Between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries*, 5 December 2002, Treaty No E104943 (on the need for refugee status determination procedures to avoid violating obligation of non-refoulement).

²⁷ During this time period, the exercise of discretion was targeted toward specific states and groups: Geoffrey Care & James C Simeon, "How Other Countries Do It — Canada: The Evolution and Development of the Refugee Status Determination System in Canada and the Balanced Refugee Reform Act" in Geoffrie Care, *Migrants and the Courts: A Century of Trial and Error?* (London: Routledge, 2016) 213 at 221–27.

²⁸ *Immigration Act, 1976*, SC 1976–77, c 52 [*Immigration Act*]. The IRB was originally called the Immigration Appeal Board (*ibid*, s 59).

such as citizens of third-world countries.”²⁹ Legislative commingling supported and enabled a range of subsequent legislative, regulatory, and policy decisions that individually and collectively diminished access to and substantive protection of the refugee system.

Crucially, these anti-protectionist steps were not just the result of government diktat but at times fused adjudicative and managerial roles at the IRB.³⁰ Restrictionist strategies generally took one of two forms. From the outset, the Board was under pressure to achieve greater administrative efficiency.³¹ Over time, this included reducing the number of adjudicators assigned to assess refugee claims, speeding up hearings, increasing the number of cases heard by adjudicators, issuing more oral decisions, and completing shorter written reasons.³² The IRB also took more substantive cues from the government. When Ministers of Immigration expressed concern about the legitimacy of certain categories of claims — Masoumi describes two such scenarios involving Roma and Mexican claimants — the IRB tended to comply. It did so by issuing decisions that effectively established precedents severely restricting the possibility of any future claimants succeeding in their claims, even when substantively similar to claims made by nationals of other states.³³

These patterns of targeted restrictions that seemed to follow governmental concerns about particular nationalities had the recursive effect of confirming some of the poisonous political rhetoric around refugees: that many were fraudulent, bogus queue jumpers. Denials of claims further reinforced the idea that refugees are dishonest. Emphasis on the irregular ways in which asylum seekers entered the country — sometimes without passports, sometimes in large groups, sometimes without using official border entry points — gave additional grounds for generalized suspicions and implied a propensity for illegality: if these are the lengths they will go to, surely they must have something to hide?

IV. CRIME & RACE IN MIGRATION

One of the consequences of the discursive connection between refugees and immigrants is that these generalized suspicions of refugees reflect on immigrants as well. The lack of a clear dividing line between the two — including that grounds for criminal inadmissibility apply broadly to all categories of migrants³⁴ — means that all foreign nationals are now viewed as suspect and must be processed as such. If the major contribution of the 1976 *Immigration Act* was to establish formal refugee determination processes while also conceptually marrying immigration and asylum, then the major contribution of the 2001 *IRPA*, as well as subsequent agreements and legislation, has been to formalize this generalized suspicion into law and policy, and prioritize securitization of borders and people attempting to cross them.³⁵ Inherent to this has been the constriction of access to refugee protection.

²⁹ Masoumi, *supra* note 5 at 45 [emphasis in original].

³⁰ Kozak, *supra* note 10 and accompanying text; Masoumi, *supra* note 5 at 82–85, 114–18.

³¹ Masoumi, *supra* note 5 at 47–50, 82–85.

³² *Ibid* at 97–99, 117–18.

³³ *Ibid* at 87–90, 119–21.

³⁴ *Immigration and Refugee Protection Act*, SC 2001, c 27, ss 36(1)–(2) [IRPA].

³⁵ See e.g. Obiora Chinedu Okafor, *Refugee Law after 9/11: Sanctuary and Security in Canada and the United States* (Vancouver: UBC Press, 2020); Asad G Kiyani, “Criminalization, Safety and the Safe Third Country

Masoumi's analysis sheds important and new light on the relevance of "crimmigration" to refugee law. Crimmigration suggests that all forms of border crossings will become increasingly criminal, that participating in irregular border crossings will be increasingly criminalized, and that public animosity will be fed and relied upon to justify greater criminalization of all forms of migration.³⁶ It therefore hypothesizes and describes the legislative and policy convergence of criminal law and migration law, such that punitive criminal measures are applied against migrants in the absence of the standard procedural protections available in criminal law.³⁷ The *Convention* contains its own exclusion clauses in Article 1F, all dealing with various forms of serious wrongdoing, including international crimes. One can clearly see how crimmigration informs contemporary refugee law. Broader grounds for ruling non-citizens inadmissible because of their criminality, formalized information-sharing agreements between like-minded states about migrants, and automatic generalized suspicions of certain kinds of foreigners that generate predefined security responses (including detention) all point to the increasing conceptualization of migrants of all sorts as criminals. For refugees, this in part manifests in an inability to apply for certain forms of appeals or reviews, for certain kinds of risk assessments, or even for asylum in the first place.³⁸

Through her episodic histories of Canadian refugee law, Masoumi describes the various points in time where these measures and approaches came into being. Her work contextualizes these shifts within the overarching push-pull of refugee law that connects each section of the book, showing how ostensible improvements in refugee law were often undermined or contradicted by parallel moves made both by government and the IRB. But the implications of the history Masoumi offers go further than repeating this tension.

Although Masoumi does not pick the point up, the stories that underpin the central paradox she describes also set up theoretical insights that nuance existing claims. For example, Masoumi's description of the intersectional racism of the government and the IRB's approach to Mexican victims of sexual and gender-based violence will be familiar to any scholar of criminal law. In the mid-2000s, Canadian state policy was that Mexico was not capable of producing refugees. The IRB complied by convening hearings involving claims of sexual violence that routinely involved degrading, assaultive interrogations of women, almost preordained to lead to a rejection of the claim.³⁹ This is a key feature of Canadian criminal law trials involving sexual assault allegations. Racial disparity in the IRB's treatment of Mexican women specifically was criticized by the Federal Court,⁴⁰ paralleling long-standing claims about how racialized and Indigenous women in Canada are often not taken seriously as victims by law enforcement agencies.⁴¹ Similarly, these claims were understood

Agreement" in Michael J Carpenter, Melissa Kelly & Oliver Schmidtke, eds, *Borders and Migration: The Canadian Experience in Comparative Perspective* (Ottawa: University of Ottawa Press, 2022) 147 (arguing that criminalization and border securitization are used to distract from the much more straightforward goal of limiting the number of asylum seekers arriving in Canada).

³⁶ Juliet Stumpf, "The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power" (2006) 56:2 Am U L Rev 367; César Cuauhtémoc García Hernández, "Criminalizing Migration, Ending Rights: The Case of the United States Crimmigration Law" in Neža Kogovšek Šalamon, ed, *Causes and Consequences of Migrant Criminalization* (Cham: Springer, 2020) 27; Kiyani, *supra* note 35 at 158.

³⁷ *Ibid.*

³⁸ *IRPA*, *supra* note 34, ss 20.1, 20.2, 55(3.1)(a), 101(1)(c.1), 101(1)(e), 110(2)(a),(c), 112(3).

³⁹ Masoumi, *supra* note 5 at 123.

⁴⁰ *Ibid* at 121–23.

⁴¹ *Ibid* at 123.

by the government as being part of a much larger package of Mexican asylum claims that were “unfounded,” which is the language used to describe the preliminary dismissal of claims by police officers who receive sexual assault disclosures from victims.⁴²

In this light, crimmigration is not just about the criminalization of asylum seekers or migrants generally. Nor is it only about the contradiction between the use of criminal law’s punitive and retributive logic and the non-incorporation of criminal law’s procedural protections. It is also about the incorporation of the systematically deficient analytical frames applied to racialized and Indigenous peoples, that at once overcriminalize them while simultaneously understating the degree of victimization they face. Connecting these dots allows the reader to understand the paradox of refugee protection that Masoumi describes, and to build a richer theory of the relationship between criminal and migration law. Both the Canadian refugee system and the Canadian criminal justice system promise to expand their scope of protection to include racialized and Indigenous peoples, but in practice severely limit that protection.

Another way in which Masoumi enriches existing discourse is through her clarity about the role that race necessarily played in many of these tensions. Particularly during the period that she studies, the underlying racism of much of the policy and adjudicative work done in migration law broadly and refugee law especially was clear to anyone attuned to such issues. By doing the careful work of describing how the racial coding of governmental statements, regulations, and policies were translated into informal adjudicative guidelines and tangible outcomes, she again gives the reader a foundation to do more than just describe the interplay between Canada and the IRB.

Through close analysis of the disparate impacts of policy shifts and IRB decision-making, Masoumi shows that there is a complexity and a nuance to the patterns of racialization practiced in refugee law. It is not merely the operationalization of the generalized xenophobia of the public rhetoric: that would be self-defeating for the IRB, which retains its legitimacy through its ability to both succeed and fail in protecting refugees. Rather, what this detailed institutional history shows is that the racialization practiced by the IRB is intermittent and variable in ways that often, but not always, synchronize with state priorities.

This will be no surprise to those who presume the presence of the misguided logic and habits throughout the migration regime. In this vein, great attention has been drawn to Canada’s radically different treatment of Ukrainians fleeing Russia’s invasion and Gazans fleeing Israel’s bombardment and siege. The Canadian government established Temporary Resident Visa (TRV) programs for both conflicts. While these TRVs are distinct from the formal refugee system, they are cognizable as proxies for racialization in refugee law because they effectively require applicants to make qualitatively similar claims to those of asylum seekers in pursuit of qualitatively similar protection.

Disparity between the programs was facially evident. The Canadian government promised to accept 5,000 applications from Gazans and select up to 1,000 of those

⁴² *Ibid* at 124.

applications as eligible to receive visas.⁴³ Meanwhile, 962,612 of 1,189,320 applications from Ukraine were approved as of 1 April 2024. Nearly 300,000 individuals arrived by that date, at which point the government stopped tracking this information.⁴⁴ The scale of this numerical disparity was taken in many quarters to be conclusive evidence of the racism of the Canadian state.⁴⁵ The requirements for applicants to each system were also substantively distinct, with additional hurdles identified for the Gazan applicants, and further evidences state racism.⁴⁶ For some stakeholders, the disparity is obvious and requires — in part — a clear commitment to greater transparency and an anti-racist approach to protection.⁴⁷ For others, this was both racist and a policy designed to fail.⁴⁸

What Masoumi’s book adds to the discourse around race in refugee law is not just another claim of state racism in relation to migration. It explains how governmental rhetoric, intransigence and patterns of racialization are processed into legal outcomes through complex forms of institutional alignment and friction. It is not as simple as the Minister of Immigration making a declaration and having administrative bodies fall into line. There is an internal volatility at the IRB that at times, but not uniformly or exclusively, reflects the government’s agenda. Showing how this plays out is crucial to the argument that the IRB is implicated in politicized xenophobia even if it is not consistently or comprehensively in lockstep with the same.

V. WESTERN FAILURE, SOUTHERN COMPLICITY

Inconsistency and intermittence are thus crucial to understanding the continued existence of the IRB. To the extent that supporters of migrant rights are critical of the IRB and conceive of it as a failure, Masoumi’s point is that the reasons why it is understood as a failure are the same reasons why it is seen as a success. It performs protection while routinely failing to deliver it to those in grave need. Essentially, it is not just the Gaza TRV program that was “intended to fail”; the entire refugee determination project can be described in the same way. As Masoumi argues, this duality illustrates a deeper paradox. Regularizing refugee protection through legislation, regulations, and formal adjudicative mechanisms has made it harder for claimants to access substantive protection. Translating the protective impulse of the postwar rights cascade into law effectively dehumanized a quintessentially humanitarian endeavour.

⁴³ Immigration, Refugees and Citizenship Canada, News Release, “Financial Assistance for Gazans Arriving in Canada Now Available” (16 January 2025), online: [perma.cc/X9VR-7HZC].

⁴⁴ Government of Canada, “Canada-Ukraine Authorization for Emergency Travel: Key Figures” (26 July 2024), online: [perma.cc/T77M-LHQ3].

⁴⁵ See e.g. El-Farouk Khaki & Aidan Simardone, “As Refugee Law Practitioners, We Oppose Canada’s Double Standards”, *The Maple* (31 March 2022), online: [perma.cc/2HSU-TR4J]; Letter from the Canadian Council for Refugees to the Honourable Marc Miller, Minister of Immigration, Refugees and Citizenship (6 February 2024) “Re: Temporary Immigration Measures in Response to Humanitarian Crisis in Gaza”, online: [perma.cc/5W9Y-YVY2] [*Letter to IRCC*]; Nir Hagigi, “Refugees Welcome? Comparing Canadian Policy on Palestinian and Ukrainian Refugees”, *Canadian Centre for Policy Alternatives* (20 November 2024), online: [perma.cc/VL5X-EQYR]; Canadian Muslim Public Affairs Council, “Open Arms for Some, Closed Doors for Others: The Racism in Canada’s Refugee Policy” (29 November 2024), online: [perma.cc/KD2Y-RSBN].

⁴⁶ *Letter to IRCC*, *supra* note 45; Alex Paterson, *Intended to Fail: Systemic Anti-Palestinian Racism and Canada’s Gaza Temporary Resident Visa Program* (Canadians for Justice in Palestine and the Middle East, 2024), online: [perma.cc/T62J-TWXZ].

⁴⁷ *Letter to IRCC*, *supra* note 45.

⁴⁸ Paterson, *supra* note 46.

Western duplicity and hypocrisy in this regard also created perverse incentives for less wealthy and less powerful states to not accept the formal obligations of the *Convention*. Already saddled with massive refugee populations as a result of their geographic proximity to displaced peoples and the unwillingness of Western states to meaningfully share any part of the burden of protection, poorer states often see no need to take on additional work and expense by ratifying the *Convention*.

Here a final parallel can be drawn with the IRB. The Third World state that refuses to accept these obligations is making a decision about how to allocate scarce resources. The role of the IRB is similarly efficiency-oriented: it is to minimize Canada's obligations to refugees.⁴⁹ These are two different tracks for achieving the same goal, but crucially, they do not operate in isolation. Rather, mechanisms like the IRB fuel the ongoing reluctance of other states to take on greater obligations. They understand, as Masoumi does, the integration of the Canadian refugee system into the global migration regime, and resist the reality of the free rider problem by pushing for a lower common denominator across diverse national systems. In this way, the tragedies of Canada's legalist approach reverberate internationally and compound the mistreatment of asylum seekers globally.

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⁴⁹ Masoumi, *supra* note 5 at 144–45.

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