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WORKING PAPER SERIES NO. 106

Smuggled migrant or migrant smuggler
Erosion of sea-borne asylum seekers' access
to refugee protection in Canada

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February 2015

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Working Paper Series

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List of abbreviations

Convention	Convention Relating to the Status of Refugees
Legislative Guide	United Nations Legislative Guide for the Implementation of the Protocol Against the Smuggling of Migrants by Land, Sea and Air
PRRA	Pre-Removal Risk Assessment
UNHCR	United Nations High Commissioner for Refugees
Protocol	Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime

1 Introduction

Why has there been a high level of legal contestation over sea-borne asylum seekers found ineligible for refugee protection in Canada due to their smuggling of other refugees? The criminalization of smuggling as a part of migration control of countries has eroded refugee protection for sea-borne asylum seekers. As it has become increasingly difficult to legally enter into a country due to the growing measures of restrictive border controls, more refugees are resorting to the service of people smuggling in order to flee from persecution. However, the penalization of “irregular emigration” (Goodwin-Gill 2011) through the criminalization of smuggling has led to ineligibility for refugee status for sea-borne asylum seekers who have aided other refugees during a voyage to Canada. Current legal approaches to smuggling neglect that smuggling is an integral part of the refugee experience (Schloenhardt and Davies 2013: 983). This paper addresses the legal implications of a particular aspect of the maritime movement of refugees: asylum seekers who cannot access refugee protection because they have helped other presumptive refugees enter into a country illegally.

“[Was the refugee applicant] a people smuggler or was [he] himself a smuggled person[?]” This question, which arose in *X(Re)* [2011] 86097 IRB, para. 9, attests to an interpretive dilemma surrounding the right to access refugee protection for sea-borne asylum seekers who have assisted refugees to cross borders illegally. In April 2014, the Supreme Court of Canada decided to hear four cases of sea-borne asylum seekers found to be ineligible for refugee protection because they helped refugees to come to Canada illegally (*B306 v. Minister of Public Safety and Emergency Preparedness* [2014]; *Hernandez v. Minister of Public Safety and Emergency Preparedness* [2014]; *J.P., et al. v. Minister of Public Safety and Emergency Preparedness* [2014]; *R. v. Appulonappa* [2014]; Schmitz 2014). Arguably, for the first time in the history of international refugee law, the highest court of a country will address the right to access refugee protection for sea-borne asylum seekers who have been found ineligible for asylum due to their involvement in smuggling. Therefore, it is timely to analyze the legal quandary facing sea-borne asylum seekers whose claims to be recognized as refugees under the 1951 Refugee Convention may be deemed ineligible in Canada, with the consequence that they are siphoned off to complementary protection. While there have been cases of criminal prosecution of humanitarian smugglers who help presumptive refugees for altruistic reasons in other countries, the anti-smuggling regime in Canada suggests an uncharted terrain in international refugee law, where smugglers who claim asylum are diverted to a weak form of complementary protection without means of regularizing their status in certain cases (Coutin 1995: 549; Wallace 2013: 251).

An interpretive controversy has emerged regarding sea-borne asylum seekers who cannot access refugee protection because they “may have been engaged in the practice of helping other refugees to arrive in Canada” (*R. v. Appulonappa* [2013] BCSC 31, para. 43). In addressing sea-borne asylum seekers found to be ineligible to have their refugee claims heard due to their alleged engagement in smuggling, the Supreme Court of British Columbia has raised unsettled legal questions surrounding these scenarios:

Suppose two refugee claimants travelled together, each assisting the other to arrive in Canada. While each would be individually protected from prosecution, the act of mutual assistance would render them both liable under [the crime of human smuggling]. Imagine, in that hypothetical, that a mother arrived with her young child. Both would be potential refugees and not liable to prosecution as refugees. However, the mother would also be a human smuggler as a person who aided or abetted the arrival of her child. Another variation would be the husband who arrives with his spouse, the husband having done all the preparatory work, and therefore aided and abetted his spouse. Both would be

legitimate refugee claimants and not liable to prosecution as refugees. However, the husband would also be a human smuggler (R. v. Appulonappa [2013] BCSC 31, para. 104).

As early as 2001, Erika Feller (2001: 7) recognized that “an asylum seeker who resorts to a human smuggler seriously compromises his or her claim in the eyes of many states.” However, there has been no systematic study on the criminalization of smuggling and refugee protection for sea-borne asylum seekers who assist other refugees in reaching a safe haven illegally. There is a dearth of literature that directly addresses how sea-borne asylum seekers have become ineligible for refugee status because of their involvement in smuggling (UN Office on Drugs and Crime 2011d: 27). There is also relatively scarce empirical research on the smuggling of migrants by sea in Canada (Perrin 2013: 140). Thus, it is fruitful to explore this analytical blind spot on how the link between criminality and migration undermines asylum for refugees at sea.

This paper examines sea-borne asylum seekers who cannot access refugee protection because they have engaged in smuggling during their maritime voyage to Canada. It considers the following questions:

- (a) What are interpretive disputes over sea-borne asylum seekers who have been found to be ineligible to access refugee protection in Canada due to their engagement in smuggling?
- (b) Why have sea-borne asylum seekers been treated differently from other refugee claimants who arrive by air or land in Canada?

This paper intends to show that the criminalization of smuggling has rendered sea-borne asylum seekers who cooperate with smugglers unable to access refugee protection. First, it demonstrates that the erosion of refugee protection for sea-borne asylum seekers who help other refugees arises because of the rigid dichotomy between smugglers and smuggled migrants in international criminal law, Canadian criminal law, and Canadian refugee law. The current legal framework in Canada neglects that “the actions and actors involved in a human smuggling are not uniformly criminal at all stages of the process” (Liang and Kyle 2001: 22). The reductionist category of smugglers and smuggled migrants neglects the fluid nature of migratory experiences where migrants may become smugglers during the migratory journey (International Council on Human Rights Policy 2010: 84). This mismatch between law and reality contributes to the erosion of refugee protection due to the criminalization of smuggling.

Second, this paper reveals that the differentiated treatment toward sea-borne asylum seekers in Canadian refugee law exposes a paradox in international refugee law, which aims to reconcile two competing goals: the right of individuals to seek asylum and the right of states to safeguard their borders (Sersli 2009: 53). The categorical distinction of sea-borne asylum seekers in Canadian refugee law reflects the deepening of the migration-criminality nexus. This, in turn, narrows the eligible grounds for refugee protection for sea-borne asylum seekers allegedly implicated in smuggling. The ambiguous concept of smuggling contributes to a protection gap in which the criminalization of smuggling undermines protection for asylum seekers seen to be involved in smuggling of other refugees in Canada. The anti-smuggling regime limits refugee protection because of the link between criminality and migration, and the assumption of the sharp distinction between smugglers and migrants.

For the purpose of analysis, a smuggler refers to an individual who assists migrants to cross state borders illegally (Hathaway 2010). While this paper acknowledges the declaratory nature of refugee status, it employs the term “asylum seekers” to refer to individuals who have not yet been recognized as refugees by a receiving state (Edwards 2005: 297). “Humanitarian smuggling” denotes acts of assistance provided to presumptive refugees without the intention of obtaining a

financial or material gain. This paper adopts the definition of smuggling as encapsulated in article 3 of the UN Protocol against Smuggling. “Smuggling of migrants” shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, from the illegal entry of a person into a State Party of which the person is not a national or a personal resident (Article 3(1), Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, 2000).

The international definition of smuggling entails the elements of a smuggled migrant’s consent, transnationality, and a smuggler’s intention of acquiring a financial or material gain. First, smuggling refers to an act of consensus where a migrant willingly contracts the service of an intermediary (Obokata 2005: 396; Oxman-Martinez et al. 2001: 15; Shelley 2014: 3). While smuggling is generally characterized as occurring based on the voluntariness of migrants, scholars disagree on the degree of agency exercised by migrants vis-à-vis smugglers (Noll 2007; United Nations Office on Drugs and Crime 2011b: 25). Second, smuggling is a transnational act of cross-border movement that results in illegal entry into a country (Hathaway 2008: 39; United Nations 2004: para.18). Third, smuggling involves the mental element of intention to obtain, directly or indirectly, a financial or other material benefit (Nadig 2002: 6; Skinnider 2006: 9). However, this element of a financial or material benefit is absent in the national definitions of smuggling in several countries, including Australia, Canada, France, Great Britain, the Netherlands, and the United States (Jannard 2010: 25; United Nations Office on Drugs and Crime 2010d: 36-59). This paper demonstrates that the lack of a financial or material benefit component in the Canadian approach to smuggling undermines refugee protection for sea-borne asylum seekers who have allegedly cooperated with smugglers.

This analysis concerns alleged maritime smugglers who initially made refugee claims but were found to be ineligible to apply for asylum in Canada. It advances legal, theoretical, and historical approaches to the problem of sea-borne asylum seekers’ inability to access refugee protection because of their complicity in having smuggled other refugees. It examines 19 cases of refugee claimants who have been determined to be ineligible for asylum due to their cooperation with smuggling. All publicly available cases on the passengers of the *Ocean Lady* (2009), *Sun Sea* (2010) and four boats that arrived in the summer of 1999 were considered. This paper does not address the detention of sea-borne asylum seekers, interception at sea, the drafting history of the UN Protocol against the Smuggling of Migrants by Land, Sea and Air (2000), and the reasons why refugees resort to the use of smuggling. Although parts of the paper are descriptive, descriptive methods in qualitative research are necessary to deconstruct the legal controversy regarding the status of sea-borne asylum seekers in Canadian refugee law. While this paper is reflexive in recognizing that its analysis cannot address all dimensions of the smuggling phenomenon, it seeks to shed light on a particular configuration of the migration-criminality nexus, principally on how increasing restrictionism has diluted refugee protection for asylum seekers at sea.

Part I explores the legal context of an inability to access refugee protection for sea-borne asylum seekers who aid other refugees in entering into Canada illegally. This section demonstrates that it is problematic to divert sea-borne asylum seekers allegedly involved in smuggling to complementary protection because they receive weak forms of protection different from that given to other asylum seekers. Part II analyzes the elements of legal contestation on sea-borne asylum seekers’ inability to access refugee protection due to their involvement in smuggling. This section shows that interpretive disputes over the scope of smuggling undermine refugee protection for maritime asylum seekers. Part III examines the scope of protection for sea-borne asylum seekers implicated in smuggling under the 1951 Refugee Convention and the UN Protocol against Smuggling. This analysis reveals that these instruments are silent on the right to access asylum for sea-borne asylum seekers involved in smuggling of refugees. Part IV delves into the conceptual frameworks of smuggling that have influenced the flawed assumptions of smuggling in international criminal law

and Canadian refugee law. Part V historicizes the legislative evolution of Canada's refugee policies toward sea-borne asylum seekers from the 1980s to the present. From 1986 to the present, there are seven notable cases of boat arrivals in Canada, which have resulted in significant changes to the refugee system (Bradimore and Bauder 2011: 639). Boat arrivals in 1986, 1987, 1999, 2009, and 2010 have led to the categorical distinction of sea-borne asylum seekers in Canadian refugee law.

At the intersection of international criminal law, Canadian criminal law, and Canadian refugee law, the criminalization of smuggling has resulted in an inability of sea-borne asylum seekers to access refugee status because they have assisted other presumptive refugees during a voyage. This paper argues that the broad grounds of "ineligibility" for refugee status in Canadian refugee law and the broad concept of smuggling in Canadian criminal law erode access to refugee protection for sea-borne asylum seekers allegedly implicated in smuggling of refugees. Moreover, interpretive contestation on sea-borne asylum seekers' complicity in smuggling in Canadian refugee law and the flawed assumption of the static identity of smugglers in international criminal law further undermine sea-borne asylum seekers' access to refugee protection in Canada.

2 Access to refugee protection for sea-borne asylum seekers

This section examines the refugee determination process that has found sea-borne asylum seekers ineligible for refugee status for having "aided smuggled migrants to come into Canada" (*X (Re)* [2011], para. 19). This part is descriptive in capturing the problem of sea-borne asylum seekers who are accorded complementary protection because they are found to be ineligible for refugee status due to their complicity in smuggling of other refugees during the migratory journey. This descriptive treatment is necessary to deconstruct the mechanism of the Canadian refugee system in order to understand legal challenges facing sea-borne asylum seekers who cannot access refugee protection for having assisted other refugees to come to Canada illegally.

Refugee determination process

The criminalization of smuggling undermines access to refugee determination for sea-borne asylum seekers implicated in smuggling because they are siphoned off to complementary protection channels based on pre-removal risk assessment (PRRA) and humanitarian and compassionate applications. Analytical materials on complementary protection and ineligibility for refugee status in Canada are relatively scarce. This part examines the cases of sea-borne asylum seekers who have been found to be inadmissible during the preliminary screening of eligibility for refugee status. Only 1 percent of all refugee applicants from 1993 to 2003 were found to be ineligible during this preliminary screening (Dauvergne et al. 2006: 36). Sea-borne asylum seekers who are allegedly involved in smuggling belong to this very small minority.

The in-land refugee determination system, which is aimed at asylum seekers who are already present in Canada, entails a two-step process: first, an admissibility screening to determine whether an asylum seeker is eligible to have his refugee claim heard at the Refugee Protection Division of the Immigration and Refugee Board, and second, the substantive step of refugee status determination (Lowry 2002: 33; Przybytkowski 2010: 109). When a refugee claim is filed, an immigration officer has three working days to conduct an interview with the refugee claimant in order to assess whether he or she is eligible for refugee determination (*Immigration and Refugee Protection Act* s.100(1); Rehaag 2011: 75). If the refugee applicant is found to be "inadmissible", an immigration officer issues an inadmissibility report, which is submitted to the Minister of Citizenship and Immigration (*Immigration and Refugee Protection Act* ss. 44-45; Macklin 2009:

80). Once the report of inadmissibility is deemed “well-founded”, the Minister refers the report to the Immigration Division of the Immigration and Refugee Board of Canada (*Immigration and Refugee Protection Act* s. 44(2)). At this point, the refugee claim is suspended pending an admissibility hearing before the Immigration Division (Crépeau and Jimenez 2004: 612). An admissibility hearing determines whether a foreigner can either remain, or is to be removed from Canada. This procedure does not address the substance of a refugee claim (Dauvergne 2012: 309; Gould et al. 2010: 458). At any point, the asylum process can end without the right of appeal if the applicant is alleged to be “inadmissible” (Jacobson 2002: 675). The inadmissibility category serves to screen out refugee claimants before the substantive process of refugee determination.

One of the grounds for inadmissibility and, subsequently, ineligibility for refugee status is “involvement in human smuggling” (*J.P. v. Canada* [2012], para.1). Access to formal refugee protection is barred once an application is found to be criminally inadmissible during the admissibility screening (Coates and Hayward 2005: 79):

A permanent resident or a foreign national is inadmissible on grounds of organized criminality for engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering (paragraph 37(1)(b), Immigration and Refugee Protection Act).

Sea-borne asylum seekers who are found to be criminally inadmissible for having smuggled other refugees are deprived of an opportunity to access the formal channel of refugee protection:

The inadmissibility ruling under paragraph 37(1)(b) is not a result of the applicant’s illegal entry into Canada, but rather of his role in facilitating the entry into Canada of other refugees (B010 v. Canada [2012] FC 569, para. 50).

The inadmissibility status limits a refugee applicant’s opportunity to present refugee claims. The determination of inadmissibility diverts sea-borne asylum seekers who have cooperated with smugglers to a removal stream (Crépeau 2005: 282; Wouk et al. 2006: 126). It is possible that sea-borne asylum seekers implicated in smuggling are genuine refugees but have been directed to complementary forms of protection out of administrative convenience (Kaushal and Dauvergne 2011: 63; UNHCR 2001b: 1-2).

Complementary protection

Refugee applicants who are found to be inadmissible have three remedies available: (a) apply for PRRA; (b) ask the Minister of Citizenship and Immigration for discretionary relief on humanitarian and compassionate grounds; or (c) obtain a waiver from the inadmissibility status by demonstrating they do not endanger Canada’s national interest (*B010 v. Canada* [2013] FCA 87, para. 90). This section analyzes two main channels of complementary protection: PRRA and application based on humanitarian and compassionate grounds.

The PRRA is a last resort against deportation for individuals who are issued a conditional removal order, which is deferred until a final decision on the PRRA is reached (Ali 2006: 74). If the PRRA application is rejected, the applicant will be deported from Canada (Saufert 2007: 39). The assessment is conducted on paper by a single officer in Citizenship and Immigration Canada. Oral hearings are rare as they occur only on the basis of questionable credibility (McAdam 2006: 12).

Sea-borne asylum seekers who have been found to be criminally inadmissible due to involvement in smuggling will be subject to a restricted PRRA, which is different from the general PRRA available for other applicants (Best 2013: 3; Khind 2013: 12). First, they are not evaluated on the risk of persecution, unlike other applicants who receive the general PRRA (Citizenship and Immigration Canada 2009: 15). In the restricted PRRA, applicants who have been found to be

criminally inadmissible are assessed on a narrower set of criteria. These include a risk of torture, risk to life, and a risk of cruel and unusual treatment or punishment upon return (*Immigration and Refugee Protection Act* s. 97(1); Lowry and Nyers 2003: 72). However, other applicants are considered on a set of consolidated criteria, including the risk of persecution in addition to the non-refoulement criteria available in the restricted PRRA. Second, they are subject to a higher standard of proof on a “balance of probabilities” in the PRRA as opposed to a lower threshold of proof in formal refugee determination (Citizenship and Immigration Canada 2009: 36). Third, even if sea-borne asylum seekers who are ineligible for refugee status due to their assistance to other refugees receive a positive decision on the PRRA, they do not enjoy the full extent of complementary protection. Unlike other successful applicants who are eligible to apply for permanent residency, they are granted a periodically reviewable temporary stay of removal rather than permanent residency (Citizenship and Immigration Canada 2009: 26). Thus, they will not be able to access means of regularizing their status (McAdam 2006: 12). Sea-borne asylum seekers who are found to be criminally inadmissible due to their cooperation with smuggling will be accorded a weaker form of complementary protection than other PRRA applicants.

Sea-borne asylum seekers who are ineligible for asylum for having aided a smuggling operation may also apply for a stay on humanitarian and compassionate grounds. This status provides permanent residency for successful applicants (*Immigration and Refugee Protection Act* s. 25(1)). A stay on humanitarian and compassionate grounds is granted in “exceptional circumstances” without the right of appeal (Saufert 2007: 39). Humanitarian and compassionate applications do not have the suspensive effect of staying a removal order like the PRRA (Becklumb 2008). The applicant has the onus of proving undue hardship upon return and the elements of “establishment” in Canada. The criteria for establishment include “English/French language skills, employment, improvements in education, presence of family members/relatives in Canada, Canadian-born children, and community involvement” (Dauvergne et al. 2006: 80). The criteria for humanitarian and compassionate applications have been criticized because they reflect Canada’s immigration selection criteria, rather than the criteria for refugee determination (Dauvergne et al. 2006: 81). Sea-borne asylum seekers who are found to be inadmissible on grounds of engaging in smuggling may face difficulty in fulfilling the establishment criteria since they are subject to detention upon their arrival.

The PRRA and humanitarian and compassionate categories provide avenues of complementary protection for sea-borne asylum seekers ineligible for refugee status due to their involvement in smuggling. However, the likelihood of obtaining such forms of complementary protection may be low for sea-borne asylum seekers who are found to be criminally inadmissible due to smuggling. Although there are no publicly available statistics on the success rate for humanitarian and compassionate applications, spousal applications tend to be a majority of positive decisions in humanitarian and compassionate applications (Dauvergne et al. 2006: 81). Since sea-borne asylum seekers who are criminally inadmissible on the ground of smuggling do not fit this profile of the successful applicant, they might have a low chance of obtaining permanency residence on humanitarian and compassionate grounds. Furthermore, only 2 to 3 percent of PRRA applications result in a positive decision (McAdam 2006: 13). The PRRA and humanitarian and compassionate processes have the worst delays in the refugee system, as these applications may take up to four years (Showler 2012: 1). Given the low rate of positive decisions for PRRA and humanitarian and compassionate applications, and the difficulty of satisfying the evaluation criteria, complementary protection may be difficult to access for sea-borne asylum seekers found to be criminally inadmissible due to engagement in smuggling.

While sea-borne asylum seekers ineligible for refugee status due to involvement in smuggling may be able to receive protection based on non-Convention grounds, it is problematic that they are diverted out of the formal refugee determination process. Furthermore, they are granted a

weaker form of complementary protection than the full extent of subsidiary protection available to the applicants to the general PRRA (McAdam 2006: 2). Given the insecurity of a temporary stay of removal resulting from a positive decision on the PRRA, they receive a bare minimum of complementary protection and do not enjoy the means of regularizing their status (Van der Klaauw 2009: 68). Thus, they are trapped in a protection gap where they cannot access refugee protection, and yet may only be able to access the basic level of complementary protection of non-refoulement through the PRRA process (Pallis 2002: 342).

This section has found that sea-borne asylum seekers who are criminally inadmissible due to their suspected involvement in smuggling are diverted out of formal refugee protection. Due to administrative convenience, the inadmissibility procedure is favoured over exclusion cases by the Immigration and Refugee Board (Kaushal and Dauvergne 2011: 63). The permissibility of the inadmissibility status in international refugee law is not clear since the inadmissibility status has an effect of rendering a refugee applicant unable to access refugee status, similar to the application of the exclusionary clause under article 1F of the 1951 Refugee Convention. The Convention is silent on a situation where a refugee determination process might not be available for refugee claimants based on “automatic bars to consideration of asylum claims” (Bossin 2001: 57; UNHCR 2012: para. 40). As inadmissibility determination is a “front end” disqualification from refugee status, the inadmissibility procedure is problematic in reversing the order of the consideration in refugee determination (Brouwer 2005: 96). The UNHCR Exclusion Guideline (2003: para.31; Gilbert 2003: 467) recommends that “inclusion should generally be considered before exclusion”. Thus, it may be aligned with Canada’s obligation to the Refugee Convention that the grounds of ineligibility for refugee protection are considered only after the refugee determination process. Thus, there is an analytical blind spot on whether the admissibility procedure in Canadian refugee law undermines the right to seek asylum for sea-borne asylum seekers who have assisted other refugees to come to Canada illegally. The inability of sea-borne asylum seekers to advance their refugee claims indicates that the criminalization of smuggling has undermined refugee protection for maritime asylum seekers.

3 Legal developments in Canada’s anti-smuggling regime

The previous section has considered procedural barriers for sea-borne asylum seekers ineligible for refugee status because of their complicity in the smuggling of other refugees. Building upon this problem of sea-borne asylum seekers who are siphoned off to complementary protection rather than refugee protection, this section addresses the emerging interpretive contestation over sea-borne asylum seekers’ inability to access refugee protection on the ground of “aiding and abetting” smuggling. Inconsistent approaches in determining an asylum seeker’s complicity in smuggling undermine refugee protection for sea-borne asylum seekers. Interpretive disputes over the level of complicity required to deem an asylum seeker a smuggler arise over the following elements: (a) the role of an asylum seeker in a smuggling operation; (b) the timing as to when an asylum seeker becomes involved in smuggling; (c) an asylum seeker’s intention of assisting other refugees; (d) the substance of a financial or material gain that an asylum seeker may obtain from smuggling; and (e) the legislative purpose behind anti-smuggling provisions in the *Immigration and Refugee Protection Act* (2002). The criminalization of smuggling has narrowed the eligibility threshold for refugee protection.

The material components of smuggling in Canadian criminal law differ from those found in article 3 of the UN Protocol against Smuggling (United Nations Office on Drugs and Crime 2011a: 3). Relevant provisions in the *Immigration and Refugee Protection Act* are:

- Human Smuggling: No person shall organize, induce, aid or abet 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 this Act (Subsection 117(1)).
- A permanent resident or a foreign national is inadmissible on grounds of organized criminality for engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering (Paragraph 37(1)(b)).

The terms “human smuggling” in subsection 117 and “people smuggling” in paragraph 37(1)(b) do not contain a specific definition of smuggling (*Sivagnanasingam v. Canada*, para. 13). Paragraph 37 refers to people smuggling as one of the grounds for the inadmissibility status, which renders an asylum seeker ineligible to access refugee protection, while section 117 outlines the elements of the crime of smuggling (*R. v. Appulonappa* [2013] BCSC 31, para.76). Due to the lack of a definition of smuggling, Canadian courts reached different interpretations on whether “human smuggling” in Canadian criminal law and “people smuggling” in Canadian refugee law are equivalent terms. *Hernandez v. Canada* [2012], para. 58, determined that “the crime of human smuggling” is not equivalent to “people smuggling”, which requires a profit motive. In contrast, *S. C. v Canada*, para. 46 held that human smuggling and people smuggling are indistinguishable because “the constitutive elements of ‘human smuggling’ and ‘people smuggling’ are the same”.

Given the absence of an explicit definition of smuggling in the *Immigration and Refugee Protection Act*, Canadian courts have compartmentalized four elements to establish the crime of smuggling (*B010 v. Canada* [2012] FC 569, para.16; *B306 v. Canada* [2012], para. 33; *Canada v. B004*, para. 22; *J.P. v. Canada*, para. 3). *R. v. Alzehrani* found that four elements are required to establish the offence of smuggling:

(i) the persons being smuggled did not have the required documents to enter Canada; (ii) the persons were coming into Canada; (iii) the smuggler was organizing, inducing, aiding or abetting the person to enter Canada; and (iv) the accused had knowledge of the lack of required documents (R. v. Alzehrani [2008] CanLII 57164 (ON SC), para. 10).

In addition to these elements of smuggling, courts have also considered an element of “wilful blindness”. *Sivagnanasingam v. Canada*, para. 22 found that an element of “wilful blindness” arises when there is “a situation where a person’s suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries.” *Sivagnanasingam* concerned a sea-borne asylum seeker who was found to be criminally inadmissible because he was a crew member of a vessel carrying asylum seekers. He was found to be ineligible for refugee protection because he was “wilfully blind to, the fact that the other passengers were undocumented migrants who intended to enter Canada illegally” (*Sivagnanasingam v. Canada*, para. 2). *B010 v. Canada* [2013] FCA 87, para. 49 also considered “wilful blindness” as an aspect of smuggling because the refugee claimant “deliberately chose not to obtain that knowledge” (e.g. whether other passengers of the *Sun Sea* did not have the required documents). Notably, the concept of smuggling in Canadian law does not include the intention of receiving a financial or material gain found in article 3 of the UN Protocol against Smuggling. The following analysis demonstrates several sites of legal contestation on the level of an asylum seeker’s complicity required to establish ineligibility for refugee protection.

Nature of responsibility in a smuggling operation

What is the degree of responsibility in smuggling required to deem an asylum seeker ineligible for refugee protection? While Canadian legal frameworks seek to distinguish between a smuggler and an “ordinary passenger” of a maritime smuggling venture (*B306 v. Canada* [2012], para. 6), there

is no clear set of criteria for differentiating between high-level smugglers and asylum seekers who “aid and abet” smugglers. Courts have been inconsistent in drawing a line between smugglers and smuggled migrants without recognizing fluid migratory experiences where asylum seekers may assume various roles during their journey.

In determining the complicity of smuggled migrants in a smuggling operation, courts have adopted contradictory approaches for assessing an asylum seeker’s degree of involvement in smuggling. On one hand, courts found that an asylum seeker needs to assume a significant degree of responsibility in a smuggling operation in order to render him ineligible for refugee protection. *X (Re)* [2012], para. 75 drew a distinction between asylum seekers who “planned and benefited from the voyage” and “those who only assisted the organizers in order to reach Canada and make a refugee claim”. Furthermore, *B306 v. Canada* [2012], paras. 6, 29 found that an asylum seeker who “collected rain water with other passengers in exchange for extra food” on board the *Sun Sea* did not engage in smuggling because he “had no authority or organizing role in the ship”. While *X (Re)* [2012] and *B306 v. Canada* [2012] suggest that a critical amount of involvement in smuggling is required to render an asylum seeker ineligible for refugee status, other rulings reached different conclusions on a sea-borne asylum seeker’s level of complicity in smuggling.

Courts determined that even peripheral involvement in a smuggling operation may be sufficient to establish a sea-borne asylum seeker’s engagement in smuggling. In *X (Re)* [2011], para. 19, a sea-borne asylum seeker was found to be inadmissible for “aiding and abetting the smuggled migrants” because he was “directly involved, albeit at a low level of responsibility, in the physical operation of the *Sun Sea*”. Similarly, *Canada v. B147*, para. 27 addressed an asylum seeker who was found to be ineligible for refugee status based on his “minor role” in smuggling because he helped to distribute food to other asylum seekers before the voyage. Furthermore, another sea-borne asylum seeker was found ineligible for refugee protection despite his “lack of a role or authority” (*J.P. v. Canada* [2012], para. 40). These cases demonstrate conflicting views on a sea-borne asylum seeker’s level of complicity in smuggling. Thus, there is a need for a clear guideline on the level of involvement necessary to determine whether an asylum seeker is eligible for refugee status.

Timing of involvement in smuggling

How does the timing of a sea-borne asylum seeker’s cooperation with smugglers affect his complicity in smuggling? Courts have drawn inconsistent interpretations on an asylum seeker’s complicity in smuggling based on the temporal point in which he became engaged. In particular, there are divergent interpretations on whether an asylum seeker’s agreement to assist smugglers *before* or *after* boarding a vessel indicates his complicity in smuggling. An asylum seeker’s consent to help smugglers *before* boarding a ship has been understood as an element of pre-determined intention of smuggling. *X (Re)* [2012], para. 26 held that an asylum seeker “chose” to support a smuggling operation “before he boarded” a vessel. Therefore, his consent to help with the maintenance of the ship prior to the departure was sufficient to constitute an act of smuggling. *X (Re)* [2011], para. 5 also found that an asylum seeker’s agreement to help with running of a ship before the voyage was an indication of his involvement in smuggling. In *Sivagnanasingam*, paras. 8, 10, an asylum seeker was also determined to be ineligible for refugee status because he “had willingly joined the crew” as he met with the captain of the ship before he boarded. Similarly, *B010 v. Canada* [2012], paras. 20, 21, rejected an asylum seeker’s account that he became “a member of the crew by accident” because he “boarded the ship knowing” that he would be part of the crew. While asylum seekers were found to be ineligible for refugee status because they consented to assist smugglers *before* boarding a vessel, other asylum seekers were also determined to be ineligible for refugee status because they cooperated with smugglers *after* boarding a ship.

Courts reached different conclusions on the crew members of the *Sun Sea* who assisted with smugglers *after* boarding the ship. On one hand, even smuggled migrants who were recruited on

board a vessel in an ad hoc manner were found ineligible to access refugee protection. *Canada v. J.P.* upheld the inadmissibility status of an asylum seeker who was recruited as an assistant navigator *after* boarding a vessel when the original crew of the ship “left the ship without a crew” (quoted in *B010 v. Canada* [2013]). On the other hand, asylum seekers’ cooperation with smugglers *after* boarding a ship was deemed as a mitigating factor in determining their involvement in smuggling. Although asylum seekers in *J.P. v. Canada* and *B306 v. Canada* agreed to help the crew of the *Sun Sea* “by happenstance” after boarding the ship, courts reached different conclusions on their ineligibility for refugee protection. *B306 v. Canada* [2012], para. 37 found that volunteering to cook for the crew after boarding a ship may not bar the refugee applicant from accessing refugee protection because he “aided the smugglers in exchange for food”. Canadian jurisprudence is inconsistent about the impact of the timing of asylum seekers’ engagement in smuggling on their ineligibility status for refugee protection.

Intention of obtaining financial or material gain

Given the lack of a profit motive in the Canadian concept of smuggling, an interpretive dispute has arisen on whether the intention of deriving a financial or material gain is necessary to establish an act of smuggling. On one hand, the element of a financial or material gain was deemed not necessary to establish an act of smuggling in *B010 v. Canada* [2012] and *X (Re)* [2011]. Furthermore, *Canada v. J.P.*, para. 92 determined that “the motive for doing so, whether ideological, financial, or material, has no bearing” in determining whether an act constitutes smuggling. This perspective posits that even assisting presumptive refugees out of altruistic motives might render an asylum seeker ineligible for refugee protection. On the other hand, *J.P. v. Canada* [2012], *B306 v. Canada* [2012], and *Hernandez v. Canada* [2012] found that the offence of people smuggling requires a profit motive. Thus, courts have construed the meaning of smuggling differently to reach divergent interpretations on the necessity of the intention of obtaining a financial or material gain.

Substance of a financial or material gain

Related to this interpretive discordance on the necessity of a profit motive in an act of smuggling, courts have confronted the question about what constitutes a material gain. The UN Office on Drug and Crime (2010d: 21), which is the guardian of the Protocol against Smuggling, notes that a financial or other material benefit should be read broadly to include any form of cash, property, assets, sexual services, bribe, reward, advantage, privilege, service or transactions through informal financial systems. A particular interpretive difficulty arises when sea-borne asylum seekers pay for their journey in kind or when they negotiate reduced payment to smugglers in exchange for their assistance to smugglers (UN Office on Drug and Crime 2011b: 35). *B010 v. Canada* [2012], para. 64 found that receiving better food on board a ship constituted a material benefit for an asylum seeker who assisted the running of an engine during the voyage. However, *B010 v. Canada* [2013], para. 57 found that better lodging and food do not constitute a personal gain. Similar confusion over the scope of material gain also arose in the case of *J.P.*, an asylum seeker who received better accommodation as a navigator assistant of a ship (*J.P. v. Canada* [2012]; *Canada v. J.P.* [2013]). The interpretive dispute over the substance of a financial or material gain implies the need to disambiguate this aspect of smuggling.

Parliamentary intent of anti-smuggling provisions

Furthermore, courts have disagreed on the legislative purpose behind the anti-smuggling provisions in the *Immigration and Refugee Protection Act*. On one hand, courts found that the parliamentary intention of anti-smuggling provisions is to protect the integrity of border control measures. *X (Re)* [2012], para. 74 held that the legislative purpose was “to deny the use of Canadian territory to” smuggling. Similarly, *R. v. Appulonappa* determined that the parliamentary intent was to create a broad offence with no exceptions, directed to concerns of

border control and the particular issue of deterring and penalizing those who assist others in entering Canada illegally (*R. v. Appulonappa* [2014] BCCA 163, para.143).

According to these rulings, drafters of the *Immigration and Refugee Protection Act* envisioned a broad scope of smuggling, which lacks the element of a financial or material benefit. Thus, the broad parameter of smuggling covers charitable acts of assistance given to refugees to enter Canada illegally. *S. C. v Canada*, para. 34 stated that Parliament had the “intention to capture humanitarian smugglers in the crime of human smuggling.” Interpretive contestation on the legislative purpose behind the anti-smuggling provisions contributes to the confusion about sea-borne asylum seekers’ complicity in smuggling.

While some rulings found that Parliament aimed to legislate “a strong offence without ‘loopholes’” (*R. v. Appulonappa* [2014], para. 107), other decisions argued that the scope of smuggling is “overbroad” as compared to the legislative purpose of providing protection for smuggled migrants. *J.P. v. Canada* [2012] and *R. v. Appulonappa* [2013], para. 143 found that the lack of intention to realize a financial or material gain in the Canadian concept of smuggling may be broad in “criminalizing any assistance given to persons coming to Canada who are not in possession of appropriate documentation.” Thus, the offence of human smuggling may be “unconstitutionally overbroad because its scope is wider than its objective” (*R. v. Appulonappa* [2014], para. 88). Furthermore, *B306 v. Canada* [2012], para. 34 found that “it is an unreasonably large reading of subsection 117(1) to suggest that any services performed in favour of smugglers can be viewed as aiding and abetting” illegal entry of asylum seekers. In a similar vein, *Hernandez v. Canada* [2012], para 71 found that the phrase of people smuggling is “ambiguous” since the concept is broad to include both “profit-motivated smuggling activity” and humanitarian smuggling. The interpretive dispute over the legislative purpose of anti-smuggling provision informs the ambiguity of the Canadian approach to smuggling.

This section has demonstrated the need for a clear interpretive guideline on sea-borne asylum seekers who cannot access refugee protection because of their engagement in smuggling. This necessity for interpretive clarity is critical when some decisions argued for the executive’s discretion in prosecuting humanitarian smugglers. *R. v. Appulonappa* [2014], para. 3, *S.C. v. Canada*, para. 34, and *B010 v. Canada* underscored the need for the government’s prosecutorial discretion in charging humanitarian smugglers on a “case by case” basis:

[I]t is to be hoped that common sense will prevail in situations such as when family members simply assist other family members in their flight to Canada, or when a person acting for humanitarian purposes advises a refugee claimant to come to Canada without documents (B010 v. Canada [2013] FCA 87, para.93).

The government’s discretionary use of prosecutorial power on smuggling is problematic since executive discretion may allow restrictionist measures that may undermine the rights of asylum seekers. This concern has already become apparent. In September 2007, Janet Hinshaw-Thomas, a humanitarian worker who had helped twelve refugee claimants to cross the US-Canada border, was charged for the crime of human smuggling. In *R. v. Bejashvil*, a woman who assisted a refugee without the profit motive was sentenced to three months of imprisonment (Jannard and Crépeau 2010: 121). The criminalization of smuggling without the requirement of the intention of a financial or material gain undermines refugee protection.

4 International protection for sea-borne asylum seekers involved in smuggling

The previous analysis of the interpretive contestation of asylum seekers' complicity in smuggling refugees in the course of their own migratory journey is important for understanding the particular configuration of legal challenges facing sea-borne asylum seekers in Canada. Complementing this legal dilemma in a domestic setting, this section analyzes whether the 1951 Refugee Convention and the UN Protocol against Smuggling provide protection for sea-borne asylum seekers ineligible for asylum due to their involvement in smuggling. While the Convention and the Protocol provide criminal immunity for smuggled migrants for their own illegal entry, these instruments are silent on asylum seekers who assist other refugees in crossing borders illegally (UN Office on Drugs and Crime 2010d: 11). In particular, the Protocol presents a contradictory stance on asylum seekers who engage in smuggling in order to help other refugees to flee from persecution.

Does article 31 of the Refugee Convention provide non-penalization protection for a refugee claimant who has assisted another refugee to cross borders illegally? The inability of sea-borne asylum seekers to access refugee status because of their involvement in smuggling raises a question about the scope of the non-penalization clause (article 31) of the Convention. Article 31 outlines an obligation not to penalize prospective refugees for illegal entry (Noll 2011: 1246). A restrictive reading of article 31 posits that the non-penalization protection is only available to refugees for "their own illegal entry" (*R. v. Appulonappa* [2014], para.137). Article 31 is silent on presumptive refugees who "aided and abetted" other asylum seekers to enter into a country illegally (Goodwin-Gill 2001: para. 34; UN Office on Drugs and Crime 2010b: 14). Refugee rights activists have argued that article 31(1) affords immunity for prospective refugees who mutually assist each other from criminal prosecution (*R. v. Appulonappa* [2014], para.133). Although article 31 removes the imputation of criminality from sea-borne asylum seekers who use the service of smugglers, article 31 is silent on asylum seekers who help other presumptive refugees in crossing borders illegally.

Furthermore, the UN Protocol against Smuggling is inconclusive about smuggled migrants who cannot access refugee protection because of their assistance to other refugees in crossing borders illegally: "A person cannot be charged with the crime of smuggling for having been smuggled. This does not mean that he or she cannot be prosecuted for having smuggled others" (UN Office on Drugs and Crime 2010a: 29).

While a possibility of the criminal prosecution of an asylum seeker who helps other smuggled migrants is raised in one instance, another guideline suggests that asylum seekers have criminal immunity for the same conduct: "The Smuggling of Migrants Protocol does not intend to criminalize:... the conduct of migrants who do not smuggle others" (UN Office on Drugs and Crime 2010d: 11).

The Legislative Guide for the Protocol attempts to reach a middle ground by stating that an asylum seeker who assists other refugees may be immune from criminal prosecution only when there is an absence of an organized criminal group during the course of smuggling (UN Legislative Guide 2004: para. 28): "The offences and sanctions established in accordance with the Protocol will apply to those who smuggle migrants, even if they are also asylum-seekers, but only if the smuggling involves an organized criminal group" (UN Legislative Guide 2004: para. 68).

The Legislative Guide stipulates that the presence of an organized criminal group is necessary for prosecuting an asylum seeker who helps other refugees. However, this attempt to address a potential contradiction within the Protocol is far from clear about the level of involvement of an

organized criminal group necessary to establish asylum seekers' complicity in smuggling other refugees. Thus, the Protocol overlooks asylum seekers who engage in "ad hoc smuggling" where asylum seekers arrange the logistics for their own journey but seek out the service of professional smugglers for some parts of the journey (UN Office on Drugs and Crime 2011a: 12). The Protocol does not provide interpretive aid on the inability of asylum seekers to access refugee status because of their assistance to other refugees during the migratory journey. The Protocol presents a contradictory stance about asylum seekers who help other refugees enter into a country illegally.

Moreover, there is another site of contradiction between article 3 and article 6(2)(b) of the Protocol. The travaux préparatoires reveals that article 3 of the Protocol aimed to "exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties" (UN General Assembly 2000: para. 88). The Legislative Guide clarifies that the crime of smugglers does not capture:

...those who procure only their own illegal entry or who procure the illegal entry of others for reasons other than gain, such as individuals smuggling family members or charitable organizations assisting in the movement of refugees or asylum-seekers (UN Legislative Guide 2004: para. 32).

The requirement of the financial and material motive in the Protocol informs the distinction between smugglers as "criminals who, for profit, prey on the poor and disadvantaged" as opposed to smugglers who are "family members, friends, and non-governmental organizations that assist others to effect illegal entry" (*Hernandez v. Canada* [2012], para. 44). Thus, the Protocol makes a distinction between smuggling for profit and smuggling for "purely humanitarian reasons" (UNHCR 2000: para.5). While article 3 is intended to exempt "humanitarian smugglers" from the crime of smuggling, article 6(2)(b), which outlines the crime of "participating as an accomplice," raises a possibility that all "accomplices," including humanitarian smugglers who are acting in good faith, may be subject to criminal liability (Crépeau 2003: 179). Therefore, the Protocol leaves an open door for a scenario where asylum seeker-cum-smuggler may be subject to criminal liability (UN Office on Drugs and Crime 2010d: 21; UN Office on Drugs and Crime 2011a: 7). The Protocol presents incoherent interpretations on the criminal immunity of asylum seekers who assist other refugees. Thus, the Protocol lacks interpretive clarity on sea-borne asylum seekers' inability to access refugee status because of their involvement in smuggling.

Despite the immunity of humanitarian smugglers from criminal liability, the Protocol may not be an interpretive aid in matters of sea-borne asylum seekers who are diverted to complementary protection because of their involvement in smuggling. The Protocol permits states to enact national definitions of smuggling since article 3 "was not intended for enactment or adoption verbatim" (UN Legislative Guide 2004: paras. 58, 61(b)). Article 6 of the Protocol allows states to establish "stricter measures" beyond the scope of article 3 (UN Office on Drugs and Crime 2010c: 2). Canadian courts have adopted this approach, which allows for the domestic concept of smuggling to be broader than the international definition of smuggling found in article 3 of the Protocol. *B010 v. Canada* [2012], para. 49 found that the Protocol does not prohibit a signatory state in "criminalizing those who engage in migrant smuggling without deriving material gain or profit therefrom." *S. C. v. Canada*, para. 37 also stated that "the Protocol creates a minimum that Canada must adhere to, it does not prevent Canada from applying a more stringent or rigorous sanction for an offence." Article 3 of the Protocol provides a minimum standard in allowing states to adopt their own domestic definitions of smuggling. Therefore, the lack of a harmonized approach to smuggling opens a protection gap for sea-borne asylum seekers who cannot access refugee protection because of their involvement in smuggling. This section has found that international law is silent on the cases of sea-borne asylum seekers who cannot access refugee status for having assisted other refugees out of altruistic motives (Schloenhardt and Hickson 2013: 55).

5 Challenging the ontological assumptions of the smuggling literature

The previous section has investigated the scope of international protection afforded to sea-borne asylum seekers found to be ineligible for refugee status because of their complicity in smuggling of other refugees. This part seeks to address how the interpretive controversy over sea-borne asylum seekers implicated in smuggling has risen in international criminal law and Canadian refugee law. The following analysis identifies dominant assumptions in the smuggling literature that have shaped the distinction between smugglers and smuggled migrants in international criminal law. Understanding the import of flawed assumptions within the smuggling literature into Canadian refugee law is critical in revealing the underlying presuppositions about smugglers and smuggled migrants in legal frameworks.

There is a relative lack of scholarly material, empirical data and quantitative research on smuggling (UN Office on Drugs and Crime 2011d: 81). The characteristics of refugees who employ the services of smugglers, the relationship between smugglers and refugees, and the profiles of smugglers are under-theorized due to the relative absence of empirical data (UN Office on Drugs and Crime 2011d: 59). Each conceptual framework on smuggling reveals a fragmentary glimpse into the phenomenon of smuggling since there is no holistic theory that captures the whole of the smuggling phenomenon (UN Office on Drugs and Crime 2011d: 2). Thus, the import of the flawed assumptions from academia into international criminal law and Canadian refugee law is problematic. This section challenges the ontological assumptions found in these prevailing theories of smuggling: (a) the migration business framework, including the model of smuggling as a criminal activity; (b) smuggling as a form of neo-slavery view; and (c) a network theory of smuggling.

Smuggling as an entrepreneurial activity

The “migration business model” is the first and the most comprehensive framework on smuggling, which emerged out of Salt and Stein’s work on trafficking in 1997 (Van Liempt and Doomernik 2006: 166). This school describes migration as business where smuggling is an entrepreneurial activity to meet the demand for illegal cross-border movement (Salt and Stein 1997: 467). In a commercial industry that yields “low risks with high returns”, smugglers are intermediaries who are motivated by profit to facilitate irregular migration (Koser 2008: 20). Furthermore, the migration business model links criminality with smuggling based on the assumption that the criminal element of smuggling arises from profiteering by smugglers (UN Office on Drugs and Crime 2011c: 13). This model examines the modus operandi of criminal networks that arrange smuggling ventures (UN Office on Drugs and Crime 2011a: 13-14). The link between smuggling and criminality is made on the basis that profits from human smuggling, estimated between £12-40 billion annually, provide a revenue for other forms of organized crime (Brolan 2002: 578; Singh 2009: 12). The criminal model of smuggling also analyzes how criminal networks professionalize “amateur” smugglers by enhancing the geographical reach and financial capabilities of smugglers (Brolan 2002: 589). This model has been applied to account for international smuggling rings, such as the smuggling networks of Russian mafias, “snakehead” organizations in China and “coyotes” networks in Mexico (Brolan 2002: 590; Liang and Kyle 2001: 3).

The criminality-migration nexus deepened with the attachment of the Protocol to the UN Convention against Transnational Organized Crime (Brolan 2002: 585). While the Protocol has concretized the perceptual link between smuggling and organized crime, smuggling has also been treated as an issue of criminality in Canada (Jayasinghe and Baglay 2011: 517). In a case concerning an asylum seeker aboard a boat from China in the summer of 1999, the Immigration

and Refugee Board made the link between smuggling and criminality: “As a victim of smuggling, was he persecuted? I find he was not. A victim of criminality is not necessarily a victim of persecution” (*X. v. Canada (Immigration and Refugee Board)* [2001], p.9). Thus, sea-borne asylum seekers have been perceived as “objects trapped by criminal networks” rather than the subjects of persecution (UN Office on Drugs and Crime 2011d: 40).

While the economic and criminal perspectives on smuggling are influential in academia, these frameworks have several analytical drawbacks. The “smuggling as migration business” model makes a reductionist assumption about the static identities of smugglers and smuggled migrants (Liang and Kyle 2001: 4). According to the “economics of smuggling” view, smugglers are depicted as profit-maximizing agents who behave according to a rational calculus of losses and benefits, while smuggled migrants are assumed to be passive (Brouwer and Kumin 2003: 9). Although smuggled migrants are consumers who initially have a choice in employing the services of smugglers, they are considered to lack power over the conduct of smugglers during the migratory journey (Garapich 2008: 737). This one dimensional understanding of profit-maximizing smugglers and passive migrants neglects the dynamic identities of smuggled migrants who may become smugglers during their migratory journey in the eyes of the law (Van Liempt, and Doornik 2006: 166). The assumption of the fixed identities of smuggled migrants and smugglers informs the rigid distinction between smugglers and migrants in the Protocol against Smuggling.

Moreover, the migration business model’s focus on the commercial interests of smugglers ignores social contexts for migration, particularly the role of “humanitarian smugglers” who help refugees without the intention to gain a financial or material benefit (Herman 2006: 191). This model’s assumption of profit-driven smuggling cannot account for sea-borne asylum seekers who assist other refugees for non-monetary reasons. Furthermore, the framework on smuggling as a criminal activity overlooks the inconclusive role of organized crime in smuggling (UN Office on Drug and Crime 2011c: 6). This model has been faulted for its flawed quantitative methodology and a selection bias on overemphasizing the notable cases of criminal prosecution of smuggling (Van Liempt and Doornik 2006: 172). The economic and criminal perspectives on smuggling underestimate the dynamic relationship between smugglers and migrants and the non-commercial motives of humanitarian smugglers.

The reductionist assumption of the static identities of smugglers and the over-emphasis on the commercial motives of smugglers inform the distinction between “an ordinary passenger” of a vessel and a smuggler in Canadian refugee law (*B306 v. Canada* [2012], para. 6). This rigid dichotomy fails to recognize that smugglers are a heterogeneous group of actors, including smuggled migrants who assume smuggling behaviours during their migratory journey (UN Office on Drugs and Crime 2011b: 30). *Hernandez v. Canada* crystallized this problem of overlooking the different profiles of smugglers: “The humanitarian smuggler remains inadmissible and is grouped, for the purposes of the [*Immigration and Refugee Protection*] Act¹, with murderers, rapists, and other serious criminals” (*Hernandez v. Canada* [2012], para. 65).

The sharp division between smugglers and migrants simplifies the complex identities of smugglers without recognizing that smuggled migrants can become smugglers during the course of a voyage. The Legislative Guide notes this blurring line between smugglers and smuggled migrants: “In the case of smuggling, migrants are recruited voluntarily and may be to some degree complicit in their own smuggling” (UN Legislative Guide 2004: para. 30).

¹ Immigration and Refugee Protection Act, SC 2001.

The binary between smugglers and migrants ignores reality where migrants may become “collaborators” of smuggling during the migratory journey (Kalu 2009: 30). The Canadian approach to smuggling adopts an all-or-nothing view of smuggling, which ignores the need to collapse the harsh distinction between smugglers and smuggled migrants. The failure of Canadian courts to understand the elastic identities of smugglers undermines sea-borne asylum seekers’ ability to access refugee protection.

Smuggling as a form of slavery

Similar to the economic and criminal views of smuggling, the framework on “smuggling as a contemporary manifestation of slavery” is inadequate to account for asylum seekers implicated in smuggling. Like the “economics of smuggling” view, this model posits that smuggling leads to the commodification of migrants based on a premise that smuggled migrants are powerless vis-à-vis smugglers (Liang and Kyle 2001: 22). This model has been applied to analyze the smuggling of Chinese migrants to the United States (Menefee 2003: 19).

This model’s assumption of the passivity and dependency of smuggled migrants contributes to the interpretive contestation over asylum seekers’ complicity in the smuggling of refugees. The framework on “smuggling as neo-slavery” contends that migrants lack agency because they are “vulnerable to exploitation” by smugglers (UN Office on Drugs and Crime 2013: 6-7). Smuggled migrants are assumed to lack autonomy and control during the migratory journey (International Council on Human Rights Policy 2010: 83). While it is true that some smugglers are unscrupulous actors who employ deception and violence towards smuggled migrants, the over-emphasis on the passivity of smuggled migrants obscures the complex relationship between smugglers and smuggled migrants.

The voluntariness of sea-borne asylum seekers who assist other refugees challenges this assumption of passive smuggled migrants. Therefore, sea-borne asylum seekers who do not conform to this assumption of passivity are found to be implicated in smuggling. Canadian cases illustrate that sea-borne asylum seekers were found to be complicit in smuggling when they were seen as actors with agency. Words, such as “choice”, “willingness” and “voluntariness” were used to describe the actions of sea-borne asylum seekers found ineligible for refugee status due to their acts of assistance to other refugees (*B010 v. Canada* [2013], para. 45; *Canada v. B004*, para. 26; *S. C. v. Canada*, para. 24). In *X (Re)* [2012], para. 8, a sea-borne asylum seeker was found ineligible for refugee protection because he “deliberately chose” to help a smuggling operation. Similarly, *B010 v. Canada* [2012], para. 21 held that an asylum seeker’s willingness to assist smugglers indicates an intention for smuggling. *Sivagnanasingam v. Canada*, para. 2 also held that an asylum seeker who “knowingly and willingly assisted” smugglers by “voluntarily” joining the crew was ineligible for refugee status. Likewise, *B306 v. Canada* [2012], para. 37 concerned an asylum seeker who could not access refugee protection because he volunteered to assist the crew of the *Sun Sea*. Thus, his agency in proactively helping smugglers defied the assumption of passive migrants (*B306 v. Canada* [2012], para. 16). Indications that sea-borne asylum seekers exercised autonomy by assisting smugglers challenge the assumption of the passivity of smuggled migrants. Therefore, sea-borne asylum seekers who do not align with this assumption of passive smuggled migrants are discursively framed as smugglers. The discursive construction of passive smuggled migrants informs the jurisprudential approach in Canada, which views the agency of sea-borne asylum seekers with suspicion.

Smuggling as a form of networks

Contrary to the “economics of smuggling” model and the “smuggling as neo-slavery” framework, smuggling networks theory recognizes the non-monetary motive for smuggling (Herman 2006: 218). The network theory of smuggling accounts for the non-commercial motives of smuggling, such as the network of humanitarian smugglers in non-profit sectors and sanctuary movements

(Garapich 2008: 737). Contrary to the assumption of greed as a motivation for smugglers in the “economics of smuggling” model, smuggling networks theory recognizes that smugglers may be motivated by principle (Brolan 2002: 590). Unlike the “economics of smuggling” and “smuggling as neo-slavery” schools, which characterize smuggled migrants as passive, smuggling networks theory underlines the agency and the dynamic identities of smuggled migrants (UN Office on Drugs and Crime 2011d: 11). This model has been analyzed in the context of members of diaspora, familial and ethnic networks who assist asylum seekers, and the “mom and pop” smuggling networks in Central America (Van Liempt and Doomernik 2006: 173).

The contradictory views of smugglers within the smuggling literature result in legal contestation about the identity of smugglers. The economic and criminal views on smuggling and the smuggling as neo-slavery framework describe smugglers as malevolent criminals who focus on profit-maximization. At this end of the spectrum, smugglers are portrayed as cruel and indifferent actors who disregard the lives of migrants through violence, deception, trafficking and extortion of exorbitant smuggling fees (Menefee 2003: 17-8; Young 2003: 104). At the other end of the spectrum, smuggling network theory advances a contrary image of benevolent smugglers compelled by humanitarianism (Sersli 2009: 81). Thus, the competing images of smugglers in the smuggling literature contribute to the failure of the Canadian legal framework to recognize that smugglers are a pluralistic group of profit-seeking actors and humanitarians. The rigid distinction between smugglers and migrants ignores this “dual reality of smuggling of migrants” (UN Office on Drugs and Crime 2011d: 9). Understanding the shortcomings of the conceptual frameworks on smuggling is essential to the analysis of limited grounds for refugee protection for sea-borne asylum seekers in Canada.

6 Legislative trajectory of measures towards sea-borne asylum seekers in Canada

The previous sections have explored the legal and theoretical aspects of the interpretive contestation of sea-borne asylum seekers’ inability to access refugee status because of their engagement in smuggling. This section contextualizes the legislative environment that led to legal challenges facing sea-borne asylum seekers who are complicit in smuggling of refugees. This historical approach locates the legislative origins of the differentiated treatment of sea-borne asylum seekers in Canada, examining how legislative responses to boat arrivals from the 1980s to the present have shaped Canada’s anti-smuggling framework. The legislative trajectory of Canadian refugee law reveals that measures towards sea-borne asylum seekers have been couched in an anti-smuggling language. While the majority of the illegal entry to Canada occurs by air or land, arrival by boat has received much more politicized attention and extensive media coverage (Crock 2004: 52; Hari et al. 2013: 8). Out of approximately 14,792 undocumented migrants who came to Canada using the services of smugglers from 1997 to 2006, the number of migrants arriving by boat is very low (Perrin 2013: 142). Despite this very small number of boat arrivals (see appendix 3), sea-borne asylum seekers have triggered major reforms to Canadian refugee law. This section seeks to unpack how legislative responses to boat arrivals have undermined refugee protection for sea-borne asylum seekers who are implicated in smuggling.

The *Aurigae* (1986)

The initial decision to link sea-borne asylum seekers with smuggling can be traced back to the arrival of 152 Tamils aboard the *Aurigae* in 1986. In light of the *Aurigae*’s arrival, the offence of “aiding and abetting” smugglers was introduced for the first time in the *Immigration Act* (Watson 2009: 55). In August 1986, 155 Sri Lankan Tamils drifted on lifeboats for five days before they were

rescued near the coast of Newfoundland. The passengers of the *Aurigae* were granted a temporary permit to stay in Canada according to “priority 18” countries on the B-1 list, which was introduced in May 1986 in order to address the backlog of refugee claims (Lippert 2005: 51). The temporary landed residence status afforded asylum seekers access to employment, education and welfare during their refugee determination process (Wood 1989: 189). While the Tamils had originally stated India as their place of departure, their possession of the Deutsche Mark revealed that they departed from West Germany in July 1986 (Mann 2009: 195). This information generated questions about the authenticity of claims made by the sea-borne asylum seekers. In light of the subsequent public backlash against the B-1 list, the Minister of Employment and Immigration stated that “Canada’s fairness and humanitarian traditions are being abused” (Panjabi 1991: 877). Thus, a discourse emerged where sea-borne asylum seekers were viewed as “queue jumpers” who imposed additional burdens on the over-strained refugee determination system.

Given the view of the passengers of the *Aurigae* as a bureaucratic challenge to the under-resourced refugee determination system, the B-1 list was eliminated in 1987. Subsequently, the government introduced Bill C-55 in May 1987, which proposed to narrow eligibility grounds for refugee status (Watson 2009: 60). For the first time in Canadian refugee law, Bill C-55, *Act to amend the Immigration Act, 1976* (1988) introduced an offence of assisting undocumented migrants, which imposed criminal penalties and a maximum fine of \$500,000 (*R. v. Appulonappa* [2014] BCCA 163, paras. 76-8). The crisis of the under-equipped refugee system in Canada informed the legislative trajectory of increasingly restrictive measures towards sea-borne asylum seekers.

The *Amelie* (1987)

While the arrival of the *Aurigae* fostered a view of sea-borne asylum seekers as a bureaucratic problem for the refugee system, the *Amelie*’s arrival in 1987 triggered an emergency session of Parliament, which proposed to increase criminal penalties for smuggling. Almost a year after the *Aurigae*’s arrival, 174 Sikhs on board the *Amelie* were rescued near Halifax in July 1987 (Mannik 2014: 76). Unlike the sea-borne asylum seekers in 1986 who were not detained, 174 passengers (173 male and one female) were detained under the suspicion of posing security threats (Creese 1992: 137). Contrary to the initially positive reception of sea-borne asylum seekers in 1986, the Sikh asylum seekers were seen as terrorists with potential links to the 1985 Air India bombing. The media portrayed the *Amelie*’s arrival as a “flood” and “invasion” while the Premier of Nova Scotia described the passengers of the *Amelie* as “queue jumpers” (Park 2010: 91). The passengers of the *Amelie* were seen to be implicated in international smuggling rings, which spurred the Canadian government to investigate organized criminal groups in smuggling (Mannik 2014: 80). The crisis of under-equipped bureaucracy due to the *Aurigae*’s arrival in 1986 was transformed into the “crisis of vulnerability” of Canadian borders.

Parliament was recalled from summer recess for an emergency session after the first release of a passenger of the *Amelie* who was detained for ten days at a Canadian Forces Base in Halifax (Creese 1992: 137). The passengers of the *Amelie* were subject to an average of twelve days of detention, which was “exceptional” because other air-borne or land-borne refugee claimants faced a maximum of eight days in detention in 1987 (Watson 2009: 61). The *Amelie*’s arrival reignited debates on Bill C-55, which was introduced in light of the *Aurigae*’s arrival a year earlier. Bill C-84, the *Refugee Deterrents and Detention Bill*, was additionally introduced a month after the *Amelie*’s landing (Pratt 2005: 97). Bill C-84 aimed to augment penalties for smugglers and their accomplices with prison terms of up to 10 years, and a maximum fine of \$5 million (Parliament of Canada 1987: 7329-31). The Minister of Employment and Immigration stated that Bill C-55 was aimed at stopping illegal migration by smugglers because undocumented migrants posed a “potential threat” to Canada (*R. v. Appulonappa* [2014], para.79). A year after the *Amelie*’s arrival, Bill C-55 was enacted as the *Refugee Reform Act* as a sunset clause to the *Immigration Act* (1976) (Lippert 2005: 52). The *Amelie*’s arrival motivated fears of abusing the Canadian refugee system

by smugglers and the vulnerability of Canadian borders to the unannounced arrivals of sea-borne asylum seekers (Sersli 2009: 1033). The legislative reactions of Bill C-55 and Bill C-84 fostered the perception of sea-borne asylum seekers as a threat to border security, which intensified with the arrival of four boats in the summer of 1999 (Pratt 2005: 102).

Summer of 1999

The association of sea-borne asylum seekers with smuggling, which began in 1986 and 1987, intensified with the arrival of 599 migrants from China on board four boats in the summer of 1999 (Bourbeau 2011: 55). Beginning with the *Yuan Yee*, which arrived carrying 123 Chinese migrants in July 1999, three more boats arrived over the next two months, with the last freighter landing on the coast of British Columbia in September 1999 (Hier and Greenberg 2002: 493). When 30 percent of migrants aboard the first boat failed to appear for refugee claim hearings, asylum seekers from subsequent boat arrivals were perceived to be implicated in a human smuggling network (Kelley and Trebilcock 2010: 422). The media circulated a narrative that sea-borne asylum seekers paid between \$25,000 and \$80,000 to smugglers in a criminal organization called “snakehead” (Williamson 2009: 411). Subsequently, 72 percent of migrants from the second, third and fourth boats were detained in a provincial prison for an average length for 212 days (Mountz 2010: 104). This was “exceptional” in comparison to the average duration of air-borne asylum seekers’ detention of one day in 1999 (Park 2010: 101). While 75 Chinese asylum seekers who arrived in Canadian airports in September 1999 were not subject to detention, sea-borne asylum seekers in the summer of 1999 faced detention upon arrival (Watson 2009: 71). Approximately 95 percent of refugee claims from the passengers of four boats were rejected, which was significantly higher than the average failure rate of asylum claims from Chinese asylum seekers in 1999 (Mountz 2011: 123). The relatively high rate of failed refugee claims and the long duration of detention of sea-borne asylum seekers were intended to signal a demonstrative message about Canada’s “tough stance” toward smuggling organizations (Park 2010: 90; *Vancouver Sun* 2009). While the detention of the passengers of four boats was justified as protection of “victims” from smugglers, the media’s description of sea-borne asylum seekers as accomplices in transnational smuggling networks influenced the public’s support for the deportation of sea-borne asylum seekers (Kymlicka 2008: 112).

The arrival of four boats in 1999 informed the drafting of the *Immigration and Refugee Protection Act* (2001), which broadened the scope of smuggling by inserting the phrase “induce, aid or abet” in the offence of human smuggling under section 117(1) of the Act (Sersli 2009: 51; Bradimore and Bauder 2011). In November 1999, two months after the arrival of the last boat carrying sea-borne asylum seekers from China, an issue of the lack of a financial or material gain in the offence of human smuggling arose:

When it comes to human smuggling, what safeguards are there to satisfy the concerns we've raised that not all human smuggling is criminal? Some of it is in fact humanitarian. What safeguards are put in place, then, to make sure Canadians who are trying to assist people in getting away from persecution aren't lumped in with the criminal aspect of exploitative human trafficking? (Pat Martin, Member of Parliament, the Parliamentary Standing Committee on Citizenship and Immigration 1999)

The UN High Commissioner for Refugees (2001a: 110) also voiced the concern that the crime of human smuggling would “unfairly punish an individual who assisted a refugee, perhaps even a family member, to flee persecution and reach safety in Canada.” In spite of such concern about the broad scope of the smuggling offence, the expanded parameter of smuggling was retained in the *Immigration and Refugee Protection Act*. This legislative change provided a foundation for a particularized treatment toward sea-borne asylum seekers in light of the arrivals of the *Ocean Lady* (2009) and *Sun Sea* (2010).

The *Ocean Lady* (2009) and the *Sun Sea* (2010)

The perceptual link between smuggling and the maritime movement of refugees in light of the arrival of four boats in 1999 was reinforced with the landing of the *Ocean Lady* and the *Sun Sea*. In October 2009, the Royal Canadian Mounted Police intercepted a cargo ship called *Ocean Lady* with 76 Sri Lankan Tamil men aboard (Krishnamurti 2012: 141). Although everyone on board the vessel made refugee claims, four crewmembers of the *Ocean Lady* were found to be ineligible for refugee status because their responsibilities in maintaining the vessel were seen as acts of smuggling (Hastie 2013). In light of the *Ocean Lady*'s arrival, Bill C-11 was enacted as the *Balanced Refugee Reform Act* in June 2010. The Act strengthened the association of the maritime movement of asylum seekers with the criminality of smuggling. The *Balanced Refugee Reform Act* authorized the Minister of Citizenship and Immigration to classify sea-borne asylum seekers as "designated foreign nationals" who are subject to different treatment in the refugee determination system (Rehaag 2012: 44). The Act established different procedures for refugee determination and the regularization of status for asylum seekers based on the mode of arrival (Harrold and Elgersma 2010: 8).

A year later, 492 Tamils, including 49 children and 25 mothers, aboard the *Sun Sea* appeared near Vancouver in August 2010 (Gulliver 2012: 26). Two months after the *Sun Sea*'s arrival, the Canadian government designated a Special Advisor on Human Smuggling and Illegal Migration with funding of \$2.6 million (Public Safety Canada 2011a; 2011b). The Minister of Public Safety described asylum seekers aboard the *Sun Sea* as "human smugglers" because the voyage was prepared by 45 agents across several countries over months (Gulliver 2012: 28). Migrants were reportedly charged between \$20,000 and \$35,000 for the passage (*S. C. v Canada*, para. 5). The voyage lasted for four months in "unspeakably difficult conditions that put the lives of all passengers in serious jeopardy" due to "food and water shortages, overcrowded sleeping space, and inadequate bathing and toilet facilities" (*B306 v. Canada*, para. 4; *S. C. v Canada*, para. 6). Subsequently, the refugee claims of six asylum seekers on board the *Sun Sea* were suspended and deportation orders were issued due to their alleged involvement in smuggling (Hastie 2013). Unlike the Tamils on board the *Aurigae* who were automatically granted a permit to stay in 1986, the Tamils in 2009 and 2010 were detained and found to be ineligible for refugee status because of their involvement with smuggling.

The assumption of the criminality of sea-borne asylum seekers due to their mode of travel led to the categorical distinction of sea-borne asylum seekers in Canadian refugee law. Two months after the *Sun Sea*'s arrival, the government introduced Bill C-49, *Preventing Human Smugglers from Abusing Canada's Immigration System Act*. Announced in front of the *Ocean Lady*, Bill C-49 was a legislative response to a perception that smugglers had been increasingly targeting Canada (Harrold and Lussier 2010: 3). On the same day, the Ministry of Public Safety issued a document called "Canada's Generous Program for Refugee Resettlement Is Undermined by Human Smugglers Who Abuse Canada's Immigration System" (Labman 2011: 58). Bill C-49 proposed a new category of arrival under "smuggling incident" and targeted sea-borne asylum seekers who would be subject to mandatory detention for at least a year, as well as a prohibition on applying for permanent residence for five years even after successfully obtaining refugee status (Park 2010: 90).

The discursive framing of the maritime movement of asylum seekers in terms of criminality continued with categorical differentiation based on the mode of arrival in Bill C-4. Bill C-49 was later reintroduced as Bill C-4, *Preventing Human Smugglers from Abusing Canada's Immigration System Act* in June 2011 (Liew 2011: 4). In proposing Bill C-4, the Minister of Public Safety stated that "the arrivals of the *Ocean Lady* and the *Sun Sea* have proved the reach and determination of organized human smuggling networks in their efforts to target Canada" (Currie and Provost 2013: 424). Similarly, the Minister of Citizenship and Immigration stated that the purpose behind Bill C-4 is to "deter smugglers from targeting Canada" (Harrold and Lussier 2010: 2; Currie and Provost 2014: 501). Bill C-4 aimed to strengthen penalties for the offence of migrant smuggling

and mandated automatic detention for sea-borne asylum seekers (Liew 2011: 62). The deterrence goal of Bill C-4 has undermined refugee protection for sea-borne asylum seekers due to categorical differentiation based on the method of arrival.

The deterrence logic of Bill C-4 was absorbed into the omnibus Bill C-31, *Protecting Canada's Immigration System Act* in February 2012 (Sersli 2009: 1037). Bill C-31 was promulgated as the *Protecting Canada's Immigration System Act* in June 2012. The Act retained the same substance of Bill C-4, except for the modification that sea-borne asylum seekers under the age of 16 would not be subject to automatic detention (Citizenship and Immigration Canada 2012). Building on the category of "designated foreign national" in the *Balanced Refugee Reform Act* (2010), the Minister of Public Safety is empowered to confer the status of "designated foreign national" on passengers of vessels suspected to be implicated in human smuggling (Sersli 2009: 1038).

The *Protecting Canada's Immigration System Act* introduced several elements of a particularized treatment for sea-borne asylum seekers labelled as "designated foreign nationals". First, "designated foreign nationals" are subject to detention up to a year without review, or until their claim has been determined (UNHCR 2012: 2). Second, unlike other refugee claimants, sea-borne asylum seekers classified as "designated foreign nationals" cannot appeal the decision of refugee status determination (Béchar and Elgersma 2012: 10). Third, although other refugee claimants are allowed to stay in Canada during their appeal of removal order, sea-borne asylum seekers would not be granted "an automatic stay of removal" (Béchar and Elgersma 2012: 7). The "designated foreign national" status symbolizes differentiated reception measures based on the mode of arrival and creates a "two-tiered system of recognized refugees" (UNHCR 2012: 9).

Even after sea-borne asylum seekers successfully obtain refugee status, they face restrictions, unlike other refugees under the *Protecting Canada's Immigration System Act*. Sea-borne refugees cannot acquire "Convention travel documents" for five years (UNHCR 2012: 5). They are subject to a five-year ban on applying for permanent residence while other refugees may apply for permanent residence within 180 days of successfully obtaining refugee status (UNHCR 2012: 9; *Immigration and Refugee Protection Act*, s. 25 (1.01)). In addition, maritime refugees cannot sponsor their family members to immigrate to Canada for five years (UNHCR 2012: 4). The Act institutionalizes a singular treatment towards sea-borne asylum seekers (MacIntosh 2011: 192).

7 Conclusion

This paper has demonstrated that the criminalization of smuggling has undermined refugee protection for sea-borne asylum seekers. The extensive grounds of "ineligibility" for refugee status in Canadian refugee law, and the broad concept of smuggling in Canadian criminal law foster the interpretive disputes on sea-borne asylum seekers' involvement in "aiding and abetting" refugees to come to Canada illegally. Furthermore, reductionist assumptions about the static identities of smugglers have been imported from the smuggling literature into Canadian refugee law. This discursive transfer reflects the mismatch between law and reality, where the idea of a sharp distinction between smugglers and migrants neglects fluid migratory experiences where migrants may become smugglers during the course of the journey.

Sea-borne asylum seekers who are implicated in smuggling are diverted to complementary protection rather than refugee determination. Sea-borne asylum seekers who are found criminally inadmissible due to their alleged involvement in smuggling are not evaluated on their risk of persecution. Furthermore, they face a higher standard of proof than that required in the refugee

determination process. Even when they are granted complementary protection in case of a positive decision from the PRRA, they do not enjoy the full extent of protection as they are granted a temporary stay of removal, not permanent residency.

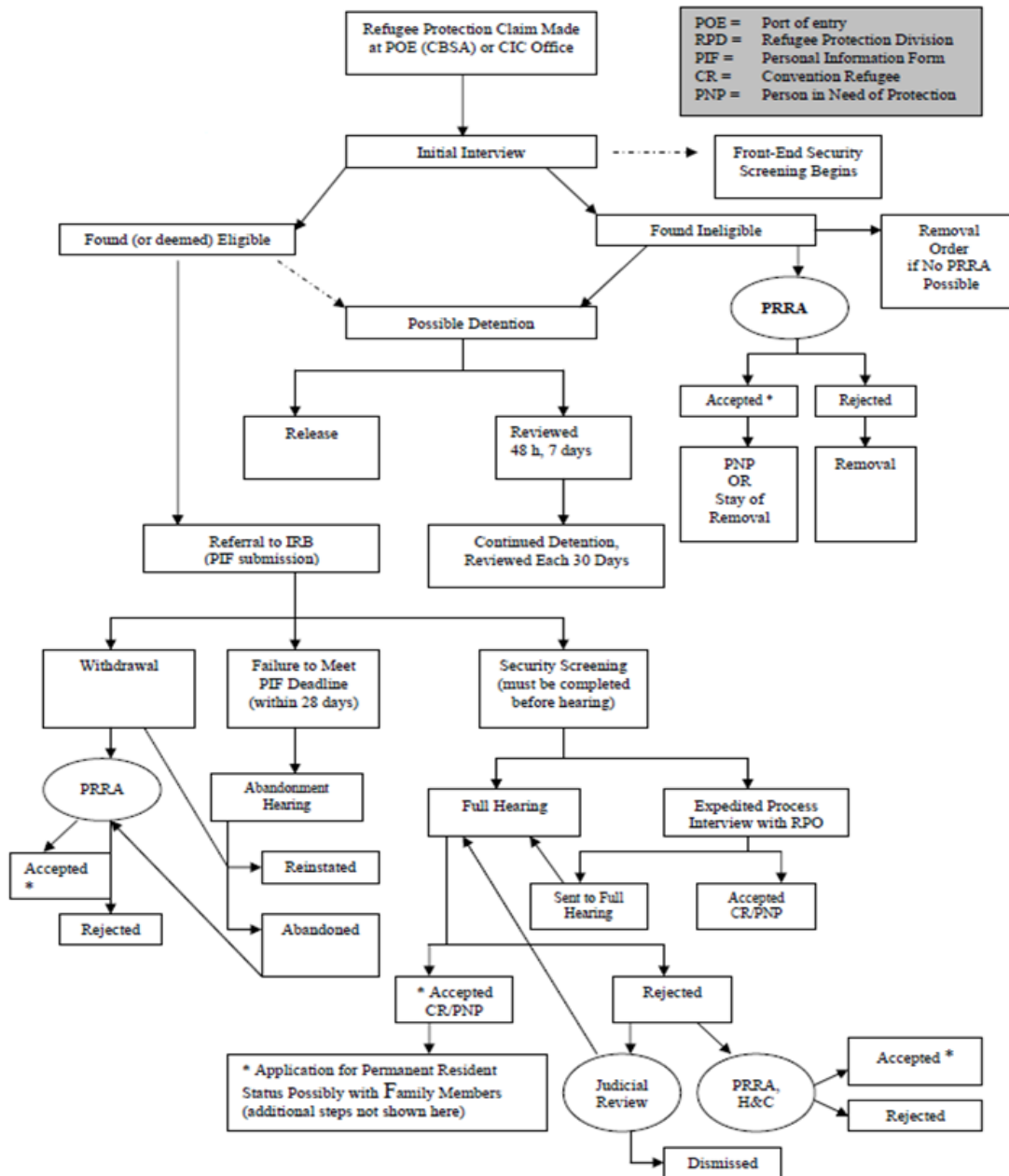
The interpretive disputes over the level of an asylum seeker's complicity in smuggling erode refugee protection for sea-borne asylum seekers. This paper has illustrated several areas of legal contestation over sea-borne asylum seekers' complicity in smuggling: first, the nature of asylum seekers' responsibility in a smuggling operation; second, the timing of their involvement in smuggling; third, their motive for "aiding and abetting" refugees; fourth, the substance of a financial or material gain; and fifth, the parliamentary intention behind anti-smuggling provisions in Canada.

Flawed assumptions in the smuggling literature have been embedded in the international legal framework on smuggling. The "economics of smuggling" model's assumption of the static identities of smugglers and smuggled migrants shapes the reductionist dichotomy between the smuggler and the smuggled migrant in international criminal law. In addition, sea-borne asylum seekers' proactivity in assisting smugglers challenges the assumption of passive smuggled migrants found in the "smuggling as a form of slavery" model. Canadian cases show that the legal frameworks on smuggling fail to recognize the diverse set of causes and circumstances of smuggling. The reductionist binary of smugglers as criminals, as opposed to smuggled migrants as victims, obscures dynamic migration experiences (International Council on Human Rights Policy 2010: 85). This analysis has demonstrated the problem of finding a refugee claimant inadmissible without recognizing the blurred line between smugglers and smuggled migrants. International refugee law fails to provide protection for all *bona fide* refugees because of the artificial distinction between the smuggler and the migrant in international and national criminal frameworks on smuggling.

Analysis of the legislative history of boat arrivals shows that the arrival of sea-borne asylum seekers has induced significant changes in Canadian refugee law. The domestic context for narrowing eligibility for asylum dovetails with the international trend of criminalizing smuggling, thereby lessening the scope for accessing asylum.

Sea-borne asylum seekers who use the services of smugglers are caught in between agency and victimhood. They are neither passive victims nor capable actors. They are particularized because they inhabit the normative hinterland in which they are viewed as actors with too much agency, rather than being vulnerable at the mercy of smugglers. The differentiated treatment toward sea-borne asylum seekers indicates the perceptual difficulties of conceiving asylum seekers as vulnerable victims *and* autonomous actors. International criminal law and Canadian refugee law have not recognized the nuanced roles played by smuggled migrants in their migratory journey. In public and political imaginations, the image of smuggler is ontologically unstable because smugglers are criminalized, but the conduct of some smugglers cannot be described as criminal. It is hoped that this paper will initiate future research to examine the relative lack of literature of the particularized treatment towards sea-borne asylum seekers in Canada.

8 Appendix 1: Refugee Status Determination process in Canada



Source: DAUVERGNE, C., ANGELES, L. C., and HUANG, A. (2006) *Gendering Canada's Refugee Process*, Ottawa, Status of Women Canada. p.8. Available from: http://www.iiav.nl/epublications/2006/gendering_canadas_refugee_process.pdf.

9 Appendix 2: Complementary protection: PRRA

	Restricted PRRA	General PRRA
Type of applicants	<p>* Ineligible claimants to refugee protection: Persons who are found to be inadmissible based on grounds of security, violating human or international rights, serious criminality or organized criminality</p> <p>* Persons whose claims for refugee protection were rejected by the Refugee Protection Division on the basis of Article 1F of the Refugee Convention</p>	<p>* Persons who were found not to be a refugee according to Article 1A of the Refugee Convention by the Refugee Protection Division</p> <p>* Persons who have been unsuccessful in a prior PRRA</p> <p>* Persons who left Canada following a rejected refugee claim or PRRA, and more than six months have passed since their departure from Canada</p> <p>* Persons who never previously sought refugee protection in Canada, and are now facing removal</p>
Assessment criteria	<p>Applicants are assessed on these criteria:</p> <ul style="list-style-type: none"> * risk of torture * risk to life * risk of cruel and unusual treatment or punishment upon return <p>**They are not assessed on the Refugee Convention grounds, including risk of persecution</p>	<p>Applicants are assessed on the same consolidated protection grounds considered by the Refugee Protection Division</p> <p>* These grounds consist of those identified in: the Geneva Convention relating to the Status of Refugees; the United Nations Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment ('Convention against Torture'); as well as risk to life or risk of cruel and unusual treatment or punishment</p>
Positive determination of PRRA	<ul style="list-style-type: none"> * The applicant receives a stay of removal * The applicant is not eligible for permanent residency 	<ul style="list-style-type: none"> * The applicant is eligible to apply for permanent residency * The applicant whose previous refugee claim failed may be granted refugee protection
Negative determination	* resumption of a removal order	

Source: compiled by author based on **CITIZENSHIP AND IMMIGRATION CANADA** (2009) *PP3 –Pre Removal Risk Assessment (PRRA)*, Available from:

<<http://www.cic.gc.ca/english/resources/manuals/pp/pp03-eng.pdf>>;

DAUVERGNE, C., ANGELES, L. C., and HUANG, A. (2006) *Gendering Canada's Refugee Process*, Ottawa, Status of Women Canada. p.8. Available from:

<http://www.iiav.nl/epublications/2006/gendering_canadas_refugee_process.pdf>

10 Appendix 3: Notable migrant smuggling incidents in Canada

Date of Arrival	Vessel Name (if known)	Nationality of Smuggled Migrants	Number of Smuggled Migrants	Descriptive Notes
August, 1986 (Fennell et al., 1999; Knox, 2009; Canadian Press, 2010).		Sri Lankan	152	<ul style="list-style-type: none"> - Rescued from two 10 metre-long lifeboats off the Newfoundland coast. - The smuggled migrants were Tamil and sought refugee protection due to persecution in Sri Lanka. They had been in lifeboats for about 5 days after having been dropped off Canada's east coast by a larger ship. - Told the RCMP they had paid between US\$3,000-5,000 to be taken to Canada or the United States.
July, 1987 (Canadian Press, 2010).	<i>MV Amelie</i>	Indian (Sikh)	173	<ul style="list-style-type: none"> - The smuggled migrants were mostly Sikhs from the Punjab State in India. - The <i>Amelie</i>, a freighter that had carried them close to the Canadian coast, was later seized by the RCMP at sea and towed to Halifax. - The Sikhs claimed refugee status on the basis of fear of persecution in India
<ul style="list-style-type: none"> - July 20, 1999 - August 11, 1999 - August 31, 1999 - September 8, 1999. (RCMP, 2006; Canadian Press, 2010; Canadian Press, 2005; Charlton et al., 2002; Fennell et al., 1999; <i>R. v.Li</i> , 2001; <i>R. v.Chen</i> , 2001; Walker, 1999; Knox, 2009).	Four different ships: <ul style="list-style-type: none"> - First, third and fourth ships had no names. - Second ship identified as <i>HuegRyong Pusan No. 705</i>. - RCMP believed that two other 	Chinese (mostly) Korean (nine)	600 (total): <ul style="list-style-type: none"> - 123 on July 20. - 131 on August 11. - 190 on August 31. - 146 on September 8. 	<ul style="list-style-type: none"> - 577 made refugee claims – only 24 of which were successful. - 330 migrants deported. - 12 were allowed to stay in Canada in exchange for testifying against their smugglers. - Most of the rest of the migrants are believed to have entered the U.S. - Each had reportedly paid tens of thousands of dollars for their journey.

Date of Arrival	Vessel Name (if known)	Nationality of Smuggled Migrants	Number of Smuggled Migrants	Descriptive Notes
	ships slipped into Canadian waters undetected.			<ul style="list-style-type: none"> - Dealing with these ships cost between CAN\$40-70 million. - Nine Korean crewmembers were arrested from the August 11 ship, and charged with aiding a group of people to enter the country illegally and causing a person to disembark at sea. - Five convicted of organizing, aiding or abetting the coming into Canada of a group of persons who were not in possession of valid travel documents. - No high-level human smugglers were convicted.
November 2000 (Canadian Broadcasting Corporation [CBC], 2006).		Chinese	122	- Boat was found trying to surreptitiously enter Canada via Nootka Sound (300 km northwest of Victoria, B.C.).
Fall 2005 (RCMP, 2006).		Chinese	47	- Four cruise ships arrived on the East Coast, representing the first identified use of cruise ships to smuggle migrants into Canada.
February 2006 (RCMP, 2006).		Majority Chinese	~ 100	- Asian and East European organized crime groups responsible for smuggling migrants in the Windsor-Detroit area over a period of two years.
April 2006 (RCMP, 2006; Todd, 2006).		Indian and Pakistani	Dozens	<ul style="list-style-type: none"> - Smuggling ring on the West Coast responsible for smuggling migrants across the border into the U.S. - At least 50 illegal immigrants were detained in America, and 14 American and Canadian residents were charged with human smuggling related offences.
October 16, 2009 (RCMP, 2011; Bell, 2011a; Office of the Prime Minister, 2011).	<i>Ocean Lady</i>	Sri Lankan	76	<ul style="list-style-type: none"> - All 76 released under terms and conditions imposed by Refugee Board. - 4 arrested for human smuggling offences.
August 12, 2010 (Quan, 2011)	<i>MV Sun Sea</i>	Sri Lankan	492	<ul style="list-style-type: none"> - The refugee claims of approximately 50 migrants were blocked on suspicion of engaging in war crimes, human smuggling, or participation in terrorist organizations. - As of July 27, 2011, 15 admissibility hearings had been completed, resulting in 6 deportations on suspicions of war crimes, belonging to terrorist organizations or engaging in people smuggling and 9 migrants permitted to proceed with their refugee claims.

Source: PERRIN, B. (2013) 'Migrant Smuggling: Canada's Response to a Global Criminal Enterprise', *International Journal of Social Science Studies* 1(2): 139-153.

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