

Questionnaire of the Special Rapporteur on the human rights of migrants: pushback practices and their impact on the human rights of migrants

Submission of the Government of Canada

Question 1. Please provide information on any relevant legislation or policy in relation to the right to seek and enjoy asylum in your country, which guarantees that migrants including asylum seekers' protection needs are examined individually, and they are not pushed back at the international border without access to this assessment and other relevant procedures. Grateful if you could kindly submit the original text of the legislation or policy, accompanied by an English translation if it is in a language other than English, French or Spanish.

The in-Canada asylum system is grounded in Canada's international legal obligations, under the treaties to which it is a Party, including the *Convention Relating to the Status of Refugees* and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. It is also grounded in its national law, including the Canadian Charter of Rights and Freedoms as well as in the Immigration and Refugee Protection Act (IRPA), which enshrines Canada's commitment "to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings" (outlined in [paragraph 3\(2\)\(e\)](#) of the IRPA).

Canada's asylum system is based on the principle of *non-refoulement* ([s. 115\(1\) of IRPA](#)) and provides protection to persons who have a well-founded fear of persecution or are at risk of torture, or cruel or unusual punishment in their countries of origin and/or habitual residence ([s.96 and 97 of IRPA](#)). Foreign nationals, who are identified as having a well-founded fear of persecution or facing a risk of torture, a risk to life or a risk of cruel or unusual treatment or punishment, can be recognized as refugees or persons in need of protection and, generally speaking, can apply to remain in Canada permanently.

Under normal circumstances, persons arriving at a port of entry or present in Canada, irrespective of the mode of entry, can make an asylum claim. All eligible claims receive a fair hearing before an independent quasi-judicial administrative tribunal, the [Immigration and Refugee Board](#) (IRB), in conformity with the law. Each claim is assessed on its individual merits by an IRB decision maker, in accordance with IRB rules and the principles of fairness and natural justice, which are intended to ensure that the process remains fair and consistent.

Most rejected claimants have access to appeal to the [Refugee Appeal Division](#) (RAD). The RAD considers appeals of decisions rendered by the Refugee Protection Division (RPD) to allow or reject claims for refugee protection. Appellants at the RAD must establish that the RPD made an error of fact, of law, or mixed fact and law. All failed refugee claimants have the option of filing an application with the Federal Court for leave and judicial review of a negative decision. Certain claimants exceptions do not have access to the RAD, including those who have made manifestly unfounded or non-credible

claims, who have abandoned or withdrawn their claims, or who are ineligible under provisions implementing the [Safe Third Country Agreement \(STCA\)](#) between Canada and the United States (U.S.).

Canada further demonstrates its commitment to the principle of *non-refoulement* via the [Pre-Removal Risk Assessment](#) (PRRA) process which assesses an individual's risk of return to persecution under the *Convention Relating to the Status of Refugees*, a danger of torture as described in the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, or a risk to their life or of cruel and unusual treatment or punishment prior to their removal from Canada. Persons who are not eligible to have a claim heard at the IRB may also, with limited exceptions, (e.g., have received a decision on their claim within a 12-month period) have their risk assessed under the PRRA process prior to removal.

The COVID-19 pandemic has temporarily increased the complexity of border management. [Orders-In-Council](#) issued pursuant to the *Quarantine Act* (P.C. 2021-0009), which restrict the entry of people into Canada, are exceptional in nature and temporary, and are subject to change according to the epidemiological situation in Canada.

While the resettlement of refugees to Canada remains impacted by Canadian border closures as well as travel restrictions imposed by countries from around the world due to the pandemic, Canada continues to work closely with our partners – the International Organization for Migration, the United Nations High Commissioner for Refugees (UNHRC), and private sponsors – to facilitate the resettlement of refugees where conditions allow, and where appropriate measures are in place to support refugees upon their arrival to Canada. Canada also continues to consider requests from the UNHCR to resettle refugees in urgent need of protection on a case-by-case basis.

Question 2. Please provide information on any existing good practices or measures taken (such as screening and referral mechanisms at borders) in your country to ensure that persons crossing international borders in mixed movements are protected according to international human rights law. Please indicate any specific measures aimed at reducing vulnerabilities of migrants, including by applying a human rights-based, gender- and disability-responsive, as well as age- and child-sensitive approach.

All refugee claimants are subject to the same requirements, and their eligibility is assessed with respect to the same grounds.

Under normal circumstances, foreign nationals present in Canada or arriving at a port of entry, irrespective of the mode of entry, can make an asylum claim (see COVID-19 border measures in response to Question 5). Individuals who are eligible to make a claim are referred to the [Immigration and Refugee Board of Canada](#) (IRB), which decides whether or not an individual is in need of protection, based on the merits of their case. All eligible asylum claimants are afforded due process and the opportunity to make their case for needing Canada's protection.

Yet, special attention is paid to the circumstances of individuals who may be facing vulnerabilities, such as women fearing gender-based violence, individuals whose ability to present their cases before the IRB is severely impaired, and individuals facing harm related to sexual orientation and gender identity and expression. To ensure such cases are handled appropriately, decision-makers (both IRB members and PRRA officers) follow the guiding principles outlined in the IRB's Chairperson's Guidelines¹.

Canada also ensures that the needs of unaccompanied minors who are going through the refugee claim determination process are met in a way that is aligned with Canada's obligations under international law. These include the obligation under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* to effectively prevent torture and other mistreatment, and the obligation under the *Convention on the Rights of the Child* that the principle of the best interests of the child be given primary consideration. Children are able to make refugee claims in Canada. The IRB has a set of Guidelines specifically for cases involving minors, especially unaccompanied minors², which state that the best interests of the child should be given primary consideration at all stages of the processing of these claims. During the initial interview, in the absence of parents or a legal guardian, a child welfare worker or authorized representative may attend to support and represent the child. Guidance for officers stresses the importance of being sensitive and helping child interviewees feel at ease. The Guidelines also describe measures that can be taken to accommodate the child during the hearing, such as explaining the process to the child, providing an informal environment, and questioning in a sensitive manner.

The IRPA requires the IRB to designate a representative for persons under 18 years of age. This person is usually a parent if the child is with his or her parents. If the child is unaccompanied, the representative can be any person who meets certain criteria.

Unaccompanied minors who arrive in Canada at the land border with the U.S. may make a refugee claim in Canada. This is an exception to the terms of the Safe Third Country Agreement with the U.S. and removes the prospect of a child being turned back to make their claim in the U.S.

Legislation stipulates that a minor child shall be detained only as a measure of last resort, taking into account other applicable criteria including the best interests of the child and the availability of alternative arrangements with local child care agencies or child protection services. Every alternative must be explored.

Question 3. Please provide information on existing restrictions or limitations in law and in practice in relation to the right to claim and seek asylum at

¹ See Guideline 4 – Women Refugee Claimants Fearing Gender-Related Persecution (<https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir04.aspx>), Guideline 8 – Concerning Procedures with Respect to Vulnerable Persons (<https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir08.aspx>), and Guideline 9 – Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression (<https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir09.aspx>)

² See Guideline 3 – Child Refugee Claimants: Procedural and Evidentiary Issues (<https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir03.aspx>)

international borders in your country (e.g., border controls, restricted access to territory) and elaborate the impact of these restrictions on the protection of the rights of migrants crossing international borders.

Under normal circumstances, foreign nationals present in Canada or arriving at a port of entry, irrespective of the mode of entry, can make an asylum claim (see COVID-19 border measures in response to Question 5). Eligibility for an asylum claim to be referred for a hearing to the IRB is determined by the Canada Border Services Agency or Immigration, Refugees and Citizenship Canada based on security concerns, criminality, previous protection claims in Canada, or having received protection from another country.

A person may be found ineligible to make an asylum claim to the IRB if they:

- Have already been granted protection in Canada or in another country to which they can be returned;
- Have previously been refused protection in Canada or have withdrawn or abandoned their previous claim;
- Have previously made a claim that was determined ineligible for referral to the IRB, or was rejected by the IRB;
- Came to Canada through a designated safe third country where a claim for protection could have been made (the U.S. is the only country designated by Canada);
- Are inadmissible on grounds of security, having violated human or international rights, or serious or organized criminality; and/or
- Are found to have made a claim for refugee protection in another country, with which Canada has an information sharing agreement, before making a claim for refugee protection in Canada.

Canada is committed to ensuring that people being removed are not sent to a country where they would be in danger or at risk of persecution. Persons who are facing removal from Canada, and who believe that they would face such a risk, may be eligible for a pre-removal risk assessment (PRRA). In most cases, a positive PRRA decision results in having a removal order stayed, the granting of protected person status, and the ability to apply for permanent residence.

Canada is committed to abiding by the international legal principle of *non-refoulement*, as reflected in subsection 115(1) of *IRPA*. The Act establishes two narrow exceptions to the principle of *non-refoulement*: the first exception is for a person who is inadmissible on grounds of serious criminality and who constitutes a danger to the public in Canada; and, the second is for a person whose application should be refused on the basis of the nature and severity of acts committed or of danger to the security of Canada (s.113 (d) of *IRPA*). These discretionary exceptions are consistent with Article 33(2) of the *Convention Relating to the Status of Refugees*.

In instances that the application of the above exceptions is considered, Canada undertakes a comprehensive evaluation of whether exceptional circumstances exist such that the nature and the severity of acts committed or the danger the person poses to the security of

Canada outweighs the risk that person would face if removed, applied in accordance with the human rights protections that are guaranteed by the *Canadian Charter of Rights and Freedoms*.

Question 4. Please provide information on any concrete instances of pushbacks, including an analysis on the circumstances of the event.

N/A.

Question 5. Please indicate any specific challenges that your Government has encountered, in the context of the COVID-19 pandemic, on ensuring the human rights of migrants crossing international borders, either by land or by sea.

Canada and the U.S. have been in discussion and agreed that the spread of COVID-19 is not yet under control and border measures continue to be necessary. Therefore, the supporting [Orders in Council](#) (OIC) remains in force until April 21, 2021. It may be subject to further extensions. This means that generally, asylum claimants entering Canada from the U.S. between official land ports of entry have been and will continue to be directed back. Individuals who are directed back may have the opportunity to return to Canada to make a claim once the border measures no longer apply.

Exceptions from the prohibition on entering Canada to make an asylum claim have been put in place for:

- U.S. citizens or stateless habitual residents of the U.S.; or
- Unaccompanied, unmarried minors without a parent or legal guardian in the U.S.

The Order also creates the authority for the Minister of Public Safety and Emergency Preparedness or the Minister of Citizenship and Immigration to exempt claimants who would otherwise be prohibited from entering Canada for the purpose of making a claim for refugee protection if it is in the national or public interest, while recognizing the paramount public health interests of Canada and Canadians.

Canada continues to cooperate with the U.S. to respect *non-refoulement* obligations, advance our shared responsibility to protect human rights, and to process asylum claims based on the principle that individuals must claim asylum in the first safe country that they enter.

For claims made at a land port of entry, the STCA and its existing exceptions will continue to be applied. This means that only those who meet an exception are permitted to enter Canada to make an asylum claim:

- Claimants with a family member in Canada;
- Unaccompanied minors;
- Persons who hold a valid travel document issued by Canada;
- Persons who are from a visa-exempt country for Canada but require a visa to enter the U.S.; or

- Cases in the public interest, e.g. death penalty.

Any refugee claimant who qualifies for a specific and limited exception to the OIC or STCA must follow the legal requirements to isolate and quarantine, as with all travelers to Canada.

For the most up to date information on how COVID-19 is affecting immigration, refugees, citizenship and passport services in Canada, please visit <https://www.canada.ca/en/immigration-refugees-citizenship/services/coronavirus-covid19.html>.

Question 6. Please indicate any challenges and/or obstacles faced by Governmental institutions or civil society organizations and individuals in protecting the human rights of migrants at international borders, including those in distress at sea and in situations where pushbacks or pullbacks are likely to take place.

N/A