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# POTENTIA

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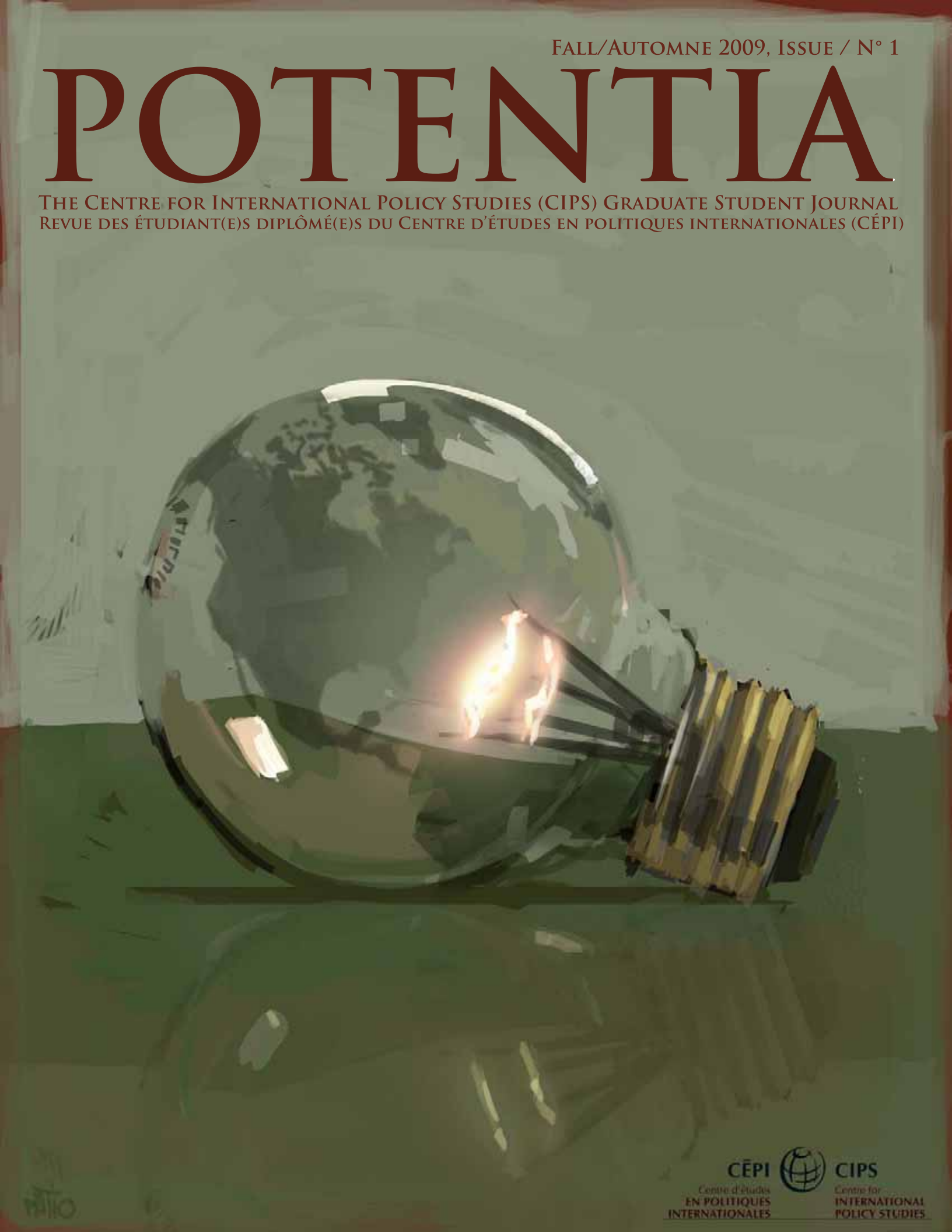

CÉPI Centre d'études en politiques internationales
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# AVANT-PROPOS

Cher lecteur,

Merci de votre intérêt envers *Potentia, le Journal des étudiants diplômés du Centre d'études en politiques internationales* (CÉPI) de l'Université d'Ottawa. Cette édition marque l'inauguration du journal et nous espérons qu'elle sera la première d'une série de contributions intellectuelles riches et stimulantes au discours sur la politique internationale au Canada et dans le monde.

*Potentia* a été créé avec l'objectif de recueillir et de diffuser le meilleur du travail des étudiants diplômés à l'Université d'Ottawa, concernant les politiques internationales. Le CÉPI fournit au journal la plate-forme idéale pour remplir un tel objectif. La mission du CÉPI est de « supporter des contributions académiques de pointe sur les enjeux de sécurité internationale et de gouvernance globale, et de stimuler et enrichir la discussion publique des enjeux de politique internationale ». Cette première édition de *Potentia* représente une contribution académique unique à cette discussion publique. De plus, elle s'inscrit parfaitement dans la nature bilingue et interdisciplinaire du CÉPI, et est un reflet de l'ambition du journal à engager un public large, au-delà des barrières linguistiques et disciplinaires. Le dépassement de ces barrières ainsi que d'autres est primordial pour faire face aux enjeux globaux contemporains et pour élaborer des solutions politiques innovatrices.

Cette première édition contient quatre articles de recherche longs, et trois réflexions plus courtes. Ils ont tous été sélectionnés sur la base de critères rigoureux, incluant l'excellence de la recherche et l'analyse pointue des politiques. Ces contributions ne se distinguent pas uniquement par la qualité de leur analyse, mais aussi parce qu'ils explorent différentes options de politiques et leurs impacts.

Le nom latin *Potentia* a été choisi pour ce journal afin de refléter le pouvoir des idées, et le potentiel qu'elles contiennent de changer le monde. Dans le marché global grandissant de l'information et des opinions, les décideurs publics doivent choisir parmi un nombre croissant d'options politiques. Cette publication vise à faciliter la compréhension des enjeux rencontrés et des options possibles.

Nous espérons que cette première édition renforcera l'intérêt pour la recherche orientée sur les politiques internationales, stimulera la discussion, et contribuera de manière significative aux débats grandissants qui affectent le Canada et le monde.

Ian B. Anderson et Kady Seguin
Co-Éditeurs-en-Chef

# FOREWORD

Dear Reader,

Thank you for your interest in *Potentia, the Graduate Student Journal of the Centre for International Policy Studies* (CIPS) at the University of Ottawa. This marks the Journal's inaugural edition. We hope it is the first of many thought-provoking and insightful contributions to international policy discourse in Canada and the world.

*Potentia* was created with one purpose in mind: to collect and disseminate the very best international policy-related graduate work at the University of Ottawa and beyond. CIPS provides the Journal with the ideal launching pad for fulfilling this purpose. CIPS' mission "is to support cutting-edge scholarship on international security and global governance issues, and to stimulate and inform public discussion of international policy issues." This first edition of *Potentia* represents a unique scholarly contribution to this public discussion. Moreover, this contribution embraces CIPS' interdisciplinary and bilingual nature, reflecting the journal's ambition to engage a broader public beyond disciplinary and linguistic boundaries. Breaking down these and other barriers is paramount to addressing contemporary global challenges with innovative policy solutions.

This first edition includes four longer research articles and three shorter analyses. All were selected on the basis of rigorous standards, including excellent research and pointed policy analysis. These contributions are noteworthy not only because they offer careful analysis, but also because they explore policy implications and options.

The Latin name *Potentia* was chosen for this Journal to reflect the power of ideas, and the potential they all contain to change the world. In an increasingly crowded global marketplace of information and opinions, decision-makers must choose from a growing array of policy options. This publication aims to make the issues they face, and the options before them, better understood.

We hope this first edition encourages further interest in international policy research, stimulates discussion, and contributes meaningfully to the growing debates that affect Canada and the world.

Ian B. Anderson and Kady Seguin
Co-Editors-in-Chief

# ACKNOWLEDGEMENTS

This journal is the collective effort of graduate students from across the University of Ottawa, many of whom took on multiple roles toward the publication of this edition. Their passion and engagement was a *sine qua non*.

# REMERCIEMENTS

Ce journal est le résultat d'un effort collectif d'étudiants diplômés de différentes disciplines à l'Université d'Ottawa. Plusieurs d'entre eux ont joué de multiples rôles dans le processus de publication de cette édition. Leur passion et leur engagement ont été essentiels au succès du projet.

Ian Anderson would like to personally thank Darlene Goodwin, whose experience and advice were essential in guiding this process through every stage. He is also grateful to Kady Seguin, whose partnership in this project is responsible for its every success.

Kady Seguin would like to thank Ian Anderson for his hard work and dedication to showcasing the work of graduate students at the University of Ottawa. It was a pleasure working with such a passionate individual. She would also like to thank all of those involved in the creation of the journal, including the executive board, editorial board, senior editors, copy editors, and Lucia Stefanescu for their excellent work and dedication. Also, a special thanks to Marie-Helene for all her wonderful help with translation.

And finally, those involved with *Potentia* would like to offer a special thanks to the Centre for International Policy Studies for its generous financial contribution. Special thanks to Roland Paris for his valuable guidance and assistance, as well as to Judy Meyer for her support throughout the entire process.

Ian Anderson souhaiterait remercier personnellement Darlene Goodwin, dont l'expérience et les conseils ont été d'une valeur inestimable dans toutes les étapes du processus. Il remercie aussi Kady Seguin, dont le partenariat est au cœur de la réussite du projet.

Kady Seguin souhaiterait remercier Ian Anderson pour son travail et son dévouement à promouvoir le travail des étudiants diplômés à l'Université d'Ottawa. Elle a grandement apprécié travailler avec un individu si passionné. Elle voudrait aussi remercier tous ceux qui ont été impliqués dans la création du journal, incluant le comité exécutif, le comité éditorial, les éditeurs principaux, les réviseurs et Lucia Stefanescu pour leur excellent travail et dévouement. Aussi, un merci spécial à Marie-Hélène pour toute son aide dans la traduction.

Et finalement, tous ceux impliqués dans *Potentia* voudraient offrir un remerciement particulier au Centre d'études en politiques internationales pour sa généreuse contribution financière. Un gros merci à Roland Paris pour la qualité de ses conseils et de son support, ainsi qu'à Judy Meyer pour son support pendant tout le processus.

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# RECONSIDERING CANADIAN CITIZENSHIP POLICY IN AN ERA OF GLOBALIZATION: DUAL CITIZENS, NON-RESIDENT CANADIANS AND THE COST OF COSMOPOLITANISM

By Jessica Breaugh, Catherine DeJong and Lauren Rutherford


## ABSTRACT

*Over the last half of the 20th century, forces of globalization have lead to a significant growth in the number of international migrants, and influenced the national governments of emigrant and immigrant countries to implement dual citizenship policies. This paper will argue that global forces have intensified the extraordinary growth of dual citizenship in Canada, changing the social meaning attributed to dual citizenship and placing internal and external pressures on the government to re-evaluate existing citizenship policies and the rights afforded to non-resident Canadians. The first section of this paper will address the theoretical framework of citizenship policy in Canada, as well as its historical foundations. The second section will discuss the forces of globalization, exploring the reasons behind the dramatic increase in dual citizenship. To conclude, the final section will examine the impact of these pressures on Canadian domestic policy as seen through the public debate surrounding the Lebanon evacuation, and the recent revision of policies granting citizenship to third generation non-resident Canadians. The final thoughts section will speak to recommended policy considerations for government.*


## INTRODUCTION

Canada was among the first nations to allow dual citizenship. In recent years, the widespread implications of this policy have led the state to call into question this approach to domestic citizenship policies. Although dual citizenship was established in Canada by the *Citizenship Act, 1977* before the expedient nature of globalization took effect, current global forces have begun to challenge not only the unitary citizenship polices held by some states, but also the rights and obligations states hold towards their citizens of multiple nationalities.

As stated by Rubenstein, "[g]lobalization emphasizes different identities of membership as the norm, according less reason to utilize a singular notion of citizenship, or a single legal status linking directly to the nation-state.[1]" This is readily seen through the influx of dual citizenship claimants within Canada, and the policy options the government has chosen to pursue in light of this growth. This outlook is also demonstrated in Canada's exploratory approach toward the very nature of citizenship with respect to state-building, revisiting dual citizenship polices and the rights of non-resident Canadians.

Canada's *Citizenship Act 1977* outlines the qualifications for acquiring citizenship, while the *Charter of Rights and Freedoms* outlines the social and civic rights guaranteed to all citizens (and residents) by law. Canadian citizenship can currently be acquired in three ways: being born in the country (unless the child is of a foreign diplomat), acquiring citizenship through immigration and subsequent naturalization, or through parental linage or "derivative citizenship."[2] The *Charter of Rights and Freedoms* guarantees that all Canadian citizens received the same rights regardless if they are resident or non-resident Canadians.[3]

As described by Renson, dual citizenship means that:

> *a person can have each or many of the rights and responsibilities that adhere to a citizen in all of the several countries in which he or she is a citizen, regardless of the length of time of actual residence in a country, … or the nature of his or her economic, cultural, or political ties.*[4]

This is an important operational definition as it calls to attention not only the political affiliations that dual citizens are bounded by, but also the economic and cultural ties that may have led to a dual citizenship accreditation in the first place and the notion of a citizen not residing in a country of their citizenship. The point of interest for this paper is how the forces of globalisation have impacted this.

This paper will argue that global forces have intensified the extraordinary growth of dual citizenship in Canada, changing the social meaning attributed to dual citizenship and placing internal and external pressures on the government to re-evaluate existing citizenship policies and the rights afforded to non-resident Canadians. This will be accomplished by exploring the conception, growth and scope of Canada's citizenship policies, the global forces leading to the dramatic rise in dual citizenship, and the repercussions of such growth for Canadian citizenship policy.

The first section will address the theoretical framework and historical foundations of citizenship policy in Canada. The second section will discuss the forces of globalization, exploring the reasons behind the dramatic increase in dual citizenship. To conclude, the final section will examine the impact of these pressures on Canadian domestic policy, drawing examples from the public debate surrounding the Lebanon evacuation and the recent revision of policies regarding citizenship of second generation Canadians born abroad. In order to understand how globalization has impacted Canadian citizenship policies, it is first important to outline basic models describing the scope of citizenship.

## PART I: CITIZENSHIP

### Citizenship frameworks

#### A) Political and social conceptions of citizenship

Depending on the focus of analysis, varying social and political conceptions of citizenship necessitate different interpretations of policy-making and the forces that influence it. Citizenship as a 'political' term delineates the rights and requirements a person has with a state. Vested in the individual by birth, parental linage or naturalization, citizenship rights are protected through laws and legislation unique to each country.[5] These rights and responsibilities form a relationship of obligation between the state and the individual, granting certain social, civic and cultural benefits. As a result, "the concept of citizenship has become a central device by which the law distinguishes those subject to it and served by it from strangers."[6]

Citizenship as a 'social' conception pertains to the link between the development of an individual's identity and the relationship of the individual to the state. Scholars such as Brodie argue that social citizenship developed with the expansion of the welfare state, and is expressed through policies such as universal education, welfare, and in the case of Canada, health care.[7] Social policies were deemed necessary for enabling citizens to associate and identify with the state, as the legal perception of citizenship failed to promote loyalty and social cohesion. This became an integral component of Canada's citizenship regime, influencing the establishment and evolution of subsequent citizenship policies. Originally, international law sought to uphold principles of national sovereignty over access to international mobility. A brief comment by the League of Nations in 1930 suggesting that, "all persons are entitled to possess one nationality, but one nationality only" best summarizes the international norm of public opinion throughout the 20th century.[8]

In 1963, for example, *The European Convention on the Reduction of Cases of Dual Nationality and Military Obligations* sought to limit the instances of dual citizenship and maintain the sovereignty of nations in enforcing military conscription.[9] Policies such as this were seen to be very important for maintaining citizen loyalty and preventing competing conscription claims of other countries.[10] Near the end of the 20th century, the enhanced economic and political cooperation among democratic states, coupled with the end of the Cold War and the decreasing probability of interstate wars between democracies, greatly diminished the need for legal measures that attempted to secure citizens' loyalty.[11] This prompted a political reorientation towards dual citizenship policies.

## The history of Canada's citizenship laws

The manner in which polices emerge directly influences the development of the country's cultural and social understanding of citizenship. Additionally, this lineage serves to establish a precedent for understanding the state's approach to the evolution of competing conceptions of citizenship and their associated rights and responsibilities.

### A) Early Canadian citizenship policy

Before the *Canadian Citizenship Act* was enacted in 1946, naturalization laws existed but remained bounded under English common law.[12] Early government policies such as the *Immigration Act* of 1910, the *Naturalization Act* of 1914 and the *Canadian Nationals Act* of 1921 were fragmented and ambiguous, resulting in confusion regarding the status of nationals.[13] These early policies however set the framework for what would become a pervasive citizenship act at the end of Second World War.[14]

Following World War II, new citizenship laws were enacted to develop social cohesion. Politicians such as Paul Martin Sr., sought to create a policy which bound people together as a community and promoted a distinct character and nationality.[15] To accomplish these goals, the *Citizenship Act* was established on January 1st, 1947 and with this came the promise that all groups in Canada would be treated equally regardless of nationality, religion, or place of birth.[16]

### B) Formulating social citizenship

From the inception of Canada's citizenship policies in 1946, the legislature did not require its new citizens to renounce their previous citizenship. The law did however stipulate that people could lose their status if they sought out additional citizenships.

The *Citizenship Act* 1947 also maintained that Canadian-born and foreign-born naturalized citizens were to be treated equally before the law regardless of "… heritage, religion, national origin; and irrespective of any proprietorial claim that any group might make to being more Canadian than any other."[17] Although these policies still barred multiple segments of society from exercising full citizenship rights (including women, aboriginals, and some racial minorities), the precedent was set for allowing the existence of multiple identities within a single state.

From 1946 until the next phase of citizenship policy reform in 1977, many of the social and cultural rights of Canadian citizens became further entrenched. Ideas of social citizenship began to develop in the 1960s with the expansion of the welfare state. Of significance was the *Canadian Bill of Rights* in 1960 which afforded a basic set of human rights to all individuals within Canada[18] and the extension of education, health care and social security benefits to all Canadians.[19] National policies deemed to enforce a multicultural cohesive Canadian culture set trends for the social integration of marginalized groups and later became a function of social citizenship.[20]

**C) Recognizing dual citizenship**

The forces of social citizenship culminated in the development of the *Citizenship Act* 1977, "when citizenship became a right for qualified applicants rather than a privilege as it had been in the past."[21] The *Citizenship Act* 1977 also removed barriers preventing citizens from acquiring (or sustaining) multiple citizenships. The reasons why dual citizenship was fully recognized remain speculative, given that it was not explicitly discussed during parliamentary debates.[22] The policy, however, highlights the trend in social interpretations of Canadian citizenship rights and regulations to move beyond the homogeneous citizenship identity traditionally associated with citizenship. Since the establishment of this act, Canada's multicultural citizenship policies have been legally entrenched through the *Charter of Rights and Freedoms* in 1982 and the *Multiculturalism Act* 1988.

To understand the relevance of these policies, one must analyze their continuing influence on Canadian society. Although dual citizenship policies have existed since 1977, an analysis of 1981 census data reveals that only a small number of citizens actually identified themselves as dual citizens. It was not until the era of globalization that the number of dual citizens in Canada started to substantially increase.[23]

## PART II: GLOBALIZATION

### Globalization and evidence of mass migration

#### A) Globalization: an operational definition

Globalization as a driving force of change has been especially relevant in research analyzing states' approaches toward dual citizenship.[24] Held and McGrew have defined globalization as "a historical process which transforms the spatial organization of social relations and transactions, generating transcontinental or interregional networks of interaction and the exercise of power."[25] Although cross border interaction is not unique to the 20th century, Held and McGrew stress that this new age of contemporary globalization "is distinguished by unique spatio-temporal and organizational features, creating a world in which the extensive reach of global relations and networks is matched by their relative high intensity, high velocity and high impact propensity across many facets of social life."[26] Globalization therefore, is creating an interconnected, interdependent world where among other things, people, goods, services, currencies, cultures and ideas flow across national boundaries with speed and ease never before witnessed.[27] The mass movement of 'migrants', a term used generally in this paper to identify people who have left their country of origin to pursue employment opportunities abroad, is a primary result of contemporary globalization.[28]

While some argue that high intensity transnational connections diminish the relevance of sovereign state borders, scholars such as Rubenstein maintain the state has a sustained role in an age of globalization.[29] States have been faced with intense global pressures, altering their scope of authority and sovereignty, forcing them to adapt their domestic policy spheres.[30] It is through this framework of analysis that the study of globalization informs the transformation of Canada's domestic citizenship arena.

#### B) Mass migration and dual citizenship around the world

In examining the mass movement of people, it becomes clear that in the last two decades, migrants have been leaving the developing world in search of higher living standards.[31] Although the international migration of people is not a new phenomenon, this accelerated, exponential, and circulatory 21st century migration is leading to rapid increases in the number of people living outside their country of birth.[32]

Due to a lack of reporting, exact measures of international migration remain impossible to obtain. The International Organization for Migration (IOM) however, has indicated that the number of global migrants has more than doubled from 75 million in 1965, to over 200 million in 2008.[33] Increasing dramatically, migrants now comprise 3% of the world's population[34] and constitute one out of every ten individuals in developed countries,[35] and one in 35 individuals around the world.[36] Global trends indicate that South-North migration is accelerating[37] and that the flow of migratory persons is increasingly directed towards North America.[38] According to the International Migration Report 2006 issued by the U.N. Department of Economic and Social Affairs Population Division, the number of international migrants in North America grew by 17 million from 1990 to 2005.[39] The record numbers of migrants travelling internationally, and the dramatic influx of migrants to North America, have had a significant impact on domestic governance. In the highly multicultural context of Canada for example, as of 2001 5.4 million people, or 18.4% of the total population, were born outside the country.[40]

**C) Mass migration and dual citizenship in Canada**

The migratory trend towards North America[41] implies an influx of foreign-born residents and international migrants in Canada.[42] Using Bloemraad's case study on Canadian citizenship models as a reference, it is evident that the aggregate level of Canadian dual citizenship has rapidly increased. In 1981, for example, (4 years after dual citizenship was legalized in Canada), 5.5% of naturalized immigrants claimed dual citizenship according to the Canadian Census. By 1991, dual citizenship claims had nearly doubled to 10.7%, and by 1996, had increased by half again to 16.6%. By 2001, 691,000 Canadians had declared themselves as dual citizens.[43] This estimate is deemed to be low, partly because only one in five households contacted is requested to complete the long form survey which includes questions regarding citizenship and naturalization.[44]

Additionally, declaring dual citizenship status is voluntary; not all persons responding to the long survey who hold dual citizenship will complete this information. Individuals whose country of origin does not allow citizens to renounce their citizenship may also not automatically recognize their dual citizenship, failing to divulge this information.

Estimates of the rapidly increasing number of dual citizens in Canada necessitate a consideration of the environmental conditions under which this has occurred. A growing scholarly consensus indicates that globalizing forces are the main determinant of this trend.[45]

Five globalizing forces can be identified in the research:

1. the creation and dispersion of powerful technologies,
2. the emergence of a global economy,
3. the securitization of migration,
4. the emergence of a universal human rights regime, and
5. the global spread of democratic values.

This section will address each of these global forces and their corresponding influence on the increasing levels of dual citizenship in Canada.

## International forces driving increase of dual citizenship in Canada

### A) The creation and transmission of powerful technologies

Throughout the last 30 years the world has seen rapid advances in technology. Increases in affordable communication and transportation technology are most relevant to elevating levels of dual citizenship. Both a cause and effect of globalization, advances in these kinds of technology have allowed migrants to maintain close connections with their countries of origin.

Communications technology, particularly the Internet, now enable migrants to communicate cheaply and instantaneously with family and friends around the world. Facilitating the global transmission of culture and identity, these instantaneous connections allow migrants to continue to form ties and build social networks within their communities of origin, promoting a sense of sustained belongingness.[46] Advances in transportation technology, allowing for faster travel times and less expensive airfare, have worked to "increase the volume of temporary, repeated and circulatory migration."[47] More frequent returns to countries of origin allow migrants to continue identifying with these societies even though they permanently or temporarily reside in another nation-state.

By allowing migrants to maintain psychological and physical connections to their country of origin, advances in technology have inadvertently increased the number of dual citizens in Canada. According to Schuck, "modern transportation and communication technology makes residence and effective participation in two polities easier than ever, converting many 'technical' dual nationals into functional ones."[48] Having a strong sense of belonging to more than one national community, migrants are now demanding citizenship options that reflect their fragmented identities.[49]

In Canada, this is reflected by the rapid increase in the number of citizens claiming dual citizenship since 1981. It is through the fragmentation of identities therefore, that advances in technology have changed the context of domestic policy, increasing the number of Canadians who hold dual citizenship.

**B) The emergence of a global economy**

The emergence of a global economy has been one of the most significant facets of globalization. Characterized as spanning across national boundaries, the newly emerged global economy manifests itself through liberalized trade, free movement of financial capital, and the international expansion of multinational corporations.[50] Fundamentally changing the economic structure in which states operate, economic globalization has further moved to 'internationalize' the domestic policy sphere, contributing to the increased number of Canadians holding multiple citizenships.

The global economy has facilitated the mass movement of financial capital throughout the international system. Aided by bilateral, multilateral and regional free trade agreements and the spread of multinational corporations, financial capital has tended to leave poorly developed areas of the world, congregating in geographic regions with high levels of human capital and technological innovation.[51] According to the research of the IMF, this free flow of financial capital has worked to increase income inequality in the world. By condensing most economic opportunities in the developed world, financial globalization has increased the earning power of those in certain geographic areas over others.[52] By increasing the earnings gap, economic openness has consequently promoted the movement of migrants towards geographic regions with higher earning potentials. Bloemraad best describes this process, along with its consequences for national identity:

> *Due to the core-periphery structure of the international economic system, migrants from developing countries are forced to find employment in the developed world. Once there, they frequently hold jobs in secondary markets, either in low skilled or manufacturing or poorly paid service positions. As the peripheries of the labour market, these immigrants feels marginalized from the host society, and they simultaneously retain links to the sending country through remittances or entrepreneurial activities.*[53]

Castles supports this description stating that, for migrants, "[t]he income gap between poor and rich countries should be sufficient reason to make a 'rational choice' to migrate" and to expect higher earnings and better economic conditions in the host country.[54] On the periphery of the labour market, these migrants are often alienated from their host nation, preventing naturalization and assimilation with the host nation's identity.[55]

Still identifying strongly with their sending nations, these migrants are unwilling to forfeit the citizenship of their country of origin. Having no better economic opportunities in their home nation however, migrants aspire to also hold the citizenship of their host nation in order to increase the ease with which they can participate in the foreign labour force. In Canada, this trend is shown by the increasing number of immigrants choosing to hold multiple citizenships.

**C) 'Migration securitization' and heightened policing of borders**

Migrants seek citizenship of Western states as a means of ensuring security beyond the borders of their country of residence. Affording migrants increased mobility in a globally interconnected labour market that is increasingly policed at the borders.[56] Western citizenship proves itself to be very valuable in providing unhindered global mobility. It is for this reason that migrants to Canada are increasingly taking up Canadian citizenship (a popular Western citizenship) in additional to that of their country of origin.

Despite the increased flow of labour and economic interconnectedness, international borders still serve to maintain patterns of inequality and constrict low-skilled migrants. The widening of the global earnings gap has further divided the world,[57] strengthening the need for protective borders. As proposed by Castles, the borders differentiating states are no longer the crucial barriers; under globalization the importance has shifted to borders demarcating the impoverished developing South from the highly developed North.[58] In response to patterns of mass migration, Northern countries have implemented 'migration securitization' measures aimed at restricting the transnational movement of undesirable individuals or groups.[59] Western citizenship remains a privilege that greatly enhances the holder's economic and social opportunities in light of these restrictions.[60]

This contributes to the value of maintaining dual citizenship with Canada. Infrequently employed under the auspices of nation-building and multicultural recognition, dual citizenship policies are now being widely utilized by a vast and exponentially increasing population of Canadian dual citizens looking for increased mobility.[61]

**D) International transmission of human rights norms**

In the 20th century, the widespread acceptance of human rights norms became a driving force of change in citizenship policy. Reduced interstate conflict, widespread recognition of human rights, and a more democratic relationship between the state and its citizens have resulted in liberalized international norms regarding dual citizenship.[62]

Dramatically higher numbers of dual citizens appeared as a result of the international movement to recognize gender equity in citizenship policies. Whereas women formerly had to acquire the citizenship status of their husband and renounce the citizenship of their original state, women are now frequently able to obtain dual citizenship.[63] These bi-national couples are having children, who under the new recognition of gender equity, are characteristically given the citizenship of both parents, further contributing to the tremendous growth in dual citizenship in Canada.

International treaties are increasingly used as a basis for national legislation and international legal norms are being employed in the development of common law, the interpretation of statutes and the international scrutiny of human rights.[64] As international treaties come to attribute human rights as those intrinsic to the individual and differentiated from the rights bestowed upon them by the state, the states' authority in determining the treatment of migrants and the rights of citizens is undermined by the vast increase in power and reach of the judiciary in the international community.[65] Further, the trend of incorporating international human rights norms into the national constitutions of developed nations has established a strong basis for rights-claims by international migrants, and facilitated the acceptance of dual citizenship as a right. Accordingly, countries that previously had implemented restrictive policies towards migrants and immigrants have largely adjusted national policies to comply with international standards, often including the recognition of dual citizenship rights. Examples of this policy convergence abound.

The 1997 *European Convention on Nationality* encouraged individual states to exercise their discretion and tolerate dual citizenship, and explicitly required acceptance of dual citizenship for children of bi-national parents and for those individuals whose citizenship cannot reasonably be lost.[66]

These changes are indicative of a larger trend to recognize citizenship rights as a component of human rights; according to Rubenstein, "citizenship is no longer legitimately the major foundation on which rights are restricted and determined, even within the nation-state."[67] As more countries recognize gender equity claims, children of binational parents, and the rights of minorities in claiming dual citizenship, naturalized Canadians and those newly immigrating to Canada are more likely to seek dual citizenship.

**E) Global patterns of democratization**

Global processes of democratization have heightened governments' awareness of democratic accountability and legitimacy, not only for citizens, but also for the growing number of international migrants within the borders of democratic countries. This has become a key driver in increasing the number of Canadian dual citizens.

In an effort to ensure compliance with human rights regulations, and uphold their domestic laws governments are compelled to increase the democratic participation of the people within their borders, granting full dual citizenship recognition for all naturalized immigrants should they seek it. The desires for higher rates of political participation and higher rates of naturalization have rendered dual citizenship policies crucial to successful integration and multiculturalism in the eyes of many governments,[68] Canada included. Canada's strong multicultural emphasis and desire for a continual stream of immigration to address its ageing population relates directly to the positive association with dual citizenship. As recent evidence in the United States has demonstrated, new immigrants given dual citizenship status naturalize more quickly and effectively than immigrants who are not given dual status.[69] For this reason, the government has a strong incentive to support the expansion of dual citizenship. By fostering social and cultural rights entrenched legislation like the *Multiculturalism Act* and the *Charter of Rights and Freedoms*, Canada has made an informal invitation to its migrants, encouraging them to become citizens and participate in Canada's democratic system of government. Eager to participate,[70] migrants have increasingly accepted this invitation by taking up dual citizenship, consequently increasing the number of dual citizen Canadians.

## PART III: CANADIAN APPLICATIONS

### Domestic pressures

The increasingly intense flows of people, communications, foreign direct investment, and international norms and values are contributing to ever-expanding numbers of dual citizen Canadians, effectively imparting new costs and placing pressures on the Canadian government. As significantly higher numbers of Canadian dual citizens travel and live abroad, responsibilities are levied on the government to incur the expanding costs of cosmopolitan responsibilities for these non-resident Canadians.[71]

No longer solely responsible for the citizens within its territorial boundaries, the government must respond to the needs of its citizens across the globe, negotiating with the governments of other countries, and using taxpayer dollars to address international concerns and crises. The resulting pressures of mounting public opinion and unforeseen budgetary expenses are provoking a domestic debate regarding the viability of Canadian dual citizenship policies, and the rights afforded to non-resident Canadians.[72] This ongoing debate is changing the way Canadian citizenship is considered. Two case studies will examine aspects of this public debate.

#### A) Rights and social benefits of non-resident Canadians: the Lebanon crisis

The rights and social benefits that accompany Canadian citizenship are widely valued by numerous diasporas partly due to the wide array of social benefits specifically developed for the benefit of non-resident citizens or citizens travelling internationally. As discussed in the C.D. Howe Institutes' report on passport packages, these non-resident citizen rights include "the ability to enter Canada at any time, ... consular services including protection for citizens charged with criminal offences and assistance with other legal matters, ...and evacuation from countries suffering war or internal strife."[73] Rarely used in the past due to the insignificant number of Canadians living abroad, the extent of these non-resident rights were largely unknown to the general population.

The rising number of Canadian dual citizens and international rights-claims has brought the issue of non-resident rights to the forefront of public opinion. The collective demands of the growing number of Canadian non-residents have evoked a challenging response from Canadians living in Canada, as seen through increased media attention.[74]

As a result, the public has increasingly put pressure on the Canadian government to re-evaluate its position on the social rights of non-resident Canadians.[75] The public outcry in response to the evacuation of Canadian citizens from Lebanon in July of 2006 demonstrates this pressure for change.

In response to the rapid destabilization of security in Lebanon, the Canadian government evacuated approximately 15,000 Canadian citizens from Lebanon in July of 2006.[76] Providing transportation, refuge and primary healthcare, the mission cost the Canadian government $94 million dollars.[77] Shocked to discover that some of the evacuees had never resided in Canada, resident Canadians called on the government to re-evaluate policies regarding non-resident citizens.[78]

Arguing for limited non-resident rights, opposition parties challenged the appropriateness of spending large amounts of tax dollars on evacuating 'citizens' who had never paid into that tax fund, and who arguably had no true affiliation to the state as a whole.[79] Numerous think tanks such as the C.D. Howe Institute issued formal reports evaluating the situation and calling on the government to revise citizenship policy. Recommendations included limiting the social benefits of non resident citizens or taxing citizens living abroad to ensure their contribution to the costs of providing rights and benefits in times of need.[80] The Government of Canada ordered a formal review of the evacuation from the Standing Senate Committee on Foreign Affairs and International Trade. As part of their evaluation, the committee addressed the fundamental underpinnings of citizenship, revisiting what it means to be Canadian and what rights should be attached to citizenship. Although formal policy change was not advocated as part of the report's recommendations, the report does acknowledge that in regard to the social benefits of citizenship, "the debate has been launched and the discussion will take place."[81]

Attracting substantial media attention, the public outrage weighed heavily on the federal government. Pressured to address the perceived inequalities in the allocation of social benefits of citizenship, the Government of Canada has taken steps to redefine current citizenship policy. The evacuation of Lebanon has proven that by increasing the aggregate level of dual citizen Canadians, globalization has indeed put pressures on domestic citizenship policy, urging the reconsiderations of its very foundation.

**Limiting derivational citizenship rights**

The increase in Canadian dual citizens, coupled with the change in global migration patterns, has placed pressures on citizenship acquisition polices. An example can be found in polices related to genealogical transmission of citizenship for children born abroad to Canadian parents born abroad. As noted, Canadian citizenship may be acquired through parental lineage.[82] Currently, second and third generation Canadians born outside Canada have until their 28th birthday to affirm their right to Canadian citizenship, under certain conditions.[83] Granted royal assent on April 17th 2008, Bill C-37 section 3(3) will change current derivational citizenship polices that allowed citizenship to pass directly to a child born to a Canadian citizen, regardless if the child was born outside the country.[84]

Effective April 17th, 2009:

> *Individuals born outside Canada to a parent who was a Canadian citizen at the time of their birth will only be Canadians at birth if the parent was born in Canada; or the parent immigrated to Canada and became a Canadian citizen. This means that a child born in another country after the new law comes into effect will not be a Canadian citizen by birth if he/she was born outside Canada to a Canadian parent who was also born outside Canada to a Canadian parent.*[85]

The government's justification was that the policy sought to promote "…citizenship stability, simplicity and consistency while also protecting the value of citizenship by ensuring that future Canadians have a real connection with Canada."[86]

This change may also reflect a citizenship regime that seeks to foster loyalty and identification with the state by both Canadian born and immigrant citizens. Indeed, a key component in the fabric of Canadian society is the perpetuation of Canadian values, and central to this is a citizen's ability to identify with the state.[87] Canada's multicultural policy has encouraged ethnic and cultural diversity. To a degree, this represents Canadian social values that reflect many "separate identities, while sharing common values and experiences."[88] Denying automatic citizenship to first generation children born outside of Canada to a Canadian parent also born outside Canada is an effort to maintain the social cohesion and loyalty that citizenship regimes have traditionally entailed.

This example illustrates the Canadian government's awareness of the increasingly transnational behaviour of dual citizens, and Canadians alike. Seeking to prevent the devaluation of Canadian citizenship and unnecessary expansion of cosmopolitan responsibilities, this recent policy change shows that globalization has impacted domestic conceptions of citizenship and subsequent policies.

**Policy considerations**

Forces of globalization have had an effect on the migratory patterns of Canadian citizens, increasing the number of citizens who remain 'globally mobile' and who seek to maintain multiple citizenships.[89] Government polices that seek to protect and promote Canadian values must also address the growth of transnational relationships between people, flows of ideas, ideologies and goods.[90]

Given that globalization has increased the number of dual citizens in Canada, a trend which is likely to continue, policymakers must begin to consider options which would manage the rising pressures on government. The Lebanon case brought to light the questionable extension of social benefits to non-resident citizens. A possible means of addressing public concerns regarding the inappropriate use of taxpayer funds would be the creation of a pool of funds designated for international crises affecting Canadian citizens. This pool could act as an insurance rather than a tax and be funded by increasing passport consular services fees for non-residents.[91]

In addition, it is unclear how recent changes to derivational citizenship policies will be received by Canadians. An evaluation programme that monitors the impact of this policy change on the domestic arena would be one possible means of monitoring the impact of this change. This may include using focus groups made up of resident Canadians as well as Canadian non-resident communities abroad. This would encourage engagement with public opinion and help evaluate public perceptions of the usefulness and effectiveness of this policy. Lastly, in order to address the lack of accurate statistical data, the government could consider adding dual citizenship as a non-voluntary component of the Canadian Census for both short and long form surveys. This would increase transparency and allow for better analysis of future policies and programmes.

## LOOKING FORWARD

Technological innovation in communication and travel, the emergence of a global economy, the change in referents of securitization, international transmission of human rights norms and increased global democratization are all forces of globalization which have fundamentally changed the manner in which people interact throughout the world. Promoting transnational identities, these pressures have led to a dramatic increase in the number of persons acquiring multiple citizenships. This paper sought to explore the pressures that these globalizing forces have placed on Canadian citizenship policy, arguing that a primary outcome has been the increase of Canadian dual citizens. Challenging the traditional assumptions of citizenship, this increase has called into question current policy regarding the rights afforded to citizens. This can be seen through proposed government policies that seek to remove the right to dual citizenship, limit benefits of non-resident citizens, and challenge automatic citizenship rights for second and third generation Canadians born abroad.

It is reasonable to expect that globalization will continue to exert pressures on citizenship policy well into the future. Taking this into consideration, the Canadian government must move forward in creating a long-term approach to the increasing number of Canadian dual citizens and the policy challenges that accompany them. Reflecting on past proposals, which aimed to restrict the scope of dual citizenship policy, one is left questioning their political feasibility in response to these challenges. Past proposals for the elimination of dual citizenship in Canada have not survived parliamentary debates, nor have they been favourable among the public.

For this reason, among others, the federal government might look to endorse options that encourage integration and promotion of Canadian values, including the creation of measures that would aid in the development and sustenance of a culture of Canadian identity and state loyalty for immigrants and dual citizens alike.

Putting pressures on domestic citizenship policies, globalization has also challenged what citizenship means in the 21st century. At an extreme end of the spectrum, some have argued that we are moving into a post-national world where citizenship is no longer connected to a single state.[92] This however, is an extreme example of world polity decentralization and fragmentation, failing to explain why migrants continue to seek out citizenship rights from states.

As Cairns stipulates:

> *Globalization presents people with an unending stream of products, ideas, values, and new identities that threatens to destabilize links between citizen and state unless they are constrained by the positive identification with the polity that an enriched practice of citizenship can generate.*[93]

In order for Canada to sustain a rich and proud citizenship regime, it must be cognizant of, and adaptable to, the pressures associated with a transnational world, while still upholding the national identity, beliefs and values associated with Canadian citizenship.

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## ENDNOTES

[1] Rubinstein, Kim. "Citizenship in an Age of Globalization: The Cosmopolitan Citizen?" *Law in Context*, *25*(1), 2007: 90; In the interest of preserving the terminology used by the authors we have referenced in this text we have used the word nation-state to represent the state as described by Weber.

[2] "Citizenship Act." Department of Justice, Government of Canada. (1985). Retrieved on March 15, 2009 from <http://laws.justice.gc.ca/en/C-29/index.html>. Part I.

[3] "Charter of Rights and Freedoms." Department of Justice, Government of Canada, (1982). Retrieved on March 15, 2009 from <http://laws.justice.gc.ca/en/charter/*Charter*>. Section VI.

[4] Renson, Stanley. "Dual Citizens in America: An issue of Vast Proportions and Broad Significance." Center for Immigration Studies - Backgrounders and Reports, 2000. Retrieved on March 15th, 2009 from: <http://www.cis.org/articles/2000/back700.html>.

[5] Renson, *op cit*.

[6] Galloway, Donald. "The Dilemmas of Canadian Citizenship Law". In Douglas B. Klusmeyer, Thomas Alexander Aleinikoff (eds.). *From Migrants to Citizens: Membership in a Changing World*, Washington: Carnegie Endowment, (2000): 88.

[7] Brodie, Janine. "Citizenship and Solidarity: Reflections on the Canadian Way."*Citizenship Studies*, *6*(4). (2002): 378.

[8] As cited in Faist, Thomas and Jurgen Gerdes. *Dual Citizenship in an Age of Mobility.* Washington, DC: Migration Policy Institute, 2008: 5.

[9] *Ibid*, 7.

[10] *Ibid*, 7.

[11] *Ibid*, 8.

[12] Knowles, Valerie. *Forging our legacy: Canadian citizenship and immigration, 1900-1977.* Ottawa: Citizenship and Immigration Canada: Public Works and Government Services Canada, 2000: 65; Galloway, *op cit*, 93.

[13] *Ibid*, 64, 65.

[14] *Ibid*, 65.

[15] Smith, David. "Indices of Citizenship". In Pierre Boyer, Linda Cardinal, David John Headon (eds.). *From subjects to citizens: a hundred years of citizenship in Australia and Canada*. Ottawa: University of Ottawa Press, 2004: 22, 23; Galloway, *op cit*, 96.

[16] Knowles, *op cit*, 66; Troper, Harold. "Citizenship Education in Urban Canada." In Yvonne M. Hebert (ed.). *Citizenship Transformation in Canada.* Toronto: University of Toronto Press, 150-161, 2002: 158.

[17] Troper, *op cit*, 157, 158.

[18] *Canadian Bill of Rights*. Department of Justice, Government of Canada. (1960). Retrieved on March 15, 2009 from <http://laws.justice.gc.ca/en/C-12.3/index.html>. Part I.

[19] Smith, *op cit*, 23, 24.

[20] *Ibid*, 24.

[21] Young, M. Canadian Citizenship Act and Current Issues. Law and Government Division. BP-445E. *Depository Services Program Parliament of Canada*, (1998). Retrieved on March 15th from <http://dsp-psd.tpsgc.gc.ca/Collection-R/LoPBdP/BP/bp445-e.htm#(39)>.

[22] Galloway, *op cit*, 99.

[23] Bloemraad, Irene. "Who Claims Dual Citizenship? The Limits of Postnationalism, the Possibilities of Transnationalism, and the Persistence of Traditional Citizenship." *International Migration Review*, *38*(2), (2004): 389.

[24] See *ibid,* and Faist, *op cit*.

[25] Held, David, and McGrew, Anthony. "Introduction" in David Held and Anthony McGrew (eds.), *Governing Globalization: Power, Authority and Global Governance*. Malden: Blackwell Publishing Ltd, (2002): 1, 2.

[26] *Ibid*, 2.

[27] Castles, Stephen, and Mark J. Miller. The Age of Migration: International Population Movements in the Modern World. New York: Guilford, 1993: 8.

[28] *Ibid.*

[29] Rubenstein, *op cit*, 91.

[30] *Ibid*, 92.

[31] Castles, Stephen. (2002). "Migration and Community Formation under Conditions of Globalization." *International Migration Review*, *36*(4): 1149.

[32] Castles & Miller, *op cit*, 4.

[33] International Organization for Migration. *World Migration 2008: Managing Labour Mobility in the Evolving Global Economy*. (2008). Retrieved on March 15th, 2009 from <http://www.iom.int/jahia/Jahia/about-migration/facts-and-figures/global-estimates-and-trends>: 2; Castles, Stephen. "Factors that Make and Unmake Migration Policies." The *International Migration Review*, *38*(3), (2004): 861.

[34] United Nations, Department of Economic and Social Affairs, Population Division World Migrant Stock: The 2005 Revision Population Database. (2006). Retrieved on March 15th, 2009 from, <http://esa.un.org/migration>.

[35] Castles, "Factors…," *op cit*, 861.

[36] International Organization for Migration. "Section 3: International Migration Data and Statistics." *World Migration 2005: Costs and Benefits of International Migration. (2005).* Retrieved on March 15th, 2009 from <http://www.iom.int/jahia/Jahia/cache/offonce/pid/1674?entryId=932>: 379.

[37] Castles, "Factors…," *op cit*, 861.

[38] IOM, "Section 3," *op cit*, 380.

[39] United Nations, "World Migrant Stock…," *op cit*, 37.

[40] Statistics Canada. "Canada's Ethnocultural Portrait: The Changing Mosaic." 2001 Census Data. (2001). Retrieved on March 15, 2009 from, <http://www12.statcan.ca/english/census01/products/analytic/companion/etoimm/canada.cfm#proportion_foreign_born_highest>.

[41] IOM, "Section 3," *op cit*, 380.

[42] Statistics Canada, "Canada's Ethnopolitical…," *op cit*; United Nations, "World Migrant Stock…," *op cit*, 37.

[43] Bloemraad, "Who Claims…," *op cit*, 405.

[44] Statistics Canada, *op cit*.

[45] Bloemraad, "Who Claims…," *op cit*; Faist, Thomas. *The Volume and Dynamics of International Migration and Transnational Social Spaces.* Oxford: Claredon Press, 2000.

[46] Schuck, Peter. 'Plural Citizenships.' In R. Hansen and P. Weil (eds.) *Dual Nationality, Social Rights, and Federal Citizenship in the U.S. and Europe: The Reinvention of Citizenship.* New York, NY: Berghahn Books, 2002: 539.

[47] Castles, "Migration and Community…," *op cit,* 1146.

[48] Schuck, *op cit*, 65.

[49] Labelle, Micheline. "Re-reading Citizenship and the Transnational Practices of Immigrants". (2002) Retrieved on March 1, 2009 from <http://www.ceri-sciencespo.com/archive/mai02/artml.pdf>: 1.

[50] Omotola, J. Sholma. "Political Globalization and Citizenship: New Sources of Security Threats in Africa." *Journal of African Law*, *52*(2), (2008): 269.

[51] International Monetary Fund (IMF). "Globalization and Inequality". *World Economic Outlook 2007*. Chapter 4, 2007. Retrieved on February 18, 2009 from <http://www.imf.org/external/pubs/ft/weo/2007/02/pdf/c4.pdf>: 45.

[52] *Ibid*, 42.

[53] Bloemraad, "Who Claims…," *op cit*, 394.

[54] Castles, "Migration and Community…," *op cit,* 1149.

[55] Bloemraad, "Who Claims…," *op cit,* 394.

[56] Andreas, Peter. "Redrawing the Line: Borders and Security in the 21st Century." *International Security*, *28*(2), 2003: 78.

[57] IMF, *op cit,* 45.

[58] Castles, "Factors…," *op cit*, 862.

[59] *Ibid*, 857.

[60] Bloemraad, "Who Claims…," *op cit*, 390.

[61] *Ibid*, 405.

[62] Faist and Gerdes, *op cit,* 8.

[63] *Ibid*, 5.

[64] Rubenstein, *op cit,* 96.

[65] *Ibid*, 96.

[66] Faist and Gerdes, *op cit*, 7.

[67] Rubenstein, *op cit*, 96.

[68] Faist and Gerdes, *op cit,* 9.

[69] Mazzolari, Francesca. "Dual Citizenship Rights: Do they Make More and Richer Citizens?" *Demography, 46(*1*)*, (2009): 169.

[70] Black, Jerome. "Immigrants and Ethnoracial Minorities in Canada: A review of their participation in federal electoral politics." *Electoral Insight* Elections Canada,. 2001 Retrieved on March 17th, 2009 from <http://www.elections.ca/eca/eim/article_search/article.asp?id=85&lang=e&frmPageSize=&textonly=false>.

[71] C.D. Howe Institute. "The Passport Package: Rethinking the Citizen Benefits of Non-Resident Canadians." *C.D. Howe Institute Backgrounder*. (2006). Retrieved on March 12, 2009 at <http://www.cdhowe.org/pdf/backgrounder_99.pdf>: 2.

[72] See for example Baltrusaitis, Vic. "My Canada includes dual citizens." *The Globe and Mail*. Toronto: March 10, 2009: 16.

[73] C.D. Howe Institute, *op* cit, 2.

[74] "What it means to be a Canadian." *Macleans*.14 August 2006.Accessed on March 15, 2009 at <http://www.macleans.ca/columnists/article.jsp?content=20060814_131821_131821>.

[75] C.D. Howe Institute, *op cit,* 3.

[76] *Ibid*, 1.

[77] *Ibid*.

[78] *Ibid*.

[79] "What It Means to be Canadian," *op cit*.

[80] C.D. Howe Institute, *op cit,* 6.

[81] The Standing Senate Committee on Foreign Affairs and International Trade (CFAIT). *The Evacuation of Canadians From Lebanon in July 2006: Implications for the Government of Canada*. (2006). Retrieved on March 11, 2009 at <http://www.parl.gc.ca/39/1/parlbus/commbus/senate/Com-e/fore-e/rep-e/rep12may07-e.pdf>: 21.

[82] Young, *op cit*, Appendix A.

[83] See "Citizenship Act," op cit, R.S., 1985, c. C-29 Part I Section 3(b).

[84] In the event that a change in policy renders a child stateless, Canada will grant citizenship to that child even if they are born of a citizen who was born abroad. See "Amendments not in Force", <http://laws.justice.gc.ca/en/CmdNev/cs/C-29>, Section 5.

[85] *Canadian Gazette.* "Regulations Amending The Citizenship Regulations, 1993." *Government of Canada,142*(50), December 13, 2008, Retrieved on March 15th, 2008 from <http://canadagazette.gc.ca/rp-pr/p1/2008/2008-12-13/html/reg1-eng.html>.

[86] *Ibid*.

[87] Frideres, James. "Creating an Inclusive Society: Promoting Social Integration in Canada." In John Biles, Meye Burstein and James Frideres (eds.), *Immigration and Integration in Canada in the Twenty-first Century*. Kingston: School of Policy Studies, Queen's University, (2008): 77; Jenson, Jane and Susan Phillips. "Redesigning the Canadian Citizenship Regime: Remaking the Institutions of Representation". In Colin Crouch, Klaus Eder, Damian Tambini (eds.) *Citizenship, Markets, and the State*. Oxford: Oxford University Press, (2001): 73.

[88] Cairns, Alan. "The Fragmentation of Canadian citizenship". In Douglas E. Williams (ed.) *Reconfigurations: Canadian Citizenship and Constitutional Change*. Toronto: McClelland and Stewart Inc, 1995: 107.

[89] Frideres, *op cit,* 78; Bloemraad, "Who Claims…," *op cit,* 405.

[90] Faist, *op cit*, 2.

[91] Currently, a portion of Canadian Passport fees are allocated to consular services for Canadians when travelling abroad (see "Consular Fees" <http://www.voyage.gc.ca/about_a-propos/fees_frais-eng.asp>)

[92] Bloemraad, "Who Claims…," *op cit,* 396.

[93] Cairns, *op cit*, 158.

# WATER AND THE MIDDLE EAST PEACE PROCESS

By Nicole Waintraub


## ABSTRACT

*In the Israeli-Palestinian peace process, the issue of water is presented as an issue for technical cooperation that must be attended to in negotiations independent of other aspects of final settlement. To sustain such a framework for negotiation, each party must come to the table supported by domestic discourse, which is compatible with the envisioned settlement. While the Israeli public is primed to accept a settlement on water characterized by joint or cooperative management, the Palestinian public is not prepared to recognize such an agreement. Due to factors emanating from territorial dispossession and experience with the peace process, the discourse on the Palestinian side, however, has not undergone such a shift. In contrast, the Palestinians operate parallel discourses: one on the international stage of cooperation and another on the domestic stage of dispossession and rights-driven calls for "water sovereignty". As it stands, this dual discourse renders unlikely the possibility of a negotiated settlement over a scarce resource. Based on this analysis, it may be necessary for third parties engaged in the Israeli-Palestinian peace process to develop strategies to address divergent discourse and accommodate Palestinian concerns into the negotiating framework.*


## INTRODUCTION

The Middle East is often cited as an example of the challenges facing water-scarce regions around the world. Perhaps for this reason, the term "water wars"—the outbreak of war in order to conquer territory for its water endowments—was formulated by way of prognostications for the region. Though the Middle East is referred to as the world's most water-challenged region, the dreaded "water wars" have not come to pass.[1] Instead, conflict over water in the region has tended more toward cooperative management, shared use and the exploration of commercial alternatives.[2] This is the envisioned outcome in the Israeli-Palestinian conflict. This paper undertakes a study of Israeli and Palestinian domestic discourses on water and the impact of these on the prospects of the peace process.

Domestic discourse has a significant role to play in the negotiations of the peace process as it reflects, to a certain extent, the range of outcomes that will be endorsed or consented to by the public. To be sure, it is not necessary that discourse directly support a negotiated agreement; however, there must be an appreciable level of compatibility between the two in order for the negotiated outcome to be viable and salable in terms that resonate with the public. It will be shown here that while the Israeli public is primed to accept a settlement on water characterized by joint or cooperative management, the Palestinian public is not prepared to recognize such an agreement. This is demonstrated through an overview of shifts in discourse between the 1967 Six Day War and the Oslo Process in the 1990s.

## THE POLITICAL SYMBOLISM OF WATER

For the Israelis, water imbues political symbolism due to its importance in the founding of the State of Israel. Rather than basing national development on geopolitical considerations, the development of the State of Israel was founded on "socialist conceptions of human and societal renewal."[3] Agricultural work was seen by many as key to this form of development. The commitment to the agrarian ideal in Zionist ideology established water access as crucial to the realization of national goals. Securing access to water was fundamental and strongly linked not only to agricultural development, in particular, but more broadly to the process of rural settlement.[4] As Israel expanded, a shift in discourse took place. Out of the ideological view of water grew what is referred to as 'Israeli hydrostrategic discourse'. 'Hydrostrategy' is a term used to describe the strategic thinking of a political actor, and the degree to which the location and availability of water influences this thinking.[5] Whereas Zionist ideology emphasized the instrumental importance of water for redemption and a return to the land, the shift to hydrostrategic discourse added, to a certain degree, a geopolitical and military dimension to the securing of water access. The existential importance of water is, however, consistent across the shifting discourse.

The manifestation of the shift in discourse to hydrostrategic thought is most apparent in the late 1960s. In December 1968, following the 1967 Six Day War, Israel issued *Military Order No. 291* in the West Bank, suspending Jordanian law with regard to private water ownership and declaring all water as property of the state.[6]

During this time, Israel's water policy in the territories revolved around two core elements: the prohibition of drilling, deepening, or repairing wells without a permit granted by the state, and the metering of wells in order to monitor and enforce water quotas for Palestinian water consumption. In the meantime, Jewish settlements in the territories expanded and wells were dug in an expedited manner.[7] Given that portions of the acquired territory, especially in the West Bank, held—and continue to hold—valuable reserves of fresh water, the prospect of giving up this territory came to be seen as a threat to Israel's control over water in the region and, by extension, the security of the state in its totality. Local officials, by way of public pronouncements, were able to disseminate this position to the public.[8] The resulting proponents of the hydrostrategic discourse were not only opposed to making concessions to the Palestinians, many were also opposed to engaging in any negotiations over water access.[9]

For the Palestinians, the political symbolism of water is bound up with the constellation of issues relating to territorial dispossession. The discourse that developed over water, therefore, was structured around the *rights* that are tied to land. As a result of the events outlined above, the claims to water rights amongst Palestinians grew sharply after the war in 1967.[10] From the Palestinian rights discourse, the following set of priorities was expressed when addressing the issue of water access: of foremost importance is the attainment of water rights. The attainment of water rights implies full and unquestioned access to, and control over, the water that falls within territorial boundaries, as well as full control over critical water infrastructure.[11] Only once this has been accomplished can attention then be directed toward developing new water sources and addressing other issues of water scarcity.[12]

In its most codified form, the Palestinian water rights discourse is organized around the following principles of international water law:

6. Natural attributes of the water source,
7. Prior use,
8. Alternative resources and comparative cost, and
9. Avoidance of appreciable harm.

According to this framework, many Palestinians believed that any division of water in the West Bank would disproportionately favour the Palestinian side because:

1. The waters of the West Bank's Western and Northern aquifers fall wholly within Palestinian territory;

2. Israeli claims to the water based on "prior or existing use" would be voided as they are based on Israel's unilateral declarations and cannot be held legally binding without the consent of the country's co-riparian;
3. The most readily available alternative in the region is desalinated brackish or sea-water. The cost of accessing this alternative process is comparatively less expensive for Israel and prohibitively expensive for Palestinians; and
4. Israel's denial of water to the Palestinians has caused appreciable harm that can only be rectified through re-allocation in favour of the Palestinians.[13]

To be sure, the application of international water law is not without its difficulties; often individual principles of international water law conflict with one another, and can be used selectively to build a case for water rights.[14] This form of legal relativism notwithstanding, the concepts of inalienable rights and justice are laced throughout the political discourse of water for the Palestinians. While the discourse of rights is not necessarily incompatible with negotiation, it does set a "red line" for the Palestinian side that negates the Israeli claim to any water in the West Bank through a negotiated settlement.

## THE EXCEPTIONALITY OF WATER AND THE PRIMACY OF COOPERATION

The pattern of water scarcity in the Middle East, in general, and Israel and the Palestinian territories, in particular, has long been presented as a challenge to strategic stability and an impediment to all tracks of the peace process. As it stands, economic development and population growth are expected to further increase the strains on existing water sources, aggravating existing tension.[15] Far from breeding violent conflict over shared sources, however, studies have shown that water scarcity is more likely to bring about cooperation and co-existence. This is so because scarcity creates interdependencies, or mutual vulnerabilities, to which technical and cooperative solutions offer jointly beneficial avenues.[16] Furthermore, some scholars have suggested that engaging on matters of disputed water allocation and control can improve overall conflicting relations between parties.[17] While this finding is based on case studies of conflict along international waterways, many challenge it on the basis of its optimism.[18] Nevertheless, the belief that the option of a negotiated settlement over the waters of the West Bank is possible has driven a track of the Israeli-Palestinian peace process in a specific direction: the direction of technical cooperation.

Technical cooperation over water can take many forms. In the case of the Israeli-Palestinian conflict and peace process, technical cooperation has been advocated in the form of joint or cooperative water management: joint development and oversight of infrastructure, cooperation on scientific study of water in the area, and joint targeting and monitoring of water consumption.[19] This section reviews the treatment of water in the peace process—as an item for cooperative engagement—over the 1990s and into the 21st century.

It can be argued that the technical and cooperative framing of the Israeli-Palestinian water issue truly took root with the pronouncements of the September 1993 *Declaration of Principles on Interim Self-Government Arrangements* (the Declaration of Principles) by the State of Israel and the Palestinian Liberation Organization (PLO). The Declaration of Principles established the foundation for a five-year framework for the peace process, including the formation of a Palestinian self-government arrangement, with a view to an eventual final settlement. Article XI of the Declaration of Principles, entitled, "Israeli-Palestinian Cooperation in Economic Fields," describes the mutual benefit to be gained through cooperation; further, Article XI calls for the establishment of a committee to oversee programs on areas particularly suited to cooperation. The first area outlined in the corresponding Annex III is water. Herein the Declaration calls for the founding of a Water Development Program—an expert group tasked with identifying viable modes of cooperation over water resources to be implemented during and beyond the interim period.

The cooperation over water that is addressed under Article XI is worthy of special attention. Other fields of Israeli-Palestinian economic cooperation identified under Article XI include: electricity, energy, finance, transport, communication, trade, industrial development, labour relations, and human resources. Annex III describes each of these fields in terms of its economic or industrial significance, except for water. While water is indeed a natural resource with implications for a country's economy, its categorization as an economic issue is contestable. The fact that water is necessary for the sustainment of human life—that its value in this regard cannot be priced, nor can it be reasonably substituted—sets it apart from other economic resources.[20] Access to water is vital to the survival of either party to the conflict, yet the security dynamic often attributed to water is not acknowledged in the Declaration of Principles. Instead, the issue of water access is framed as water management; it is addressed under the same rubric of economic matters and categorized as an opportunity for cooperation.

The principle of cooperation over water was further strengthened in the September 1995 *Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip* (the Interim Agreement). This agreement called for the creation of a Joint Water Committee to manage the joint water resources and enforce agreed upon water policies based on management standards for such activities as drilling for wells. The Interim Agreement also called for an increase in the amount of water made available for use by the Palestinians—an acknowledgment that Palestinians were being insufficiently supplied with water. Israel was therefore responsible for increasing the Palestinian allocation of water by twenty-eight million cubic metres. The development of water resource availability for either side was encouraged as an initiative to be funded through international channels.

International funding channels played a key role in shaping the way in which water issues are framed in the peace process. The United States Agency for International Development (USAID) announced that the water sector constitutes a strategic investment area and an "ideal sector for peace-making" following the issuing of the Interim Agreement and in support of cooperation projects. In general, the international donor community followed suit, earmarking over ten percent of all Palestinian aid money between 1993 and 2000 to cooperative water initiatives.[21] It is important to note that the delivery of aid to the Palestinian territories was (and continues to be) subject to a great deal of criticism. Due to institutional obstacles on the part of the donor community and bureaucratic inefficiency on the Palestinian side, the flow of aid to the region did not meet the immediate needs to which it was meant to respond.[22]

The water accords achieved at Taba are considered by some to be amongst the most significant outcomes of the Oslo Process.[23] While the recognition of the need to increase the allocation of water to the Palestinians figured prominently in this assessment, the focus in terms of achievement is the founding of the Joint Water Committee (JWC). The JWC is a body composed of the Israel Water Commission and the Palestinian Water Authority, each with equal representation and veto power; it constitutes the primary mechanism for cooperation and coordination over water.[24] Specific activities carried out by the JWC include: licensing of new wells and other such water installations, monitoring and regulating extraction quotas from water sources, and planning and overseeing the implementation of construction projects for new water and sewage systems. JWC compliance duties are carried out by the Joint Supervision and Enforcement Teams, also with equal Israeli and Palestinian representation.

The value attributed to cooperation and the exceptional nature of water in the Israeli-Palestinian conflict is further underlined by the special status it was allocated through the Israel-Palestinian JWC's January 2001 *Joint Declaration for Keeping the Water Infrastructure out of the Cycle of Violence* (the Joint Declaration). In this declaration, both sides of the joint committee expressed their dedication to ensuring the provision of water services despite the rising incidence of violence at the time. They implored that their respective communities not damage critical water infrastructure and drew particular attention to the fact that Israeli and Palestinian water infrastructure is intertwined. Damage to pipelines, pumping stations and drilling equipment, it was noted, will compromise services to both sides. The language employed in the Joint Declaration is well aligned with the cooperative discourse on water management. To be sure, the public did not observe the principles advanced in the Joint Declaration. Mark Zeitoun provides a detailed description of the attacks on water infrastructure carried out following the declaration by the joint committee.[25] Nevertheless, the fact that such a supplication was made by a joint institution speaks to the salience of cooperation in the peace process.

The framing of water issues described in this section is both aligned with and symptomatic of the belief that without conceptual intervention, water issues have the potential to derail the peace process. Beyond the need to frame water access considerations in terms of technical cooperation, there also seems to be a belief that extracting and isolating water, as an item for negotiation, is vital to the overall Israeli-Palestinian peace process. This outlook was not exclusive to the effort in the peace process during the 1990s. For example, at the Camp David Summit in 2000, water-related issues were discussed remotely from other central final status issues, in Emmetsburg, Iowa. Practitioners described that introducing water-related issues to the central negotiations risks "poisoning" the entire effort.[26] The risk referred to here seems to emanate from the political symbolism of water that is apt to arise when the issue is analyzed alongside questions of territorial division and control in a final status arrangement. This is especially the case with regard to the Palestinian claim to full sovereign rights over territorial water and the Northern and Western aquifers of the West Bank. The framing of water issues as an isolated matter for technical cooperation is a signal of the strategic approach to potentially politically- and symbolically-laden issues in the peace process.

## DEVELOPMENT OF THE COOPERATION DISCOURSE

The emphasis on cooperation over water in the peace process is, in many ways, far removed from and incompatible with the respective political discourses previously described for the Israelis and the Palestinians. The process of developing a cooperation discourse in support of the tenets of the peace process has been dramatically different for each side. For the Israelis, it seems that the hydrostrategic discourse has been phased out of the public mentality due to changes in Israel's social setting and the accompanying changes in the perception of water issues. Eran Feitelson (2002) describes this transition in Israel as being a result of the confluence of the growing institutionalization of water management, the decline in salience of the agricultural sector, and the growing ecological discourse over water. According to Feitelson, over the course of the 1960s and 1970s, water was decreasingly the subject of public pronouncements and ideological discussion and increasingly the domain of an insular professional community, populated by practitioners and scientists. Furthermore, as agricultural production in Israel shifted from self-sufficiency to export, and food security was ensured through grain import and storage, agriculture was de-coupled from state survival.[27] Finally, the rise of an ecologically oriented technocracy within Israel's city planning sector added to the shift in thinking on water.[28]

To be sure, the transition in discourse from hydrostrategic to cooperative did not take root in full across the country automatically. There remain some who view water through a strategic lens. At best, the social position on water in Israel can be seen as fragmented.[29] Nevertheless, the change in mentality that did occur allowed for the emergence, in time with Oslo, of a broad group of Israelis that was willing to acknowledge legitimate Palestinian domestic water needs and advance a discourse of technical cooperation. Though this group did not acknowledge full Palestinian *rights* to water—especially with regard to economic and agricultural development—its members did recognize the need to rectify past disproportionate water allocations through cooperative measures.[30] When framed properly, it seems that water issues in the context of the Israeli-Palestinian dispute could gain consensus across ideological lines in Israel. Moreover, water could be addressed through the peace process, provided that it avoided the rights discourse.[31]

Compared to the case of Israel, the transition in discourse for the Palestinians was far less gradual and was not driven by internal developments. Whereas the shift in discourse on the Israeli side was part of a decades-long domestic process of decoupling water from political ideology and strategic analysis, the rights-based discourse amongst Palestinians did not dissipate gradually. Instead, it was displaced abruptly, at the official level, by the discourse of cooperation in time with the Oslo Process, following the Interim Agreement. In this regard, the official discourse of cooperation was delivered primarily through the Palestinian Water Authority (PWA)—the body established by the Interim Agreement to represent the Palestinian people on the JWC. The PWA committed to advancing the principles of cooperative water and waste-water management. As a part of its public endorsement of cooperative water management, and in the face of extensive damage to critical water infrastructure on the Palestinian side, the PWA continued to publicly endorse cooperation with its Israeli counterpart despite the outbreak of the Al Aqsa Intifada.[32] As already mentioned, it was at this point that the PWA issued, along with the Israeli side, the Joint Declaration.

It has been argued that the official discourse of cooperation on the Palestinian side is advanced as a "parallel sanctioned discourse", meaning that it is employed alongside another distinct discourse depending on the political environment.[33] In the context of the peace process and for the sake of engaging the international donor community, Palestinian officials advocate cooperative water management. In contrast, when engaging the domestic audience, Palestinian officials shift discourses, emphasizing instead the injustice of Israel's policies and calling for full sovereignty over water—the rights-based discourse. Even representatives of the PWA have made unofficial declarations of resentment of Israeli policy.[34] This approach has been labeled as pragmatic by some and politically opportunistic by others. Regardless of the characterization, the practice indicates that the discourse of cooperation does not coincide with consolidated domestic support for the *principle* of cooperation in the peace process with a view to a final status agreement. The prospect of joint or cooperative management as a part of a final settlement is not supported by discourse on the Palestinian side.

## THE CAUSES AND IMPLICATIONS OF UNCONSOLIDATED COOPERATION DISCOURSE

To be sure, the discourse of cooperation was not universally supported on the Israeli side; however, alternate discourses were either conceptually compatible with the principle of technical cooperation or marginal in the public domain.

The approach adopted in the peace process through the 1990s was able to resonate with the public and generate support.

On the Palestinian side, the parallel discourses that were advanced ran counter to one another. The discourse of cooperation was, in general, not disseminated domestically; rather, it was reserved for international relations. Upholding the inalienable principle of territorial rights, in general, and water rights, in particular, was a fundamental component of the Palestinian position. In this regard, political symbolism and water were inextricable.

Further to there being resistance to the de-politicizing of water over the course of the 1990s, there was also distinct contempt for the notion of cooperation. In the experience of the Palestinians, "cooperation" in practice did not yield significant improvements. To begin, the peace process' division of water access was unequal. According to the terms of the Interim Agreement, Israel and its West Bank settlers were able to consume eighty-seven percent of the total water yield of the territory's two trans-boundary aquifers. While Israeli consumption of water was relatively unchecked, Palestinian consumption was closely monitored and limited.[35] Furthermore, the administration of water at the local level seemed to marginalize the PWA and the needs of Palestinians. Applications for procedures as straight forward as repair work to Palestinian water infrastructure were often drawn-out over months or years despite the PWA equal stature on the JWC.[36] Such realities on the ground further bolstered the call for total and complete sovereignty over Palestinian territory and its resources. From the perspective of public officials, it also rendered unfeasible the propagation of cooperation rhetoric amongst the domestic population.

That the discourse of cooperation is conspicuously unconsolidated on the Palestinian side has implications for the peace process and prospects for final status negotiations over water. While the parallel discourses were somewhat tenable through the Oslo Process, final status talks would bring the incompatible principles of cooperation and rights under direct scrutiny on the international and domestic stages.

Though there has been some recent support for the advancing of needs-based as opposed to rights-based claims to water on the Palestinian side, the parallel discourses of cooperation and water-sovereignty have not given way.[37] In a process aimed at dividing territory, the win-sets available to Palestinian negotiators in final status talks would be significantly more constrained, if not non-negotiable, than those of their Israeli counterparts.

## CONCLUSION

In a water-scarce region such as the Middle East, water access is bound to be fraught with political symbolism and a sense of existential threat. By removing the political symbolism carried by the issue of water access, the cooperation framing and its supportive discourse broadens the range of available win-sets in a negotiating framework. It does so by removing the perception of a zero-sum environment by the parties' respective domestic constituencies. For the Israeli side it could be argued that, by the 1990s, the domestic constituency was primed and had undergone the necessary developments to be able to embrace a solution to the water issue, so long as it occurs through cooperative means. For the Palestinians, in contrast, the same developments have not taken place. Rather than adopting a cooperative discourse domestically—or a needs-based discourse, which is more compatible with the cooperative agreements envisioned—Palestinian officials continue to advanced parallel sanctioned discourses. The Palestinian constituency is, therefore, still primed to view water issues through a rights-based, zero-sum lens. As it stands, it is unlikely that the two parties can come to final status negotiations equally committed to implementing cooperative measures over the region's most scarce resource. It is possible, however, that improvements can be made if third parties active in the peace process develop initiatives specifically intended to align public discourse and political communications, with the goals of final settlement. This would likely involve an acknowledgment of historic grievance over water access as well as special attention to the potential for double standards in cooperative management institutions.

## ABOUT THE AUTHOR

**Nicole Waintraub** recently completed her M.A. in Public and International Affairs at the University of Ottawa. Her major research paper on the relevance of Track II Diplomacy for regional security, arms control and non-proliferation in the Middle East was granted The Simons Foundation and DFAIT International Security Research Outreach Programme's Graduate Research Award. Nicole hopes to continue her studies at the doctoral level.

## ENDNOTES

[1] John Anthony Allan, "Hydro-Peace in the Middle East: Why no Water Wars?: A Case Study of the Jordan River Basin," *SAIS Review* 22:2 (2002): 255-272; Aaron T. Wolf, "Conflict and cooperation along international waterways," *Water Policy*, 1 (1998): 251-265.

[2] Allan, 2002.

[3] Alwyn Rouyer, *Turning Water into Politics: The Water Issue in the Palestinian-Israeli Conflict* (New York: Palgrave, 2002) 82.

[4] Eran Feitelson, "Implications of Shifts in the Israeli Water Discourse for Israeli-Palestinian Water Negotiations," *Political Geography*, 21 (2002): 300.

[5] Aarib T. Wolf, *Hydropolitics Along the Jordan River*, (New York: United Nations University Press, 1995) 73.

[6] Rouyer, 2002: 47.

[7] Rouyer, 2002: 48.

[8] Feitelson, 2002: 75-76

[9] Mark Zeitoun, *Power and Water in the Middle East: The Hidden Politics of the Palestinian-Israeli Water Conflict* (London: I.B. Tauris, 2008) 75.

[10] Zeitoun, 2008: 80.

[11] Jan Selby, *Water, Power and Politics in the Middle East: The Other Israeli-Palestinian Conflict* (London: I.B. Tauris, 2003) 30.

[12] Zeitoun, 2008.

[13] Sharif Elmusa, "Dividing Water Resources According to International Water Law: The Case of the Palestinian-Israeli Waters," *Natural Resources Journals*, 35 (1995) 235-240.

[14] Aaron T. Wolf, "Criteria for Equitable Allocations: The Heart of International Water Conflict," *Natural Resources Forum*, 23:1 (1999a) 3-30.

[15] Rouyer, 2002: 31

[16] Mustapha Dolatyar and Tim Gray, "The Politics of Water Scarcity in the Middle East," *Environmental Politics*, 9:3 (2000) 67; Aaron T. Wolf, "Water Wars and Water Reality: Conflict and Cooperation Along International Waterways," in Steve C. Lonergan (ED.), *Environmental Change, Adaptation, and Security* (Netherlands: Kluwer Academic Publications, 1999b).

[17] David K. Hambright, F. Jamil Ragep and Joseph Ginat, *Water in the Middle East: Cooperation and Technological Solutions in the Jordan Valley* (Norman, OK: University of Oklahoma Press, 2006) xii.

[18] Selby, 2003.

[19] Hambright, et al, 36.

[20] Myriam Lowi, "Water and Conflict in the Middle East and South Asia: Are Environmental Issues and Security Issues Linked?" *The Journal of Environmental Development*, 8 (1999) 377; Jon Barnett, "Destabilizing the Environment-Conflict Thesis," *Review of International Studies*, 26 (2000) 273.

[21] Selby, 2003: 5. The dominance of support for projects characterized as "cooperative" is the subject of some controversy. A World Bank report entitled, "Thirty-six Months of Intifada," described donor fatigue on the part of organizations attempting to support water initiatives that were not aligned with the cooperation discourse. These organizations met with difficulty in implementing their initiatives due to lack of collaboration on the ground. As these organizations were subject to increased pressure from their head offices to "deliver", there was an increasing alignment with the status quo.

[22] Rex Brynen, "Buying Peace? A Critical Assessment of International Aid to the West Bank and Gaza," *Journal of Palestine Studies*, 25:3 (1996) 79-92.

[23] Alwyn Rouyer, "The Water Accords of Oslo II: Averting a Looming Disaster," *Middle East Policy*, 7:1 (1999) 114. It is important to note that Interim Agreement does acknowledge the "water rights" in the West Bank; however, this point lacks elaboration and a further description of what constitutes "rights" in this case is left for final status negotiations. This aberration in the general approach to water issues in the peace process is attributed by some to confusion amongst negotiators over acceptable language.

[24] Zeitoun, 2008: 99.

[25] Zeitoun, 2008: 88-91

[26] Jonathan Lautze, Meredith Reeves, Rosaura Vega and Paul Kirshen, "Water Allocation, Climate Change and Sustainable Peace – The Israeli Proposal," *Water International*, 30:2 (2005) 197-209.

[27] Sharif Elmusa, *Water Conflict: Economics, Politics, Law and Palestinian-Israeli Water Sources* (Washington, DC: Institute for Palestine Studies, 1997) 279.

[28] Feitelson, 2002: 304.

[29] Feitelson, 2002: 306.

[30] Zeitoun, 2008: 77-78.

[31] Eran Feitelson, "Political Economy of Groundwater Exploration: The Israeli Case," *Water Resources Development*, 21:3 (2005) 418; Arnon Soffer, "Mapping Special Interest Groups in Israel's Water Policy" (Begin-Sadat Center for Strategic Studies, Bar Ilan University, Department of Political Science, 2002).

[32] Zeitoun, 2008: 91.

[33] Julie Trottier, "Water Wars: The Rise of a Hegemonic Concept – Exploring the Making of the Water War and Water Peace Belief within the Israeli-Palestinian Conflict." Paper prepared for the Green Cross International project *From Potential Conflict to Co-operation Potential*. (Geneva, Switzerland, 2003).

[34] Allouche, cited in Zeitoun, 2008: 79.

[35] Selby, 2003: 105.

[36] Zeitoun, 2008: 99-102.

[37] David J.H. Phillips, Shaddad Attili, Stephen McCaffrey, and John S. Murray, "Factors Relating to the Equitable Distribution of Water in Israel and Palestine," paper presented at UNESCO's 2nd Israeli-Palestinian International Conference on *Water for Life in the Middle East*, 2004: 3.

# MIGRATION, TRANSFERTS ET DÉVELOPPEMENT: LE CAS DU SÉNÉGAL

Par Adrian Profitos


## RÉSUMÉ

*Cet article explore les dynamiques et les impacts des transferts issus de la migration dans les pays en développement, et au Sénégal en particulier. L'auteur soutient que malgré les attentes, les effets des transferts sur le développement montrent un bilan très mitigé et complexe. En effet, ni le développement économique ni le développement entendu comme une amélioration des capacités et des choix des individus ne peuvent être directement associés à l'effet des transferts. Au contraire, une dépendance cyclique survient facilement entre et envers la migration et ses transferts, ceux-ci jouant alors un rôle important pour assurer la stabilité des ménages mais sans pour autant réduire les contraintes qui poussent à migrer. D'autres conditions structurelles et conjoncturelles interviennent, tant au niveau local, national qu'international. Ces conditions sont analysées pour en dégager des recommandations telles que le renforcement des organisations sociales au niveau local, la démocratisation, et la décentralisation des institutions nationales. De même, ces mesures doivent être accompagnées d'une régulation prudentielle et bienveillante des transferts, et d'une réduction des coûts de transaction des transferts au niveau international. Dans un contexte où la libre circulation des personnes n'existe pas et où les circonstances sont contraignantes, ni les migrants ni leurs transferts ne peuvent être les seuls responsables du développement de leur pays d'origine.*


## INTRODUCTION

La migration est un phénomène historique et universel qui altère et façonne tant les pays d'origine que ceux d'accueil dans plusieurs domaines : la société, la culture, la politique, la démographie et l'économie. De nos jours, nombreux sont les points de vue, les études, les recherches, les stratégies et les politiques qui en découlent pour faire face aux problèmes ou pour améliorer les bénéfices qu'elle apporte, souvent marqués par des contextes, des intérêts et des imaginaires changeants.

Étant donné la nature complexe, dynamique et multidimensionnelle de la migration, sa relation avec le développement devient un thème polémique non résolu. En particulier, dans les dernières années, un intérêt croissant s'est tourné vers les transferts issus de la migration soulevant à la fois euphorie et scepticisme quant à leur potentiel développeur[1]. En effet, le montant des transferts en direction des Pays en développement (PED) est deux fois supérieur à l'Aide publique au développement (APD)[2], soit près de 250 milliards de dollars par année[3] alors que les Investissements directs à l'étranger (IDE) vers les PED sont autour des 380 milliards[4]. Par conséquent, nombreux sont ceux qui s'attendent à ce que les transferts aient un effet sur la croissance économique et le bien être des populations des pays récepteurs.

En ce sens, ce que nous voulons étudier ici est l'impact réel des transferts issus de la migration sur le développement. Existe-t-il un lien de causalité nécessaire, positif ou négatif, entre ces phénomènes? Est-ce que l'impact des transferts sur le développement dépend de facteurs autres que les quantités déversées? Quels sont les enjeux qui affectent les processus de migration, transferts et développement? Quelles sont les politiques qui peuvent mener à un impact positif des transferts sur le développement?

Plus particulièrement, nous chercherons à savoir comment les théories et recherches générales existantes à présent s'appliquent ou concordent avec un cas concret, celui du Sénégal. Nous tenterons d'utiliser les résultats de notre recherche afin d'approfondir et d'éclaircir la relation entre la migration, les transferts et le développement. Nous viserons également à comprendre le rôle des facteurs structurels et conjoncturels qui peuvent affecter l'impact des transferts, tels que les politiques publiques gouvernementales et les systèmes socio-économiques.

Pour structurer notre analyse nous allons procéder en plusieurs étapes. Tout d'abord, nous préciserons la relation entre les notions fondamentales de notre argumentation : le développement, la migration et les transferts. Ainsi, nous présenterons le cadre théorique sous lequel nous pourrons analyser la relation entre migration, transferts et développement. Nous verrons quelle est la situation actuelle de cette relation à un niveau global puis nous focaliserons notre attention sur le Sénégal par le biais d'une étude de cas spécifique dans ce pays. Finalement, après avoir dégagé certaines politiques publiques qui peuvent être mises en place pour favoriser le potentiel de développement des transferts, nous conclurons en répondant aux questions de recherche suivies de quelques réflexions.

## LES THÉORIES, LES CONCEPTS, LEUR RELATION

Dès les années 50 et 60, les positions développementalistes et néoclassiques, influencées par les théories de la modernisation, s'accordaient pour considérer la migration positivement, pouvant faciliter la transition des sociétés traditionnelles ou en développement vers un modèle de société aux principes libéraux, capitalistes, rationnels et démocratiques grâce à l'accès aux connaissances, valeurs et technologies du monde occidental[5]. Cette vision linéaire et universaliste a été récupérée par le néolibéralisme avec l'objectif de réduire la pauvreté en favorisant la croissance, le PIB *per capita*, les échanges commerciaux, les investissements, l'industrialisation et la productivité comme sources principales de création de richesse et de prospérité pour tous et grâce à l'effet « *trickle down* ».

Selon cette perspective, les migrants sont perçus comme des agents de changement, des innovateurs ou des investisseurs qui, grâce à leurs transferts, leur expérience, leur savoir-faire et leurs connaissances acquises sont capables de contribuer au décollage économique de leur pays. Remarquons que ce renouveau sur le potentiel développeur des migrants ne vient plus de la main des théories centrées sur l'État des années 50 et 60, mais du néolibéralisme où l'utilisation rationnelle des transferts par les individus contribue à combler le vide et le recul mal assuré par les défaillances de l'État. Dans ce contexte, ce sont malgré tout les États qui favorisent souvent la migration comme une politique importante pour promouvoir le développement national.

De l'autre côté, les théories structuralistes et de la dépendance qui ont joué un rôle important dans l'analyse et la compréhension de la migration, des transferts et du développement, sont plutôt pessimistes puisqu'elles jugent la migration, en termes de Gunder Frank, comme étant la cause et la conséquence du « développement du sous-développement »[6]. Selon cette perspective, la migration provoque la perte du capital humain et l'ébranlement des communautés traditionnelles stables et de leur économie. Cette situation a pour conséquence de mener à un développement passif, non productif et dépendant des transferts et qui peut d'ailleurs accentuer les inégalités au détriment de la solidarité et de l'intégrité socioculturelle que les communautés possédaient auparavant[7]. Bien que cette perspective ait été contestée[8], elle demeure en partie vraie dans certains aspects comme le montre les analyses plus récentes de l'usage fait des transferts et de leur impact sur le développement.

La migration est généralement considérée comme signe d'un problème de développement qu'il faut résoudre pour la réduire ce qui s'accorde plutôt avec les théories de la dépendance. Mais malgré la perception d'une situation de migration de masse, de nos jours seulement 3 % de la population mondiale vit en dehors de son pays dont 40 % le fait dans les pays industrialisés[9].

D'une part, la migration touche surtout aux classes à faible ou à moyen revenu et suppose souvent une stratégie familiale pour minimiser les risques liés aux instabilités présentes et futures tout en diversifiant les alternatives de revenus et en apportant une source supplémentaire de moyens financiers de subsistance[10]. De ce fait, les migrants envoient de l'argent dans leurs pays d'origine par des transferts de fonds. Par conséquent, cette stratégie viendrait rejoindre la perspective de rationalité économique des théories développementalistes.

De l'autre côté, la migration touche les classes plus aisées et éduquées qui ont plus de facilités à partir pour satisfaire leurs ambitions et capacités professionnelles face à un manque d'opportunités locales. Cette stratégie peut être aussi considérée sous le prisme développementaliste car elle facilite en principe l'envoie stable de transferts aux sommes plus importantes. De plus, le savoir-faire acquis à l'étranger peut fournir des avantages au retour.

En somme, les migrants sont à la recherche d'un meilleur niveau de vie face à des contraintes défavorables, un manque d'opportunités locales et un espoir de prospérité au-delà de leur région.

Les transferts sont des sommes d'argent versées par les migrants vers leur pays d'origine. À la différence de l'APD, les transferts se font toujours d'une manière bilatérale et privée, le plus souvent à l'intérieur d'une même famille. Cette nuance est importante du fait que les buts et l'usage fait des transferts sont différents de ceux de l'APD, qui vise le développement selon des critères établis au préalable par les institutions publiques et parfois à travers la négociation des intéressés[11].

Les transferts se font à travers des canaux formels et informels. Les canaux informels prennent plusieurs formes selon les lieux et les cultures car ils sont fondés sur des liens de parenté, de tradition, de confiance, de caste et/ou de religion[12]. En ce sens, les transferts formels mais surtout les transferts informels soulignent l'importance et la maintenance des liens de solidarité familiaux et ethniques, ce qui viendrait contredire la théorie de la dépendance. De plus, il est estimé que la moitié des transferts dans le monde peuvent être réalisés à travers ces mécanismes, et entre 8 et 85 % selon les pays[13]. En général, les transferts, à différence d'autres flux de capitaux, sont contre-cycliques et stables face à des situations de crise, ce qui viendrait renforcer le potentiel des transferts sous la perspective développementaliste.

En ce qui nous concerne, nous voulons considérer les effets de la migration et des transferts sur le développement économique mais aussi sur les relations sociales, sur le capital humain (éducation et santé) sur les inégalités de genre et de distribution des richesses et sur les changements politiques. Dans cet esprit, Amartya Sen comprend le développement comme étant un processus d'expansion des libertés réelles dont jouissent les personnes, c'est-à-dire, la possibilité de choisir grâce à l'amélioration des capacités humaines et des conditions environnantes, politiques, sociales et économiques[14]. Par conséquent, alors que les deux cadres théoriques développementaliste et de la dépendance s'intercalent souvent malgré leur apparente polarisation, nous proposons l'optique du juste milieu en considérant à la fois les aspects positifs et négatifs de la migration et des transferts sur le développement tant économique que social, et dans le sens du renforcement des capacités de Sen.

## L'UTILISATION ACTUELLE DES TRANSFERTS POUR LE DÉVELOPPEMENT DANS LE MONDE

Dans une étude commanditée par l'Organisation internationale pour les migrations (OIM), et réalisée à l'échelle mondiale, Bimal Ghosh conclut que les transferts, au niveau des ménages, ont souvent un effet positif sur le développement car ils servent à améliorer l'éducation des enfants tout en diminuant le travail des mineurs. Ghosh note aussi qu'ils contribuent à une meilleure santé, à un meilleur logement et au bien être de ses membres.

Ainsi, les transferts diminuent les contraintes à l'acquisition de crédit et permettent de développer de petites entreprises et de se protéger contre les risques existants dans les zones rurales. L'analyse de plusieurs pays et régions montre que les transferts collectifs et organisés peuvent contribuer au développement de villages et de communautés locales autrement stagnantes car ils aident à la construction d'écoles, d'hôpitaux, de centres communautaires, à l'amélioration des routes et autres petites infrastructures. La consommation, facilitée par l'obtention des transferts, peut avoir aussi des effets multiplicateurs dans le développement économique en stimulant l'activité économique à travers la demande de biens et services[15], ce qui peut bénéficier aussi à ceux qui ne reçoivent pas de transferts.

Au niveau national, les transferts peuvent être des sources importantes de devises étrangères et une partie très importante du PIB pour certains petits pays[16]. Tel que mentionné plus haut, comparativement à d'autres sources de financement extérieurs, les transferts se sont avérés plus stables et faiblement pro cycliques, voir anti-cycliques, en temps de crises[17].

De même, la fuite de cerveaux peut être contrebalancée par des gains de productivité issus de l'expérience professionnelle acquise pendant la période de migration comme il arrive au Mexique ou en Inde qui ont par contre (ce n'est pas toujours le cas) des systèmes économiques où l'expérience professionnelle peut être capitalisée[18].

Néanmoins, l'expérience montre aussi que des récessions économiques dans les pays d'accueil peuvent mener à une diminution des transferts à destination de certains pays[19]. Aussi, lorsque les transferts sont destinés à l'investissement ils sont beaucoup plus sensibles aux aléas des pays d'origine du migrant. D'autre part, lorsque les transferts sont perçus comme stables, réguliers et prévisibles, ils ont une tendance à être dépensés et non pas à être épargnés ou investis, diminuant leur rôle potentiel de développement économique. Finalement, il y a peu de relation causale entre les transferts et la performance économique comme par exemple aux Philippines, en Équateur ou au Yémen où la grande quantité de transferts reçus n'a pas amélioré la situation. Par contre, dans des pays comme la Chine, l'Inde ou le Mexique, qui reçoivent des sommes importantes de transferts bien que proportionnellement négligeables par rapport à leur PIB, la performance économique a été bien meilleure.

En général, il semble que les transferts contribuent à promouvoir le développement du capital humain. Mais bien que les transferts puissent diminuer le fardeau de la pauvreté en apportant des ressources économiques essentielles pour la consommation de biens de base, ils encouragent souvent la consommation ostentatoire avec une préférence pour les biens importés tout en dénigrant les produits nationaux ce qui nuit à l'économie locale. Les transferts peuvent contribuer à l'investissement et à la croissance mais ce processus n'est pas automatique. Au contraire, il est dangereux de tout miser sur les effets positifs des transferts car les retombées de ceux-ci n'arrivent pas nécessairement et même peuvent être la source d'effets contraires faisant plus difficile la lutte contre la pauvreté et la promotion d'un développement durable. Par exemple, la migration des adultes provoque souvent une baisse de la main d'œuvre et de la production, surtout dans les zones rurales. De plus, il n'est pas certain que les transferts servent à diminuer les inégalités au sein d'une communauté, menant plutôt à un accroissement de celles-ci au moins dans le court terme. Aussi, les faillites de petites entreprises soutenues par des transferts sont fréquentes et des taux élevés de migrants peuvent dissuader l'investissement dans ces communautés en raison d'un manque de main d'œuvre ou de sa moindre fiabilité[20].

Finalement, Bimal Ghosh remarque aussi que les transferts produisent un délai dans la mise en œuvre des réformes essentielles de la part de l'État étant donné que la population subsiste et que les pressions sont moindres. En même temps, ceux qui reçoivent des transferts en deviennent dépendants et les ménages ont besoin d'une continuation de la migration parmi les jeunes en âge de travailler car, souvent, après de longues périodes à l'étranger, les transferts ont plus de chances de s'estomper[21]. Tout cela entraîne un cycle constant de migration et de dépendance envers les transferts sans aucun effet ou changement majeur sur le développement des choix et des capacités.

## MIGRATION, TRANSFERTS ET DÉVELOPPEMENT AU SÉNÉGAL

Le Sénégal occupe la 153$^{e}$ place sur 179 pays sur l'Indice de développement humain (IDH) du programme des Nations unies pour le développement (PNUD)[22]. Un tiers de la population vit sous le seuil de pauvreté et avec un taux de chômage élevé touchant surtout les jeunes. Sur une population totale de presque 12 millions d'habitants, environ 500 000 sont migrants transnationaux dont 16 % sont des femmes et 84 % des hommes[23]. Dans les villages, de 30 à 50 % des hommes actifs sont absents et dans les villes et les zones rurales, 76 % et 64 % des ménages respectivement ont un membre de la famille vivant à l'étranger[24]. De tous les migrants sénégalais à l'étranger, 42 % envoient régulièrement des transferts, 31 % irrégulièrement et 27 % ne le font pas du tout[25]. La féminisation de la migration s'est accrue à partir des années 90 lorsque les conditions se sont empirées[26].

L'investissement direct à l'étranger est de 70 millions actuellement, alors que l'APD est de 750 millions de dollars ce qui représentait 45 % de la dépense total du gouvernement en 2003. Les transferts formels en 2004 représentaient 563 millions de dollars[27], soit environ 30 % de la masse monétaire totale du pays[28], 7 % du PNB (10 milliards selon la Banque Mondiale) et entre 30 à 80 % du budget des ménages[29].

Au Sénégal, 75 % des transferts reçus par les ménages sont utilisés aux besoins de consommation courante représentant un enjeu vital pour les populations, surtout celles qui vivent dans des zones de forte émigration[30]. Les transferts servent à répondre aux besoins de dépenses quotidiennes et donc améliorent et maintiennent le niveau de vie des ménages (nourriture, santé, logement, éducation des enfants, transports).

Rejoignant la perspective développementaliste, la vision officielle des transferts au Sénégal démontre un optimisme quant aux effets positifs que peuvent apporter ces sommes d'argent pour la réduction de la pauvreté, d'une part, et de la promotion du développement, de l'autre. En effet, une étude menée par le Ministère des Finances au Sénégal affirme que l'envoi de transferts contribue grandement à la réduction de la pauvreté au Sénégal, permettant à 31 % des ménages qui en reçoivent de ne pas tomber sous le seuil de pauvreté. Les transferts seraient aussi à l'origine d'une hausse des dépenses par tête des ménages sénégalais de 59,85 % en moyenne[31]. Cette étude souligne l'importance d'encourager l'envoi par des moyens officiels en réduisant les coûts de transfert, ainsi que la mise en place d'infrastructures financières et bancaires attractives et la collaboration de celles-ci avec les établissements de crédits.

D'ailleurs, le gouvernement s'intéresse au fait que peut être plus du 50 % des transferts se font de manière informelle, sans pouvoir taxer, contrôler ou rediriger ces flux. De la même manière, les banques régionales et internationales comme les banques marocaines et françaises par exemple, cherchent à participer en tant qu'intermédiaires dans ces flux de capitaux dans l'espoir d'arracher le monopole surtout à *Western Union* qui contrôle ce marché au Sénégal[32]. Cela pourrait avoir des conséquences positives si la concurrence mène à une chute des coûts de transaction, qui peuvent aller jusqu'à 20 % du montant transféré (ce qui explique en partie le recours aux transferts informels) et si en même temps des projets et initiatives d'appui à l'investissement rentable des migrants se mettent en place. Certainement, la formalisation des transferts via le système bancaire permettrait aux récepteurs d'avoir accès au crédit ou autres services financiers puisque l'argent reçu régulièrement pourrait servir comme aval.

Néanmoins, il semble en général que l'intérêt pour les transferts s'incline d'avantage du côté lucratif du secteur financier car la diminution des coûts de transaction à eux seuls n'aurait qu'un faible impact sur l'usage qui se fait des transferts ainsi que sur le développement des communautés proprement dit. En effet, les transferts, majoritairement utilisés pour la consommation courante, ne contribuent que marginalement au développement économique, à l'autonomisation des ménages ou à la diversification des sources de revenus. Par exemple, en moyenne à peine 10 % des transferts sont épargnés, souvent à la Banque de l'Habitat du Sénégal, en vue probablement de réaliser prochainement un investissement immobilier[33].

Les investissements sont donc très loin derrière la consommation et sont destinés principalement à l'immobilier ou à l'achat de terrains et parfois aux petites activités commerciales.

Les investissements productifs sont alors comparativement beaucoup plus rares et se concentrent dans le secteur des transports (taxi, cars), du commerce (importation de voitures et de pièces détachées d'occasion) et dans une moindre mesure dans l'agriculture[34].

À cet égard, le manque d'investissement dans l'agriculture se doit à diverses raisons. D'abord, c'est à cause de la crise de l'agriculture au Sénégal[35] que la migration est devenue massive (érosion des sols, sécheresses, coûts des engrais, déclin de la productivité et des prix, chute des exportations) et ensuite l'investissement dans ce secteur demande des sommes plus élevées, un savoir technique et scientifique complexe et, finalement, les résultats ne sont à compter qu'à moyen terme. Finalement, compte tenu des aléas climatiques et économiques, l'investissement semble très risqué.

En somme, le manque d'accès au micro crédit ou à d'autres ressources financières, la difficulté à trouver un aval (surtout si les transferts sont informels), le faible niveau d'instruction et d'esprit d'entreprise des migrants (en général), l'éloignement géographique de ceux-ci avec leur pays (avec le risque du détournement des fonds, de la corruption, des délais…) et finalement le manque d'opportunités, de possibilités et de garanties pour investir font que, au bout de la ligne, il n'est pas surprenant que les transferts ne soient pas utilisés à cette fin mais plutôt à l'amélioration du niveau de vie et du bien être des familles. C'est donc à tous ces niveaux que les politiques publiques devraient se pencher.

En ce sens, en vue d'améliorer les aspects positifs de la migration et des activités des migrants dans l'investissement productif de leur pays, le programme « Migration pour le développement en Afrique » (MIDA) de l'OIM, réalisé en partenariat avec des pays européens et africains tels que la France, l'Italie et le Sénégal, met en marche des politiques pour une meilleure gestion des fonds transférés par les migrants :

- optimisation financière et gestion efficace pour canaliser et attirer les transferts vers une stratégie de développement local et de réduction de la pauvreté;
- valoriser et capitaliser les ressources humaines, intellectuelles, techniques financières et les capacités d'investissement de la diaspora sénégalaise en vue de contribuer au développement socioéconomique de leur pays d'origine;
- identifier des mécanismes alternatifs et des modèles de systèmes financiers décentralisés (micro finance); et
- identification et analyse des besoins et opportunités d'investissement pour les migrants sénégalais comme agents de développement.[36]

De la même manière, des transferts utilisés collectivement par des associations communales ont donné des résultats plus clairs et durables au caractère plus social mais certainement avec des retombées économiques sur le long terme, tout en favorisant les opportunités, les capacités et le capital humain. Il s'agit de la construction d'écoles, de centres de santé, de mosquées, de centres communautaires et d'autres soutiens à l'infrastructure comme des points d'eau, des bureaux de poste ou des projets d'électrification dans ce qui peut s'appeler comme « développement intégré »[37].

## ETUDE DE CAS : KÉBÉMER

Nous allons focaliser notre attention sur une ville sénégalaise, Kébémer, dans le bassin arachidier, ancien bastion de l'exportation, marquée par la migration depuis des décennies et donc représentative du phénomène au Sénégal. Pour ce faire, nous nous sommes servis de l'information recueillie lors d'entretiens qualitatifs semi structurés réalisés avec différentes personnes de la ville en 2007[38].

Le caractère contingent de la migration est fort souligné au regard du fatalisme qui règne quant aux possibilités d'améliorer la situation à Kébémer. L'État est perçu comme absent ou impuissant, ne pouvant intervenir partout pour empêcher que les jeunes partent, notamment en pirogue, risquant leur vie et l'argent investit dans cette dangereuse entreprise. En effet, la situation économique est contraignante (« la vie est chère, les temps difficiles »). Il y a un manque d'opportunités pour les jeunes, qui ont du mal à trouver un emploi et quand ils l'ont, le salaire ne suffit pas à satisfaire les besoins de la famille ni des attentes de réussite ce qui les poussent à migrer (« comme il n'y a pas d'emploi, il faut que les jeunes partent…tout le monde aurait préféré rester dans son pays pour y travailler »).

Plusieurs circonstances socioéconomiques s'y ajoutent et expliquent le panorama fataliste. D'abord, pour investir dans une entreprise productive il faut des fonds (du crédit notamment), des partenaires et un climat économique favorable. Les fonds ne sont pas facilement accessibles car d'abord il faut des contacts dans les banques (politiques, familiaux, personnels). Ensuite le système est faible et/ou réticent à octroyer des crédits à ceux qui ne peuvent pas prouver un aval formel. Enfin, les micros crédits sont insuffisants entraînant plutôt un cycle de dépendance et de risque. De plus, vu que beaucoup de jeunes partent, le tissu social est affaibli. Ainsi, les contacts, la dynamique sociale et l'initiative nécessaires aux entreprises font défaut.

À ceci s'ajoute une caractéristique de Kébémer qui certainement existe ailleurs au Sénégal. Les transferts de chaque migrant sont souvent envoyés à un commerçant auquel sa famille achète tout dont elle a besoin. De cette manière, étant donné que presque toutes les familles reçoivent l'argent d'un migrant, tous les ménages sont déjà associés à un commerçant de manière permanente. Par conséquent, ouvrir un nouveau commerce semble difficile puisque il n'y a pas de parts de marché libres. La concurrence et le jeu de l'offre et la demande ne s'appliquent donc pas de la même manière à Kébémer que dans un système capitaliste et par conséquent la libre entreprise ne fait pas beaucoup de sens, ce qui nuit aux incitatifs d'investissement pour des projets productifs.

Dans ce contexte, l'éducation et l'apprentissage d'une profession ne garantissent pas non plus l'accès au travail. Être plus ou moins éduqué n'a pas d'effet sur les désirs ou la nécessité de migrer. Une personne moins instruite peut avoir moins de possibilités locales et donc vouloir ou devoir migrer. Une personne plus instruite peut penser qu'elle réussira mieux à l'étranger que localement car son niveau d'études ne peut pas donner les résultats espérés sur place.

Dans ce fatalisme, les habitants de Kébémer sont conscients des multiples échecs des migrants et des conséquences ainsi que des coûts et des risques associés à la migration. Les migrants ne réussissent pas nécessairement, n'envoient pas d'argent ou ne reviennent jamais ce qui contribue à la démystification du migrant mais pas pour autant de la migration elle même comme possibilité et peut être comme seul moyen de réussite.

En ce sens, une valeur très répandue est celle de la « téranga », c'est-à-dire, la réussite financière personnelle. La *téranga* est intimement liée à un autre élément important, celui du mariage. Dans la littérature sur la migration, les transferts et le développement, le mariage ne fait l'objet d'une seule ligne[39] mais est néanmoins un facteur essentiel pour comprendre ces phénomènes. En effet, la dot nécessaire pour épouser une femme est devenue très élevée, par le même processus qui a fait augmenter les prix des maisons à Dakar : les migrants qui reviennent avec des grandes sommes d'argent ont fait monter les prix. On pourrait parler d'une inflation de la valeur de la dot. L'effet produit est que, d'une part, les femmes s'attendent à ce type de dot et d'autre part, les hommes veulent être à la hauteur de l'exemple donné par les migrants.

La *téranga* passe par pouvoir démontrer qu'on a suffisamment d'argent pour payer la dot, avoir une belle maison et d'autres biens matériels qui prouvent le pouvoir, la richesse et la prospérité, comme les voitures notamment ou autres biens de luxe. Le problème alors est qu'à Kébémer et même à Dakar, la possibilité de réussite financière est très limitée, surtout à court terme. L'option la plus efficace démontrée par l'exemple est la migration transnationale (« ils veulent la *téranga*, comme ici ils ne peuvent pas l'avoir, ils vont à l'extérieur chercher ça »).

Somme toute, quand au développement économique, la situation n'est pas adéquate pour l'investissement productif et les risques sont grands, ce qui porte un effet dissuasif. L'euphorie associée aux transferts par les théories développementalistes devrait être limitée car des conditions préalables sont nécessaires à l'épanouissement économique espéré. En effet, le fatalisme partagé quant aux possibilités d'améliorer la situation pousse d'abord les personnes à migrer et ensuite à ne pas vouloir investir pour la changer. D'ailleurs, les causes et objectifs de la migration et des transferts sont principalement destinés à combler des aspirations et des demandes personnelles (mariage, *téranga*, maison, statut, épanouissement) et familiales (survie, subsistance, bien être) qui ne sont pas nécessairement productives mais qui sont souvent accomplies.

En ce sens, le deuxième aspect du développement (capital humain, bien être) semble effectivement être assuré car les familles sont nourries et logées, les factures sont payées, les enfants vont à l'école, et les besoins de santé et d'habillement semblent être comblés. Mais la dépendance envers le cycle migration et ses transferts est la conséquence négative face à des contingences importantes ce qui viendrait supporter les théories de la dépendance.

Finalement, quand au développement des capacités, des choix et des libertés, le bilan semble être négatif puisqu'il n'y a pas d'opportunités pour les mettre en pratique et c'est cela qui nous intéresse ici pour compléter le tableau des perspectives du développement dans le sens donné par Sen. D'abord, le phénomène répandu de la migration ne mène pas à une organisation des migrants ni de la gestion des transferts pour des projets communs où les jeunes pourraient participer évitant ainsi leur migration. De même, la meilleure option de réussite est la migration, les opportunités font défaut, le fatalisme règne, la dépendance est cyclique, les possibilités politiques et économiques ne semblent pas s'être améliorées, l'État est absent et les associations communales sont faibles. La migration pourrait être considérée dans ce cas comme une opportunité qui garantit la subsistance mais au prix de la dépendance qui devient un obstacle pour le développement économique et social, des libertés et des choix.

## BILAN POLITIQUE DE LA MIGRATION ET DES TRANSFERTS DANS LE DÉVELOPPEMENT

La question fondamentale qui se pose ici est de savoir si ce sont les individus ou les institutions publiques qui doivent s'occuper du bien être et du développement de leurs communautés. Cette distinction repose au cœur des débats entre le libéralisme et l'étatisme. Cela est toutefois un débat finalement sans issue car l'être humain ne peut s'épanouir seul sans un ensemble de conditions établies et la société ne peut fonctionner sans la participation de ses membres. Ainsi, sans règles préalables, ni la seule recherche des intérêts personnels ni le monopole centralisé de la gestion des ressources peuvent mener au bien être général. Il faut donc une conjonction des deux phénomènes avec sans doute un renforcement des capacités de l'État, des associations et des individus.

Nous avons vu comment la migration est conditionnée par des contingences défavorables de toutes sortes. Les défaillances de l'État ainsi que l'impact de facteurs conjoncturels et structurels sont les principales causes sur lesquels les transferts ou l'individualisme ne peuvent rien. En ce sens, la migration et les transferts qui y sont associés sont une réponse stratégique rationnelle qui vise à diversifier les revenus, à s'assurer une protection en cas de risques et à maintenir un niveau de vie acceptable, malgré la dépendance cyclique. Mais le manque de développement est la cause de la migration et non pas sa conséquence car si les conditions sont bonnes (opportunités d'emploi et d'investissement, protection sociale, bonne gouvernance et droits politiques) la plupart des migrants ne partiraient pas.

Pour rester pragmatiques et ne pas nier l'évidence (le manque d'opportunités ou les flux de migration), il faut bien favoriser ce qui existe, c'est-à-dire, les transferts. Un des éléments clés semble se trouver dans la transaction et la gestion des transferts. Il serait notamment pertinent d'instaurer des agences gouvernementales en accord avec les intermédiaires financiers privés qui puissent canaliser les transferts à des fins de développement. Il ne s'agit pas de lutter contre les transferts informels car cela est une réalité qui n'est pas nécessairement négative puisqu'elle renforce des liens de solidarité et répondent à une logique économique face à des coûts de transaction élevés accompagnés d'une confiance déficitaire envers les canaux officiels. En revanche, les organisation et associations locales en relations avec la migration devraient être encouragées, favorisées et supportées le plus possible, ce qui renforcerait les liens communautaires[40].

Les pouvoirs institutionnels devraient assurer un coût de transaction à taux variable entre 2 et 8 % maximum. Cette variabilité répondrait à des incitatifs liés aux objectifs des transferts d'une part et aux conditions des migrants de l'autre. En ce sens, si les transferts sont destinés à l'investissement, à des fins productives ou de développement social ou communautaire le taux serait moindre. De même, si l'objectif est le support de la famille, le coût serait aussi moins élevé qu'à travers les canaux privés formels habituels. Évidemment, l'État devrait faire tout le possible pour favoriser les investissements de ses ressortissants, surtout au niveau agricole[41].

Tout cela peut casser la rationalité économique actuelle mais dans un certain sens le développement mené par l'État n'a pas de caractère lucratif, d'où son avantage comparatif et redistributif par rapport aux agences privées de transaction qui ne s'occupent pas du développement. Le problème évident est la corruption mais cela renvoie à des problèmes que nous ne pouvons pas traiter ici. Dans tous les cas, cela serait une bonne raison pour favoriser la bonne gouvernance, la décentralisation, la transparence et la reddition de comptes, thèmes très importants dans les pratiques actuelles du développement.

D'autres facteurs comme un marché dynamique, un secteur financier et un système juridique crédibles et solides, l'intégration territoriale et l'accès aux marchés, au crédit et aux opportunités sont nécessaires pour que les transferts puissent permettre l'investissement et la croissance tout en étant transmis dynamiquement au niveau national et sans demeurer enclavés dans certaines zones ou profitées à certains groupes seulement.

Il ne faudrait donc pas surestimer l'importance des transferts par rapport à l'APD ou les IDE ni minimiser le rôle développeur de l'État car rien n'assure que les transferts reviennent aux plus pauvres ni qu'ils ont un impact sur le développement à long terme alors que des réformes structurelles et en infrastructures, que les transferts ne peuvent pas atteindre, sont essentielles pour que précisément ceux-ci puissent s'épanouir en élevant les opportunités, les choix et les capacités des populations.

## CONCLUSION

Par le biais de l'étude de cas, nous avons vu comment le cas général s'accorde assez bien avec la situation au Sénégal. Somme toute, comme dans beaucoup de pays à faible PIB avec une grande proportion de migrants, les transferts semblent avoir peu d'impacts sur le développement économique local ou sur les projets de développements communautaires sous la main d'associations, faute de conditions adéquates.

Cela renvoie à la question de savoir dans quelle mesure la solidarité, les circonstances économiques, culturelles et sociales contraignantes, le fatalisme ainsi que les causes et les objectifs de la migration et des transferts, interagissent pour façonner, conditionner ou voir même déterminer le type de développement qui a lieu (économique, humain ou des capacités).

Dans la pratique, les transferts servent au développement des ménages jusqu'à un niveau stable de subsistance et de bien être où les besoins quotidiens sont garantis autant que les transferts sont stables et constants, ce qui favorise le capital social. Mais les transferts sont majoritairement utilisés au maintien stationnaire des ménages qui se trouvent alors dépendants de ces revenus entraînant un cycle de migration/transferts constant alors que rien n'assure vraiment la régularité des transferts ou le succès du migrant, tant à son départ comme à son arrivée. Le tissu social semble être affaibli et les femmes se trouvent plus touchées par une triple situation de dépendance (juridique, économique et sociale) qui les pousse à migrer aussi ou à travailler davantage. L'éducation ou la formation ne jouent pas de rôle majeur dans la prévention ou la dissuasion de la migration qui apparaît souvent comme seul moyen effectif à court terme pour la réussite financière personnelle, le mariage et le soutien de la famille, malgré le fait de la démystification du migrant et de la conscience de ses échecs et des risques associés. Somme toute, les possibilités, les opportunités et les conditions sont limités et ne prennent pas place.

Le bilan du développement par les transferts est très mitigé et tant que les transferts continuent, la situation reste stable mais les causes négatives qui poussent à migrer ne disparaissent pas. Comment changer la situation? Faut-il la changer? Peut-elle être changée? La migration peut être finalement vue comme une forme supplémentaire de travail ou d'aliénation sans remède. Le travailleur absent, comme toujours, mais cette fois plus loin.

De plus, les migrants se voient revêtus d'une nouvelle responsabilité à part celle de faire vivre leurs familles : celle de développer leur pays faute d'intervention étatique et des pouvoirs publics dans un contexte légitimateur néolibéral. Le caractère altruiste ou égoïste que pouvait avoir la nature et les objectifs des transferts (sa famille ou le migrant lui-même) se voit supplanté par un devoir moral et « rationnel » de reconstruction et de développement national alors que les causes qui ont poussé le migrant à partir ne relèvent pas du loisir mais de la contrainte et de la pauvreté dont les causes à nouveau sont au-delà de sa responsabilité.

Au contraire, la responsabilité retombe plutôt sur l'État, sur les institutions financières et sur un système économique qui a fait des ravages surtout en Afrique et qui demande alors au migrant de participer, grâce à ses transferts et seulement par les transferts, à réduire l'échec des politiques du passé.

En même temps, la libre circulation des personnes sur laquelle se base la théorie du libre échange et de la mondialisation demeure une promesse non tenue. Beaucoup sont ceux qui la réclament pour diverses raisons[42] mais rien ne garantit encore qu'à elle seule, elle servira à améliorer les conditions de vie des plus pauvres. Il existe une multitude de déclarations de bonne volonté à travers des conférences internationales qui depuis des années réclament une prise de conscience et d'action envers les processus de migration et de développement[43]. Encore, les déclarations restent du papier mouillé si elles ne sont pas accompagnées d'actions concrètes et énergiques.

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## ENDNOTES

[1] cf. UNRISD. "Remittances, migration and social development. A conceptual review of the literature." *Social Policy and Development Programme Paper,* nº34, October 2007.

[2] En 2007 l'APD fut de 103 milliards de dollars. Voir OCDE : <www.oecd.org/dac/stats/dac/reftables>.

[3] Pendleton, Wade et al. "Migration, remittances and development in south-Africa." Southern African Migration Project. *Migration Policy Series,* nº44, 2006 : p.8. Le chiffre donné inclus les transferts formels et informels. Ces derniers demeurent toujours des estimations approximatives pouvant représenter entre 30 et 50% des transferts totaux. Les transferts formels sont d'environ 180 milliards pour l'année 2006 selon UNCTAD 2008. On peut donc estimer les transferts en 350 milliards mais nous préférons rester prudents.

[4] UNCTAD. "Development and Globalization. Facts and Figures." 2008: p. 29.

[5] UNRISD. "Remittances, Migration and Social Development. A Conceptual Review of the Literature." *Social Policy and Development Programme,* Paper nº34, October 2007: p. 3.

[6] Frank, A-G. "The Development of Underdevelopment." *Monthly Review*, Vol.18, September 1966.

[7] UNRISD, op.cit. p. 4 et 5.

[8] Cette hypothèse, ainsi que l'ensemble de la théorie de la dépendance, porte une vision romantique sur les sociétés traditionnelles en les considérant justes, honnêtes et égalitaires, ce que l'histoire et l'anthropologie contredisent. En termes d'Olivier de Sardan, il s'agit d'une perspective populiste idéologique.

[9] Mondain, N. « Migration et développement : une relation complexe » dans *Introduction au développement international : approches, acteurs et enjeux.* Beauder, P. Schafer, J. et Haslam, P. Ottawa, Presses de l'Université d'Ottawa. Chap.19. 2008. p.315.

[10] UNRISD, op.cit. p.6.

[11] Voir à cet égard la « Déclaration de Paris sur l'Efficacité de l'Aide au Développement » 2005.

[12] Voir Libercier, M-H & Schneider, H. « Les migrants : partenaires pour le développement ». Centre de Développement de l'Organisation de Coopération et de Développement Économiques, OCDE, Paris. 1996 : p.40.

[13] Ghosh, Bimal. "Migrants' remittances and development: myths, rhetoric and realities". IOM, International Organization for Migration. 2006: p. 15.

[14] Sen, A. *Development as Freedom*, Anchor Books: New York. 1999.

[15] United Nations and International Organization for Migration. *World Migration Report*. 2000 : p. 31.

[16] En 2006, autour de 20 % du PIB pour des pays comme le Lesotho, la Jordanie ou El Salvador. Voir UNCTAD op.cit. p. 35.

[17] C'est le cas notamment du Liban, lors de la guère en 2006 les transferts ont fortement augmenté. Cf. UNCTAD op.cit p. 35.

[18] World Migration Report 2000. op.cit. p.33.

[19] C'est le cas actuellement de la récession économique aux États-Unis qui affecte notamment les employés immigrés et qui ont plus de mal à envoyer des transferts vers leur pays.

[20] World Migration Report 2000. op.cit. p.32.

[21] *Ibid*, p. 34. Il faudrait tenir en compte que souvent la migration n'est que temporelle mais tant si le migrant revient ou pas, les transferts s'estompent tôt ou tard.

[22] UNDP. *Human Development Report*. 2008. <http://hdr.undp.org/en/statistics/>.

[23] Il existe de forts contrastes entre les chiffres officiels et les estimations. D'autres sources pertinentes considèrent la migration transnationale en 2 millions, soit 15% de la population du Sénégal. Voir Ndione, B & Broekhuis, A. « Migration internationale et développement. Points de vues et initiatives au Sénégal » *Working papers Migration and Development Series*. Report nº8. 2006: p.3. <http://www.ru.nl/socgeo/html/files/migration/migration8.pdf>.

[24] Ministère de l'Economie et des Finances, République du Sénégal, Direction de la Prévention et de la Statistique, Rapport de Synthèse de la Deuxième Enquête Sénégalaise Auprès des Ménages (ESAM-II), Juillet 2004. Cité dans UN Instraw <http://www.un-instraw.org/fr/grd/country-brief/remittances-in-senegal.html>.

[25] *Ibid*.

[26] IOM op.cit. p.154.

[27] Development Prospect Group. « Migration and Remittances in Senegal ». *Migration and Remittances Factbook. World Bank*. <http://siteresources.worldbank.org/INTPROSPECTS/Resources/334934-1181678518183/Senegal.pdf.>

[28] Sander, C; Barro, I. « Étude sur les transferts d'argent des émigrés au Sénégal et les services de transferts en microfinance » Social Finance Programme. Document de Travail nº40. Date non spécifiée. <http://www.ilo.org/public/french/employment/finance/download/wp40.pdf>.

[29] OIM, op.cit p.151. Jusqu'à 90% selon United Nations, IOM International Organization for Migration. "The migration-development nexus". Edited by Van Hear,N & Nyberg-Sorensen, N. 2003.

[30] Sander et Barro, op.cit. p. 11.

[31] Co-Développement.org. « Les envois d'argent des migrants contribuent fortement à réduire la pauvreté, selon le Ministère des Finances du Sénégal». 2007. <http://www.co-developpement.org/index.php?sv=30&aid=945>.

[32] Aujourd'hui le Maroc (24-9-2008). « Sénégal : Hausse des transferts de fonds » <http://www.aujourdhui.ma/economie-details64081.html>, consulté le 24-9-2008.

[33] Sander et Barro, op.cit. p. 11.

[34] *Ibid*. p. 12.

[35] Sy,M. Ba,A; Ndiaye,N. « Les implications démographiques des politiques de développement au Sahel : le cas du Sénégal » dans Migration et Urbanisation au sud du Sahara : quels impacts sur les politiques de population et de développement?. Touré et Fadayomi, ed. CODESRIA, Dakar, Sénégal. 1993 : p.198.

[36] « Transferts de fonds des migrants sénégalais : les 500 milliards des émigrés intéressent l'OIM ». Sonikara. <http://www.soninkara.com/societe/emigration/transferts-de-fonds-des-migrants-senegalais-les-500-milliards-des-emigres-interessent-loim.html>, consulté le 20-10-2007.

[37] Ndione, B & Broekhuis, A. « Migration internationale et développement. Points de vues et initiatives au Sénégal » Working papers Migration and Development series. Report nº 8. 2006. <http://www.ru.nl/socgeo/html/files/migration/migration8.pdf>.

[38] Les répondants appartiennent à la même ethnie majoritaire (Wolof) mais à des groupes générationnels différents pour ainsi tenter d'élucider les changements et contrastes dans la manière d'envisager la migration, les transferts et leur impact sur le développement de Kebemer. L'un a 23 ans, il est commerçant et son frère est migrant mais lui a préféré rester au Sénégal pour gagner sa vie. L'autre a 68, il est à la retraite et a vécu toute sa vie à Kebemer ce qui lui confère une expérience majeure quant à l'évolution qu'a subi la ville dans le processus de migration et de développement. Un de ses enfants est migrant et sa famille reçoit des transferts dont il bénéfice en partie.

[39] Nous avons trouvé une seule référence dans une thèse doctorale traitant de la migration mais sans rapport explicite avec les transferts et le développement. Cf. Lin, T.S. « Le régime de travail en Chine », Paris, Le Manuscrit. Chap. 3. 2009.

[40] Nous pensons notamment aux associations solidaires et coopératives de micro finance.

[41] Il faut remarquer à cet égard que la part des dépenses en agriculture tant des États africains comme de l'APD s'est réduite à seulement 4% de leurs budgets depuis nombreuses années.

[42] Cf. Pecoud, A; de Guchteneire, P. "Migration without borders. Essay on the free movement of people." UNESCO Publishing, Paris. 2007.

[43] Cf. United Nations. "Compendium of recommendations on international migration and development: The UN Development Agenda and the Global Commission on International Migration Compared". Department of Economic and Social Affairs, Population Division. UN Publications. 2006

# BALANCING STATE SOVEREIGNTY AND HUMAN RIGHTS: ARE THERE EXCEPTIONS IN INTERNATIONAL LAW TO THE IMMUNITY RULES FOR STATE OFFICIALS?

By Stephanie Markovich


## ABSTRACT

*To what extent are state officials held accountable for their actions? This essay will examine a specific aspect of this question, namely whether there is an exception to the general rule that the Head of State, Head of Government and Foreign Minister are immune from prosecution in another country's national courts for serious international crimes. It will begin with a brief review of the relevant treaty provisions relating to immunity of state officials. Second, it will examine some pre-Arrest Warrant case law specifically on the issue of potential exceptions to the immunity rule for state officials. Third, it will review the Arrest Warrant Case, an ICJ decision that halted this trend and discuss some of the issues left unresolved by the decision. Fourth, it will review the ICJ's discussion of immunity post-Arrest Warrant in Djibouti v. France. Finally, it will explore the concept of* jus cogens *and whether this could help reconcile the competing interests (state sovereignty and accountability for serious international crimes) at play in this issue. This essay will conclude that while the* jus cogens *nature of serious international crimes does not equate to an automatic carte blanche for removing immunity, it does strongly support the developing norm of limited exceptions to the general rule of immunity.*


## INTRODUCTION

Almost 70 years ago, the international community embarked on a bold attempt to bring to justice the officials responsible for the death and destruction of WWII. For the first time in history, legal mechanisms were invoked to hold the perpetrators of war crimes and crimes against humanity accountable for their actions using international tribunals specifically established for that purpose.[1]

Aside from their sheer novelty at the time, the Nuremberg and Tokyo International Military Tribunals were particularly astonishing for two reasons.

First, the allies nearly succumbed to the temptation for retribution and almost refused to let the tribunals happen. Second, although many of the accused were convicted, some were acquitted, much to the shock of those who assumed the tribunals were "mere formalities preceding declarations of predetermined guilt".[2] Thus, despite their flaws, these tribunals helped to quell the urge for vigilantism against suspected war criminals, and paved the way for the establishment of the International Criminal Court (ICC). Most importantly, the Tribunals represented the first concrete attempts to prosecute individuals responsible for war crimes.

How has international law evolved since these first bold attempts? To what extent are state officials held accountable for such serious crimes today? This essay will examine a specific aspect of this question, namely whether there is an exception to the general rule that the Head of State, Head of Government, and Foreign Minister, often called the troika, are immune from prosecution in another country's national courts for serious international crimes (genocide, war crimes, and crimes against humanity).[3] This essay will begin with a brief review of the relevant treaty provisions relating to immunity of state officials as they apply to serious international crimes. This section will conclude (as does both the International Court of Justice (ICJ) in the *Arrest Warrant* case[4] and the International Law Commission (ILC) draft report) that while these provisions are helpful with respect to certain aspects of the question of immunity of state officials, they do not provide a definitive answer to the question of whether there is a 'war crimes' exception to the rule of immunity for state officials from a foreign state's *domestic* courts. Second, this essay will examine some pre-*Arrest Warrant* case law. Specifically, it will examine the issue of potential exceptions to the immunity rule for state officials and argue that this case law (in addition to the treaty law examined) provides evidence of an emerging norm in customary international law (CIL) of certain exceptions to the immunities generally accorded to Heads of State, Heads of Government, and Foreign Ministers. Third, this essay will review the *Arrest Warrant Case*, an ICJ decision that halted this trend, and discuss some of the issues left unresolved by the decision. Fourth, it will review the ICJ's discussion of immunity post-*Arrest Warrant* in *Djibouti v. France*.[5]

Finally, this essay will explore the concept of *jus cogens* and whether this could help reconcile the competing interests (state sovereignty and accountability for serious international crimes) at play in this issue.

This essay will conclude that while the *jus cogens* nature of serious international crimes does not equate to an automatic *carte blanche* for removing immunity, it does strongly support the developing norm of *limited* exceptions to the general rule of immunity.

## RELEVANT TREATY LAW

### A) Immunity

Immunity is usually defined as "the exception or exclusion of the entity, individual, or property enjoying it from the jurisdiction of the State; an obstacle to the exercise of jurisdiction; limitation of jurisdiction; a defence used to prevent the exercise of jurisdiction over the entity, individual or property."[6] The granting of immunity, and the type of immunity granted, depends on whether one is speaking of foreign diplomats, Heads of State, or other high-ranking officials. With respect to the former, Article 31 of the *Vienna Convention on Diplomatic Relations* grants diplomatic agents immunity from the criminal jurisdiction of the receiving state; and Article 32 stipulates that this immunity may be waived by the sending state, but that such waiver must always be expressed.[7] Thus, immunity for diplomats and their entourage is largely governed by treaty law, is specific to the host country, and can be removed if the host state declares the diplomat and/or members of their entourage to be *persona non grata*.[8]

With respect to Heads of State, or other high-ranking officials, immunity *ratione materiae*, or functional immunity (immunity for official acts committed as part of one's duties while in office), is traditionally granted to state officials. When the official leaves office, he or she continues to enjoy immunity *ratione materiae* with regard to acts performed while he or she was serving in an official capacity.[9] In addition to immunity *ratione materiae*, high-ranking officials (traditionally, the "troika")[10] are also granted immunity *rationae personae*, immunity for personal acts committed during the official's time in office. Since the immunity is connected with the post occupied by the official in government service it is of temporary character and becomes effective when the official takes up the post and ceases when he or she leaves that post.[11]

Finally, the immunities attached to the Head of State are often considered qualitatively from those attached to the other two positions. This is because the Head of State is considered the "personification" of that state, someone whose sovereignty is inviolable. For example, Article 21 of the 1969 Convention on Special Missions clearly distinguishes between Heads of State in paragraph 1 and Heads of Government/Foreign Ministers in paragraph 2.[12]

### B) Jurisdiction

As discussed above, the various sources and types of immunity assume that there is jurisdiction from which the state official requires this immunity. The starting point for a discussion of jurisdiction is the Permanent Court of International Justice decision in the famous *Lotus* case.[13] In this case, Turkey initiated a criminal proceeding against a French national accused of involuntary manslaughter resulting in Turkish casualties on the high seas. The Court held there was no rule of CIL prohibiting Turkey from asserting jurisdiction over events committed outside Turkey. The Court stated that, as a matter of principle, jurisdiction is territorial and that a state cannot exercise jurisdiction outside its territory without authorization derived from either CIL or treaty law. However, it then proceeded to qualify this statement:

> *It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad. . . it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules.*[14]

It must be noted that the court was speaking here of *prescriptive*, not *enforcement*, jurisdiction. In other words, it was referring to what a state can do in its own territory when investigating or prosecuting crimes committed abroad, not what that state can do in the territory of another state with respect to that crime. Although the decision leaves many unanswered questions[15] and has been followed by 80 years of international law development, it is an important and early recognition of the principle of universal jurisdiction.[16]

Turning to treaty law, the most important legal basis in the case of universal jurisdiction for war crimes is Article 146 of the IV *Geneva Convention* of 1949, which lays down the principle *aut dedere aut judicare* (extradite or prosecute):

> *Each High Contracting Party shall be under the obligation to search for persons alleged to have committed… such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also…hand such persons over for trial to another High Contracting Party...*[17]

As mentioned, attempts to ensure that war criminals (even former Heads of State) did not escape accountability for their actions based on their official position go back as far as WWII.

The Charter establishing the Nuremberg Tribunals states, "The official position of the defendants, whether as Heads of State/Government, or responsible officials in government departments, shall not be considered as relieving them from responsibility or mitigating punishment."[18] Article IV of the *Genocide Convention* states that "Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."[19] Similarly, the Statutes of both the ICTR and the ICTY state "the official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment."[20]

Most recently, Article 27 of the Rome Statute of the International Criminal Court states:

1. *This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility...*
2. *Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.*[21]

The ICC is arguably the widest-reaching attempt thus far to hold officials accountable for international crimes. However, Article 27 must be read in conjunction with Article 98, which prevents the Court from proceeding with a request for surrender or assistance that would require the requested state to act inconsistently with its obligations under international law.[22] In addition, the major roadblock to making use of these provisions to prosecute war criminals shielded by immunity is that a state must accept the ICC's jurisdiction by ratifying the Rome statute; many states have not done so.

Although none of the treaty provisions mentioned above specifically remove the immunities accorded to the troika with respect to national court jurisdiction, they illustrate a clear trend in international law to hold state officials accountable for serious international crimes. In this respect, the provisions may provide for national court jurisdiction where a Head of State, Head of Government, or Foreign Minister is accused of a serious international crime.

## RECENT CASE LAW AND CUSTOMARY INTERNATIONAL LAW (CIL)

In its 2008 preliminary report on immunity of state officials from foreign criminal jurisdiction, the ILC recognized that "the group of persons enjoying immunity from foreign criminal jurisdiction is not limited to Heads of State."[23] It also reached the conclusions with respect to treaty law (outlined above) that "these treaties do not regulate questions of immunity of State officials from foreign criminal jurisdiction in general or as regards many specific situations or as regards the precise definition of the group of officials enjoying immunity"; and "there is no universal international treaty fully regulating all these issues and related issues of immunity of current and former State officials from foreign criminal jurisdiction."[24] The report also correctly remarks, "not all the international treaties regulating this subject have entered into force, and those which have entered into force are not noted for the broad participation in them of States."[25]

Finally, the report observes that "the question of immunity of State officials from foreign criminal jurisdiction, as well as the question of jurisdictional immunity of States, are matters concerning inter-State relations" and that, for this reason, "the basic primary source of law in this matter is international law."[26] Ideally, the report states, domestic law should in this sphere play a subsidiary role, allowing implementation of the provisions of international law to regulate the question of immunity.[27]

That said, some domestic courts have carefully considered international law in addressing the question of immunity of state officials with respect to serious international crimes, and these decisions have contributed to the development of CIL. For example, in the *Pinochet* case,[28] the UK House of Lords had to consider whether immunity applied to Chile's former Head of State, Augusto Pinochet, in order to respond to the Spanish government's request to extradite Pinochet to Spain in order to try him for crimes prohibited by the *Convention Against Torture* (CAT). Lord Browne-Wilkinson aptly stated the issue as:

> *…whether international law grants state immunity in relation to the international crime of torture and, if so, whether the Republic of Chile is entitled to claim such immunity even though Chile, Spain and the United Kingdom are all parties to the Torture Convention…*[29]

Lord Browne-Wilkinson found that, once out of office, Heads of State retain immunity for official acts performed while in office (*ratione materiae*) but lose immunity *ratione personae*.

He then concluded that there is a "strong ground for saying that the implementation of torture as defined by the Torture Convention cannot be a state function" because acts which are criminal under the local law can still have been done officially, therefore giving rise to immunity *ratione materiae*. By ratifying the CAT, member states (including the parties to the *Pinochet* dispute) agreed to ban and outlaw torture. Moreover, because the international crime of torture must be committed "by or with the acquiescence of a public official", all defendants in torture cases will be state officials. Lord Browne-Wilkinson finds it impossible to accept that the Convention drafters intended to allow those most responsible to escape liability while their inferiors are held accountable.

While Lord Browne-Wilkinson's arguments could be logically extended to support removing immunity for high-ranking officials with respect to other serious international crimes (war crimes and crimes against humanity), it is clear that he reached his conclusions in the specific context of three states that have ratified the CAT. In fact, he explicitly expresses doubts as to whether, "before the coming into force of the Torture Convention, the existence of the international crime of torture as *jus cogens* was enough to justify the conclusion that the organization of state torture could not rank for immunity purposes as performance of an official function."[30]

In a separate opinion, Lord Goff of Chieveley strongly disagrees with Lord Browne-Wilkinson's argument, which he sees as premised upon the idea that ratification of the CAT implies a waiver of the principle of immunity *ratione materiae*. He finds no evidence that such a waiver was ever intended, or even discussed, by the parties in preparing the treaty and argues that a more explicit waiver is needed to override immunity.[31] Lord Hope of Craighead, who agreed with Lord Browne-Wilkinson's majority position, counters this position by re-framing the issue not as one of implied waiver, but one in which "the obligations which were recognized by customary international law in the case of such serious international crimes by the date when Chile ratified the Convention are so strong as to override any objection by it on the ground of immunity *ratione materiae.*"[32]

As Writh notes, four of the seven law lords denied immunity for core crimes in general – not just torture under the CAT. This denial of immunity is thus *opinio juris* and when viewed in conjunction with state practice suggests that immunity *rationae materiae* does not exist for core crimes.[33]

In a case similar to the *Pinochet* case, the *Quadaffi* case,[34] a *juge d'instruction* of the *Tribunal de Grande Instance* in Paris brought charges against Libyan leader Muoammar Quadaffi for complicity in the bombing of a DC-10 aircraft on 9 September 1989, which killed 156 passengers and 15 crew members, including some French citizens.[35] The Court declined jurisdiction based on the argument that Heads of State enjoy immunity from international crimes. However, the court remarks that, "at this stage in customary international law, the crime charged [terrorism], no matter how serious, does not fall within the exceptions to immunity from jurisdiction of foreign Heads of State in office."[36] The logical inference from this statement is that there are exceptions to the immunity rule.

## CASE CONCERNING THE ARREST WARRANT OF 11 APRIL 2000: DEMOCRATIC REPUBLIC OF THE CONGO V. BELGIUM

### A) Facts

On 11 April 2000, the Belgian investigating magistrate issued an "international arrest warrant *in absentia*" against the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo (DRC), Abdulaye Yerodia Ndombasi.

The warrant alleged grave breaches of 1949 Geneva Conventions based on speeches made inciting racial hatred during August 1998. Article 7 of Belgian Law, under which Mr. Yerodia was charged, provides that "The Belgian courts shall have jurisdiction in respect of the offences provided for in the present Law, wheresoever they have been committed."[37] The complainants were twelve individuals residing in Belgium, five of whom were of Belgian nationality. However the acts to which the warrant relates took place outside of Belgian territory, Mr. Yerodia was not a Belgian national at the time of the acts, and he was not in Belgian territory at the time the arrest warrant was issued and circulated. After Yerodia left office, the DRC brought the case before the ICJ and presented the Court with an opportunity to clarify existing international law on immunity of state officials and universal jurisdiction.

### B) MAJORITY JUDGEMENT

Before ruling on the substantive legal issues, the majority judgment in the *Arrest Warrant Case* addressed five technical arguments put forth by Belgium. Belgium's fifth argument, the one with the most direct bearing on the Court's substantive ruling, was that the *non ultra petita* rule[38] limited the Court's jurisdiction to those issues that were subject of the Congo's final submissions.

Originally, the Congo had put forward a twofold argument based on: 1) Belgium's lack of jurisdiction; and 2) the Minister's immunity from jurisdiction, but the former was excluded from its final submissions. Thus, Belgium argued that the Court was precluded from ruling on the issue of universal jurisdiction. The Court said that while it is not entitled to decide upon questions not asked of it, the *non ultra petita* rule did not preclude the Court from addressing certain legal points in its reasoning.[39]

On the merits of the case, the Court said several things. First, it noted that the Conventions cited "provide useful guidance on certain aspects of the question of immunities" but "do not…contain any provision specifically defining the immunities enjoyed by Ministers for Foreign Affairs."[40] Thus it would have to decide the issue based on CIL.[41]

Second, it concluded that the functions of the Minister of Foreign Affairs are such that, "throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability."[42]

Third, the Court ruled that there is no distinction in that respect between acts performed in an official capacity vs. those performed in a private capacity, nor is there a distinction between acts performed before vs. acts performed during the individual's time in office.[43] Fourth, the Court said that even the mere risk that traveling to another state will result in the Minister of Foreign Affairs exposing himself or herself to legal proceedings could deter international travel when the Minister is required to do so in order to perform his or her official functions.[44] Fifth, the court ruled that there is no exception to immunity from criminal jurisdiction and inviolability where the incumbent foreign minister is suspected of having committed war crimes or crimes against humanity.[45] Finally, in one of the more controversial aspects of the decision, the Court drew distinctions between procedural and substantive immunity, and immunity versus impunity, saying that jurisdiction does not imply absence of immunity, and absence of immunity does not imply jurisdiction.[46] The Court went on to note that there is no immunity in a perpetrator's home country; the home state of the accused could waive immunity; the person may lose some immunities upon leaving office; and the person could be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.[47]

## C) SUMMARY OF DISSENTING JUDGEMENTS

Judge Van den Wyngaert's vigorous dissent offers a powerful critique of the majority judgment. First, she argues that while Belgium may have violated international comity, it did not violate international law.[48]

Second, she notes the brevity of the majority judgment, which is due to the fact that it did not address the logically prior issue of universal jurisdiction, and because it did not address other arguments as fully as other decisions from national and international courts addressing similar issues.[49]

Third, she notes that while the case technically concerned the issuance of the arrest warrant and its legality, in broader terms it was about how far states can and must go in implementing international criminal law, given a) the inability of the international criminal courts to prosecute *all* international crimes; and b) the need to balance the competing principles of international accountability for serious crimes, and the sovereign equality of states.[50]

On the substantive issues, she disagreed with the majority's pronouncements that a) there is a rule of CIL granting full immunity to Foreign Ministers; and b) no exception exists for serious international crimes. She argues that there are virtually no examples of one state granting immunity to another's Foreign Minister.[51] To the extent that this could be construed as evidence of "negative practice" (states *refraining* from prosecuting another's Minister for Foreign Affairs), she argues that a) this could be attributed to other political or practical considerations; and b) "negative practice" is not sufficient to constitute the requisite *opinio juris* of a rule of CIL: "Only if this abstention was based on a conscious decision of the States in question can this practice generate customary international law."[52] Finally, she rejects the analogies made between the Minister for Foreign Affairs on the one hand, and Heads of State or diplomatic agents on the other. The former, she says, is granted immunities based on his or her personification of the state; the latter is clearly governed by treaty law and concepts such as reception by the host state and *persona non grata*.

In sum, she finds evidence in international law of the Foreign Minister being treated differently than the Head of State with respect to immunities, and argues that if Foreign Ministers were accorded the same immunities as Heads of State, "*Male fide* governments could appoint suspects of serious human rights violations to cabinet posts in order to shelter them from prosecution in third States."[53] Implicit in this statement is the argument, not raised in the majority judgment, that if Foreign Ministers are elevated to the level of Heads of State with respect to immunities granted, why shouldn't other ministers be granted the same privilege? Particularly as the world becomes increasingly globalized and states are forced to work more closely together on a myriad of issues, there are few (if any) cabinet ministers who would not be required at some time to travel to other states throughout the course of their duties.

With respect to the majority's rejection of a possible war crimes exception, Judge ad hoc Van den Wyngaert argues that because the majority mistakenly classified the immunities accorded to Foreign Ministers as CIL, it fails to analyze fully whether there may be a hierarchical distinction between the rules concerning immunities and those concerning accountability for serious international crimes. She seems to argue that even if full immunity of Foreign Ministers were a rule of CIL, the *jus cogens* nature of the prohibitions against war crimes and crimes against humanity would override these. Finally, she is very critical of the majority's immunity/impunity distinction, particularly the fact that the Court does not qualify its distinction between official and private acts.[54]

## THE ICJ AFTER THE ARREST WARRANT CASE

More recently, the ICJ considered immunity of state officials as a secondary issue in *Questions of Mutual Assistance in Certain Criminal Matters (Djibouti v. France)*.[55] This case concerned France's investigation into the 1995 death of Judge Bernard Borrel, a French national. The *procureur de la République* of Djibouti opened a judicial investigation into Borrel's death on 28 February 1996. The investigation concluded that the cause of death was suicide, and the case was closed on 7 December 2003.[56] In France, a judicial investigation into the cause of death eventually joined with a civil action commenced by Borrel's widow and children and then transferred to the Paris *Tribunal de grande instance* on 29 October 1997.[57] By this time, French authorities suspected the cause of death not to be suicide, but murder.

As the investigation proceeded, France issued a summons on two separate occasions for Djibouti's Head of State to testify in respect of subornation of perjury in the '*Case against X for the murder of Bernard Borrel*'.[58] The first summons was withdrawn because it did not comply with certain procedural requirements of French law; the second was issued while the Djiboutian Head of State was in France attending a conference and news of the summons was widely publicized by the French media. Djibouti argued that the summons violated France's obligation under customary and general international law "to prevent attacks on the person, freedom or dignity of an internationally protected person, whether a Head of State or any representative or official of a State" and asked the Court to adjudge and declare that "the French Republic is under an international obligation to ensure that the Head of State of the Republic of Djibouti, as a foreign Head of State, is not subjected to any insults or attacks on his dignity on French territory."[59]

Based on its decision in the *Arrest Warrant Case*, the Court held that the determinative factor in assessing whether or not there was an attack on the immunity of the Djiboutian Head of State was whether that person was subject "to a constraining act of authority."[60] The Court went on to find that the first summons was "merely an invitation to testify which the Head of State could freely accept or decline" and that, consequently, "there was no attack by France on the immunities… enjoyed by the Head of State, since no obligation was placed upon him…"[61] However, the Court did find that the issuing judge "failed to act in accordance with the courtesies due to a foreign Head of State."[62]

With respect to the second summons, the Court said that there was no attack on the honour or dignity of the President merely because this invitation was sent to him while he was in France to attend an international conference. However, the Court observed that if Djibouti had proven that such confidential information (news of the summons) was passed from the French judiciary to the media, "such an act could, in the context…have constituted not only a violation of French law, but also a violation by France of its international obligations."[63] Although the issue of immunities accorded to state officials was secondary in this case, the ICJ established that merely being asked to testify in a perjury investigation was not so constraining on the Head of State's authority as to constitute an interference with his or her ability to perform necessary duties, and thus was not an attack on his or her immunity.

## JUS COGENS NORMS

The *Pinochet* case in particular illustrates two of the prominent approaches to balancing the competing principles, accountability of state officials for serious international crimes vs. sovereign inviolability of foreign states, at play in this essay. They are the implied waiver and the *jus cogens* approach.

First, Lord Browne-Wilkinson explicitly acknowledged that ratification of the CAT played an important part in his finding that Pinochet could be held accountable for (official) acts of torture committed while in office. This is known as the "implied waiver" approach. If a state has ratified an international treaty prohibiting a particular international crime (torture, war crimes, crimes against humanity), in doing so it has contributed to formally criminalizing those acts in international criminal law, and can therefore be said to have waived immunity from foreign prosecution for state officials accused of that crime.

Lord Browne-Wilkinson thought that it did not make sense for a state to ratify a treaty condemning a particular crime and then still be permitted under international law to do nothing about it. Lord Goff did not agree, he felt that a waiver of immunity for state officials should not be taken lightly and that there must be crystal clear evidence of that waiver before immunity can actually be removed. Also, as Zappalà argues, if there was no exception to the immunity rule before a state ratified the treaty, all crimes committed by officials of that state before enactment of relevant treaties would be protected by immunity, and this could not have been the drafters' intent.[64]

Another approach, used by Lord Hope of Craighead is that the norms in question (prohibition of serious international crimes) trump the usual rules of immunity of state officials. In other words, prohibitions against torture, war crimes, genocide and crimes against humanity are *jus cogens* norms, which give rise to obligations *erga omnes* from which states may not derogate. As we saw in Judge ad hoc Van den Wyngaert's dissent in the *Arrest Warrant* case, the failure of the court to seriously consider the hierarchy of these norms and the potential implications flowing from that lack of analysis was one of the major criticisms of the majority judgment.

As Cassese argues, if states are permitted under international law to use the protective principle to take proceedings for extraterritorial acts whose link with the forum state lies exclusively in the infringement of a national interest of that state, it would seem appropriate that states could do the same for acts that violate *universal* values held by the world community.[65] Moreover, state officials should not be immune from this principle:

> *To allow these agents to go scot-free only because they acted in an official capacity, except in the few cases where an international criminal tribunal has been established, or where a treaty is applicable, would mean to bow to and indeed strengthen traditional concerns of the international community (chiefly, respect for state sovereignty), which in the current international community should instead be reconciled with new values, such as respect for human dignity and human rights.*[66]

Although powerful, the main problem with this argument is that *jus cogens* norms are not a "blank cheque" for foreign states to unilaterally assert jurisdiction over whomever they choose. No one argues that immunity of state officials, as a concept, is a bad thing; indeed, there are many compelling reasons why it is necessary, including facilitating smooth relations between states and allowing state officials to do their jobs unimpeded.

The question is whether, and to what extent, exceptions exist to acknowledge other critically important principles of international law such as fundamental human rights and human dignity. Overall, *jus cogens* norms provide a strong argument, not for an indiscriminate removal of immunities, but for a balancing of these principles. The argument could include a "war crimes" exception to the CIL rule of immunity of state officials from national court jurisdiction. While granting states ability to arrest such officials *while in office* would seriously impede this, retired high-ranking officials need not be replaced.

## CONCLUSION

The ICJ decision in the *Arrest Warrant* case halted a clear emerging trend in CIL toward recognizing certain exceptions to the rules of immunity for state officials. By not addressing the jurisdiction issue as fully as it could have, the ICJ failed to truly weigh the competing principles at issue and missed an excellent opportunity to clarify the developing law in this area.

Moreover, the idea of removing immunity in a situation such as that which arose in the *Arrest Warrant* case is implicitly premised on the ethnocentric idea that western justice systems are better able to dispense justice. It is easy to forget that many in the developing world do not perceive western justice systems as "fair" at all and may have the same feeling that arose before the Nuremberg tribunals, that trials of their former officials in a foreign court system would merely serve to disguise predetermined findings of guilt. Finally, many developed countries such as Belgium are certainly not innocent of complicity in developing country human rights transgressions.

Unfortunately, history provides us with countless examples that demonstrate why a state cannot always be trusted to hold former officials accountable for serious international crimes. Moreover, the debate presumes that prosecutions for serious international crimes would gravely impact the state official's ability to conduct his or her official duties, and this is not necessarily the case, particularly if *rationae materiae* were removed *after* the official leaves office.[67] As Writh notes, state officials are obliged to contribute to the international community's shared set of values; "the highest of these values is the maintenance of peace; and immunity *rationae personae*, protecting the most important representatives and decision-makers of a state, helps safeguard the ability of a state to contribute to the maintenance of international and internal peace."[68]

In other words, while granting states the ability to arrest such officials *while in office* would seriously impede this, retired officials, even though high-ranking, need not be replaced. Most importantly, the trend in international law has been toward creating limited exceptions to the rule of immunity of state officials. The *jus cogens* nature of serious international crimes does not provide a "blank cheque" to remove immunity, but it does provide support for this growing trend.

## ABOUT THE AUTHOR

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## ENDNOTES

[1] Theodor Meron. "Reflections on the Prosecution of War Crimes by International Tribunals." *American Journal of International Law*, 525 (2006): 551.

[2] *Ibid* at 552.

[3] Due to space limitations, this essay will not address the broader question of immunities accorded to other high-ranking state officials, nor will it focus on other international fora in which the troika do not enjoy complete immunity, except insofar as treaty provisions on these topics can be used as evidence of a developing norm in international law of holding high-ranking state officials accountable for serious international crimes.

[4] *Case Concerning the Arrest Warrant of 11 April 2000: Democratic Republic of the Congo v. Belgium*, ICJ Judgment of 14 February 2002.

[5] *Questions of Mutual Assistance in Certain Criminal Matters (Djibouti v. France)*, ICJ judgment of 4 June 2008.

[6] Preliminary report on immunity of State officials from foreign criminal jurisdiction, A/CN.4/601, by Special Rapporteur Roman Anatolevich Kolodkin. <http://www.un.org/law/ilc/> (*accessed 25 November 2008*) at p.27 [ILC Preliminary Report].

[7] *Vienna Convention on Diplomatic Relations*, 18 April 1961, 500 U.N.T.S. 95-239 at art. 31-32.

[8] Once declared *persona non grata*, an individual is no longer protected by diplomatic immunity and must leave the country in order to avoid being prosecuted under the host country's domestic laws.

[9] ILC Preliminary Report, *supra* note 6 at p.38.

[10] As will be discussed below, the distinctiveness of the Foreign Minister vis-à-vis other Ministers with respect to the need to travel unimpeded in order to perform his or her job functions is less clear today as most, if not all, Ministers deal with issues requiring some level of international cooperation.

[11] ILC Preliminary Report, *supra* note 6 at 37.

[12] *Vienna Convention on Special Missions*. New York, 16 December 1969, Annex to UNGA res. 2530 (XXIV) of 8 December 1969 at art. 21. It should be noted that there are conflicting opinions as to what extent this Convention in particular may be considered a codification of CIL; moreover, it clearly speaks to immunities enjoyed by Foreign Ministers only while on *official visits* (when they take part in a special mission of the sending State), and does not apply as general rule. However, it is one of several examples where the Head of State is treated differently than other high-ranking officials in international law.

[13] *The Case of the S.S. "Lotus"*, Permanent Court of International Justice, Series A, No. 10, 7 September 1927 <http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus/> (*accessed 1 December 2008*).

[14] *Ibid.* at pp.14-15.

[15] For example, the line between issuing an arrest warrant and *enforcing* that warrant abroad, as was disputed in the *Arrest Warrant* case.

[16] For example, in his separate opinion in the *Arrest Warrant* case, discussed below, Judge Guillaume distinguishes between universal jurisdiction (*compétence universelle*) over extraterritorial crimes by foreigners, based on the accused's presence in the forum state, and universal jurisdiction by default (*compétence universelle par defaut*) asserted by a state without any link to the crime or the defendant, not even his presence in the territory, when that jurisdiction is first exercised (*Arrest Warrant Case*, separate opinion of Judge Guillaume, par.13).

[17] *Convention (IV) Relative to the Protection of Civilian Persons in Time of War*. Geneva, 12 August 1949, Article 146. <http://www.icrc.org/ihl.nsf/WebART/380-600168?OpenDocument> (*accessed 11 November 2008*).

[18] *Charter of the International Military Tribunal in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 8 August 1945, 82 U.N.T.S. 280 at art. 7.

[19] *Convention on the Prevention and Punishment of the Crime of Genocide,* 9 December 1948, 78 U.N.T.S. 278 at art. IV.

[20] *International Criminal Tribunal for Yugoslavia*, SC Res. 808, UN SCOR, 48th Sess., Annex, at 20, UN Doc. S/Res/23274 (1993) at art. 7(2) [*ICTY*]; *International Criminal Tribunal for Rwanda*, SC Res. 955, UN SCOR, 49th Sess., Annex, at 20, UN Doc. S/Res/955 (1994) at art. 6(2) [*ICTR*].

[21] *Rome Statute of the International Criminal Court*, 17 July 1998, UN Doc. A/CONF.183/9 at article 27.

[22] *Ibid.* at article 98.

[23] ILC Preliminary Report, *supra* note vi at 15.

[24] *Ibid.* at 15.

[25] *Ibid*.

[26] *Ibid.* at 20.

[27] *Ibid*. at 20-21.

[28] *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* ("Pinochet No. 3"), House of Lords, 24 March 1999, [2000] AC 147. <http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm> (*accessed 28 October 2008*).

[29] *Ibid.*

[30] *Ibid*.

[31] *Ibid.*

[32] *Ibid.*

[33] Steffen Wirth. "Immunity for Core Crimes? The ICJ's Judgment in the *Congo v. Belgium* Case." European Journal of International Law 13/853 (2002): 884.

[34] *Quadaffi* case, Decision of the *Chambe d'accusation* of the *Cour d'Appel* of Paris, 20 October 2000.

[35] Salvatore Zappalà, "Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The *Ghaddafi* Case Before the French Cour de Cassation." European Journal of International Law 12/595 (2001): 596.

[36] *Ibid.* at 600-601.

[37] *Supra* note 4 at para. 15.

[38] The *non ultra petita* rule states that the body adjudicating a dispute should only rule on those issues on which it is asked to rule.

[39] *Supra* note 4 at paras. 41-43.

[40] *Ibid.* at para. 52.

[41] *Ibid*.

[42] *Ibid.* at para. 54.

[43] *Ibid.* at para. 55.

[44] *Ibid.* at para 55.

[45] *Ibid.* at para. 58. The Court noted, at par. 58, that none of the decisions of the Nuremberg and Tokyo international military tribunals, nor those of the ICTY, dealt with the specific question before the court.

[46] *Ibid.* at para. 59.

[47] *Ibid.* at para. 61. It should be noted that it was a reduced majority (13-3) that restricted the scope of the case by applying the *non ultra petita* rule so rigidly as to essentially avoid the question of universal jurisdiction. See Boister, N. "The ICJ in the Belgian *Arrest Warrant Case*: Arresting the Development of International Criminal Law" (2002) 7 J. Conflict and Security L. 145 at 297.

[48] *Arrest Warrant Case*, dissenting opinion of Judge ad hoc Van den Wyngaert, at para. 1.

[49] *Ibid.* at para. 4.

[50] *Ibid.* at para. 5.

[51] *Ibid.* at paras. 10-11.

[52] *Ibid.* at para. 13. On this latter argument she cites the *Lotus* case.

[53] *Ibid.* at para. 21.

[54] *Ibid.* at para. 36. The latter may no longer be protected by immunity when the individual leaves office.

[55] *Questions of Mutual Assistance in Certain Criminal Matters (Djibouti v. France)*, ICJ judgment of 4 June 2008.

[56] *Ibid.* at para. 20.

[57] *Ibid.* at para. 21.

[58] *Ibid.* at paras. 32-33.

[59] *Ibid.* at paras. 73-74.

[60] *Ibid.* at para. 170.

[61] *Ibid.* at para. 171.

[62] *Ibid.* at paras. 171-172.

[63] *Ibid.* at para. 180. Interestingly, with respect to two of the other officials summoned to testify – both of whom were found guilty, *in absentia*, of subornation of perjury - the court noted, at par. 194, "that there are no grounds in international law upon which it could be said that the officials concerned were entitled to personal immunities, not being diplomats within the meaning of the Vienna Convention on Diplomatic Relations of 1961, and the Convention on Special Missions of 1969 not being applicable in this case". This goes to the question of whether immunity could be extended to state officials beyond the "troika".

[64] *Supra* note 34 at 603.

[65] Antonio Cassese. "When May Senior State Officials be Tried for International Crimes? Some Comments on *Congo v. Belgium* Case." European Journal of International Law 13/853 (2002): 859.

[66] *Ibid*. at 873-874.

[67] The concern with this approach is that the state could simply appoint an individual to a high-ranking position to which immunity attaches in order to avoid extraterritorial prosecution.

[68] *Supra* note 34 at 888.

# MAINSTREAMING RESOLUTION 1325 ON WOMEN, PEACE AND SECURITY – ARE WE THERE YET?

By Renee Black


## ABSTRACT

*In October 2000, the Security Council adopted Resolution 1325 calling for women's participation in peace processes, the promotion of women's rights, and the protection of women from violence. Since then, however, advocates argue integration of these principles has been weakly implemented and that only a third of resolutions contain a reference to a gender perspective. This brief re-examines the need for this resolution, analyzes how and in what ways this resolution has diffused into the discourse at the Security Council, and identifies policy implications at the international level, and for Canada looking forward.*

*N.B. The research article on which this policy brief is based was published in the Journal of Military and Strategic Studies (Vol 11, No 4: Summer 2009) at the University of Calgary. It was the recipient of the JMSS Award of Excellence.*


## INTRODUCTION

In October 2000, the United Nations (UN) Security Council adopted Resolution 1325 on Women, Peace & Security, which acknowledged for the first time "the disproportionate and unique impact of armed conflict on women, recognized the under-valued and under-utilized contributions women make to conflict prevention, peacekeeping, conflict resolution and peace-building, and stressed the importance of their equal and full participation as active agents in peace and security" (NGO Working Group on Women, Peace & Security).

However, in the nine years since the adoption of this landmark resolution, its influence remains unclear and important questions remain over what actions are needed to address the weaknesses in its implementation. One NGO project called Resolution Watch monitors the influence of 1325 on Security Council discourse by analyzing resolution language for 19 countries on the Department of Peacekeeping Operations agenda. (See Table 4)

They find that "the integration of a gender perspective and the provisions of 1325 have been sporadic and slow; many resolutions contain no references to women or a gender perspective," and that only a third refer in some capacity to women or gender." While there is clearly a gap in the Security Council's commitment to 1325, this analysis fails to answer questions that might help to strengthen policy responses. For example, has this behaviour shifted over time? Are certain aspects of 1325 more prevalent than others? Are certain types of conflict more likely to elicit a reference to 1325 than others? What does this demonstrate about the extent to which 1325 has become mainstreamed in the discourse of conflict-specific resolutions? This brief reviews the need for Resolutions 1325, analyzes patterns found in the discourse of Security Council language in order to answer some of questions listed above, and highlights the policy relevance of 1325 to Canada today.

## UNDERSTANDING THE NEED FOR 1325

Recognition of the need for a specific resolution dedicated to addressing the situation of women in armed conflict has resulted from over two decades of lobbying by women's activists in conflict-affected countries. Yet, the attention drawn to the impact of conflict on women during several conflicts in the 1990s likely provided critical momentum for the issue. In both Rwandan and Bosnia, women became targets of systematic campaigns of sexual violence. The subsequent expansion of the jurisprudence arising from the establishment of international criminal tribunals in Bosnia and Rwanda, and subsequently the International Criminal Court in 1998, have been important steps in advancing the situation of women in these two countries in particular and in international law more broadly. These changes include the recognition that "rape was used as a form of torture and sexual organs of both men and women were deliberately, brutally violated."

In the aftermath of the Rwandan genocide, women unexpectedly represented 70% of the population, and were forced to assume non-traditional roles. Despite laws that limited access to formal employment, property ownership and even control over their own children, women immediately began to head households, act as community leaders and family providers, and help to address the needs of devastated communities, including: burying the dead, finding homes for nearly 500,000 orphans, leading reconstruction efforts and becoming the most productive segment of the population (Powley). They also contributed to community security by convincing relatives on both sides of the conflict to return from hiding or refuge in other countries.

Many Rwandans perceive women to be better at reconciliation and less corrupt than men (Powley), which has likely been a contributing factor to the election of 55% women in the Rwandan parliament today.

Liberia has also witnessed a particularly dramatic shift in women's political participation. It is the first African country to elect a female head of state, it hosts one of only two female-led UN missions, and it has hosted the first and second ever all-female UN peacekeeping police units. Female enrolment in the Liberian National Police tripled following the deployment of these units. Furthermore, Liberia has a female-led Security Sector that includes a specialized sexual crimes unit. The presence of this unit has helped to increase social trust in the police in the communities where they serve. This, in turn, has resulted in increased reporting rates, which consequently have led to a decline in sexual violence crimes.

Liberia also recently hosted an international Colloquium on Women's Leadership in partnership with Finland, which culminated in the Monrovia Declaration and Call to Action on Resolution 1325. Moreover, just as the conflicts that affected these countries impacted on neighbouring countries, there is also evidence that positive advancements for women in Liberia and Rwanda are impacting on the situation of women in neighbouring countries such as Sierra Leone and Burundi.

Despite these successes, the saliency of 1325 is weak outside of key advocacy circles, women's groups, and selected international organizations, as evidenced by the fact that many programs and policies continue to fail to adequately consider the situation of women. For example, in post-conflict Sierra Leone – where forcibly-recruited women made up 25% of combatants – demobilization and reintegration programs failed to recognize the differentiated impacts of the conflict on women, including that many communities rejected returning women. This, in turn, forced many women to turn to prostitution as a source of income and survival. According to an Amnesty International report written six years after the conflict, "rebel wives," continue to be "targeted for discrimination and exclusion and [are] denied access to health care, jobs and schools."

More generally, reintegration assistance tends to favour former combatants returning to communities who are generally *male,* while *females* who may have been victims of reintegrating combatants receive little or no assistance.

Although such reintegration assistance for former combatants remains a critical aspect of peacebuilding strategies, these policies have potential to reinforce existing disparities and can even be perceived by some as rewards for their role in the conflict.

The UN continues to strengthen its reintegration programs based on this and other experiences, however there are many other examples of the failure to consider gender perspectives in policy development. The key is that women's issues should not be considered separately as a distinct issue, and prioritized above or below other considerations; rather, emphasis needs to be placed on the idea that gender perspectives within policy analysis should become an integral part of *all* decision-making.

While there is a much broader recognition today of this need, many political actors continue to fail to see the value of including women or lack the political will to implement the principles upheld in 1325. As Swedish diplomat Pierre Schori explains, "after childbirth, war-making has possibly been the most segregated of activities along gender lines. Armed forces and military factions are generally male-dominated institutions, while women and girls face most risks and dangers. Yet, women are generally absent from official initiatives to end conflicts and their voices are missing from decisions on priorities in peace processes."

Resolution 1325 challenges historical characterizations of women as victims, and instead calls for their active participation in conflict resolution. Schori emphasizes that 1325 is not an end, but rather the beginning of a process that will gradually help to reduce the gap in inequalities that exist between men and women at all levels of society. Closing this gender gap will require considerable change, including through legal reform, effective law enforcement, normalizing the practice of gender mainstreaming, and employing the discourse of 1325 to ensure that women are able to effectively participate in decision-making processes.

## MAINSTREAMING RESOLUTION 1325?

This section examines how Resolution 1325 has influenced Security Council discourse by examining the language of Security Council resolutions over a 10-year period. This analysis is broken down into two segments.

In the first segment, 315 resolutions[1] adopted between October 31, 2000 and October 31, 2008, are analyzed according to the following distinctions:

- References to 1325, which can either be *direct,* in that 1325 is specifically mentioned, or *indirect,* meaning that 1325 language is used but is not specifically mentioned.
- Each resolution is examined for the presence of one or more of 18 possible 1325-related themes (See Table 1).[2]
- Each theme is categorized by one of the three key pillars*:* the *participation* of women at all levels of decision-making; *prevention* through the promotion women's human rights, and; the *protection* of women from harm.

In the second segment, 73 resolutions adopted between October 31 1998 and October 31st 2000 with reference to the same countries, are analyzed for their inclusion of five key words – "mother," "girl," "woman," "female" and "gender" – that indicate references to women before the adoption of 1325.

The analysis of these two data sets will help to show how references to women have shifted over time, which themes and patterns are more and less likely to emerge, and what shifts are occurring at a country level.

The following are the major findings resulting from this analysis:

| Rank | Theme | Pillar | Graph Code |
|---|---|---|---|
| 1 | General Reference to 1325 | Prevention | 1325 |
| 2 | Peacekeeping Operations | Prevention | PKO |
| 3 | Conflict Prevention & Resolution | Participation | CPR |
| 4 | Rule of Law & Human Rights: Institutions and Mechanisms | Prevention | ROL |
| 5 | Civil Society | Participation | CS |
| 6 | Disarmament, Demobilization, Reintegration, Resettlement and Repatriations | Prevention | DDR |
| 7 | Peace Negotiations & Agreements | Participation | PN&A |
| 8 | Constitution, Justice and Security Sector Reform | Participation | SSR |
| 9 | Governance & Electoral Processes | Participation | GEP |
| 10 | Reporting by the Secretary General | Prevention | UNSG |
| 11 | Sexual Exploitation & Abuse | Protection | SEA |
| 12 | Training of UN Personnel | Prevention | TUNP |
| 13 | Violations of Human Rights and Humanitarian Law | Protection | VHR |
| 14 | Refugees & Internally Displaced Persons | Protection | IDP |
| 15 | Protection of Civilians & Humanitarian Assistance | Protection | PCHA |
| 16 | *Sexual and Gender-Based Violence | Protection | SGBV |
| 17 | *Gender Equality & Post-Conflict Reconstruction | Participation | GE |
| 18 | *AIDS/ HIV | Protection | AIDS |

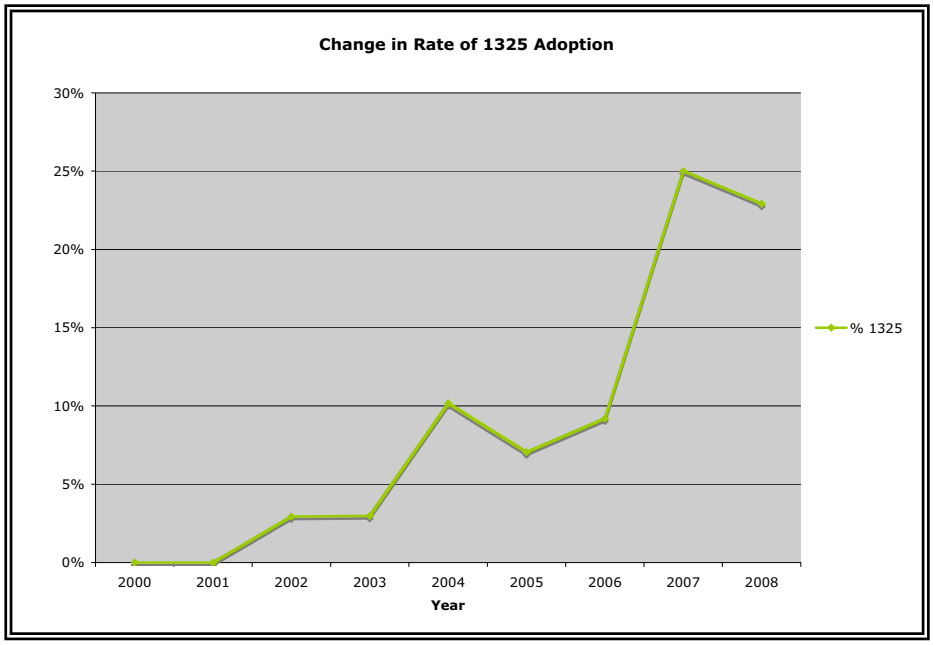
** Do not appear in the NGO Working Group checklist*

**Table 1: 1325 Themes**

*Note: Each theme can actually have element of any of the pillars, however each has a dominant focus, and that is what is what has been used here to classify each theme.*

## TEMPORAL PATTERNS

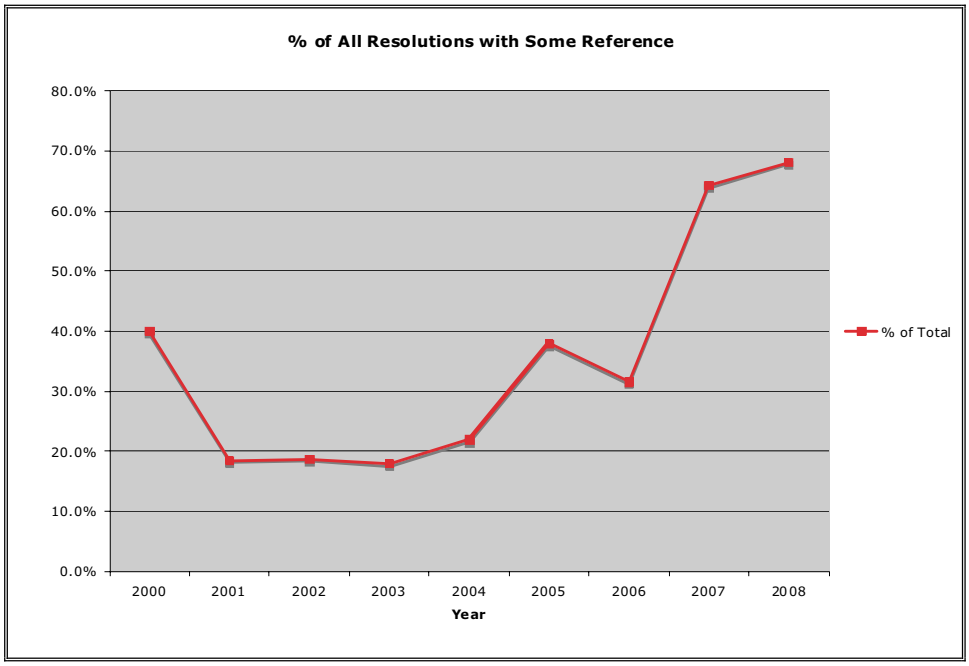
Direct references to 1325 can be found in 15% of all resolutions and have grown slowly over time, remaining under 11% until 2006 and jumping to 25% only in 2007. (See Graph 1). While only 34% of all resolutions contain either a direct or indirect reference to 1325, referencing has generally increased since 2001. Prior to 2005, references can be found in less than 22% of resolutions, yet this rose to 40% in 2005, and then to 64% and 68% in 2007 and 2008 respectively. (See Graph 2 and Table 2)




**Graph 1: % Change in Theme #1 (1325-Specific Reference) Since October 31, 2000**

| Year | Total # of Resolutions | # of Resolutions w Reference | % of All Resolutions |
|---|---|---|---|
| **2000** | 5 | 2 | 40.0% |
| **2001** | 27 | 5 | 18.5% |
| **2002** | 32 | 6 | 18.8% |
| **2003** | 39 | 7 | 17.9% |
| **2004** | 41 | 9 | 22.0% |
| **2005** | 50 | 19 | 38.0% |
| **2006** | 57 | 18 | 31.6% |
| **2007** | 42 | 27 | 64.3% |
| **2008** | 22 | 15 | 68.2% |
| **Total** | **315** | **108** | **34.3%** |

**Table 2: Change in Thematic Reference since October 31, 2000**




**Graph 2: % Change in All Thematic References since October 31, 2000**

Of the 73 Security Council Resolutions analyzed between October 31, 1998 and October 31, 2000, seven (less than 10%) contained one of the five key words, six of which refer to women as victims or in need of protection while one, UNSCR 1270, calls for "gender-related provisions" for UN personnel training protocols. None of these resolutions calls for the participation of women.

| Year | # of Resolutions | # of References | % of References |
|---|---|---|---|
| **1998** | 6 | 1 | 16.7% |
| **1999** | 38 | 5 | 13.2% |
| **2000** | 29 | 1 | 3.4% |
| **Totals** | 73 | 7 | 9.6% |

**Table 3: Resolutions & References Prior to 1325 (PW countries only)**

## THEMATIC PATTERNS

The themes most likely to be referenced tend to refer to the protection of women, or to procedural matters, which fall under the prevention pillar (e.g. training for UN personnel). None of the top fives themes focus on the participation of women in decision-making processes. (See Table 3) Themes that specifically address the participation of women, including Governance & Electoral Processes, Constitution, Justice & Security Sector Reform and Conflict Prevention & Peacebuilding, are among those least likely to be referenced.

| Rank | Theme | # of References | % of Resolutions |
|---|---|---|---|
| 1 | Sexual Exploitation & Abuse | 55 | 14.3% |
| 2 | UN Secretary General Reporting | 53 | 13.8% |
| 3 | Reference to 1325 | 42 | 10.9% |
| 4 | Training by UN Peacekeepers | 36 | 9.4% |
| 5 | Sexual & Gender-Based Violence | 28 | 7.3% |
| 6 | Protection of Civilians & Humanitarian Assistance | 27 | 7.0% |
| 7 | Rule of Law & Human Rights | 26 | 6.8% |
| 8 | Violence Against Human Rights | 25 | 6.5% |
| 9 | Peacekeeping Operations | 20 | 5.2% |
| 10 | Gender Equality & Post-Conflict Reconstruction | 15 | 3.9% |
| 11 | Demobilization, Disarmament, Reintegration, Resettlement & Repatriation | 12 | 3.1% |
| 12 | Conflict Prevention & Peacebuilding. | 12 | 3.1% |
| 13 | Constitution, Justice & Security Sector Reform | 10 | 2.6% |
| 14 | Civil Society | 9 | 2.3% |
| 15 | Governance & Electoral Processes | 8 | 2.1% |
| 16 | Refugees & Internally Displaced Persons | 3 | 0.8% |
| 17 | Peace Negotiations & Agreements | 0 | 0.0% |
| 18 | HIV/ AIDS | 0 | 0.0% |

**Table 4: Number and Percent of Thematic Reference**

## CONFLICT-SPECIFIC PATTERNS

Eight of the 19 countries analyzed have resolutions referring to over half (nine) of the possible 18 themes, with Sudan having resolutions reflecting 15 of the possible 18 different themes.

There is evidence of a strong positive correlation between the number of resolutions adopted for a given country and the number of themes represented throughout that country's set of resolutions.

Conflicts with highly complex peacekeeping missions tend to reference a greater number of themes, which is intuitively consistent given that complex operations are more likely to have more granular levels of reporting and more gender specialists.

There appears to be a positive correlation between the number of resolutions adopted by a particular conflict and the number of resolutions referencing 1325 directly or indirectly. Six countries – Afghanistan, Burundi, Golan Heights, Haiti, Sudan and Sierra Leone – have over 40% of country-specific resolutions containing some reference to 1325 or a 1325 theme. Countries with high numbers of resolutions and considerable 1325 references have typically experienced disturbing histories of violence against women, including high levels of rape by armed actors in countries with repressive governments and patriarchal traditions.

This is proven to be true in Afghanistan, the DRC, Liberia, Sierra Leone and Sudan and suggests a reactive rather than proactive response.

| Country | # of Resolutions | # of Theme Types | # of Resolutions with Reference to 1325 | % of Resolutions with Reference to 1325 |
|---|---|---|---|---|
| Sudan | 24 | 15 | 12 | 50.0% |
| Sierra Leone | 19 | 14 | 9 | 47.4% |
| Burundi | 10 | 12 | 4 | 40.0% |
| Cote d'Ivoire | 29 | 12 | 9 | 31.0% |
| Haiti | 9 | 12 | 5 | 55.6% |
| Liberia | 29 | 11 | 8 | 27.6% |
| DRC | 42 | 10 | 13 | 31.0% |
| Timor-Leste | 14 | 10 | 4 | 28.6% |
| Afghanistan | 26 | 7 | 12 | 46.2% |
| Chad & CAR | 2 | 3 | 2 | 100.0% |
| Cyprus | 17 | 3 | 6 | 35.3% |
| Ethiopia & Eritrea | 21 | 3 | 1 | 4.8% |
| Georgia | 16 | 3 | 5 | 31.3% |
| Lebanon | 19 | 3 | 6 | 31.6% |
| W. Sahara | 22 | 3 | 5 | 22.7% |
| Golan Heights | 16 | 2 | 7 | 43.8% |
| India & Pakistan | 0 | 0 | 0 | 0.0% |
| Kosovo | 0 | 0 | 0 | 0.0% |
| Middle East | 0 | 0 | 0 | 0.0% |
| **Total** | **315** | | **108** | |

**Table 5: # and % of Resolutions Reference By Country, Theme Types**

## REVIEW AND ANALYSIS OF FINDINGS

The above analysis demonstrates that references to women in conflict have been sporadic and inconsistent, and have tended to refer to women as victims, rather than referring to the need for gender perspectives or for calling for greater participation of women in decision-making processes.

Before the adoption of 1325, references to women were generic and were not directed at specific actors. The adoption of 1325 resulted in a significant increase in the number of resolutions that refer to women. While referencing remained slow up until 2005, the proportion significantly increased from 2006 onward, suggesting that gender mainstreaming is becoming more normalized within the Security Council. It is unclear whether this shift has been the result of an internal intervention; yet, it is certainly attributable, in part, to sustained advocacy of NGOs and UN entities, and does not necessarily indicate that the Security Council itself has internalized gender considerations into operational behaviour.

However, there are three significant concerns that emerge from this analysis. First, the percentage of direct references has reached only 25% of all resolutions even by 2008. Second, conflicts with the highest proportion of references tend to be characterized by frequent instances of violence against women. A cursory glance also find that these conflicts are host to complex peace operations, suggesting that high rates of victimization and mission types are possible drivers for high referencing rates. Third, the themes most frequently referenced tend to refer to women as victims rather than as active agents in the peacebuilding process. The latter two findings point to reactive versus proactive responses to addressing the situation of women, and highlight critical weaknesses in the Security Council's commitment to key aspects of 1325. Furthermore, while there appears to be increasing recognition that prevention is the cheaper and more effective response, this recognition has yet to translate into political will and compelling action.

## RESOLUTION 1325 AND CANADIAN POLICY

There are two high-level policy considerations for Canada with respect to 1325.

The first involves fulfilling the Secretary-General's October 2004 request to all countries to develop National Action Plans (NAP) on Women, Peace & Security. At least 14 countries (mostly European states), have developed NAPs to date, and several more are currently developing NAPs. Donors typically use NAPs to build coherent cross-departmental strategies on 1325 into the 3D's (diplomacy, development and defense) of foreign policy platforms.

For conflict-affected countries, there tends to be a greater focus on the domestic implementation of 1325. For example, many countries focus on increasing the participation of women in post-conflict governance. Interestingly, some donor countries are choosing to create their NAPs in tandem with post-conflict countries. For instance, Ireland is collaborating with both Timor-Leste and Liberia to inform the development of its NAP.

Curiously, there is evidence that a Canadian NAP was developed under the Martin administration, (PeaceWomen) however it was never officially launched and little is known about its contents. Advocacy groups may be biding time and waiting for the fall of the Harper government before again pursuing this agenda in a more aggressive manner, perhaps out of concern that any plan under the Harper government would reflect a watered down, 'lowest common denominator' approach.

However since June 2008, the Security Council has adopted three more resolutions (1820, 1888 and 1889) on the women peace and security agenda, which, among other things, reinforce calls for the development of NAPs, mandate the appointment of a Special Representative to the Secretary-General on sexual violence, and call for establishment of global indicators on women, peace and security. These developments are creating important momentum at the UN and have some potential to encourage Canada to reconsider its position.

The second matter relates to UN reform agenda, which included four possible proposals specifically aimed at strengthening strategic coherence in the UN's delivery of funds, services and programs related to women. The most ambitious of these proposals, known as the Composite model, called for the development of a unified international women's agency, endowed with both a policy and operational branch. There is very limited awareness in Canada about this aspect of UN reform or about Canada's role in this process. But in fact, Canada's Mission to the UN has played a key leadership role in building support among member-states for this agenda. The result of these and other efforts was the adoption on September 14, 2009 of a General Assembly Resolution mandating the Secretary-General to deliver a proposal for the establishment of this new entity within the next six months. (INSTRAW)

In the meantime, there are many questions that Canada must ask itself. For one, while Canada is advocating for significant change in the status of women abroad, the participation of women in Canadian parliaments has only risen from 20.6% and 22.1% in the last 12 years. (Cool) This stagnation has led Canada to drop from 21st to 48th in female parliamentary representation worldwide. (IPU) Although most Canadian political parties have committed to having more women campaign in elections, this has yet to translate into stronger representation. If Canada expects to be a credible advocate for participation policies overseas, surely questions of its own situation and the barriers to women's effective participation at home warrant higher priority.

Canada is also playing a critical role in Afghanistan, yet Canada's application of Resolution 1325 in the Afghan context is vague at best. While there are a number of projects that focus on gender equality, there is limited evidence that 1325 is informing or driving these projects. Participation is not strongly emphasized, and while there is evidence that gender perspectives are important to the policy development process at the Canadian International Development Agency (CIDA), the programs identified tend to focus on health and education.

Afghan women, particularly those in rural areas, continue to face monumental challenges. Sixty percent of Afghan girls under the legal age of 16 are forced into arranged marriages and are immediately removed from school, contributing to Afghanistan's 80% female illiteracy rate (The Economist). The majority of women face domestic violence and sexual harassment, which severely restricts their ability to participate in political life. According to the United Nations Development Program (UNDP) Programme Manager Gender Advisor Indai Sajor, even collecting data on sexual violence in many communities is nearly impossible due to threats to victims and human rights defenders, cultural traditions that encourage women's silence, ineffective rule of law and systematic denial of women's political participation. Sajor explains that, "it is not just about documenting sexual violence but also understanding why women do not want their sufferings documented." As PeaceWomen explain, "the issues of participation and violence are inextricably linked – sexual violence is both a cause and consequence of low levels of women's participation in all decision-making and participation in day-to-day life. Sexual violence does more than discourage political engagement, sexual violence holds communities hostage and prevents access to markets, water-points and schools." (Cook)

The Royal Canadian Mounted Police (RCMP) and Canadian Forces are also working on other important areas such as helping to professionalize the Afghan security sector through training on women's issues and recruiting female officers. Yet neither the lessons learned in Liberia, nor the calls from the Secretary-General and the Security Council to deploy more female troops seem to be informing Canada's deployment strategy, with women representing only 10% of personnel deployed to Afghanistan since 2004.

A 2008 RAND report presented to the Senate Committee on National Security and Defence, finds "little evidence that the terms of UN Resolution 1325 on Women, Peace and Security are taken seriously in Afghanistan" and many view "that cultural change on issues like gender discrimination will take generations." While there may be truth to this statement, it should only strengthen the argument for the need for a more unified and coherent strategy aimed at fully implementing 1325. Such a strategy must focus on understanding and strategically addressing the barriers that prevent women from participating in public life in order to drive sustainable change for Afghan women and women around the world.

## ABOUT THE AUTHOR

**Renee Black** completed a Masters at the University of Ottawa's Graduate School of Public and International Affairs in April 2009. She spent six months in New York doing research on the Women, Peace & Security agenda, two of which were spent interning with the United Nations in the Department of Peacekeeping Operations. She is presently consulting with UNIFEM. Renee's research interests include: the role of media in conflict; transitional justice mechanisms; resources and conflict; international institutions; transnational activism and global policy development. Renee previously completed Honors Commerce at Dalhousie and worked as a Business Analyst on IT projects for over seven years.

## ENDNOTES

[1] Note: The PeaceWomen data set contains a number of discrepancies, which are outlined in the appendix of an extended version of this article, which can be found at the Journal of Military and Strategic Studies at the University of Calgary.

[2] Note: These themes are largely derived from a 1325 Checklist developed by the NGO Working Group on Women, Peace & Security.

## REFERENCES

Amnesty International USA. Women of Sierra Leone Suffer Painful Legacy of Wartimes Sexual Slavery, Torture and Mass Rapes Years Later, Amnesty International Report. Nov 1, 2007.
http://www.amnestyusa.org/document.php?lang=e&id=ENGUSA20071101001

NGO Working Group on Women, Peace & Security. Women's Participation and Gender Perspectives in Security Council Resolutions. 2004.
<http://womenpeacesecurity.org/publications/SCR_1325_Checklist_EN.pdf>
(a) PeaceWomen. The PeaceWomen Project: 1325 Security Council Monitor - Resolution Watch.
<http://www.peacewomen.org/un/sc/1325_Monitor/index.htm>
(b) PeaceWomen. UK Minister Agrees to a UK National Action Plan on Women, Peace & Security. FCO News. March 8, 2006. Available at <http://www.peacewomen.org/news/International/March06/UK_1325.html>
(c) PeaceWomen. Working Toward the Implementation of 1325: Who's Responsible for Implementation? PeaceWomen. Available at <http://www.peacewomen.org/un/UN1325/whoswho_un.html>
(d) Working Toward the Implementation of 1325: Who's Responsible for Implementation? National Level – Canada
<http://www.peacewomen.org/un/UN1325/national_canada.html>

"From Local to Global – Making Peace Work for Women." NGO Working Group on Women, Peace & Security. Oct 2005.
<http://womenpeacesecurity.org/publications/NGOWG_5_Years_On_Report_ENG.pdf>

Government of Canada. Government of Canada's Response to the Request of the Gender and Peacebuilding Working Group of the Canadian Peacebuilding Coordinating Committee regarding Canada's support for UN Security Council Resolution 1325 in Afghanistan.

Inter-Parliamentary Union. Women in National Parliaments. May 31, 2009
http://www.ipu.org/wmn-e/arc/classif010197.htm (1997)
http://www.ipu.org/wmn-e/classif.htm (2008)

UN-INSTRAW. General Assembly agrees on creation of new gender entity.
http://www.un-instraw.org/

Parliament of Canada. How are we doing in Afghanistan? Canadians need to know. Report of the Standing Senate Committee on National Security and Defense. June 2008.
http://www.parl.gc.ca/39/2/parlbus/commbus/senate/Com-e/defe-e/rep-e/rep09jun08-e.htm

Parliament of Canada. How are we doing in Afghanistan? Canadians need to know. Report of the Standing Senate Committee on National Security and Defense. June 2008.

Liberian National Police web site.
http://liberianationalpolice.org

http://www.un.org/Docs/sc/
Note: All resolutions adopted between October 31, 1998 and October 31, 2000 were analyzed for this paper. This includes all resolutions from Resolution 1205 to Resolution 1325.

Abdela, Lesley. Finally, a UN agency for women: The UN system has failed the world's 3 billion plus women – but a new 'super-agency' may bring welcome change.
http://www.guardian.co.uk/commentisfree/2009/may/27/un-super-agency-women

Binioris, Sofia; Braun, Sylvia. Canadian 1325 National Action Plan Highlighted In Voice Of Women Exhibit. International Women's Tribune Centre. New York. April 24, 2007.
http://www.iwtc.org/326.html

Cordell, Matthew. Unit Commander on All-Female Peacekeeping Unit. UN Dispatch. May 24, 2007.
http://www.undispatch.com/archives/2007/05/interview_with_1.php

Cool, Julie. Women in Parliament. Political and Social Affairs Division. Library of Parliament. Oct 9, 2008.
http://www.parl.gc.ca/information/library/PRBpubs/prb0562-e.htm#awomen

Galloway, Gloria. "Afghan Woman Given Refuge in Canada." Globe & Mail. Jan 24, 2009.
http://www.theglobeandmail.com/news/national/afghan-woman-given-refuge-in-canada/article967416/

Kymlicka, Will. Contemporary Political Philosophy. Oxford, UK. Oxford University Press. 2002.

Oates, Lauryn. Women, Peace & Security in Afghanistan. Implementation of United Nations Security Council Resolution 1325

Powley, Elizabeth. Strengthening Governance: The Role of Women in Rwanda's Transition. United Nations Office of the Special Advisor on Gender Issues and Advancement of Women. 2004.

Sinclair, Stephanie. Afghanistan's Child Brides. The Economist. August 15, 2009.

Soguel, Dominique. UN Officials Call for More Female Peacekeepers. Women's e-News. March 10, 2009.
www.womensenews.org/article.cfm/dyn/aid/3944

Monrovia Declaration. A call to Action from the participants of the international Colloquium on Women's Leadership, Development, International Peace & Security. March 8, 2009.
www.realizingrights.org/pdf/Monrovia_Declaration_Mar2009.pdf

Implementation of 1325. UN – INSTRAW.
http://www.un-instraw.org/en/gps/general/implementation-of-un-scr-1325.html

Correspondence with Lieutenant Joseph Frey, Public Affairs Officer. Canadian Forces Recruiting Group. August 21, 2009.

Interview with Cora Weiss, President, Hague Appeal for Peace. New York City. March 10, 2009

Interview with Ambassador Anwarul Chowdhury, former Ambassador of the Permanent Mission to the United Nations. New York, NY. March 31, 2009

"Resolution 1325 – Implementation in Peacekeeping Operations" Remarks by Pierre Schori at the International Kvinna To Kvinna (Women to Women) Conference in Dubrovnik, Croatia. Aug 23, 2003.
www.un.int/sweden/pages/READING/PIERREgender.htm

Telephone interview with Indai Sajor. UNDP Afghanistan. April 21, 2009. New York, NY.

United Nations Security Council Resolution 1820. United Nations Security Council. June 18, 2009. New York, NY.

# ENTENTE ENTRE LE CANADA ET LES ÉTATS-UNIS SUR LES PAYS TIERS SÛRS : LES ÉTATS-UNIS SONT-ILS SÛRS POUR LES DEMANDEURS D'ASILE?

By Fadwa Benmbarek


## RÉSUMÉ

*En décembre 2004, l'Entente entre le Canada et les États-Unis sur les pays tiers sûrs (l'Entente) visant à avoir plus de contrôle à la frontière terrestre canado-américaine en matière de mouvement migratoire des réfugiés a été mise en application. Cette Entente a été adoptée dans le contexte d'un vaste accord entre le Canada et les États-Unis : le Plan d'action binational pour une frontière intelligente. En vertu de cette Entente, les demandeurs d'asile sont tenus de présenter leur demande de statut de réfugié dans le premier pays sûr (le Canada ou les États-Unis) où ils arrivent.*

*L'Entente a suscité beaucoup de controverses et d'opposition de la part d'organismes et de groupes d'intérêts venant en aide aux réfugiés. Ceux-ci ne considèrent pas les États-Unis comme un pays sûr pour les réfugiés. En d'autres termes, l'Entente ne respecterait pas les conventions en matière de protection des réfugiés. Par conséquent, cet accord est nuisible pour les réfugiés car les politiques américaines en matière de protection des réfugiés ne respectent pas les conventions internationales. Cet essai tentera de démontrer que dans le cadre de l'Entente, la protection des réfugiés est minée car les États-Unis ne sont pas un « pays tiers sûr » pour les réfugiés.*


## CONTEXTUALISATION DU RÉGIME DE « PAYS TIERS SÛRS »

Le Canada et les États-Unis ne sont pas les premiers pays à avoir fait un tel accord. La création de l'Union européenne a impliqué l'effacement de frontières entre les pays membres afin de laisser libre cours à la liberté de mouvement des personnes et des biens[1]. Les États membres de l'UE ont développé de nouvelles procédures et politiques harmonisées de protection des réfugiés. La plus importante politique d'harmonisation a notamment été l'introduction du concept de pays tiers sûrs.

Le concept de pays tiers sûrs, dans le contexte de l'UE, vise à empêcher les demandeurs d'asile de faire une demande d'asile dans plusieurs pays simultanément ou consécutivement. Chacune des demandes doit être examinée par un seul État. L'objectif de la politique de pays tiers sûr de l'UE est d'encourager les pays ayant des frontières poreuses, laissant entrer plusieurs migrants illégaux, à prendre en charge la protection des réfugiés ayant transités par leur pays[2]. Avant l'adoption de l'entente de l'UE, les demandeurs d'asile entraient illégalement dans le territoire européen par des pays de l'Europe Méditerranéenne et de l'Est. Par la suite, ceux-ci tentaient de faire leur demande dans d'autres pays européens[3].

L'adoption d'une politique de pays tiers sûr requiert l'harmonisation des politiques d'immigration et de détermination du statut des réfugiés ainsi que l'assurance que les États signataires respectent les directives de la Convention relative au statut des réfugiés (1951) ainsi que la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants (1987)[4]. Donc, les pays désignés comme tiers sûrs doivent agir en conformité avec le régime international de protection des réfugiés afin d'être déterminés comme « sûrs » pour les demandeurs d'asile.

Tout comme les pays européens, le Canada a adopté diverses mesures restrictives de non-entrée, notamment le concept de pays tiers sûrs, à cause de l'appréhension des répercussions des flux important de personnes indésirables ou de demandeurs d'asile vers le Canada. Toutefois, le concept de pays tiers sûrs n'est pas quelque chose de nouveau pour le Canada. En 1988, le Canada a introduit pour la première fois dans sa législation la clause de pays tiers sûrs avec le projet de Loi C-55 dans le but de modifier la Loi sur l'Immigration de 1976. Le projet de Loi C-55 visait à désigner plusieurs pays tiers sûrs afin d'éviter ce qu'on appelle le « magasinage d'asile » où une personne traverse plusieurs frontières « sûres » en faisant ou non des demandes d'asile afin d'augmenter ses chances d'obtenir le statut de réfugié, d'éviter le refoulement lorsque le pays n'a pas de pratiques acceptables en matière de protection de réfugiés ou tout simplement par préférence pour le Canada[5].

Suite aux attentats du 11 septembre 2001, la coopération en matière de sécurité frontalière entre le Canada et les États-Unis est devenue beaucoup plus importante. En réponse au nouveau contexte de sécurité, les deux pays ont signé en 2001 la « Déclaration sur la frontière intelligente Canada - É-U ». Plusieurs politiques en relation à la migration font parties du plan d'action pour la création d'une frontière sûre et intelligente.

Le Canada et les États-Unis ont notamment décidé de partager de l'information et de gérer conjointement les demandes d'asiles tout en faisant la coordination des politiques migratoires futures.

En décembre 2002, le Canada et les États-Unis ont signé l'Entente en se désignant mutuellement comme pays tiers sûrs dans le cadre du plan d'action de la frontière intelligente. L'Entente a principalement été le fruit de négociations initiées par le Canada. Selon le témoignage d'une représentante du gouvernement américain, Kelly Ryan, au *« Subcommittee on Immigration of the House of Congress »*, les négociations *« were undertaken at the request of the government of Canada[…] Canada has had a long-standing interest in concluding such an agreement with the U.S. »*[6]. Cette initiative de la part du gouvernement canadien a pour objectif de réduire le nombre de demandes d'asiles au Canada étant donné que celui-ci reçoit plus de demandes d'asile que les États-Unis à la frontière terrestre.[7]

## MODALITÉS DE L'ENTENTE ENTRE LE CANADA ET LES ÉTATS-UNIS

À ce jour, seul les États-Unis sont signataires d'un tel accord avec le Canada. Selon le Ministère de la Citoyenneté et de l'Immigration, l'Entente est en mesure d'aider « les deux pays à mieux gérer, sur leur territoire respectif, l'accès au système de protection des réfugiés par les personnes qui traversent leur frontière commune »[8].

En vertu de l'Entente, les réfugiés doivent présenter leur demande d'asile dans le premier pays où ils arrivent, soit le Canada ou les États-Unis, lorsque ceux-ci sont à des postes frontaliers canado-américains[9]. C'est-à-dire par exemple qu'un demandeur d'asile en provenance de l'Amérique centrale, et passant par les États-Unis, ne peut pas faire une demande d'asile au Canada, à moins que celui-ci soit éligible à l'admission au Canada par l'une des exceptions prévues par l'Entente.

Les exceptions prévues par l'Entente prennent en considération l'importance de la réunification familiale, l'intérêt public et l'intérêt des mineurs. Il y a quatre types d'exceptions :

A. Les demandeurs d'asile : un demandeur d'asile ayant un membre de sa famille immédiate[10] résidant au Canada peut placer une demande aux postes frontaliers canadiens;
B. Les mineurs non accompagnés : les mineurs n'étant pas accompagnés par un tuteur légal ou parent peuvent faire une demande aux postes frontaliers canadiens;

C. Les titulaires de documents : Cette exception vise les personnes ayant un visa leur permettant de rentrer au Canada;
D. Exception concernant l'intérêt public : ces personnes sont soit des ressortissants de pays que le Canada a temporairement suspendu le renvoi pour des causes humanitaires[11] ou bien des ressortissants de pays pouvant faire face à la peine de mort.

Par contre, même si un demandeur d'asile est visé par l'une de ces exceptions, d'autres « critères de recevabilité prévus dans la législation canadienne en matière d'immigration s'appliquent »[12]. Par exemple, si une personne a été interdite d'accès au territoire pour des raisons de sécurité telles que le terrorisme, les crimes contre l'humanité ou la grande criminalité[13], elle ne verra pas sa demande jugée recevable.

Tel qu'il est stipulé dans la *Loi sur l'immigration et la protection des réfugiés* (LIPR), un pays tiers sûr doit avoir les qualifications nécessaires pour qu'une « personne qui passe dans ce pays puisse présenter une demande d'asile »[14]. Les facteurs servant à déterminer les critères désignant un tiers pays sûr, selon la LIPR, sont les suivants :

A. Le fait que le pays à été désigné soit signataire de la Convention relative au statut des réfugiés (1951) et à la Convention contre la torture (1987);
B. Que ses politique et usages en ce qui touche la revendication du statut de réfugié soient conformes à la Convention sur les réfugiés et aux obligations découlant de la Convention contre la torture;
C. Ses antécédents en matière de respect des droits de la personne;
D. Le fait fasse ou non partie d'un accord avec le Canada concernant le partage de la responsabilité de l'examen des demandes d'asile.

Le Gouvernement canadien a désigné les États-Unis comme pays tiers sûr en vertu des critères inscrit dans la LIPR. Par contre, cette désignation s'avère erronée, selon les groupes d'intérêts des droits des réfugiés. Ils ne considèrent pas que les États-Unis soit un pays sûr car ce dernier n'est pas signataire du Protocole facultatif se rapportant à la Convention contre la torture des Nations-Unies (réserve des États-Unis pour les articles du 16 et 17 de la Convention) et ne respecte pas le régime de protection international en ce qui attrait à « leurs politiques et usages en ce qui touche la revendication du statut de réfugié »[15]. De plus, les États-Unis n'ont pas de bons antécédents en matière de droits humains.

## LES ÉTATS-UNIS SONT-ILS UN PAYS TIERS SÛR?

Comme il a été mentionné plus haut, le Canada a déterminé une liste de critères nécessaires afin de reconnaître un autre pays comme étant un pays tiers sûr pour les réfugiés. Toutefois, les pratiques américaines en matière de droit des réfugiés et de la détermination du statut ne sont pas en conformité avec les normes du droit international ainsi que les critères mentionnés dans la LIPR.

Le fait que les États-Unis soient désignés comme étant un pays sûr alors que certaines de leurs pratiques sont contradictoires avec les critères désignés dans la LIPR est profondément problématique. C'est d'ailleurs pour cette raison que des groupes d'intérêts de défense des droits des réfugiés (Amnistie Internationale, le *Canadian Council for Refugees (CCR)* et le *Canadian Council of Churches (CCC)*) ont mis à l'épreuve l'Entente en défiant le gouvernement du Canada devant la Cour fédérale pour contester la désignation des États-Unis comme pays tiers sûr. Le premier jugement de la Cour fédérale *(The Queen vs Amnesty International, Canadian Council for Refugees, Canadian Council of Churches and John Doe (November 2007))* a penché en la faveur des organismes cités plus haut en stipulant que le Canada ne pouvait pas selon les critères énoncés dans la LIPR désigner les États-Unis comme pays tiers sûr. De nombreuses politiques américaines ont été citées afin de démontrer l'inadéquation du régime américain de protection des réfugiés. Parmi ces pratiques, la détention, la déportation, les questions de sécurité et autres ont été citées.

## LA DÉTENTION

Suite à la mise en place de l'Entente, le nombre de demandeurs d'asile à la frontière canadienne en provenance des États-Unis a été considérablement réduit. Pour la première année de mise en œuvre de l'Entente (2005), 4 041 personnes se sont présentées à la frontière canado-américaine tandis que près de 8000 personnes s'y étaient présentées l'année précédente[16]. Près de 75% des demandes d'asile à la frontière répondaient à l'une des exceptions visées par l'Entente et ont été autorisées à présenter une demande d'asile[17].

La pratique de détention des demandeurs d'asile et personnes sans statut aux États-Unis est très courante. Dans certains cas les conditions de détentions sont en violation avec les standards internationaux. Dans un rapport des procédures visant la détention des demandeurs d'asile le Haut Commissariat pour les Réfugiés (HCR) écrit que la détention de ces personnes n'est pas désirable particulièrement lorsqu'elles font parties de groupes vulnérables (femmes, enfants, personnes nécessitant une aide médicale ou psychologique). Ils ajoutent :

> *"Key significance to the issue of detention is Article 31 of the 1951 Convention. Article 31 exempts refugees coming directly from a country of persecution from being punished on account of their illegal entry or presence, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."*[18]

La détention des demandeurs d'asile est pourtant une pratique courante aux États-Unis. Durant l'année fiscale de 2003, 13 800 demandeurs d'asile ont été détenus[19]. Une fois détenus, les demandeurs d'asile font face à d'importantes barrières les empêchant de faire leur demande notamment parce qu'ils ont un accès limité à de l'aide juridique[20]. De plus, plusieurs d'entres eux se retrouvent dans des complexes de détention où se trouvent aussi des criminels, ce qui a pour conséquence de les humilier et d'être perçus comme des criminels[21].

De plus, les plaignants (Amnistie Internationale, CCR et CCC) à la Cour fédérale ont soutenu que les conditions de détention auxquelles font face les réfugiés aux États-Unis augmentent leur chance d'être refoulés vers leur pays d'origine puisqu'ils ont un accès limité à de l'aide juridique. Dans le jugement rendu par la Cour fédérale *(The Queen vs Amnesty International, Canadian Council for Refugees, Canadian Council of Churches and John Doe (November 2007))*, le juge Phalen affirme qu'il n'y a pas de preuve concrète que les personnes qui sont refoulées le sont suite à une détention et un accès limité à de l'aide juridique aux États-Unis.

Par contre, dans le rapport de surveillance du HCR, l'agence fait la recommandation au gouvernement américain d'améliorer les conditions de détention car « le HCR se préoccupe particulièrement des conditions de détention qui pourraient avoir une incidence sur la capacité du demandeur d'asile de faire la preuve de la recevabilité de sa demande en vertu de l'Entente »[22]. Le HCR fait la recommandation de fournir l'accès gratuit à des services d'interprétation, de téléphone longue distance et aux services juridiques et gouvernementaux.

## ONE-YEAR BAR POLICY

Une autre contrainte de la politique de protection des réfugiés aux États-Unis est la politique de *One-Year Bar*. Les demandeurs d'asile doivent faire une demande de statut de réfugié à l'intérieur d'un an tout au plus à partir de leur arrivée dans le territoire américain. Une fois les 365 jours passés, une personne ne peut plus faire de demande d'asile[23]. Cette politique n'est pas en harmonie avec les politiques de protection de réfugiés au Canada et du régime de droit international qui ne permet pas qu'une demande d'asile soit exclue sous la réserve de l'impossibilité de faire une demande d'asile dans une limite de temps[24].

Le problème est que d'une part les personnes en quête d'asile aux États-Unis ne sont pas nécessairement informées des règlements de la politique du *One-year Bar*. Les demandeurs d'asile prennent souvent le temps de retomber sur leurs pieds après un long trajet pour fuir la persécution. Ceci a surtout un impact sur les demandeurs d'asile en situation de vulnérabilité. Cette politique a particulièrement un impact sur les femmes ayant fui la persécution liée à leur genre. Tel est le cas pour les femmes victimes de mutilations génitales ou fuyant la violence domestique et les personnes fuyant la persécution basée sur leur orientation sexuelle. Ces dernières, selon les témoignages à la Cour fédérale dans *Queen vs Amnesty International, Canadian Council for Refugees, Canadian Council of Churches and John Doe*, sont souvent « victimes » de cette politique à cause du manque d'information et de la honte face aux motifs de leur persécution. Cela leur prend parfois plus d'un an avant de s'organiser et de demander un statut[25].

Le juge Reed dans *Williams vs. Canada,* reconnaît que les femmes demanderesses d'asile prennent plus de temps pour faire une demande d'asile car elles sont incertaines si la persécution dont elles sont victimes est reconnue dans la Convention relative au statut de réfugié de 1951. On peut donc avancer l'idée que les personnes ayant souffert de la torture ou de mauvais traitements, comme c'est le cas pour la plupart des réfugiés, sont donc particulièrement désavantagés par cette politique.

Lorsqu'une personne ne peut pas faire de demande de statut de réfugié après un an aux États-Unis, et qu'elle ne peut pas en faire une au Canada, les seules alternatives pour se protéger contre le refoulement sont soit l'illégalité ou soit une demande de protection sous la Convention contre la torture (CAT). C'est alors aux demandeurs d'asile de prouver qu'ils ont une peur fondée de persécution dans leur pays et qu'ils risquent d'être assujettis à la torture[26].

## QUESTIONS DE SÉCURITÉ

Il n'y a pas de doute que les évènements du 11 septembre 2001 ont eu des impacts sur la notion de sécurité transfrontalière et nationale des États-Unis. Ces derniers ont pris des mesures législatives telles que le *Patriot Act* afin de s'assurer que la sécurité du pays ne soit pas en danger. Ce contexte sociopolitique n'a pas épargné la protection des réfugiés. Il est possible que des individus voient leur demande de statut de réfugié ou leur demande d'évaluation des risques avant la déportation écartée si ces derniers ont des liens avec des groupes terroristes, et ce malgré les directives de la Convention contre la torture des Nations Unies[27]. Ces liens peuvent être aussi simples que d'avoir donné du matériel ou des biens à des groupes terroristes, sans avoir connaissance des activités et intentions terroristes du groupe, et peut-être même par la coercition du groupe[28] :

> *212(a) (3) (B) (IV) (VI):*
>
> *to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons),explosives, or training –*
>
> *[…]*
>
> *(Bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;*

Cette politique est farouchement contestée par les groupes de défense des droits des réfugiés car celle-ci est en opposition avec le droit international ainsi qu'avec les standards de protection des réfugiés au Canada. Certes un pays a le droit de vouloir protéger son territoire et sa population de personnes ayant commis de graves crimes ou ayant l'intention d'en commettre.

Mais le problème avec cette politique est le fait que même si les demandeurs d'asile sont forcés de supporter des groupes militants et/ou terroristes et de leur fournir du matériel involontairement – ce qu'ils tentent de fuir – ces demandeurs d'asile se font refouler directement vers le pays qu'ils ont fui. Parfois, ils sont mêmes refoulés vers des pays ou la torture est pratiquée ou acceptée par l'État.

De plus, il est plus difficile pour un demandeur d'asile de prouver les risques de torture si celui-ci est déporté vers son pays d'origine lorsqu'il fait une demande aux États-Unis plutôt qu'au Canada. Dans une décision rendue aux États-Unis sur le cas d'un réfugié ayant des liens avec des groupes terroristes, l'interprétation de l'exclusion sur la base d'activités terroristes ou de support de ces activités est très large. C'est-à-dire qu'aux États-Unis, une personne peut être refoulée si *« a potential belief that a person may pose a danger »*[29]*.* Ceci est très different de la procedure canadienne où *« there is a requirement for an actual threat substantiated on objectively reasonable suspicion based on the evidence* »[30].

Malheureusement, les législations portant sur la sécurité nationale des États-Unis et les politiques d'immigrations ont un impact significatif sur certaines populations. C'est particulièrement le cas avec les réfugiés colombiens, qui fuient la persécution des groupes paramilitaires et terroristes dans leur pays (les FARC par exemple) justement parce que ces groupes obligent les Colombiens à payer des *taxes de guerre.* Les exemples ne manquent pas. Le *Migration Policy Institute* (2003) des États-Unis écrit que ces politiques désavantagent particulièrement les demandeurs d'asile de descendance arabe et/ou musulmane[31] et que l'ouverture de la frontière du Canada leur offrirait beaucoup plus de chance d'être protégés[32]. Le *Migration Policy Institute* écrit que ces politiques sont en quelques sortes discriminatoires car elles stéréotypent des individus selon leur origine ethnique ou nationale :

> *The US government has imposed some immigration measures more commonly associated with totalitarian regimes. [T]here have been too many instances of long-time US residents deprived of their liberty with due process of law, detained by the government and held without charge, denied effective access to legal counsel, or subjected to closed hearings. These actions violate bedrock principles of US law and society.* ***Rather than relying on individualized suspicion or intelligence-driven criteria, the government has used national origin as a proxy for evidence of dangerousness. By targeting specific ethnic groups with its new measures, the government has violated another core principle of American justice****: the Fifth Amendment guarantee of equal protection.*[33]

Depuis septembre 2001, les irrégularités dans les politiques d'immigration américaines ont servi de prétexte afin de détenir et de déporter (souvent vers la torture) principalement des non-citoyens musulmans et/ou arabes sans qu'ils aient accès à de l'aide juridique[34]. Dans ce contexte, il est compréhensible que des demandeurs d'asile colombiens, arabes ou tout simplement de confession musulmane souhaitent faire leur demande de statut de réfugié au Canada. L'Entente ne le permet toutefois pas lorsque ceux-ci sont passés par la voie terrestre des États-Unis vers le Canada.

## QUESTION DE L'APPROCHE DIFFÉRENCIÉE SELON LES SEXES POUR LA DÉTERMINATION DU STATUT DE RÉFUGIÉ

Un autre problème avec le régime de protection des réfugiés aux États-Unis est la question de la persécution basée sur le genre. Comme il est mentionné dans un rapport du Comité permanent de la citoyenneté et de l'immigration, il y a des raisons légitimes de croire que l'Entente a un impact négatif sur les femmes fuyant la persécution basée sur la violence domestique. Cette fois-ci, le problème n'est pas dans la politique de One-*Year Bar*, mais plutôt dans la définition de la persécution menant à la définition du statut d'un réfugié selon la Convention telle qu'elle est interprétée par le gouvernement américain[35] (CCR, 2005). Le gouvernement canadien a assumé que l'approche américaine est similaire à l'approche canadienne. Cependant, la question de la persécution basée sur le genre, et particulièrement lorsqu'il y a violence domestique, est abordée peu clairement dans le système américain. En 1999, le *Board of Immigration Appeals* (BIA) a déterminé que la violence domestique ne faisait pas de la victime un membre d'un groupe social particulier (PSG) et que même si elle faisait partie d'un PSG, la raison de sa persécution n'était pas due à son adhésion à ce groupe social[36]. Dans le jugement de la Cour fédérale de 2007, le juge Phallen a recueilli des témoignages d'experts sur le sujet. Selon un des experts, le *Department of Homeland Security* (DHS) considère que la seule demande de statut de réfugié basée sur la persécution sur le genre acceptable est celle des mutilations génitales[37].

Ceci veut dire que des femmes qui ont fui leur pays car les autorités ne les protégeaient pas contre la violence domestique dont elles sont victimes peuvent se voir refuser le statut de réfugié aux États-Unis et par conséquent, se faire déporter dans leur pays d'origine.

Le juge Phalen écrit donc : *"Obviously if these women are being denied asylum protection, the secondary withholding of removal provision would not protect them and the CAT (Convention Against Torture) protection may impose too high a threshold of danger to protect women subject to domestic violence. This could result in a real risk of refoulement, contrary to the Refugee Convention. Since the GIC (Governor in Council) has an obligation to conclude positively that the U.S. is compliant, it would be unreasonable to do so in the face of the uncertainty in U.S. law."*[38] Si ces femmes avaient la possibilité de venir au Canada pour faire leur demande de statut de réfugié, elles auraient probablement beaucoup plus de chance de ne pas être refoulées et par conséquent, d'être protégées.

## CONCLUSION

L'Entente canado-américaine sur les pays tiers sûrs s'inscrit dans la rationalité gouvernementale de limiter l'accès au territoire aux potentiels réfugiés entrant par la frontière terrestre canado-américaine. Les ententes européennes de pays tiers sûrs s'inscrivent également dans la tendance de réduction des responsabilités de la part des pays occidentaux envers les demandeurs d'asile. L'application de l'Entente des pays tiers sûrs entre le Canada et les États-Unis a pour objectifs de décourager les demandes d'asiles multiples dans les deux pays, de réduire le nombre de demandes d'asile et de renforcer la sécurité frontalière.

Toutefois, le problème avec l'Entente entre le Canada et les États-Unis est que ce dernier n'est pas sûr pour les réfugiés. Les États-Unis ont créé un régime de protection des réfugiés quasi indépendant du régime de droit international ce qui met parfois la vie d'authentiques réfugiés en danger. Il reste à savoir si le gouvernement du Canada acceptera de changer sa position face au système américain de protection des réfugiés. Ceci ne sera pas facile, car une telle révision nécessiterait un désir de la classe politique de désigner les États-Unis comme étant « non-sûrs », ce qui aurait sans doute des impacts importants dans les relations canado-américaines.

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## ENDNOTES

[1] Abell, N.A. "Safe Country Provisions in Canada and in the European Union: A Critical Assessment". International Migration Review 31. 3 (1997): p.569.

[2] Ibid.

[3] Lavenex, S. Safe Third Countries: Extending the EU Asylum and Immigration Policies to Central and Eastern Europe, Central European University Press, 1999.

[4] UNHCR. "The application of the safe third country notion and its impact on the management of flows and on the protection of refugees". Background paper No. 2. 2001.

[5] Chambre des Communes du Canada. Comité Permanent de la Citoyenneté et de l'Immigration. No.2. 2ème Session. 35e Législature. Témoignages du 19 mars1996.

[6] United States, Congress, House of Representatives, Subcommittee on Immigration, Border Security and Claims of the Committee o the Judiciary House of Representatives, 107th Congress, 2nd Session, "United States and Canada Safe Third Country Agreement." Serial No. 111, 16 October 2002. p.3-4.

[7] Des statistiques sur le nombre de demandes d'asiles pour les États-Unis à la frontière canado-américaine ne sont pas disponibles. Par contre, le « Rapport de Surveillance » de la première année de l'application de l'Entente par le HCR donne des statistiques sur le nombre de demandes faites à la frontière dans la première année de l'Entente. Pour ce qui est du Canada, 4041 demandes d'asiles ont été faites à la frontière canado-américaine tandis qu'aux États-Unis seulement 66 demandes d'asiles ont été faites à la frontière canado-américaine.

[8] Citoyenneté et Immigration Canada. « Entente entre le Canada et les États-Unis sur les tiers pays sûrs. » 2006.

[9] Les demandeurs d'asile ayant fait un transit aux États-Unis mais venus en avion sont exclus de cette entente. Seuls les demandeurs d'asile venus par avions mais ayant déjà été refusés aux États-Unis sont exclus.

[10] Dans le cadre de l'Entente sur les tiers pays sûrs sont reconnus comme membres de la famille : un époux; un tuteur légal; un enfant; un père ou une mère; un frère ou une sœur; un grand-père ou une grand-mère; un petit-fils ou une petite-fille; un oncle ou une tante; un neveu ou une nièce; un conjoint de fait; un conjoint de même sexe.

[11] À l'heure actuelle, le Canada a temporairement suspendu les renvois vers les pays suivants : l'Afghanistan; le Burundi; la République démocratique du Congo; Haïti; l'Iraq; le Liberia; le Rwanda

[12] Citoyenneté et Immigration Canada, op cit.

[13] Par grande criminalité ont entend des crimes graves tels que le meurtre, le trafic de drogue et d'humains etc.

[14] Ibid.

[15] Justice Canada. Loi sur l'immigration et la protection des réfugiés (LIPR). Art. 2. 2001.

[16] UNHCR. « Rapport de surveillance: Entente sur les tiers pays sûrs entre le Canada et les É-U. » 2006.

[17] Ibid.

[18] UNHCR. "Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers." 1999.

[19] United States commission on International Religious Freedom (USCIRF). "Report on Asylum Seekers in Expedited Removal". Expert Reports Vol. 2. 2005.

[20] Harvard Law School. "Bordering on Failure: The U.S.-Canada Safe Third Country Agreement: Fifteen Months After Implementation." Harvard Immigration and Refugee Clinical Program. 2006

[21] Physicians for Human Rights USA (PHRUSA). "From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers." 2003.

[22] UNHCR. « Rapport de surveillance: Entente sur les tiers pays sûrs entre le Canada et les É-U. » 2006. p.53.

[23] Harvard Law School. "Bordering on Failure: The U.S.-Canada Safe Third Country Agreement: Fifteen Months After Implementation." Harvard Immigration and Refugee Clinical Program. 2006.

[24] UNHCR. "Comments on Proposed Rules on "Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens: Conduct of Removal Proceedings; and Asylum Procedures." 1997.

[25] Jugement de la Cour d'appel fédérale. Queen vs. Amnesty International, Canadian Council for Refugees, Canadian Council of Churches and John Doe. Ottawa. Ontario. May 21, 2008. 2008 FCA 229.

[26] OHCHR. "Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment." 1987 : Articles 1 et 33.

[27] Notez ici que cette provision ne respecte pas le concept de non-refoulement de l'Article 33 de la Convention pour les réfugiés de 1951.

[28] Department of Justice USA. Aliens and National Act. Chapter 12: Immigration and Nationality. (8 USCA § 1182 a3B).

[29] Jugement Cour fédérale. Queen vs. Amnesty International, Canadian Council for Refugees, Canadian Council of Churches and John Doe. Ottawa Ontario. November 29, 2007. IMM-7818-05, 2007FC1262.

[30] Ibid.

[31] Migration Policy Institute. "America's Challenge: Domestic Security, Civil Liberties, and National Unity after September 11." 2003.

[32] Macklin, A. "The Value(s) of the Canada-US Safe Third Country Agreement." Caledon Institute of social Policy. 2003.

[33] Migration Policy Institute, op cit.

[34] Macklin, A. op cit.

[35] CCR. "Closing the Front Door on Refugees: Report on the First Year of the Safe Third CountryAgreement." Montréal, 2005.

[36] Jugement de la Cour d'appel fédérale. Queen vs. Amnesty International, Canadian Council for Refugees, Canadian Council of Churches and John Doe. Ottawa. Ontario. May 21, 2008. 2008 FCA 229.

[37] Ibid.

[38] Ibid.

# CANADA-US BORDER REALITIES: PRE AND POST 9/11

By Priya Kumar

## ABSTRACT

*Amidst considerable program policy implementation and advancement, the struggle between security and border efficiency remains a concern for both the U.S and Canada. Post 9/11 border efficiency has become fused with security – a major challenge for both commercial trade and the movement of respective citizens. This policy paper provides a synthesis of current and future challenges of Canadian-U.S border efficiency. It also provides key recommendations for policy and program implementation, a framework through which post 9/11 border thickening can be controlled.*

### BACKGROUND PRE AND POST 9/11

Canada-U.S. relations prior to 9/11 are best understood as a relationship of economic strength via interdependent cooperation. Agreements such as the NAFTA (1994) have increased border efficiency. The movement of goods and services, jobs, and capital pre 9/11 was done in a user-friendly and economically profitable manner. The high volume of economic interaction has been especially beneficial for Canada with trades of goods and services equating roughly $7 billion dollars in 2000.[1] An open border has promoted a sentiment of familiarity and ease of travel between the two countries, as approximately 15 million Canadians travel to the U.S. every year.[2] For both Canada and the U.S., 9/11 was the catalyst for security modernization and border infrastructure development, the effect of which threatens the sentiment of familiarity and ease of travel between the two countries.

In the aftermath of 9/11, the Canada-U.S. border was highlighted as a key weakness of U.S. national security. Immediately following the attacks, the initial effects of border thickening and inefficiency took the form of border delays, which for Canadian firms dependant upon export revenue, was financially destabilizing. It became clear that Canada was very reliant upon the U.S. for economic prosperity. Specifically, 85% of Canadian trade has consistently been dependent upon U.S. firms and citizens.[3]

Border efficiency is fundamentally tied to Canadian economic growth. In order to mitigate economic consequences, the Government of Canada remains focused on border security, program implementation and strategic policy advancement.

It is only through collective policy and program implementation and modernization that both border security and border efficiency can be achieved. Border administration practices have fundamentally shifted in strategy. The immediate aftermath of 9/11 provided a transition period for policy adjustment and response. Canadian officials were proactive in jointly designing a policy response; this is best highlighted in the formation of the Smart Border Accord (SBA). Signed on December 12, 2001, by John Manley and Tom Ridge, the SBA strives for effective risk management through information technology techniques.[4]

Overall, 44 different agencies are now responsible for protecting the Canada-U.S. border.[5] Government agencies have increasingly streamlined their approach. This is most visible through the interaction between the Canadian Border Service Agency (CBSA) and the U.S. Customs and Border Patrol (CBP).[6] The SBA platform aims to separate high risk movement from low risk movement with common and compatible standards and information sharing. The SBA addresses 32 specific areas, through four concrete security pillars:[7] the secure flow of people, the secure flow of goods, investing in secure infrastructure, coordination and information sharing in the enforcement of these objectives

The SBA has created a framework for border management centered on two pillars: risk management and delocalisation. First, the SBA has promoted risk management and intelligent filtering techniques at border corridors. Information technology, for example, can more efficiently separate low-risk from high-risk movement. Secondly, de-locating – moving border administration activities *away* from corridors – is an effective way to mitigate the cumbersome nature of the post 9/11 border security requirements. Successful risk management techniques and technologies can contribute to this activity. Efforts to de-locate border security have increasingly become a top priority for American and Canadian officials alike.

The SBA has been the major catalyst and means through which economic concerns associated with border security have gained a platform. More concretely, the SBA's strategies have provided the means by which both robust security mechanisms and border efficiency can collectively be achieved.

Through the implementation of the SBA, Canadian-U.S. border interaction has shifted from a relationship previously best characterized as friendly neighbors to one of risk management. This shift is especially apparent at border corridors, where programs such as FAST, NEXUS and WHTI have begun to play an increasingly active role in border corridor management.[8]

## AN OVERVIEW OF KEY PROGRAM AND POLICY INITIATIVES

### Free and Secure Trade

The Free and Secure Trade (FAST) card is a key initiative undertaken to reduce the costs of border inefficiency for commercial drivers, importers and motor carriers.[9] FAST has become integral to the process of efficient trade between Canada and the U.S. and is a major step forward in bilateral commercial trade. As an example of delocalisation, actual verification of the data for a FAST card is done at a different time *away* from the physical border, increasing efficiency. There are many benefits to the FAST card, such as access to dedicated lanes allowing for faster crossing.[10] Pre-approved importers, carriers and drivers save time because documents associated with shipments are sent electronically to customs officials before the truck approaches the border. Costs are reduced because of this predictability and lane filtering. With a cost of $50 dollars and valid for 5 years,[11] FAST cards are a sustainable means for commercial trade to offset border thickening security policy.

### Nexus

The NEXUS card was developed to mitigate the border thickening associated with increased security checks. A joint venture between CBSA and CBP, NEXUS provides individuals with the opportunity to distinguish themselves as low risk travellers.[12] Individuals who cross the Canada-U.S. border regularly find utility in obtaining the card. Applicants who successfully pass a risk assessment are able to purchase the card, allowing them access to dedicated border lanes, with automated self-serve kiosks.[13] NEXUS cardholders are treated as pre-approved, frequent travellers, which places a relative ceiling on the amount of time spent crossing the border.

## POST 9/11 BORDER REALITIES

Increased border security post 9/11 has resulted in slower crossing times. Policies and initiatives inevitably will continue to promote strict surveillance tactics, which with current infrastructure realities may compromise efficiency. The majority of border delays are the result of heavy traffic bottlenecks due to documentation glitches, long lines and low ratios of customs officers to those who are crossing.[14]

The full benefits of FAST and NEXUS have yet to be realized due to the insufficient number of border personnel and lanes. Pre-approved cargo shipping also has yet to be perfected. To be sure, without sufficient lane facilities, the usefulness of sophisticated policy based on risk management and information technology is limited.

Efforts have been made to improve bottlenecks: the 2003 Canadian budget allocated CAD150 million for the immediate improvement in border infrastructure in Windsor.[15] In 2005, the Government of Canada announced a 5-year plan to hire an additional 270 border officials.[16] Nevertheless, the functions of strategic security measures are still limited.

Despite the challenges at the border, the real volume of exports and imports between Canada-U.S. has not decreased post 9/11.[17] Rather, a thickened border has served to slow down the speed at which goods cross the border. In 2003 alone, 60% of cross border commercial traffic experienced delays of up to 8 hours, (most were resolved in 1-2 hours).[18] Costs of security compliance for companies have become increasingly cumbersome. Between 2001 and 2004 Ontario based firms alone lost an average of $5.2 billion dollars a year from late deliveries and delays.[19] Organizational inefficiencies are collectively costing the Canadian-U.S economy $7.5-13.2 billion dollars a year.[20] This destabilizes Canada-U.S cooperation as 70% of all trade between the countries is intra-industry.[21]

The level of sophistication and organization of border security policies have primarily focused on commercial trade, neglecting the complexities associated with human travellers. Whether for business or pleasure, crossing the border for the average citizen has become complicated and confusing mostly associated with the Western Hemisphere Travel Initiative (WHTI).[22] Implemented on June 1, 2009, the WHTI requires all western hemisphere citizens to present valid identification when entering the US.

Deadlines for WHTI implementation had consistently been postponed, from January 1, 2007 to January 1, 2008 and finally to June 1, 2009.[23] Proper identification includes passports, NEXUS cards, FAST cards, certificates of Indian status, enhanced driver licences, approved photo identification with citizenship proof, and in some cases birth certificates.[24] The continuous postponement of new restrictions has cemented the scepticism and confusion associated with border security policy. The process is further confused by the fact that the accepted documents and costs for US entry differ depending upon the avenue of entrance.[25]

In short term, the WHTI is destabilizing as majority of citizens do not hold secure border identification. In 2005 only 34% of US residents had a passport, in comparison to 41% of Canadian residents.[26] Currently only Americans have access to PASS cards, a 'lighter' cheaper version of a passport. The cards cost $55 dollars less than traditional booklet passports.[27] PASS cards became available on July 14 2008, and the Department of State has already received over 350,000 applications.[28]

To the dismay of respective tourism industries, travel rates between Canada and the US in the short term will likely decrease. A study conducted by the Conference Board of Canada in 2006 estimated that decreases in US travel to Canada between 2005 and 2010 would amount to a loss in 14.1 million inbound trips ($3.6 billion dollars).[29] During this time, Canadian travel to the US is estimated to decrease by 7.4 million trips.[30] It is anticipated that same day trips will radically decline by 5.1 million trips in the same period.[31]

## ANALYSIS

Under the principles of risk management, information technology and border de-location, there are key issues that presented persistent policy challenges. Both in terms of real physical infrastructure and customs officials, basic bottlenecks must be mitigated. High levels of traffic and border line-ups hinder effective risk management techniques associated with border policies such as FAST; this is a continuing struggle. With the implementation of the WHTI land clause, border inefficiencies are likely to increase. Specific weaknesses are most visible at peak travel times and key southern Ontario corridors. Advanced policy and information technology cannot fully maximize their benefits without adequate basic facilities.

Although the pillars of the SBA are rather simple, implementation of border policy has been complex and inefficient. There is a lack of an over arching policy or department which could effectively house and organize border initiatives in a clear and concise manner. Much of this criticism emerges from WHTI, which has been unnecessarily confusing both in its regulations and execution. With its sweeping nature, the WHTI runs *against* risk management techniques.[32] Moreover, for travellers, the WHTI competes with NEXUS, and regulations regarding the two are confused. In both countries the general population does not yet understand which identification cards can be used for air, land, and sea crossing.

Part of the reason WHTI execution dates have been postponed so many times is ineffective public education campaigns. This is partly due to competing campaigns between government departments such as Passport Canada and CBSA. A consensus is needed if policy is to be deemed a success. In terms of WHTI, this is not the case, especially considering the availability of PASS cards for US citizens and not Canadians.

Without the use of strategic technology, the border would likely be far thicker than it is today. Technology has become the primary vehicle through which efficient and user-friendly border crossing will likely be achieved. Although in the short run scepticism remains, technology has become internalized in border security risk management techniques. Programs such as NEXUS and FAST have their basis in technological innovation, the results of which have been a more predictable border crossing experience. For companies this has meant increased organization of administrative affairs and less time-consuming paperwork. In response to WHTI, efforts are also being made to incorporate technological advances and promote the use of enhanced drivers licenses (EDLs). Many provinces have begun discussions and feasibility studies on EDLs, for example Nova Scotia, Saskatchewan and Manitoba.[33] British Columbia is now in the process of conducting testing trials on EDLs through 521 qualified volunteer drivers.[34] EDLs may be a cost effective means through which individuals can cross the border and conform to the stringent reality of the WHTI. For travellers, the benefits of information technology have yet to fully be realized. However, with increased interest in EDLs, it is clear that efforts to push technology forward are being made. For the present time, technology will be the means through which border thickness can be decreased.

Budget 2008 committed $174 million dollars (over 2 years) to Canadian-US border affairs such as equipment, infrastructure and cooperative framework funding.[35] Moreover, since 2000 almost $10 billion dollars has been spent on law enforcement and border security.[36] Critical questions of whether or not such high levels of funding are necessary should be asked. This applies to harmonious border policy implementation and analysis debates. Are current practices producing cost-saving externalities? This is especially relevant considering the current economic downturn. In the meantime, Budget 2009 committed $80 million dollars to the Canada-US border.[37] Monies were mainly allocated to corridor modernization, and infrastructure development (Peace and Blue Water Bridge in particular).

Canadian sentiment has consistently expressed a concern over US dominance. However, the fact remains that one in 25 American jobs is dependent upon open and free trade with Canadian counterparts.[38] Thus, while security may for the moment trump trade, American officials have a great interest in promoting efficiency at the border. Delays at the border have cost the American trucking industry $9 billion dollars annually.[39] Canadian and American officials must take these realities into consideration. Cooperative and coordinated border policy is mutually beneficial.

## POLICY OPTIONS

Considering the above, along with the need for effective risk management techniques, three options are suggested below:

1. Policy Enhancement via Technology – Budget 2008 committed $7 million dollars to the implementation and introduction of EDLs,[40] which will make border crossing under the WHTI far more efficient. The Government of Canada has also set a goal of introducing a high security electronic passport by 2011.[41] It is suggested that future border inefficiencies be tackled through technology as opposed to new policy development. This would effectively put a freeze on border policy implementation (with the exception of the WHTI). Efforts should be made to standardize technology use between Canada and the US. This would include the implementation of a Canadian PASS card. One of the main problems of border policy is the confusion associated with overlapping policies. Time is needed to set in current practices, highlight problems and suggest technology-based solutions. Moreover, coherent campaigns must be undertaken so

that both the trade and travel components of the Canada-US border are promoted. This is an immediate concern, as the WHTI was fully implemented June 1, 2009. Focus should be placed on trying to solve and answer the questions and concerns of the public in a coherent way.

2. Infrastructure Investment – the real needs in terms of physical infrastructure and border officials will be fully known after the implementation of WHTI. Until then, efforts should be made to anticipate areas of contention and weakness (Southern Ontario). Also, the real capabilities of linking Canada-US roads with the railway should be further investigated. This could be especially beneficial for commercial trade. Infrastructure investment is considered to be a medium-term initiative as it yet unclear how much the WHTI will affect future border thickness in real terms.
   Proactive spending on border facilities and personnel is costly and doing so without a clear indication of problems is risky. Technology investment should be the first option. If and when those techniques fail, infrastructure modernization policies could be further developed.
3. Joint Border Commission – the Canadian International Council (CIC) recommends a Permanent Joint Border Commission (PJBC) between Canadian and US border officials.[42] The PJBC aims to remove trade barriers which hamper levels of economic interdependence between Canada and the US. Initiatives are divided into short term (improvements in security structures) and long term (trade and regulation) goals.[43] Initial steps in creating the PJBC put much responsibility in the hands of two high profile representatives who are given the task of developing a plan of action for border management.[44] Acknowledging the complexities of such a commission, CIC loosely suggests that representatives would then establish a framework for long term border security coordination i.e.: the PJBC.[45] Executive cabinet level officials would then take over the PJBC functions, informing relevant government officials approximately every six months.[46]

Based on its complexity, the PJBC is considered to be a long-term initiative. Moreover, time frame questions emerge in relation to implementation given the fact that a new US administration has taken office and thus new relationships will need to be developed. Secondly, doubts exist when considering the asymmetrical power and influence between Canada and the US in terms of global affairs. The success of the joint commission will be dependent upon good relations between governing officials and policymakers from both countries.

## CONCLUSION

In the short run, it is recommended that focus be placed upon information technologies and techniques. Since 2001, numerous border security policies have emerged – the implications of which have only recently become fully visible. Moreover, there is much more to learn about the relationship between efficiency and thickness. This is especially true when considering the potential impacts the WHTI and even the Obama administration may have on trade and travel relations. For this reason, it is advised that infrastructure and policy development proceed with caution for the time being. More time is needed to allow for an efficient and thoughtful analysis of concrete border obstacles.

Furthermore, technology allows for a cost-effective means through which border thickness can be mitigated. With current interests in enhanced driver licences and identification cards, technology is the ideal medium through which risk management techniques can be perfected. Infrastructure development will indeed be needed in the future. However, for the time being, easier methods with more visible positive externalities should be exhausted. It is recommended that a public awareness campaign be undertaken immediately to help reduce the negative effects the WHTI may have on trade and travel. These campaigns must avoid complexity and thus require departmental cooperation. Overall, the intention of technology promotion is to internalize and establish a harmonious framework through which border dialogue can occur. Cross border trade and travel will never be as it once was pre 9/11 and this must be accepted. However, through effective coordination and filtering technologies, the Canada-US border can become a key source of increased cooperation between the two countries.

## ABOUT THE AUTHOR

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## ENDNOTES

[1] Hart, Michael and Dymond, William. "Common Borders, Shared Destinies: Canada, and the United States and Deepening Integration", Centre for Trade Policy and Law, Ottawa: Norman Patterson School of International Affairs at Carleton University, 2000, 3.

[2] Ibid, 7.

[3] Sokolsky, Joel. "Northern Exposure? American Homeland Security and Canada", International Journal (no.1) (60), Winter 2004-05, 35.

[4] This information was found in numerous sources such as: Kergin, Michael and Matthiesen, Birgit. "A Bridge for Old Allies", Canadian International Council, November 2008, 4. and Canada. Government of Canada. Foreign Affairs and International Trade. "Border Cooperation". <http://geo.international.gc.ca/can-am/main/border/default-en.asp>.

[5] "Canada-US Border Requirements Impede Trade and Reduce North American Competitiveness: Border Coalition's Fourth Report", Ottawa. Canadian Manufacturers & Exporters. <http://www.cme-mec.ca/pdf/bordercoalition%20release_approved.pdf>.

[6] Ibid.

[7] "Border Cooperation," op cit.

[8] Kergin and Matthiesen, 4.

[9] Government of Canada. Canada Border Services Agency. "Free and Secure Trade". <http://www.cbsa-asfc.gc.ca/prog/fast-expres/menu-eng.html>.

[10] Ibid.

[11] U.S. Customs and Border Protection. "Fast Express, Commercial Driver Program Application Instructions" 31 January 2008, 6. <http://www.cbp.gov/linkhandler/cgov/trade/cargo_security/ctpat/fast/fast_driver/canada_fast_driver/fast_cd.ctt/fast_cd>.

[12] Government of Canada. Canada Border Services Agency. "Cross often? Make it simple, use NEXUS". <http://www.cbsa-asfc.gc.ca/prog/nexus/about-sujet-eng.html>.

[13] Ibid.

[14] Personal conversation with Former U.S Ambassador Kergin, Monday November 17 2008.

[15] Government of Canada. Department of Finance. "The Budget Plan 2003", 168. <http://www.fin.gc.ca/budget03/pdf/bp2003e.pdf>.

[16] Parliament of Canada. Senate Standing Committee on National Security and Defence: Canadian Security Guide Book. Border Crossings, Ottawa, March 2007, 20.

[17] Goldfarb, Danielle. "Reaching a Tipping Point: Effects of Post-9/11 Border Security on Canada's Trade and Investment", The Conference Board of Canada, June 2007, 7.

[18] Konrad, Victor and Nicol, Heather. "Boundaries and Corridors: Rethinking the Canada-United States Borderlands in the Post-9/11", Canada-American Public Policy, Dec 2004, (60), 18.

[19] MacPherson, Alan D. et al. "The Impact of U.S. Government Antiterrorism Policies on Canada-U.S. Cross-Border Commerce: An Exploratory Study from Western New York and Southern Ontario", The Professional Geographer, 58(3) 2006, 267.

[20] Ibid, 268.

[21] Kergin and Matthiesen, 1.

[22] Government of Canada. Canada Border Services Agency. "Western Hemisphere Travel Initiative – Chronology." <http://www.cbsa-asfc.gc.ca/whti-ivho/chron-eng.html>.

[23] "Border & Transportation Infrastructure: Border Policies", Ontario Chamber of Commerce. October 2006, 5. This was confirmed by consulting: Government of Canada. Canada Border Services Agency. "Western Hemisphere Travel Initiative – Chronology". Countries include: Canada, Mexico, Anguilla, Antigua and Barbuda, Bahamas, Bermuda, British Virgin Islands, Cayman Islands, Dominica, Dominican Republic, Grenada, Jamaica, Montserrat, Netherlands Antilles, St. Kitts and Nevis, St. Lucia, St. Vincent

and the Grenadines, Turks and Caicos. As described on U.S. Department of State. "Western Hemisphere Travel Initiative". <http://travel.state.gov/travel/cbpmc/cbpmc_2223.html>.

[24] Government of Canada. Canada Border Services Agency. "Western Hemisphere Travel Initiative – Accepted documents into the United States". <http://www.cbsa-asfc.gc.ca/whti-ivho/doc-eng.html>

[25] Government of Canada. Canada Border Services Agency. "Western Hemisphere Travel Initiative – Accepted documents into the United States".

[26] Starky, Sheena. "The Western Hemisphere Travel Initiative: Balancing Security and Economic Interests", Economics Division, Library of Parliament Parliamentary Information and Research Services, May 23 2006.

[27] U.S. Department of State. "Travel Documents for U.S. Citizens". <http://travel.state.gov/pdf/ppt_pptCard.pdf>.

[28] U.S. Department of State. "U.S. Passport Card." <http://travel.state.gov/passport/ppt_card/ppt_card_3926.html>.

[29] "An Update on the Potential Impact of the Western Hemisphere Travel Initiative on Canada's Tourism Industry", Prepared by the Conference Board of Canada for Industry Canada, August 2006, 3. <http://www.ic.gc.ca/epic/site/dsibtour.nsf/vwapj/qq00029_eng.pdf/$FILE/qq00029_eng.pdf>.

[30] Ibid. 4.

[31] Ibid.

[32] Martin, Pierre. "The Mounting Costs of Securing the "Undefended" Border", Policy Options, July-August 2006, 16.

[33] Government of Canada. Canada Border Services Agency. "Western Hemisphere Travel Initiative – Enhanced Driver's License/Enhanced Identification Card". <http://www.cbsa-asfc.gc.ca/whti-ivho/edl-pcp-eng.html>.

[34] Insurance Corporation of British Columbia. "Driver Licensing – Enhanced Driver's Licence". <http://www.icbc.com/licensing/lic_renew_replace_enh_dl.asp>.

[35] "Border Cooperation," op cit.

[36] Ibid.

[37] Canada. Department of Finance. "Canada's Economic Action Plan – Budget 2009". <http://www.budget.gc.ca/2009/plan/bpc3d-eng.asp>.

[38] Kergin and Matthiesen, 1.

[39] *Ibid*., 7

[40] "Border Cooperation," *op cit.*

[41] *Ibid*.

[42] Kergin and Matthiesen, 15.

[43] *Ibid*.

[44] *Ibid*.

[45] *Ibid*.

[46] *Ibid*., 15-16