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***Contemporary Challenges of the Americas in the Context of  
Refugee and Immigration Law: A Judicial Perspective***

Presentation by  
The Honourable Justice Russel W. Zinn  
Federal Court  
President of the Americas Chapter of the IARLJ  
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My comments this morning are mine alone and should not be taken to reflect the views of other judges, or my Court.

I wish to acknowledge the assistance I have received in preparing these remarks from Ross Pattee of the Immigration and Refugee Board [IRB], Jennifer Higgins of the U.S. Citizenship and Immigration Services, Judge Esteban Lemus Laporte of the Costa Rican Immigration Tribunal, and Carlos Alberto Meza Ruiz of the Mexican Commission for Refugee Aid (COMAR). I thank each for their assistance, and acknowledge that any errors or omissions are mine alone.

If there is a theme to be found regarding refugee claims and migration among the countries in the Americas in 2017, it is that each is faced with an unexpected surge in persons seeking protection and that we are all seeking solutions to slow the flood and process asylum claims in a timely manner.

As a Judge of Canada's Federal Court, I begin my remarks with an examination of the state of affairs in my home country.

### Canada

The number of people seeking asylum in Canada is now the highest it has been since 2009. In September, our Minister of Immigration, Refugees and Citizenship observed that based on current trends, Canada could see over 40,000 claimants by the end of 2017. If so, that number would exceed the peak Canada experienced in 2008 and 2009.

This increase is driven, in part, by a marked increase in claimants crossing Canada's land border with the United States of America at points not designated official ports of entry; these are dubbed "irregular arrivals" in the jargon of the immigration bureaucracy. All branches of government, executive, legislative, and judiciary must now contend with the consequences of this phenomenon.

An October 19<sup>th</sup> article in the New York Times<sup>1</sup> neatly encapsulates the refugee policy crossroads at which Canada now finds itself. It opens by stating that "a wave of asylum seekers entering Canada ... has exacerbated a backlog of refugee claims that the government is struggling to manage, leaving tens of thousands of people stuck in bureaucratic limbo even as they try to build new lives." The reader is informed that a backlog of 40,700 cases is currently clogging up that system. The Immigration and Refugee Board [IRB] backlog has been growing since January at a rate of some 1400 claims per month. Claims filed today are not likely to be

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<sup>1</sup> *Canada Welcomed Refugees, but Now Struggles With Backlog*, October 19, 2017, Dan Levine

heard for 16 months or more. This backlog is in addition to the “legacy claims” filed with the Board before December 2012, when the legislation underwent a significant change. It is my understanding that those claimants may wait 5 or more years for a hearing, although efforts have recently been undertaken by the IRB to process those claims more quickly.

How did this state of affairs come to be? I recall being told by a judge from Europe that we Canadians were smug about our refugee processes, because we had ice to the north, water on the east and west and the USA on the south. In short, we did not have the experience of European nations of being inundated with refugees from close neighbours. Well, that has changed.

It is probably safe to say that few nations have been as directly impacted by some of the immigration policy shifts of the Trump administration as its neighbours immediately to the north and south.

Some have said that President Donald Trump’s January 27th, 2017, Executive Order, temporarily barring foreign-born nationals from seven countries from entering the USA, sent an alarming message to the millions of foreign nationals then residing in the USA, and thereby started a chain of events that were to indirectly impact migration patterns to Canada and the rate and type of asylum requests made following irregular crossings of our border. Indeed, it is fair to say that the impacts of this Order still reverberate, and my remarks on issues and challenges in North America should be viewed in the context of this Order and the debate it

prompted regarding revisiting some key aspects of Canada's refugee policy, one which continues in Canada to this day.

Some in Canada looked for an immediate response to President Trump's Executive Order last January. Some called for the suspension of the *Agreement between the Government of Canada and the Government of the United States of America for cooperation in the examination of refugee status claims from nationals of third countries*, known colloquially as the "Safe Third Country Agreement."<sup>2</sup> Signed in December 2002, the Safe Third Country Agreement sets out a broad framework by which refugee claimants arriving at the land border between the USA and Canada are returned to the country from which they are travelling (i.e. Canada or United States) for the purpose of determining their refugee status, subject to exceptions. The Safe Third Country Agreement has been given effect in Canadian law by provisions in the *Immigration and Refugee Protection Regulations*<sup>3</sup> made under Canada's *Immigration and Refugee Protection Act* [IRPA].

In essence, section 102 of the IRPA provides that the Governor in Council can designate, by regulation, a country that complies with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture for the purpose of sharing responsibility in refugee determination with governments of foreign states. The United States is the only country that

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<sup>2</sup> The official title is: "*Agreement between the Government of Canada and the Government of the United States of America For cooperation in the examination of refugee status claims from nationals of third countries.*" (final text: <http://www.cic.gc.ca/english/department/laws-policy/safe-third.asp> )

<sup>3</sup> *Immigration and Refugee Protection Regulations*, SOR/2002-227, ss. 159.1 to 159.7. Online: <http://laws.justice.gc.ca/eng/regulations/SOR-2002-227/FullText.html>

has been so designated by Canada, a particular status that a number of critics claim it no longer deserves.

It is interesting to note that the Safe Third Country Agreement has not been universally applauded among refugee advocates and the legal community in Canada. In fact, the Agreement and its related regulations were and currently are the subject of a judicial challenge. In 2007, in *Canadian Council For Refugees v Canada*<sup>4</sup> the Federal Court struck down the Safe Third Country Agreement and related regulations as it found that the United States' compliance with Article 33 of the *Refugee Convention* and Article 3 of the *Convention Against Torture* were conditions precedent to designating a country. The applications judge was of the opinion that the evidence showed that the United States' policies and practices did not meet the conditions set down for authorizing Canada to enter into a Safe Third Country Agreement. Specifically, the Court found that the United States did not meet the Refugee Convention requirements or the Convention Against Torture.

The decision of the Federal Court was reversed by the Federal Court of Appeal. The Court of Appeal found that the Federal Court had erred by focusing on whether the United States actually complied with the Conventions, rather than whether the Governor In Council, in designating the United States, assessed the relevant factors set out in the Act. Since it was

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<sup>4</sup> *Canadian Council for Refugees v. Canada*, [2009] 3 FCR 136, 2008 FCA 229. Online: <http://canlii.ca/t/1z69f> ; Reversing *Canadian Council for Refugees v. Canada*, [2008] 3 FCR 606, 2007 FC 1262. Online: <http://canlii.ca/t/1tz0l> . Leave to appeal the Federal Court Appeal dismissed by the Supreme Court of Canada: *Canadian Council for Refugees, Canadian Council of Churches, Amnesty International and John Doe v. Her Majesty the Queen*, 2009 CanLII 4204 (SCC). Online: <http://canlii.ca/t/22d7x>

clear that the Governor in Council assessed the factors, and there was no suggestion that it was acting in bad faith or for improper purposes, the Court of Appeal held that the designation of the United States as a safe country complied with the statutory requirements.

As I said, the Safe Third Country Agreement is again under a new attack in the Federal Court. Again, its critics are arguing that returning persons back to the USA is unconscionable and not in keeping with Canada's international obligations. That challenge is likely to be heard in early 2018; regardless of the result, it is almost certain to be appealed, perhaps to the Supreme Court of Canada.

My Court also took note of the Trump Administration's Executive Order. On February 3<sup>rd</sup>, 2017 the Honourable Madam Justice Heneghan granted an interim stay to Syrian citizens who were to be removed from Canada to the USA, the first such case before the Court. The immediate concern was that the USA might well return this family to Syria. The Executive Order was to be the basis of the applicants' submissions on the full motion to stay the removal which was to be heard on the following Tuesday; however the Minister granted the family temporary Permanent Residence in Canada that Saturday and the hearing was unnecessary.

In addition to the immediate impact this influx of claimants has on the IRB, I note that ultimately, the judiciary will feel the impacts of this influx of asylum seekers as will the various social and community organizations, which are called upon to mobilize and support these

newcomers to Canada. The delay in adjudicating claims will also increase the amount of money Canada spends on asylum seekers' medical care, education and public assistance.

There is little doubt that the situation is by no means "business as usual" for the IRB. "The strain on the organization to handle this many people's hearings is enormous," Shereen Benzvy Miller, head of the Board's refugee protection division, told the parliamentary immigration committee last month.

The New York Times article informs us that most of the 8,500 asylum seekers who walked into Québec from New York State in July and August were Haitians fearing deportation from the United States after the Trump administration announced it might end their "temporary protected status" which was granted following Haiti's massive 2010 earthquake. They crossed the border into Canada seeking to benefit from a loophole in the Safe Third Country Agreement between the two countries that allows people to make refugee claims in Canada if they do not arrive at legal ports of entry. When daily arrivals from across the border soared into the hundreds, the Québec provincial government was compelled to turn the former Montréal Olympic Stadium into a temporary shelter with space for 1,500 beds. While this might hardly seem noteworthy to those here with more than a passing knowledge of the work of the UNHCR, or indeed anyone who has worked in the world's conflict zones, I can assure you that it was a remarkable and unfamiliar sight for citizens of a country whose only land border is with the United States of America.

By some estimates, more than 250,000 migrants from El Salvador, Honduras, and Nicaragua who are currently eligible to remain in the USA due to the suspension of removals to their home country could follow in the footsteps of the Haitians, and make their way north if it appears that the American administration is likely to lift the stay of removals for individuals of their nationality. Indeed, some may be tempted to come to Canada in anticipation of a decision by the Trump administration to lift a stay.

In September, President Trump announced that he would be ending the Deferred Action for Childhood Arrivals program, the initiative that shields from deportation 800,000 migrants brought to the USA as children - now known as Dreamers. Some in Canada have argued that these Dreamers ought to be welcomed with open arms as they are, by and large, well educated, energetic individuals whose talents we can use in Canada. However, those numbers would exceed our annual immigration levels and if this program ends, some of these Dreamers, not wishing to return home to a country of which they know little, may enter Canada claiming refugee status based on the risks they face in their home country. Even if not accepted as refugees in Canada, they may claim surrogate protection or may apply for a humanitarian and compassionate exemption permitting them to apply within Canada for permanent residency. Regardless, such claims and applications will place an additional burden on the Canadian immigration and refugee system.

## United States of America

The United States has seen a substantial increase in the number of individuals seeking protection domestically over the last few years. This includes both those present in the United States who have claimed refugee protection, as well as those apprehended at or near the border who claim they are afraid to return to their home country. If these persons establish they have a “credible fear” of returning to their home country, then they cannot be subject to deportation from the USA until their asylum claim is processed.

US authorities report that in FY2016, United States Citizenship and Immigration Services [USCIS] screened nearly 93,000 individuals who claimed a credible fear, including those apprehended at or near the border, nearly double the number of individuals screened the previous year and almost seven times the number screened four years earlier. In FY2016, affirmative asylum application filings increased to over 100,000 for the first time in 20 years, reaching nearly 115,000 new filings. This was an increase of over 30,000 filings from the previous fiscal year, and double the number of filings received three years earlier. Through the third quarter of FY2017, USCIS has already received 61,063 credible fear referrals and 111,218 new affirmative asylum applications.

Because individuals in the credible fear screening process are detained while they await their interviews with USCIS asylum officers, USCIS has prioritized these cases for the last several years. To process these requests in a timely manner, USCIS has had to shift asylum officers from the affirmative asylum caseload to the credible fear caseload. Additional asylum officer

resources were also diverted from asylum case processing over the previous two fiscal years to support increased overseas refugee processing. This diversion of resources, when coupled with the significant increase in the number of affirmative asylum filings, has resulted in a growing backlog of affirmative asylum cases. That backlog has increased from approximately 15,000 at the end of FY2012 to approximately 275,000 at the end of the 3rd quarter of FY2017, and will surpass 300,000 cases early in FY2018.

Much of the increase of claims in the USA comes as a result of persons fleeing from the Northern Triangle of Central America, encompassing Guatemala, Honduras and El Salvador. In the words of the UNHCR, these are countries where “amidst widespread economic and political instability, the threat of violence, intimidation, and extortion at the hands of the local criminal [gangs] ... makes a challenging situation all the more desperate” and thousands are forced to flee and seek asylum in nearby countries.

The notorious wall that President Trump proposes to build along the southern border of his country is intended to address some of the surge of humanity crossing into the USA.

A recent article in the LA Times<sup>5</sup> reports that the United States and Mexico are teaming up to stem the flow of migrants from Central America, noting that some 200,000 Central Americans were detained at the border in 2016. The new initiative aims to discourage people from leaving Honduras, El Salvador and Guatemala by funding projects over the next six months to improve

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<sup>5</sup> *The U.S. and Mexico want to slow migration from Central America, Will mass deportations help?* by Kate Linthicum, October 27, 2017.

the economies and security situation in those countries while reducing corruption. However, advocates warn that other migration-related policies the administration has enacted or is weighing could destabilize the region by leading to much higher levels of deportations of Central Americans from the USA. In August, the current American administration ended a program that granted temporary legal residence to Central American children who could prove they were under threat of violence. The program was designed as a safe and legal alternative for children who might have otherwise sought to migrate alone. Without it, some fear more minors will head north with the assistance of human smugglers.

### **Mexico**

In 2013, only 1,296 applications for refugee status recognition were received in Mexico.

In 2016, 8,793 applications for refugee status recognition were received in Mexico. In 2017 up to October 12th, 10,921 applicants were received. At this rate the number of applications in 2017 will be a 10-fold increase over those in 2013 – just 4 years prior.

The main nationalities entering Mexico from 2013 to 2016 were from the northern triangle countries. This has changed in 2017: they now mainly come from Venezuela in addition to Honduras and El Salvador.

The main challenges of the Mexican Government are the processing of the total number of refugee applications with the same number of staff, within the 45 working days timeline (90 working days in cases that are extended) established by Mexican legislation while respecting

the principles of due process. In response to this challenge of rising intake, the Government of Mexico, through COMAR, has implemented training sessions on issues related to refugee analysis for its protection officers, in addition recently the "Handbook for Determining the Recognition of the Status of Refugees in Mexico" and an online training module for Migration Officers regarding the refugee procedure were published. With these two actions, the Government of Mexico intends to standardize the refugee procedure in all the offices of COMAR, and provide tools for the proper access of foreigners to the procedure.

### **Costa Rica**

The Costa Rican Immigration Tribunal is currently working with four majority nationalities as refugee applicants coming from both the south: Venezuela and Colombia as well as from the north: Honduras and El Salvador. From Costa Rica's perspective, the most rapid rise of intake is from Venezuela. Venezuelan refugee applications have increased more than 100% compared to two years ago. The Costa Rican officials are closely following the changes in the requests for refugee protection from Colombian nationals after the peace process. Two themes that are a constant factor are violence by gangs in El Salvador and structural violence in Honduras.

In the face of these surging challenges, a number of countries in the area are taking action. The Comprehensive Regional Protection and Solutions Framework (or MIRPS in its Spanish acronym) is a regional version of the Comprehensive Refugee Response Framework (CRRF) adopted by all States as Annex 1 of the 2016 New York Declaration. It builds on previous regional commitments and responsibility-sharing mechanisms, most notably the 2014 Brazil

Plan of Action and the 2016 San Jose Action Statement, by developing detailed national action plans to strengthen protection and solutions in the region. The CRPSF will serve as a regional contribution towards the development of the Global Compact on Refugees.

In line with the CRRF, the MIRPS also seeks to mobilize and align early on a broad group of stakeholders (governments at national and local levels, international and regional financial institutions, UN agencies and NGO partners, business, civil society actors and affected populations), and seeks to bring more financial resources to the table.

The MIRPS was adopted at a regional conference in Honduras on October 26 and 27, 2017. Belize, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, and Panama have officially confirmed their participation in the MIRPS. Each is preparing a national plan of action based on the main priority areas highlighted in the CRRF; namely, reception and admission, support for immediate and on-going needs, support for host countries and communities, and durable solutions.

I'd like to conclude my remarks by noting that the current realities of refugee migration in the Americas and indeed around the world did not exist at the time of writing of many of the foundational pillars of international refugee treaties and conventions. Those pillars are now being tested as they have perhaps never been. Not only in the Middle East, Africa, and other perennial hotspots around the globe, but in the Americas, and most unfamiliarly for a Canadian, in my own backyard.

Given the current historic global levels of refugees and displaced persons, the unprecedented migration of populations on a scale not seen since the 1940s, the current U. S. Administration's demonstrated policy direction, the rampant criminal gangs, and political and economic instability of many South and Central American countries, many countries in the Americas will continue to be impacted for a number of years by this evolving asylum trend.