

*Strategies for Recognizing the Intersection of  
Vulnerability and Complementary Pathways to  
Admission:*

*Lessons from Canada*

Andrew Fallone

Thesis submitted for assessment with a view to obtaining the  
degree of Master of Arts in Transnational Governance of the  
European University Institute

Florence, 15 May 2022



European University Institute  
**School of Transnational Governance**

# Strategies for Recognizing the Intersection of Vulnerability and Complementary Pathways to Admission: Lessons from Canada

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I confirm that this research draws upon the earlier article I published together with Roberto Cortinovis on 13 May 2022, "Country Report CANADA: An analysis of the Private Sponsorship of Refugees (PSR) program and the Economic Mobility Pathways Pilot (EMPP)". The interviews herein were conducted in conjunction with the ASILE Project, undertaken with the Centre for European Policy Studies Justice and Home Affairs Unit.

I confirm that I wrote 100% of this thesis alone.

I confirm that Roberto Cortinovis participated in 11 of the 23 interviews referenced herein.

I confirm that I personally coordinated with each interviewee, attained their written consent and prepared the questionnaire for all of the interviews referenced herein.

Signature and date:

A handwritten signature in black ink that reads "Andrew Fallone". The signature is written in a cursive, flowing style.

15 May 2022

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## **Abstract**

This research aims to provide critical insights on the Canadian Economic Mobility Pathways Pilot's (EMPP) approach to mitigating its co-creation of structural vulnerability. Migration scholars frequently point to Canadian policy mechanisms as models for international observers and government actors to learn from. Indeed, the newly implemented Economic Mobility Pathways Pilot takes promising steps toward developing the complementary pathways emphasised by the United Nations' Global Compact on Refugees. Yet, without sufficient attention to structural vulnerability, the high level of discretion involved in complementary pathways risks creating 'preferred' categories of refugees. Based on interviews with Canadian government practitioners, refugee leaders, civil society representatives, academics, and legal experts, this article verifies the relevance of three key factors that shape institutional approaches to structural vulnerability in the design of complementary pathways. The findings illustrated herein yield insights pertinent to the design of all future economic-oriented complementary pathways for admission.

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## 1. Introduction

The attention of international policymakers involved in the design of migration mechanisms currently lies on the development of “complementary pathways for admission”. These policies aim to fulfil humanitarian objectives by expanding refugee resettlement efforts while simultaneously avoiding the political contention involved with expanding the effort required of national governments to operate such mechanisms. One such Canadian complementary pathway, the Economic Mobility Pathways Pilot (EMPP), relies on economic migration pathways to both increase the number of refugees reaching Canada and to accelerate these refugees’ labour market integration. The EMPP’s use of economically-oriented migration pathways undoubtedly deserves praise for expanding the range of actors involved in refugee resettlement and support, and for providing the world with a proof-of-concept that such mechanisms can prove viable. Yet, the extent to which the alternative framing of complementary pathways such as the EMPP impacts the attention paid by these policy mechanisms to their own potential to co-create structural vulnerability.

Rather than ascribing ‘vulnerability’ to certain categories of people, effective policy structures respond to all individuals’ disparate levels and varieties of vulnerability. One such variety of vulnerability is of heightened importance when analysing newly implemented policies: structural vulnerability. By focusing on structural vulnerabilities, observers can identify potential shortcomings in new policies that can create new challenges and vulnerabilities for individuals due to specific facets of their design. This analysis therefore specifically focuses on structural vulnerability co-created by limited access to institutions, procedural inequity, and a lack of access to justice and legal recourse. Such a focus does not negate the significant vulnerability originating from policies related to the ongoing Covid-19 pandemic, yet the policy mechanism analysed herein may create vulnerability long after the pandemic ends if careful attention is not paid to their structure.

This research seeks to answer *how the design of the Canadian EMPP complementary pathway seeks to mitigate structural vulnerability* by establishing the relevance of factors influencing the policy’s design and implementation. Given the multiple transnational initiatives currently seeking to expand the implementation of complementary pathways, disentangling the influence of the intervening factors in the causal chain shaping the Canadian institutional approach to structural vulnerability provides crucial insight for nations to consider when seeking to

replicate complementary pathways such as the EMPP. To accomplish this, this research seeks to test the influence of the following three hypothesised factors on the EMPP's approach to addressing structural vulnerability:

- a. Lack of *legal obligation* to implement complementary pathways results in a lack of desire to assume new responsibility and establish new institutional processes.
- b. The *nascent* nature of the tested complementary pathway impairs its approaches to structural vulnerability.
- c. The *economic orientation* of the tested complementary pathway, as opposed to humanitarian, is perceived to diminish the need for policies tailored to reduce structural vulnerability.

By using data from 23 semi-structured interviews to test the pertinence of these hypotheses through process tracing, this research conclusively establishes the relevance of all three hypotheses to the broader causal chain, providing a springboard for further research.

This research was conducted in close collaboration with the EU Horizon 2020 funded ASILE Project, coordinated by the Centre for European Policy Studies. In offering a detailed explanation of how the EMPP approaches structural vulnerability, this research expands on my findings in the “Country Report CANADA: An analysis of the Private Sponsorship of Refugees (PSR) program and the Economic Mobility Pathways Pilot (EMPP)”, published together with Roberto Cortinovis.<sup>1</sup>

This research is structured as follows. Section 2 summarises the relevant literature on the global objectives for establishing “complementary pathways for admission”, the context of migration policy implementation in Canada, and outlines a theoretical framework for the analysis of vulnerability. Section 3 stratifies “structural vulnerability” into three observable categories. Section 4 summarises the data collection strategy, operationalises this data for use in process tracing, and assesses the potential limitations of this methodological design. Section 5 presents the data found in the 23 interviews conducted. Section 6 presents the findings of the tests applied to each hypothesis to establish its influence over policy approaches towards each dimension of structural vulnerability.

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<sup>1</sup> Roberto Cortinovis and Andrew Fallone, “Country Report CANADA An analysis of the Private Sponsorship of Refugees (PSR) program and the Economic Mobility Pathways Pilot (EMPP)”, *ASILE Project Interim Country Reports*, (May 2022), [https://www.asileproject.eu/wp-content/uploads/2022/05/D4.2\\_Canada\\_Interim-Country-Report.pdf](https://www.asileproject.eu/wp-content/uploads/2022/05/D4.2_Canada_Interim-Country-Report.pdf).

## 2. Literature Review

In order to provide a foundation for deeper analysis, one must first understand the context of complementary pathways for admission within international law, the context of this research's Canadian policy mechanism case study, and the taxonomy of 'vulnerability'.

### *2.1. Complementary Pathways for Admission in the Global Context*

All individuals' right to irregularly cross national borders to claim asylum from persecution is strongly affirmed by international law. Article 14 of the Universal Declaration of Human Rights states that "Everyone has the right to seek and to enjoy in other countries asylum from persecution".<sup>2</sup> The modalities of this fundamental right and the framework for its delivery by United Nations Member States are specified in the 1951 and 1967 Convention and Protocol Relating to the Status of Refugees.<sup>3</sup> Despite this robust foundation, paragraph 62 of the United Nations Global Compact on Refugees (GCR) establishes the Asylum Capacity Support Group under the auspices of the UNHCR, seeking to "strengthen aspects of their [Member States'] asylum systems, with a view to ensuring their fairness, efficiency, adaptability and integrity".<sup>4</sup> Exercising this right to asylum, however, necessitates that individuals first reach the territory of a safe host country. The high difficulty associated with reaching such a safe host nation and the limited scope of international refugee resettlement compared to the size of global displaced populations requires the development of complementary pathways for admission to expand access to resettlement.

Complementary pathways for admission remain a more nascent concept in international refugee protection efforts. The third core objective of the Comprehensive Refugee Response Framework unanimously adopted by all 193 Member States of the United Nations in the 2016 New York Declaration calls on nations to "expand third-country solutions".<sup>5</sup> The parameters for realizing this objective were outlined in the 2018 GCR, which emphasises the need to

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<sup>2</sup> United Nations General Assembly, "Resolution adopted by the General Assembly 217 A (III). Universal Declaration of Human Rights". A/RES/3/217 A, (1948), <http://www.un-documents.net/a3r217a.htm>.

<sup>3</sup> United Nations High Commissioner for Refugees, "Convention and Protocol Relating to the Status of Refugees", (1951; 1967). <https://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html>.

<sup>4</sup> United Nations, "Global Compact on Refugees", (New York: 2018), <https://www.unhcr.org/5c658aed4.pdf>.

<sup>5</sup> United Nations High Commissioner for Refugees, "New York Declaration for Refugees and Migrants", (New York, 2016), <https://www.unhcr.org/new-york-declaration-for-refugees-and-migrants.html>.

promote complementary pathways for admission in paragraphs 94 – 96 in order to expand the toolkit of viable solutions for refugees.<sup>6</sup> These paragraphs prioritise using policy mechanisms such as labour mobility pathways, private and community sponsorship, family reunification, scholarships and student visas, and humanitarian visas to enable benefit from existing institutional infrastructure to increase refugees’ global access to durable solutions.<sup>7</sup> To serve as a roadmap for upholding this commitment, the UNHCR released a Three-Year Strategy on Resettlement and Complementary Pathways (2019 – 2021), which defines complementary pathways as “safe and regulated avenues for refugees that complement resettlement by providing lawful stay in a third country where their international protection needs are met”.<sup>8</sup>

The principle of ‘additionality’ plays a central role in shaping complementary pathways, as the UNHCR asserts that complementary pathways “do not substitute the protection afforded to refugees under the international protection regime”.<sup>9</sup> However, this understanding of ‘additionality’ cannot serve as a justification for inadequate attention to the differential accessibility of such pathways and their potential to generate structural vulnerability. One of the greatest strengths of complementary pathways can therefore also become a liability based on the detail of policy mechanisms’ design, due to the fact that complementary pathways seek to concurrently endow refugees with a higher level of independent agency in accessing pathways while also reducing the institutional pressure on host states by utilizing existing migration pathways to now also encapsulate refugee resettlement. The UNHCR describes this objective in the Key Considerations released for Complementary Pathways for Admission of Refugees to Third Countries:

An important feature of many complementary pathways is that refugees are able to exercise control over their own solutions by accessing them independently using publicly available information and processes. By allowing refugees to access new and existing pathways autonomously, third country solutions for refugees can be achieved on a greater scale.<sup>10</sup>

Complementary pathways for admission that involve the employment of refugees must further conform to the Objective 5 of the International Organization for Migration’s Global Compact

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<sup>6</sup> United Nations, “Global Compact on Refugees”; Interview CAN4-4, 28.04.2021.

<sup>7</sup> United Nations, “Global Compact on Refugees”.

<sup>8</sup> United Nations High Commissioner for Refugees, “The Three-Year Strategy (2019-2022) on Resettlement and Complementary Pathways”, (June 2019), <https://www.unhcr.org/5d15db254.pdf>.

<sup>9</sup> Ibid.

<sup>10</sup> United Nations High Commissioner for Refugees, “Complementary Pathways for Admission of Refugees to Third Countries: Key Considerations”, (April 2019), <https://www.refworld.org/docid/5cebf3fc4.html>.

for Safe, Orderly and Regular Migration (GCM), which calls for an expansion of pathways for regular migration.<sup>11</sup> Such complementary pathways, however, must heed the GCM's Objective 6, which emphasises the need for decent work, and Objective 7, which emphasises reducing vulnerabilities in migration.<sup>12</sup> The adaptation of existing economic migration pathways provides a promising opportunity to expand refugee resettlement, yet their successful implementation requires that Member States fully adopt all GCR and GCM objectives to ensure that the necessary attention is duly paid to the ways in which these policy mechanisms' design can engender new vulnerabilities.

## *2.2. Political and Geographic Context of International Protection in Canada*

Only sharing a land border with the United States and separated from its aquatic neighbours by large and cold oceans, Canada's relative geographic insulation from the world indelibly shapes its approaches to refugee and asylum policy. In tandem with the Canada–U.S. Safe Third Country Agreement and information sharing agreements between Five Eyes member nations (Australia, Canada, New Zealand, the United Kingdom, and the United States), this geographic location results in a comparatively small number of spontaneous asylum applications each year. As a result, Canadian policymakers can develop sophisticated policy mechanisms that carefully dictate access to Canada's territory through refugee resettlement and economic migration programs, among other mechanisms. However, an emphasis on maintaining state control over territorial access risks engendering greater structural vulnerability by precluding individuals from fully exercising their right to international protection.

One drawback of Canada's geographic isolation is a bifurcation in reactions to refugees and refugee claimants (asylum seekers). An interviewee explained that support for refugees in Canada "...is not a political football, it's not something that's up for debate...it's part of Canada's self-identity that we have a humanitarian tradition and that we welcome refugees" with interviewees reiterating that Canada understands itself as a 'country of immigration'.<sup>13</sup> This view results in strong Canadian pro-refugee and pro-immigrant government messaging, with markedly high Canadian civil society interest in supporting refugees.<sup>14</sup> These factors

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<sup>11</sup> International Organization for Migration, "Global Compact for Safe, Orderly and Regular Migration", A/RES/73/195, (December 2018), <https://undocs.org/A/RES/73/195>.

<sup>12</sup> International Organization for Migration, "Global Compact".

<sup>13</sup> Interview CAN4-5, 29.04.2021, (Quoted); Interview CAN4-7, 04.06.2021.

<sup>14</sup> Interview CAN4-7, 04.06.2021.

disseminate the view among Canadians that their refugee support systems are something to be proud of, and can serve as a model for the rest of the world to follow.<sup>15</sup> Unfortunately, when individuals seeking protection arrive on Canadian territory through irregular means, both political and public reactions are far less positive. Within one year of each other in 2009 and 2010, two boats carrying a total of 568 refugee claimants fleeing civil war in Sri Lanka arrived on the shores of Western Canada, called the MV Ocean Lady and the MV Sun Sea.<sup>16</sup> In 2017 the number of refugee claimants in Canada lodging new claims doubled,<sup>17</sup> with individuals crossing into Québec from New York via an unmonitored border crossing on Roxham Road from the United States.<sup>18</sup> In both examples, the visibility of physical arrivals via boat arrivals or a terrestrial border crossing created contention in both public opinion and the Canadian political system.<sup>19</sup> Despite this, another interviewee expressed that such highly visible traumatic events could mobilise greater public compassion, which could in turn fund higher private resettlement sponsorship.<sup>20</sup> Still, a clear disparity remains in the reactions to state-regulated resettlement and migration pathways and the spontaneous arrival of individuals claiming refugee status.

In the Canadian legal system, the structure of actors and delineation of jurisdiction related to refugee protection are dictated by the Immigration and Refugee Protection Act (IRPA), adopted in 2001 and significantly amended in 2012 by the Balanced Refugee Reform Act and the Protecting Canada's Immigration System Act.<sup>21</sup> This framework comes into force under the Immigration and Refugee Protection Regulations (IRPR). The Canadian legal system frames individuals seeking asylum as “refugee claimants” and the process of claiming asylum as “refugee protection claims”. The core institutions involved in administering refugee protection claims and refugee resettlement pathways are “Immigration, Refugees and Citizenship Canada” (IRCC), the “Immigration and Refugee Board of Canada” (IRB), and the “Canada Border Services Agency” (CBSA).

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<sup>15</sup> Ibid.

<sup>16</sup> Canadian Council for Refugees, “Sun Sea: Five year later”, (2015), <https://ccrweb.ca/sites/ccrweb.ca/files/sun-sea-five-years-later.pdf>

<sup>17</sup> Increasing from 23,350 to 47,425. Immigration and Refugee Board of Canada, “Refugee Protection Claims (New System) Statistics”, (2021), <https://irb.gc.ca/en/statistics/protection/Pages/RPDStat.aspx>.

<sup>18</sup> Interview CAN4-1, 08.04.2021; Interview CAN 4-2, 15.04.2021.

<sup>19</sup> Canadian Council for Refugees, “Sun Sea”; Interview CAN4-3, 19.04.2021.

<sup>20</sup> Interview CAN4-4, 28.04.2021.

<sup>21</sup> Parliament of Canada, “Immigration and Refugee Protection Act”. S.C. 2001, c. 27, (2001), <https://laws.justice.gc.ca/PDF/I-2.5.pdf>; Parliament of Canada, “Immigration and Refugee Protection Regulations”, SOR/2002-227, <https://laws-lois.justice.gc.ca/eng/regulations/sor-2002-227/>.

Canada was one of the earliest adopters of the type of policy mechanism that the GCR would later call ‘complementary pathways for admission’, creating the institutional framework required for groups of private individuals and community organisations to independently facilitate refugee resettlement through the Private Sponsorship of Refugees (PSR) programme. Introduced in 1976 and coming into effect in 1979, the PSR is the “world’s largest and longest-running community sponsorship programme”, effectively enabling the resettlement of nearly a third of a million people since its inception.<sup>22</sup> The PSR provides a key example of how civil society and non-state actors can supplement and expand national governments’ resettlement capacities in times of heightened attention to refugee movements by capitalizing on public interest and providing a platform to translate that awareness into action. Existing evidence indicates that public involvement in resettlement pathways through the PSR achieves more rapid social and labour market integration upon arrival to Canada.<sup>23</sup> However, my analysis together with Cortinovis illustrates that complementary pathways such as the PSR and EMPP risk reinforcing an inequitable stratification of refugees’ mobility by privileging refugees with greater pre-existing connections within Canada or a specific desired human capital profile.<sup>24</sup> This finding merits a deeper analysis of complementary pathways’ attention to structural vulnerability.

International commentators often portray Canada as a paragon example of progressive refugee resettlement policy. Canada’s resettlement of the highest number of refugees globally during the Covid-19 pandemic and its reactions to individuals displaced from Afghanistan and Ukraine illustrates its strong commitment to resettlement.<sup>25</sup> The Canadian government further

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<sup>22</sup> Jennifer Bond, “The Power of Politics: Exploring the True Potential of Community Sponsorship Programmes”, in Catherine Dauvergne (ed.) *Research Handbook on the Law and Politics of Migration*, (Cheltenham: Edward Elgar, 2021): 155-170, <https://www.elgaronline.com/view/edcoll/9781789902259/9781789902259.00021.xml>.

<sup>23</sup> Audrey Macklin, et al., “A preliminary investigation into private refugee sponsors”, *Canadian Ethnic Studies*, 50, no. 2 (2018): 35–57, <https://jhyndman.info.yorku.ca/files/2018/11/CES-Macklin-et-all-FINAL-2018.pdf>; Audrey Macklin and Joshua Blum, “Country Fiche: CANADA”. *ASILE Project*, Andrew Geddes, Leiza Brumat, and Sergio Carrera (eds.), (2021), <https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiche-CANADA-Final-Pub.pdf>.

<sup>24</sup> Cortinovis and Fallone, “Country Report CANADA”.

<sup>25</sup> Hon. Marco Mendicino, “Speaking Notes for the Honourable Marco Mendicino, Minister of Immigration, Refugees and Citizenship: Announcement related to new initiatives to help Canada assist even more refugees”, Delivered 18.06.2021, <https://www.canada.ca/en/immigration-refugees-citizenship/news/2021/07/speaking-notes-for-the-honourable-marco-mendicino-minister-of-immigration-refugees-and-citizenship-announcement-related-to-new-initiatives-to-help-.html>; Immigration, Refugees and Citizenship Canada, “Canada’s Response to the Situation in Afghanistan”, (2021), <https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/afghanistan.html>; Immigration, Refugees and Citizenship Canada, “Canada expands settlement support for Ukrainians coming to Canada”, (2022), <https://www.canada.ca/en/immigration-refugees-citizenship/news/2022/03/canada-expands-settlement-support-for-ukrainians-coming-to-canada.html>.



occupies a leadership role in initiatives promoting transnational policy transfer aimed at expanding complementary pathways. Canada leads the Global Refugee Sponsorship Initiative (GRSI), which was launched in 2016 and seeks to expand the implementation of privately led complementary pathways to resettlement using Canadian policy as a template and is cited in paragraph 95 of the GCR.<sup>26</sup> This effort already demonstrates results with Canada's participation in the GRSI encouraging the European Commission to support expanding private and community based complementary pathways in its 2020 Communication on a New Pact on Migration and Asylum.<sup>27</sup> Additionally, Canada serves as the inaugural chair of the Global Task Force on Refugee Labour Mobility launched in 2022, which will use the EMPP as a model for other states to replicate such qualification-based complementary pathways to resettlement.<sup>28</sup> Yet, with complementary pathways such as these featured prominently in the eye of foreign observers, reflexively analysing the factors that influence the Canadian state's approach to structural vulnerability provides a needed opportunity to recognise the remaining potential for further policy refinement.

### *2.3. Taxonomy of Vulnerability*

Social scientists offer manifold academic interpretations of vulnerability, stemming from the fields of international human rights law, human security studies, and labour market research, among others. Yet, all of these disparate interpretations wrestle with the same core dilemma: all individuals are affected by their personal circumstances, but not all individuals are affected by their circumstances in the same way, therefore making vulnerability "...both universal and particular".<sup>29</sup> This paradox results in divergent understandings of the intersecting factors that may or may not render individuals vulnerable. Moreover, some scholars problematise many

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<sup>26</sup> Global Refugee Sponsorship Initiative, "Guidebook", (2017), <https://refugeesponsorship.org/guidebook>; United Nations, "Global Compact on Refugees".

<sup>27</sup> European Parliamentary Research Service, "Community Sponsorship Schemes Under the New Pact on Migration and Asylum: Take-up by EU Regions and Cities", Anja Radjenovi, PE 690.675, (June 2021), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690675/EPRS\\_BRI\(2021\)690675\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690675/EPRS_BRI(2021)690675_EN.pdf); European Commission, "COMMUNICATION FROM THE COMMISSION on a New Pact on Migration and Asylum", COM(2020) 609 final, (Brussels: 2020), <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601287338054&uri=COM%3A2020%3A609%3AFIN>.

<sup>28</sup> Immigration, Refugees and Citizenship Canada, "Expanding refugee access to third-country solutions: International leaders launch the Global Task Force on Refugee Labour Mobility", (2022), <https://www.canada.ca/en/immigration-refugees-citizenship/news/2022/04/expanding-refugee-access-to-third-country-solutionsinternational-leaders-launch-the-global-task-force-on-refugee-labour-mobility.html>.

<sup>29</sup> Lourdes Peroni and Alexandra Timmer, "Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law", *International Journal of Constitutional Law*, 11, no. 4, (2013): 1058, <https://academic.oup.com/icon/article/11/4/1056/698712>

humanitarian actors' impulse to ascribe vulnerability to specific subsets of the population, instead interpreting vulnerability as a continuum on which all individuals lie according to a confluence of influencing dynamics. Thus, for this research to evaluate the efficacy of the EMPP's approach to vulnerability, I first develop a critical approach to vulnerability by unpacking the implications of distinct existing interpretations.

### *2.3.1. Individual and Group Vulnerability*

Many contemporary institutional interpretations of vulnerability rest on a foundation of *individual* or *group vulnerability*. This interpretation implies that specific factors and circumstances can render certain individuals or groups acutely vulnerable, and promotes targeted policies to mitigate the situations faced by these segments of society. The cause of such vulnerability can be situational, resulting from conditions such as forced displacement, natural disasters, or societal racism. The sources of such vulnerabilities can additionally stem from distinguishing individual or group markers ranging from gender, age, physical disabilities, religious, ethnic, and sexual identities, or status as a stateless person, asylum seeker, social assistance recipient, or care home resident, to name a just few.<sup>30</sup> Indeed, the GCR adopts this approach in Part B of the compact, wherein it aims to "...ease the burden on host countries and to benefit refugees and host community members" by identifying areas where nations require support. The Compact outlines some of the ways it will achieve this goal in paragraph 51, where it states:

The measures in Part B will take into account, meaningfully engage and seek input from those with diverse needs and potential vulnerabilities, including girls and women; children, adolescents and youth; persons belonging to minorities; survivors of sexual and gender-based violence, sexual exploitation and abuse, or trafficking in persons; older persons; and persons with disabilities.<sup>31</sup>

Despite thoroughly listing numerous subsets of the population that may experience acute vulnerability, such an individual or group oriented approach to vulnerability encounters significant limitations.

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<sup>30</sup> Ingrid Nifosi-Sutton, *The Protection of Vulnerable Groups under International Human Rights Law*. Routledge Research in Human Rights Law, (Routledge, Taylor & Francis Group: London and New York, 2017): 270, <https://www.routledge.com/The-Protection-of-Vulnerable-Groups-under-International-Human-Rights-Law/Nifosi-Sutton/p/book/9780367266837>

<sup>31</sup> United Nations, "Global Compact on Refugees".

Purveyors of this approach argue that “the consequence of vulnerability for the individual or group concerned is that a higher level of human rights protection in their favour is required from states”.<sup>32</sup> It is true that identifying certain individuals or groups as ‘vulnerable’ can bring greater attention to the challenges that these subsets face, and that it can elicit a caring response from both people and state institutions. Yet, in contrast, such labelling can also inimically stigmatise the populations identified as ‘vulnerable’, fixing their position in the eyes of the public and the state into one of perpetual victimhood. This risk stems from the difficulty in translating the ascribed label of ‘vulnerable’ into a prescriptive force.<sup>33</sup> The time lag between labelling groups as ‘vulnerable’ and state action to sufficiently ameliorate the catalysts for such vulnerability can enact lasting negative effects on the social standing of these populations. Australian refugee integration efforts exemplify the challenges associated with this dichotomy of care and stigma, because “by expecting widespread trauma, Australia effectively views a large section of the refugee population as impaired; as such, they are not expected to participate in Australia”.<sup>34</sup> Furthermore, by labelling only some portions of the refugee and migrant populations as ‘vulnerable’, economic resources and institutional attention may be diverted away from other refugees or migrants that face similar challenges but lack such recognition.<sup>35</sup> These limitations to the efficacy of *individual* or *group* vulnerability result in some scholars and practitioners adopting more nuanced approaches to understanding the sources of vulnerability.

### 2.3.2. *Socio-Contextual Vulnerability*

By critically analysing the causes of vulnerability, an alternative *socio-contextual* interpretation of vulnerability emerges. This interpretation eschews the idea that inherent dimensions of individuals’ and groups’ identities alone render them vulnerable, and instead problematises the societal processes that place individuals in positions of exaggerated vulnerability. This new emphasis incorporates the intersection of broader ‘...psychological/emotional, corporeal, economic, political, and legal vulnerabilities...’ that emerge through socially constructed

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<sup>32</sup> Alexander H. E. Morawa, “Vulnerability as a Concept of International Human Rights Law”, *Journal of International Relations and Development*, 6, no. 2 (2003: 150), [https://ciaotest.cc.columbia.edu/olj/jird/jird\\_jun03\\_moa01.pdf](https://ciaotest.cc.columbia.edu/olj/jird/jird_jun03_moa01.pdf).

<sup>33</sup> Peroni and Timmer, “Vulnerable Groups”.

<sup>34</sup> Alice M. Neikirk, “Expectations of Vulnerability in Australia”, *Forced Migration Review*, FMR 54, (2017), <https://www.fmreview.org/resettlement/neikirk>.

<sup>35</sup>Hande Sözer, “Humanitarianism with a neo-liberal face: vulnerability intervention as vulnerability redistribution”, *Journal of Ethnic and Migration Studies*, 46, no. 11 (2019: 2163-2180), <https://doi-org.eui.idm.oclc.org/10.1080/1369183X.2019.1573661>.

societal processes.<sup>36</sup> Vulnerabilities therefore derive not from the situations individuals experience or aspects of their identity, but from the societal reactions to those factors.

This interpretation significantly contributes to a more nuanced understanding of vulnerability by adding salience to the structural catalysts for vulnerability. Central to advancing pre-existing beyond individual and group conceptions of vulnerability is that “...the focus is expanded towards the social and historical forces that originate, maintain, or reinforce the vulnerability of a group”.<sup>37</sup> In doing so, the socio-contextual approach to vulnerability argues that the relationships between individuals, society, and the state can marginalise some more than others. The perception of individuals by cultural and state processes consequently plays a key role in socially constructing their conditions of vulnerability.<sup>38</sup> This provides both national and supranational courts with added reason both to evaluate context-specific data when adjudicating responses to vulnerability, and to take “...into account measures of governments designed to ameliorate conditions of vulnerability”.<sup>39</sup> The socially constructed nature of many of the causes of vulnerability, such as discrimination or wealth inequality, necessitates the establishment of structures to prevent the societal creation of such conditions.<sup>40</sup> While this *socio-contextual* approach to vulnerability engenders necessary focus on the structures and societal processes creating vulnerability, scholarly contention remains concerning the scale of individuals considered vulnerable.

### 2.3.3. *Universal Vulnerability*

Diverging from all previously discussed interpretations of vulnerability, conceptions of *universal* vulnerability promote the idea that all individuals experience some level of vulnerability, derived from their circumstances and experiences. Martha Fineman greatly advanced this field of scholarship, explaining that “vulnerability analysis demands that the state

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<sup>36</sup> Erinn C. Gilson, *The Ethics of Vulnerability: A Feminist Analysis of Social Life and Practice*, Routledge Studies in Ethics and Moral Theory, Routledge, Taylor & Francis Group: London and New York, 2014): 37, <https://www.routledge.com/The-Ethics-of-Vulnerability-A-Feminist-Analysis-of-Social-Life-and-Practice/Gilson/p/book/9781138208964>

<sup>37</sup> Peroni and Timmer, “Vulnerable Groups”, Op. cit., 1073-1074.

<sup>38</sup> Baumgärtel, Moritz, *Demanding Rights: Europe’s Supranational Courts and the Dilemma of Migrant Vulnerability*, (Cambridge: Cambridge University Press, 2019), <https://www.cambridge.org/it/academic/subjects/law/human-rights/demanding-rights-europes-supranational-courts-and-dilemma-migrant-vulnerability?format=PB>.

<sup>39</sup> Id., 115.

<sup>40</sup> Martha Albertson Fineman, “The Vulnerable Subject: Anchoring Equality in the Human Condition”, *Yale Journal of Law & Feminism*, 20, no. 1 (2008): 1-23, <https://digitalcommons.law.yale.edu/vjlf/vol20/iss1/2/>.

give equal regard to the shared vulnerability of all individuals, transcending the old identity categories as a limitation on the recognition that the state has a vital role to play in protecting against discrimination.”<sup>41</sup> This approach experiences criticism from scholars who argue that such a broad understanding of vulnerability can denude the salience of certain egregious manifestations of vulnerability, and worry that a universal approach could discourage state action to redress vulnerability.<sup>42</sup> Fineman’s work itself assuages such concerns by delineating that “a vulnerability analysis begins by first considering how the state has responded to, shaped, enabled, or curtailed its institutions”.<sup>43</sup> Judith Butler adopts a similarly universal approach to vulnerability in her book *Frames of War: When Is Life Grievable?*. When discussing government endeavours to enact ‘responsibilisation’ and make disenfranchised immigrants self-reliant, she questions whether only some individuals are vulnerable, or if it is that only the inherent vulnerability of some are *recognised*, writing that “perhaps such a responsibility can only begin to be realised through a critical reflection on those exclusionary norms by which fields of recognizability are constituted...”.<sup>44</sup> Butler’s emphasis on exclusionary norms does not deny that certain situations extenuate the vulnerability that some experience, and indeed does not imply that all experiences of vulnerability are analogous, but her theory forwards that different experiences of vulnerability share ‘convergent modes of dispossession’.<sup>45</sup> All of the scholars discussed herein promoting a *universal* understanding of vulnerability argue that the state is a key actor in rectifying both the unequal recognition of, and resources devoted to, individuals’ vulnerability.

#### 2.3.4. Structural Vulnerability

Combining the *socio-contextual* approach’s emphasis on the societal processes creating vulnerability with the *universal* approach’s recognition of these processes’ ability to render all individuals vulnerable, this research adopts a *structural* approach to vulnerability. This conception of structural vulnerability underscores both institutional participation in and

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<sup>41</sup> Id., 20.

<sup>42</sup> Baumgärtel, *Demanding Rights*, Op. cit., 150.

<sup>43</sup> Fineman, “The Vulnerable Subject”. Op. cit., 20.

<sup>44</sup> Butler, Judith, *Frames of War: When is Life Grievable?*.(London: Verso, 2009), <https://www.versobooks.com/books/2148-frames-of-war>.

<sup>45</sup> Mari Ruti, “The Ethics of Precarity: Judith Butler’s Reluctant Universalism”, In Van Bever Donker M., Truscott R., Minkley G., and Lalu P. (eds.), *Remains of the Social: Desiring the Post-Apartheid*, Wits University Press, Johannesburg, (2017): 110-111, <https://www.jstor.org/stable/10.18772/22017030305.8>.

inability to prevent situations creating vulnerability. In doing so, this work seeks to engender greater reflexivity in the drafting of migration policy instruments.

Individuals' differential access to state services and protection illustrates institutions' role in the co-creation of vulnerability.<sup>46</sup> Though not denying that circumstances beyond the state's control can result in vulnerability, a focus on structural vulnerability calls attention to the state's need to extend its protection to individuals in such circumstances as comprehensively as it does to others. Rather than allowing the attribution of blame or resentment towards individuals rendered vulnerable by circumstances outside of their own control, "delineating between structural and personal vulnerability is crucial if the concept is not to degenerate into stereotyping".<sup>47</sup> When discussing 'circumstances outside of their own control', the main objects of analysis for the structural interpretation of vulnerability are state legal systems and policy instruments. Migrant employment provides a clear example of such a process, because the legal status structurally ascribed to individuals can distort the work relations between migrants and their employers.<sup>48</sup> Furthermore, recognizing and labelling individuals as vulnerable without rectifying the root structural causes of such vulnerability can counterproductively "...encourage performances of powerlessness".<sup>49</sup> Instead, by transcending identity-oriented approaches to vulnerability, understandings of structural vulnerability encourage governments and courts to focus on "...the justice-oriented obligations owed to citizens"<sup>50</sup> and to measure "...how the respondent state limited a person's autonomy".<sup>51</sup> This obligation of states to provide their citizenries with equal justice and autonomy at all institutional levels serves as the compass needle for further analysis.

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<sup>46</sup> Nifosi-Sutton, *The Protection of Vulnerable Groups*, Op. cit., 270.

<sup>47</sup> Cathryn Costello and Colm O'Cinnéide, "The Right to Work of Asylum Seekers and Refugees", *ASILE Project*, Deliverable 4.1., (2021), [https://www.asileproject.eu/wp-content/uploads/2021/06/D4.1.CostelloOCinneide\\_RightToWorkASILE\\_10May2021\\_REVISED.pdf](https://www.asileproject.eu/wp-content/uploads/2021/06/D4.1.CostelloOCinneide_RightToWorkASILE_10May2021_REVISED.pdf).

<sup>48</sup> Mark Freedland and Cathryn Costello, "Migrants at Work and the Division of Labour Law", in *Migrants at Work: Immigration and Vulnerability in Labour Law*, Cathryn Costello and Mark Freedland (eds.), Oxford University Press, (2014): 1-26, <https://oxford-universitypressscholarship-com.eui.idm.oclc.org/view/10.1093/acprof:oso/9780198714101.001.0001/acprof-9780198714101-chapter-1>.

<sup>49</sup> Lewis Turner, "The Politics of Labeling Refugee Men as "Vulnerable"", *Social Politics*, 28, no. 1 (2019): 14-16, <https://academic.oup.com/sp/article/28/1/1/5572273>.

<sup>50</sup> Francesca Ippolito, *Understanding Vulnerability in International Human Rights Law*, (Naples: Editoriale Scientifica, 2020): 18, <https://www.editorialescientifica.com/shop/catalogo/libri-in-lingua-straniera/understanding-vulnerability-in-international-human-rights-law-detail.html>.

<sup>51</sup> So Yeon Kim, "Les vulnérables: evaluating the vulnerability criterion in Article 14 cases by the European Court of Human Rights", *Legal Studies*, (2021): 16, <https://www.cambridge.org/core/journals/legal-studies/article/les-vulnerables-evaluating-the-vulnerability-criterion-in-article-14-cases-by-the-european-court-of-human-rights/3B9298E292D99504A3835AEEBB0F3520>.

Refusing to delimit only certain individuals as vulnerable, the *structural* approach adopts a similar line of questioning to the *socio-contextual* by examining the causes that construct conditions of vulnerability. Indeed, “posing the question ‘Vulnerability to what?’ will thus provoke an analysis of power structures and hence greater understanding of root causes...”, which herein emerge at the structural level.<sup>52</sup> Extending this question further not only enables analysis of policy instruments’ efficacy at responding to all individuals’ differing vulnerabilities, but also enables analysis of policy instruments’ awareness of the ways that they themselves can co-create vulnerability.<sup>53</sup> At the judicial level, the Supreme Court of Canada set the precedent of a state protection test in *Canada (Attorney General) v Ward* that largely functions to this effect.<sup>54</sup> Although this test applies to the right of third country individuals to claim refugee status within Canada due to their home government’s inability or unwillingness to provide them with protection, thus extenuating these individuals’ vulnerability, one could apply the same criteria of state ability and willingness to evaluate policy mechanisms the world over.<sup>55</sup> As argued above, state institutions themselves emerge from the need to manage all individuals’ shared vulnerabilities, and “the dynamic and dialectical relationship between institutional precariousness and ontological vulnerability drives the evolution of human rights legislation and culture”.<sup>56</sup> Herein, ‘ontological vulnerability’ refers to all individuals’ universal ability to be affected by their experiences and circumstances, with the imperfection of socially created institutions therefore continuously creating dissatisfaction among affected individuals, thereby catalysing their own evolution.<sup>57</sup> This process of rectifying structurally vulnerability cannot be rectified through policies that target only subsets of the population, and instead must involve a critical evaluation of the exclusionary elements of all state policies.

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<sup>52</sup> Christina R. Clark, “Understanding Vulnerability: From Categories to Experiences of Young Congolese People in Uganda”, *Children and Society*, 21, no. 4 (2007): 284-296, <https://onlinelibrary.wiley.com/doi/10.1111/j.1099-0860.2007.00100.x>.

<sup>53</sup> Ippolito, *Understanding Vulnerability*, Op. cit., 271.

<sup>54</sup> Supreme Court of Canada, “Canada (Attorney General) v. Ward”. 2 S.C.R. 689, no. 21937 (1993), <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1023/index.do>.

<sup>55</sup> Jamie Chai Yun Liew, “Denying Refugee Protection to LGBTQ and Marginalized Persons: A Retrospective Look at State Protection in Canadian Refugee Law”, *Canadian Journal of Women and the Law*, 29, no. 2 (2017): 290-316, <https://heinonline.org/HOL/P?h=hein.journals/cajwol29&i=310>.

<sup>56</sup> Bryan S. Turner, *Vulnerability and Humans Rights*, (Penn State University Press, 2006): 32, <https://www.jstor.org/stable/10.5325/j.ctt7v124>.

<sup>57</sup> Gilson, *The Ethics of Vulnerability*, Op. cit., 37.

### 3. Conceptual Framework

In seeking to contribute to a productive evolution and enhancement of state institutions, this research stratifies three dimensions of *structural* vulnerability to serve as a lens for deeper analysis: equitable access to institutions and rights; procedural equity; and access to justice and recourse. Each of these identified dimensions of structural vulnerability will serve as a case for this research's research to evaluate the influence of the EMPP's *legal obligation framing*, *nascent stage of implementation*, and *economic vs. humanitarian framing* in shaping the pathway's approach toward structural vulnerability.

#### 3.1. Equitable Access to Institutions and Fundamental Rights

The first dimension of structural vulnerability results from flaws in the design of institutions that can preclude individuals from exercising the same guaranteed rights and levels of access to state services. The form of public resources provided differs for all states, yet within the confines of a state no individual should need to surmount undue hurdles to access those resources, for such hurdles inherently create structural vulnerability.<sup>58</sup> Given that the state is a socially created way of managing vulnerabilities, its purpose is to provide the same rights to all of its citizens. One such right may be the right to collectively organise to safeguard workers' labour rights and promote their interests. If migrants do not enjoy the same access to labour unions, this creates structural vulnerability.<sup>59</sup> Of all supranational judicial bodies, the jurisprudence of the Inter-American Court of Human Rights (IACtHR), to which Canada is not a member, displays the most responsive approach to guaranteeing equitable access to institutions and rights. Through its ruling in the 2009 *Case of González et al. ("Cotton Field") v. Mexico*, the IACtHR established the strong precedent that redress for situations of known structural vulnerability cannot remain limited to the compensating the victims involved in the case, and must involve addressing the systemic lack of equitable access to rights in order to avoid repeating the situations of the case.<sup>60</sup> The following year, the IACtHR ruling in the *Case of Vélez Loor v. Panama* expanded upon the court's 2003 *Advisory Opinion OC-18/03* on the

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<sup>58</sup> Ippolito, *Understanding Vulnerability*, Op. cit., 161.

<sup>59</sup> Freedland and Costello, "Migrants at Work".

<sup>60</sup> Dorothy Estrada-Tanck, "Human Security and Human Rights under International Law: Reinforcing Protection in the Context of Structural Vulnerability", *EUI PhD Theses*, Department of Law, European University Institute, Florence, (2013): 178-179, <https://cadmus.eui.eu/handle/1814/28036#>; Inter-American Court of Human Rights (IACtHR), *González et al. ("Cotton Field") v. Mexico*, Judgment of November 16, 2009, (Preliminary Objection, Merits, Reparations, and Costs), [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_205\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_205_ing.pdf).



‘Juridical Condition and Rights of Undocumented Migrant’ by asserting that the irregular status of such individuals created barriers to access to state institutions and impeded both the protection of these individuals and the prosecution of their abusers.<sup>61</sup> Finally, the IACtHR’s 2013 ruling in the *Case of the Pacheco Tineo Family v. Plurinational State of Bolivia*, the court outlined that protecting the human rights of undocumented populations necessitated rectifying legal and institutional structures that impair their access to protection.<sup>62</sup> Paragraph 159 of the ruling specifies that indeed, access to services such as legal assistance alone cannot be considered sufficient ‘access to protection’ without access to a competent interpreter, if necessary.<sup>63</sup> This research applies the same comprehensive view of ‘equitable access to institutions and fundamental rights’ to the evaluated Canadian policy instruments.

### 3.2. Procedural Equity

Even when individuals possess full access to state services and institutions, a lack of procedural responsiveness to individuals’ diverse needs can create further structural vulnerability. For example, a victim of sexual violence’s inability to testify from the witness stand during a court case due to their past trauma should not preclude the effective conviction of their attacker. To this end, Article 13 of the United Nations Convention on the Rights of Persons with Disabilities delineates that legal proceedings involving persons with disabilities must include the provision of procedural accommodations, and the UN Committee Against Torture recommends that states “...ensure that procedures to determine redress do not pose obstacles to members of vulnerable groups that could prevent or discourage them from pursuing their claims”.<sup>64</sup> Such assertions are necessary because the very structure of some state processes may prevent

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<sup>61</sup> Ippolito, *Understanding Vulnerability*, Op. cit., 163; Inter-American Court of Human Rights (IACtHR), *Case of Vélez Loo v. Panama*, Judgment of November 23, 2010, (Preliminary Objections, Merits, Reparations and Costs), [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_218\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_218_ing.pdf); Inter-American Court of Human Rights (IACtHR), *Advisory Opinion OC-18/03*, “Juridical Condition and Rights of Undocumented Migrants”, September 17, 2003, Requested by the United Mexican States, [https://www.corteidh.or.cr/docs/opiniones/seriea\\_18\\_ing.pdf](https://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf).

<sup>62</sup> Nifosi-Sutton, *The Protection of Vulnerable Groups*, Op. cit. 201-202; Inter-American Court of Human Rights (IACtHR), *Case of the Pacheco Tineo Family v. Plurinational State of Bolivia*, Judgment of November 25, 2013, (Preliminary Objections, Merits, Reparations and Costs), [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_272\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_272_ing.pdf).

<sup>63</sup> Inter-American Court of Human Rights (IACtHR), *Case of the Pacheco*. Op. cit., 53.

<sup>64</sup> Dorothy Estrada-Tanck, “Human Security and Human Rights under International Law: Reinforcing Protection in the Context of Structural Vulnerability”, *EUI PhD Theses*, Department of Law, European University Institute, Florence, (2013): 239, <https://cadmus.eui.eu/handle/1814/28036#>; United Nations, “Convention on the Rights of Persons with Disabilities”, (New York, 2006), [https://treaties.un.org/doc/Publication/CTC/Ch\\_IV\\_15.pdf](https://treaties.un.org/doc/Publication/CTC/Ch_IV_15.pdf); United Nations, “Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment General Comment no. 3 of the Committee against Torture: Implementation of Article 14 by States Parties”, CAT/C/GC/3, (2012), [https://www2.ohchr.org/english/bodies/cat/docs/GC/CAT-C-GC-3\\_en.pdf](https://www2.ohchr.org/english/bodies/cat/docs/GC/CAT-C-GC-3_en.pdf).

individuals who have full access to such processes from effectively utilizing them. Evidence of this is found in labour law, for “the very complexity of the legal questions she addresses renders migrant workers’ vulnerable, as they may be under incorrect impressions about their labour rights”.<sup>65</sup> A lack of action to proactively prevent such scenarios in the future could further create structural vulnerability, a criticism that scholars levelled at the European Union’s 2013 Recast Asylum Procedures Directive.<sup>66</sup> While the Directive create exceptions for individuals it considers vulnerable, claiming such an exception creates further inequity by requiring excessive procedural dexterity or the employment of legal representation.<sup>67</sup> The European Court of Human Rights (ECtHR) experiences similar scholarly criticism for failing to recognise the procedural inequities that can extenuate the structural vulnerability of asylum seekers. The ECtHR relies on an interpretation of selective vulnerability rather than acknowledging the ways in which the structure of asylum proceedings can create vulnerability for all individuals, despite their disparate individual needs.<sup>68</sup> Thus, the potential for state procedures to engender heightened structural vulnerability creates an imperative for states to exert a higher level of reflexivity in the design and evaluation of their policy mechanisms.

### 3.3. Access to Justice and Recourse

Deviating from broader definitions of ‘access to justice’, the final dimension of structural vulnerability analysed herein focuses on the ability of individuals to use justice systems to contest decisions concerning their migratory status when they believe they were incorrectly adjudicated. This neither concerns access to justice systems themselves, which would fall under ‘equitable access to institutions and fundamental rights’, nor the equitable function of state justice systems, which would fall under ‘procedural equity’. Instead, this element of structural vulnerability derives from individuals’ inability to pursue legal recourse due to myriad factors, such as individuals’ lack of legal standing and the limited impact of litigation, as outlined by the UN Special Rapporteur on Extreme Poverty and Human Rights.<sup>69</sup> The structural

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<sup>65</sup> Freedland and Costello, “Migrants at Work”, *Op. cit.*, 15.

<sup>66</sup> European Parliament and the Council of the European Union, “Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection”, *Official Journal of the European Union*, L 180/60, 32013L0032, (2013), <http://data.europa.eu/eli/dir/2013/32/oj>.

<sup>67</sup> Ippolito, *Understanding Vulnerability*, *Op. cit.*, 171.

<sup>68</sup> *Id.*, 167-168.

<sup>69</sup> Magdalena Sepulveda, “Report of the Special Rapporteur on Extreme Poverty and Human Rights: Access to Justice”, United Nations General Assembly, A/67/278, (2012), <https://www.researchgate.net/publication/256043411>.

vulnerability created by individuals' inability to appeal or remedy potentially fallacious legal decisions instigated the Inter-American Commission on Human Rights to recommend that "...states are required to remove any regulatory, social, or economic obstacles that prevent or hinder the possibility of access to justice", (although Canada has not ratified that American Convention on Human Rights).<sup>70</sup> Fears of potential deportation and familial separation further exacerbate the structural vulnerability that irregular migrants experience by discouraging their interaction with authorities to appeal negative status decisions.<sup>71</sup> In other cases, modes of recourse do not even exist in the first place, as is the case with the United Nations International Covenant on Economic, Social and Cultural Rights.<sup>72</sup> Structural vulnerability resultantly stems not only from barriers to accessing mechanisms for legal recourse, but also from such mechanisms' total absence in cases where the institutionalisation of individuals' rights is lacking.

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<sup>70</sup> Inter-American Commission on Human Rights, "Access to Justice as a Guarantee of Economic, Social and Cultural Rights. A Review of the Standards Adopted by the Inter-American System of Human Rights", 2007, OEA/Ser.L/V/II.129, <https://www.cidh.oas.org/countryrep/AccessoDESC07eng/Accessodesci-ii.eng.htm>.

<sup>71</sup> Estrada-Tanck, "Human Security and Human Rights", 239.

<sup>72</sup> Id., 146; United Nations, "International Covenant on Economic, Social and Cultural Rights", General Assembly Resolution 2200A (XXI), (1966), <https://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf>.

## 4. Methodology

Expanding the existing literature on migration policy approaches to vulnerability and deepening understandings of the EMPP pathway, this research uses process tracing to untangle the role of three intervening variables in shaping this mechanism's attention paid to structural vulnerability. Data from 23 semi-structured interviews with actors implementing these policies on the ground enables the qualitative analysis of the EMPP's acuity to its potential co-creation of the three dimensions of structural vulnerability identified above in Section 3, based on the pathway's *legal obligation framing*, *nascent stage of implementation*, and *economic vs. humanitarian framing*.

### 4.1. Data Collection

While existing scholarship discusses strategies to address vulnerability amongst refugee and displaced populations both at large and within Canada, less work devotes specific attention to the ways in which the structure of policy mechanisms could engender heightened vulnerability. This research draws on a wealth of evidence gleaned through 23 semi-structured expert interviews conducted between March and November of 2021. In doing so, this research builds on Cortinovis and Fallone's findings published in the ASILE Project Canada Interim Country Report analysing the PSR and EMPP on May 13<sup>th</sup>, 2022. The new research herein expands on earlier findings by narrowing its theoretical scope to focus specifically on institutional approaches to structural vulnerability. The semi-structured interviews gathered perspectives from the members of the Canadian government, refugee-led and grassroots civil society organisations, actors within international organisations and NGOs, refugee law professionals, and experts from the academic community. By synthesizing the evidence from interviews conducted with key actors involved in the design and enactment of Canadian migration policy mechanisms, this research adopts a critical approach to the ways in which these mechanisms may co-create structural vulnerability.

Interviews were conducted based on two standard questionnaires (indicated in their interview codes), selected based on the affiliation and expertise of each interview subject.<sup>73</sup> The first

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<sup>73</sup> Bryman, Alan, *Social Research Methods, 5th Edition*, (Oxford University Press Academic UK, 2016), <https://global.oup.com/ukhe/product/brymans-social-research-methods-9780198796053?q=brymans%20social%20research%20methodws&cc=it&lang=en>.

questionnaire examined refugee status determination processes, approaches to vulnerability, and refugee rights, while the second questionnaire examined the interactions between networks of actors involved in refugee support in Canada, and in humanitarian support for displaced populations abroad. These two questionnaires were tailored to reflect the Canadian context and the specific areas of expertise of each individual interview subject. The semi-structured format of the interviews provided interviewees with a platform to share their experiences and challenges implementing the discussed policies.<sup>74</sup>

Given this research's focus on a Canadian migration policy mechanism case study, follow-up questions were used to supplement the standard questionnaire in order to gain specific insight on the facets of the policy mechanism about which the interviewee had unique expertise. Each interviewee signed a standard consent form indicating their intention to participate in this research. Before the interview, participants were informed that they could abstain from answering questions they felt did not align with their expertise or that they did not feel comfortable answering. In order to secure research subjects' participation and to ensure their unfiltered honesty during interviews, all interviews were entirely strictly anonymous and confidential. An anonymised record of the date and length of each interview can be found in Appendix I.

All semi-structured interviews were conducted digitally due to the Covid-19 pandemic. Following each interview, video recordings were used to create interview transcripts, which were then coded for the themes analysed herein. All data collection rigorously adhered to the ASILE Data Management Plan. This includes creating standardised metadata bound to unique identifiers for each interview conducted, in conformity to the ASILE Project's commitment to developing findable, accessible, interoperable, and re-usable data. The interview recordings and transcripts generated by this research cannot be made publicly accessible, due to the strict conditions of confidentiality and anonymity promised to all research participants.

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<sup>74</sup> Ragin, Charles, and Lisa Amoroso, *Constructing Social Research, 3<sup>rd</sup> edition*, (SAGE Publications, Inc., 2019), <https://www.vitalsource.com/products/constructing-social-research-the-unity-and-charles-c-ragin-lisa-m-v9781544322445>.

## 4.2. Identification Strategy

Employing rigorous process tracing enables this research to assess the relevance of the three posited hypotheses explaining the evaluated mechanism's approaches to structural vulnerability. The independent variable that is the starting point for the design processes of both policy mechanisms is identical – the institutional decision to construct a policy mechanism – yet all three hypotheses represent potential intervening variables that can increase or decrease the ultimate dependent variable tested: the level of attention paid by a policy mechanism to mitigating its potential co-creation of structural vulnerability.

Figure 1 below provides a directed acyclic graph (DAG) illustrating the causal chains tested in this research. The answers found to the three hypothesised intervening variables listed in Section 1 do not fit into discrete categories, with the influence of the EMPP's legal obligation framing, duration of implementation, and economic vs. humanitarian framing displaying continuous variation.<sup>75</sup> By analysing the intersection between these three hypotheses, this research follows Collier's guidance that "the *descriptive* component of process tracing begins not with observing change or sequence, but rather with taking good snapshots at a series of specific moments".<sup>76</sup> The causal links in connecting the moments where the intervening variables illustrated in Figure 1 interact "can only be inferred, not directly observed, no matter how close one gets to the process or how fine grained one's data is," as explained by Humphreys and Jacobs.<sup>77</sup> The research design employed remains open to the emergence of alternative inductive insights beyond the three hypothesised intervening variables.<sup>78</sup>

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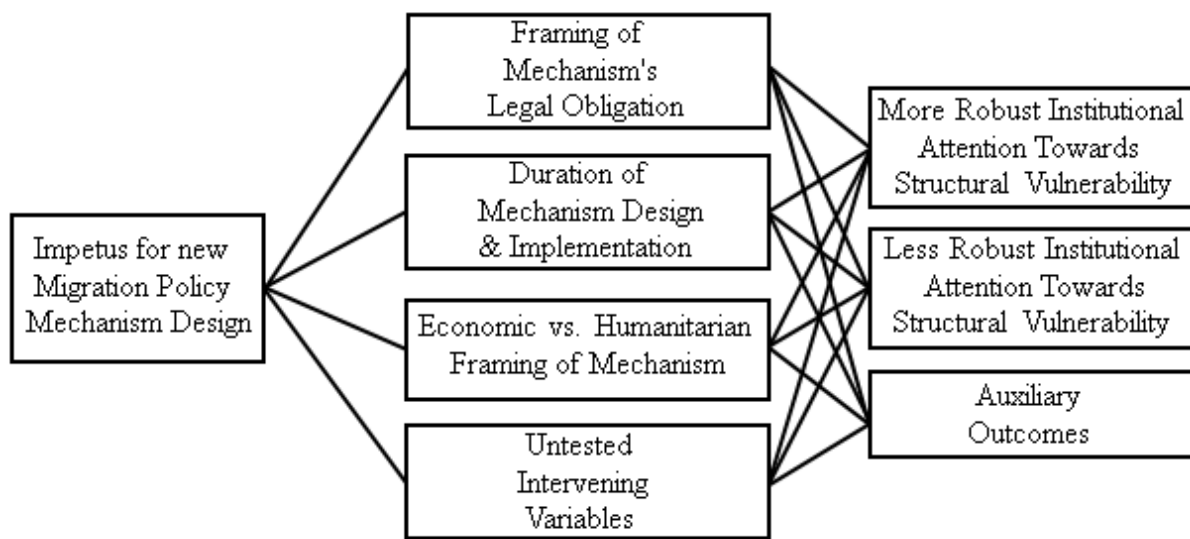
<sup>75</sup> Ragin and Amoroso, *Constructing Social Research*.

<sup>76</sup> Emphasis in original. David Collier, "Understanding Process Tracing", *PS: Political Science and Politics*, 44, no. 4 (2011): 824, <https://doi.org/10.1017/S1049096511001429>.

<sup>77</sup> Macartan Humphreys and Alan Jacobs, "Qualitative Inference from Causal Models", Columbia University, (2017): 6, <http://www.columbia.edu/~mh2245/qualdag.pdf>.

<sup>78</sup> Jeffrey T. Checkel, "Mechanisms, Process and the Study of International Institutions", Wissenschaftszentrum Berlin für Sozialforschung, Discussion Paper, SP IV 2014-104, (July 2014), <https://bibliothek.wzb.eu/pdf/2014/iv14-104.pdf>; Andrew Bennett and Jeffrey T. Checkel, "Process Tracing: From philosophical roots to best practices", in *Process Tracing: From Metaphor to Analytic Tool*, Bennett, Andrew and Checkel, Jeffrey T. (eds.), (Cambridge: Cambridge University Press, 2015): 3-37, <https://doi.org/10.1017/CBO9781139858472>.

**Figure 1: Directed Acyclic Graph of Causality in Migration Policy Mechanism Design**



By delimiting the scope of analysis to the intervening causal variables connecting the creation of a new migration policy mechanisms with its level of institutional attention towards structural vulnerability, this research encounters the potential challenge associated with process tracing described by Mahoney as “an infinite number of intervening causal steps between any independent and dependent variable...”.<sup>79</sup> Therefore, rather than seeking to definitively identify a tested single intervening variable as causal, this research seeks to untangle the admittedly complex web of interactions between variables displayed in Figure 1.<sup>80</sup> Using process tracing to accomplish this allows us to understand the way in which these intervening variables can turn into a “normative mandate embraced by policymakers”, as Collier establishes is possible.<sup>81</sup>

Using the empirical evidence gathered through the 23 semi-structured interviews, this research’s process tracing conducts hoop tests to evaluate the necessity of all three proposed hypotheses to the causal chain influencing differences in Canadian institutional approaches to structural vulnerability. The strength of these hoop tests stems from their ability to potentially

<sup>79</sup> James Mahoney, “After KKV: The New Methodology of Qualitative Research”, *World Politics*, 62, no. 1 (January 2010): 123, <https://doi.org/10.1017/S0043887109990220>.

<sup>80</sup> Howard White and Daniel Phillips, “Addressing Attribution of Cause and Effect in Small n Impact Evaluations: Towards an Integrated Framework”, 3iE - International Initiative for Impact Evaluation, (2012), <https://www.alnap.org/help-library/addressing-attribution-of-cause-and-effect-in-small-n-impact-evaluations-towards-an>.

<sup>81</sup> Collier, “Understanding Process Tracing”, Op. cit., 824.

eliminate each hypothesis, should they prove irrelevant to the design and implementation of the EMPP.<sup>82</sup> Each single hypothesis passing their hoop test cannot disprove the alternative hypotheses, but applying a hoop test based on the criteria identified above to each hypothesis allows their elimination if they fail to ‘jump through the hoop’.<sup>83</sup> No smoking gun tests are possible in the evaluation of these hypotheses, because their overlapping web of interactions prevents the assertion of a singular hypothesis as sufficient to accept an explanation. Although these hoop tests alone cannot assert a causal relationship, establishing their relevance to the causal chain provides a strong foundation for future research.

Akin to Checkel’s use of process tracing to differentiate the impact of European socialisation mechanisms and Schimmelfennig’s use of process tracing to analyse EU and NATO integration, this research’s use of hoop tests based on observable criteria supports the disentanglement of the influences dictating the structure of the EMPP.<sup>84</sup> These hoop tests rely on the identification of the influence of the EMPP’s *legal obligation framing*, *duration of implementation*, and *economic vs. humanitarian* framing analysed in statements made by interviewees regarding policy approaches (or lack thereof) to the three dimensions of structural vulnerability identified in Section 3. Beyond the hoop tests conducted, this research also searches for auxiliary outcomes that might demonstrate the relevance and causal importance of each of the three tested hypotheses.<sup>85</sup> The criterion for rejecting a tested hypothesis is its absence from the causal chain of all three dimensions of structural vulnerability.

The findings presented in Section 5 therefore contribute toward the development of an explanatory causal inference by using process tracing to establish the relevance of the three hypothesised intervening variables to the causal chain resulting in the Canadian EMPP policy mechanisms’ approach towards assuaging their co-creation of structural vulnerability, and linking this causal chain to possible auxiliary outcomes.<sup>86</sup>

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<sup>82</sup> Id., 825.

<sup>83</sup> Id., 826.

<sup>84</sup> Jeffrey T. Checkel, *International Institutions and Socialization in Europe*, (Cambridge: Cambridge University Press, 2007), <https://doi.org/10.1017/CBO9780511618444>; Frank Schimmelfennig, *The EU, NATO and the Integration of Europe: Rules and Rhetoric*, (Cambridge: Cambridge University Press, 2003), <https://10.1017/CBO9780511492068>.

<sup>85</sup> Collier, “Understanding Process Tracing”, Op. cit., 828; Mahoney, “After KKV”, Op. cit., 129.

<sup>86</sup> David Waldner, “What makes process tracing good? Causal mechanisms, causal inference, and the completeness standard in comparative politics”, Ch. 5 in *Process Tracing: From Metaphor to Analytic Tool*, Bennett, Andrew and Checkel, Jeffrey T. (eds.), (Cambridge: Cambridge University Press, 2015): 126-152, <https://doi.org/10.1017/CBO9781139858472>.



### 4.3. Potential Limitations

This methodological design's focus on testing the relevance of hypothesised intervening variables rather than definitively asserting a causal relationship avoids King, Keohane, and Verba's oft-cited criticism that process tracing does not confer a strong causal inference.<sup>87</sup> It is true, however, as Mahoney indicates, that this design also cannot definitively determine "which of multiple potential intervening mechanisms truly link the independent variable with the dependent variable".<sup>88</sup> Acknowledging this does not diminish the findings, because "not all good process tracing is conclusive", as succinctly stated by Bennett and Checkel.<sup>89</sup> Although not doubly decisive, the findings remain nonetheless significant because the non-elimination of a tested hypothesis confirms its role in the causal chain, validating its relevance for Canadian migration policy design.<sup>90</sup> Furthermore, affirming the relevance of multiple tested hypotheses is also not a limitation of this research, for the influence of these hypotheses over the causal chain is not mutually exclusive. Acknowledging the uncertainty that such overlapping influences generate is central to effective process tracing.<sup>91</sup> Relying on 23 interviews provides sufficient evidence to test the three hypotheses' relevance, because "for each test in determining whether an animal is a duck – walk, sounds, etc. – a small sample is sufficient. A thousand steps or quacks provide no more convincing evidence than a few," borrowing Bennett and Checkel's apt metaphor.<sup>92</sup>

The final limitation of this research stems from the possible exogenous factor that a complementary pathway to resettlement's reduced efforts to mitigate structural vulnerability is not the accidental result of a causal chain, but is instead an endemic feature of actors' intentional policy design. One could argue that a complementary pathway to resettlement need not adopt as comprehensive an approach to equitable accessibility, procedures, and access to justice as due to such migration pathways' 'additionality', because they are intended to supplement existing pathways. This argumentation falls flat, however, when considering that

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<sup>87</sup> Gary King, Robert O. Keohane, and Sidney Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research*, (Princeton: Princeton University Press, 1994), <https://gking.harvard.edu/kky>.

<sup>88</sup> Mahoney, "After KKV", Op. cit., 123.

<sup>89</sup> Bennett and Checkel, "Process Tracing", Op. cit. 30.

<sup>90</sup> Ricks, Jacob I. and Liu, Amy H., *PS: Political Science and Politics*, 51, no. 4 (2018): 843, <https://doi.org/10.1017/S1049096518000975>.

<sup>91</sup> Bennett and Checkel, "Process Tracing", Op. cit. 30.

<sup>92</sup> Id., 28.

all individuals impacted by policy mechanisms should enjoy the same freedom from structural vulnerability that results from facets of such policy mechanisms' fundamental design.



## 5. Data and Analysis

After providing an overview of the EMPP's structure and function in Section 5.1, Sections 5.2–5.4 provide evidence of the role played by the EMPP's *legal obligation framing*, *nascent stage of implementation*, and *economic vs. humanitarian framing* in addressing the dimensions of structural vulnerability identified in Section 3.

### 5.1. Overview of the Economic Mobility Pathways Pilot (EMPP)

Canada's Economic Mobility Pathways Pilot (EMPP) launched in April 2018, aimed at using existing labour migration pathways in Canada to facilitate higher rates of refugee resettlement. The first phase of this project lasted through 2019; it enabled six individuals to begin working for Canadian firms and also facilitated the movement of nine family members to accompany them.<sup>93</sup> Although this was lower than the 10 to 15 principle applicants that the EMPP originally aimed to resettle, these individuals' successful resettlement led to the IRCC to decide to dramatically expand the project's goals during the second phase of its implementation that began in 2020, aiming to facilitate the economic mobility of 500 refugees to Canada by the end of 2022.<sup>94</sup> Although the project's coordinators currently anticipate delays reaching this goal associated with the Covid-19 pandemic, an interviewee posited that Phase 2 would incur reduced costs of implementation compared to Phase 1 given that the necessary systems will already exist.<sup>95</sup>

While Canada exhibits both robust government institutional support for refugee resettlement activities and a panoply of more than 80 different immigration programs, an interviewee described that “the problem is that the refugee system is here, and the immigration system is here, and there's not a lot of interaction”.<sup>96</sup> To ameliorate the divide between these different migration mechanisms in Canada, the EMPP seeks to increase the interaction between the IRCC's Immigration Program Guidance Branch, Refugee Affairs Branch (RAB), the Immigration Branch, the Settlement and Immigration Branch, the provincial and territorial governments handling local immigration and integration policy, the UNHCR, two key

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<sup>93</sup> Immigration, Refugees and Citizenship Canada, “The Economic Mobility Pathways Project”.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.; Interview CAN4-5, 29.04.2021; Interview CAN4-8, 04.06.2021.

<sup>96</sup> Interview CAN4-6, 12.05.2021; Interview CAN4-5, 29.04.2021.

implementing partner NGOs, and Canadian private employers.<sup>97</sup> According to one interviewee, this process of combining such a menagerie of different levels of institutional and private actors with also mobilising refugee resettlement coordinators' expertise in local integration "means bringing together actors that don't normally sit together".<sup>98</sup>

The key distinguishing characteristic of the EMPP when compared to alternative complementary pathways, such as private and community resettlement or refugee student programs, is its clear employer focus. Data from 13 significant source countries for refugees arriving in Canada between 1980 and 2009 illustrates this success, with an average of 70% of male refugees and 51% of female refugees employed after five years in Canada.<sup>99</sup> Yet, both male and female refugees' employment lagged behind that of male and female economic migrants from the same 13 countries at each interval of one, five, 10, and 15 years after their arrival.<sup>100</sup> The EMPP seeks to address this by ensuring that refugees participating in the project arrive in Canada with a place of employment already secured, while concurrently addressing the increased job vacancies currently affecting Canada, a problem that is especially acute for some rural communities.<sup>101</sup>

Interviewees expressed that, given the multiple sectors of the Canadian economy facing unmet labour demands, "...there's no reason at all why there shouldn't be complementary access for refugees".<sup>102</sup> By expanding resettlement access by enabling refugees to access the Canadian labour market, the focus of the EMPP lies on the skillsets most desired by Canadian employers, with an interviewee clarifying that "the EMPP is all about human capital, really. It starts with the employers' needed human capital, understood as skills and work experience and education".<sup>103</sup> The EMPP therefore not only circumvents traditional barriers to refugees' labour market access, but also provides tools that "...help employers to tap into a different international recruitment pool".<sup>104</sup> The narrow focus on employers' desired human capital

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<sup>97</sup> Immigration, Refugees and Citizenship Canada, "The Economic Mobility Pathways Project".

<sup>98</sup> Interview CAN4-5, 29.04.2021.

<sup>99</sup> These figures represent unweighted averages. Garnett Picot, Yan Zhang, and Feng Hou, "Labour Market Outcomes Among Refugees to Canada", *Statistics Canada*, Catalogue no. 11F0019M — no. 419, (2019): 18, <https://www150.statcan.gc.ca/n1/en/pub/11f0019m/11f0019m2019007-eng.pdf>.

<sup>100</sup> *Id.*, 19.

<sup>101</sup> Government of Canada, "Economic Mobility Pathways Pilot". *Immigration, Refugees and Citizenship Canada*, 2021, <https://www.canada.ca/en/immigration-refugees-citizenship/news/2021/06/economic-mobility-pathways-pilot.html>; Interview CAN4-5, 29.04.2021; Interview CAN2-9, 21.06.2021.

<sup>102</sup> Interview CAN4-4, 28.04.2021.

<sup>103</sup> *Ibid.*

<sup>104</sup> Interview CAN4-5, 29.04.2021.

profiles and the institutional support provided to employer demonstrates the EMPP's promising potential, given that the project was "...overwhelmed with employer interest at the outset".<sup>105</sup>

The Canadian government uses the lessons learned from the early phases of the EMPP's implementation as a model for global skills-based complementary pathways for admission, through platforms such as the Global Task Force on Refugee Labour Mobility chaired by the Canadian government. Initiatives such as this support global efforts to reframe refugee resettlement away from a strictly humanitarian endeavour, because such a framing can the significant professional talents that many refugees have.<sup>106</sup> In doing so, the EMPP meets the three goals identified by the UNHCR for complementary pathways: easing pressure on host states, enhancing refugees' self-reliance, and expanding third-country solutions.<sup>107</sup> These aforementioned features led an interviewee to indicate that the EMPP may serve as a model for other nations to develop similar complementary labour mobility pathways, deeper analysis of how these dynamics intersect with structural vulnerability is required in order to understand if there are risks associated with policies designed to increase refugees' self-reliance and reduce state governments' involvement in resettlement.<sup>108</sup>

## *5.2. Equitable Access to Institutions and Fundamental Rights*

The application and selection process of the EMPP remains fundamentally constrained during the first two phases of implementation, due both to the focus on employers' needs and to the two select NGO partners implementing the project within a limited geographic scope. Refugees' ability to participate in the EMPP therefore "...depends on the needs of the labour market and maxing out specific profiles of human capital".<sup>109</sup> The multiple interviewed actors who designed and implemented the pathway explain that it is important that the selection logic of participants resembles that of a normal job application process because the EMPP is "...is employer focused, meeting demonstrated needs. This shifts the employer's mindsets from a burden to a benefit".<sup>110</sup> Although successful in incentivizing greater employer participation, thereby expanding refugees' access to resettlement, there remains potential for this process to

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<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

<sup>107</sup> United Nations High Commissioner for Refugees, "Complementary Pathways...Key Considerations".

<sup>108</sup> Interview CAN4-8, 04.06.2021.

<sup>109</sup> Interview CAN4-5, 29.04.2021.

<sup>110</sup> Interview CAN2-9, 21.06.2021.

also replicate and reinforce a two-tiered system that privileges refugees who had the socioeconomic privilege to already attain certain desired skill profiles and excludes refugees' with lower human capital allotments.<sup>111</sup> One interviewee explained that the designers of this mechanism may justify a focus on exclusively high-skilled refugees, due to worries associated with enabling lower-skill individuals to access this pathways and requiring greater institutional support if they lose their job and cannot find another.<sup>112</sup> Similarly, the employer-focus may prevent individuals with significant human capital, yet who also have physical disabilities or are victims of torture or sexual and gender-based violence, from accessing the pathway.<sup>113</sup> This policy design exhibits the reasoning that there are alternative state-led resettlement pathways that could better serve these individuals, without a legal obligation to create an equally-accessible complementary pathway for admission.

These challenges resulted in an interviewed implementing actor highlighting the importance of managing EMPP applicants' expectations, saying that "this is all employer driven and so, if an employer interviews 10 people and wants to hire one, there's expectations to manage around that when the job offer means so much to someone".<sup>114</sup> Indeed, in the EMPP that job offer would be the catalyst for individuals' and their families' potential resettlement.

EMPP implementation relies on two principal partner organisations, RefugePoint and Talent Beyond Boundaries, to identify and catalogue refugees' available human capital in Jordan, Lebanon, and Kenya. In these first stages of implementation, individuals' participation in the EMPP required that their skills were first identified by these two organisations so that their profiles could match with Canadian employers' needs, although their skill recognition strategies differ. RefugePoint's skill recognition involves their existing infrastructure of vocational programs in the Kakuma and Dadaab refugee camps in Kenya, with only those whose skills were catalogued through their participation in RefugePoint or UNHCR programs able to be paired with Canadian employers.<sup>115</sup> Talent Beyond Boundaries instead casts a slightly wider net among the refugee communities they work with in Jordan and Lebanon, cataloguing refugees' skill profiles in a consolidated database to match them with Canadian

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<sup>111</sup> Interview CAN4-5, 29.04.2021.

<sup>112</sup> Ibid.

<sup>113</sup> Interview CAN4-11, 16.06.2021; Interview CAN 2-10, 22.06.2021.

<sup>114</sup> Interview CAN4-5, 29.04.2021.

<sup>115</sup> Interview CAN2-9, 21.06.2021; Interview CAN4-5, 29.04.2021; Immigration, Refugees and Citizenship Canada, "The Economic Mobility Pathways Project".

employers' needs.<sup>116</sup> Access to the EMPP is thus currently not entirely geographically equitable, due to the limited capacity of the two current partner NGOs, with an interviewee noting that there are presently "...disparities within the available networks identifying human capital in different locations, for sure, but remember that we're still talking about something that's quite nascent".<sup>117</sup>

Given its early phase of implementation, potential remains to expand accessibility to the EMPP in the future to include not only a wider geographic region, but also a wider range of refugees' skill sets. Organisations such as TalentLift and Jumpstart Refugee Talent both seek to incentivise greater numbers of Canadian employers to participate in the EMPP and hire refugees with diverse skill profiles.<sup>118</sup> Multiple interviewees also indicated that there is potential for the future expansion of the EMPP to Latin America. They indicated Colombia, Ecuador, and Peru as nations of special interest, in part due to pre-existing livelihood programming.<sup>119</sup> Such livelihood programs would provide an accessible and detailed catalogue of individuals who could meet the needs of employers participating in the EMPP.

Beyond skill profile and geographic scope, further limits to the EMPP's accessibility persist. Participation in the EMPP requires that applicants have recognised refugee status, have registered as an asylum seeker, or have a "person of concern letter" written by the UNHCR.<sup>120</sup> This prerequisite means that refugee claimants within Canada's territory cannot currently participate in the EMPP, even if they may eventually receive refugee status and may have desired human capital.<sup>121</sup> The collaboration with the UNHCR provides a positive example of how the design of a policy can reduce potential structural vulnerability for individuals who were not able to apply for or receive a positive Refugee Status Determination (RSD), although greater time implementing the EMPP is needed to evaluate if this feature expands EMPP

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<sup>116</sup> Sandra Elgersma et al., "Tapping the Potential of Displaced Talent: Lessons Learned", In *Beyond 2020: Renewing Canada's Commitment to immigration*, Metropolis eBook. Volume 1, (2020), [https://www.ciim.ca/img/boutiquePDF/608\\_metropolis\\_ebook\\_vol1\\_2020\\_v10\\_lr-n3qfp.pdf](https://www.ciim.ca/img/boutiquePDF/608_metropolis_ebook_vol1_2020_v10_lr-n3qfp.pdf); Interview CAN2-9, 21.06.2021.

<sup>117</sup> Interview CAN4-5, 29.04.2021.

<sup>118</sup> Interview CAN2-2, 30.03.2021; Interview CAN2-8, 27.05.2021; Immigration, Refugees and Citizenship Canada, "The Economic Mobility Pathways Project".

<sup>119</sup> Interview CAN4-5, 29.04.2021; Interview CAN2-8, 27.05.2021; C. D. Smith and D. Wagner, "How Canada can address skills shortages by improving access to economic pathways for refugees and displaced people in Latin America", CERC Policy Brief, no. 01 (April 2021), [https://www.ryerson.ca/content/dam/cerc-migration/Policy/Final\\_PB\\_Smith\\_Wagner\\_April19.pdf](https://www.ryerson.ca/content/dam/cerc-migration/Policy/Final_PB_Smith_Wagner_April19.pdf).

<sup>120</sup> Cortinovis and Fallone, "Country Report CANADA".

<sup>121</sup> Interview CAN4-6, 12.05.2021.



accessibility in practice. Additionally, Appendix II provides a detailed explanation of the eligibility exclusions that apply to participation in the EMPP, although this is not an endogenous result of the EMPP's design.

A final evolving core element of the EMPP that may limit the pathway's accessibility are the four economic migration pathways used to facilitate the mobility of refugees' participating in the EMPP. The EMPP relies on the Atlantic Immigration Pilot (AIP), the Provincial Nominee Programs (PNP), the Rural and Northern Immigration Pilot (RNIP), and the four component pathways of the Express Entry (EE) system for Canadian labour migration (Federal Skilled Worker Class; Federal Skilled Trades Class; Canadian Experience Class; and Enhanced Nomination Provincial Nominee Class high-skilled streams).<sup>122</sup> Each of these pathways involves its own prerequisites and requirements for accessibility, the details of which are discussed at greater depth by Cortinovis and Fallone.<sup>123</sup> While the use of such economic migration pathways to enable refugee resettlement replicates a system that benefits those with higher human capital allotments and greater socioeconomic resources, the implementers of the EMPP remain committed to the UNHCR's Key Considerations for complementary pathways, which note that economic pathways "could be adapted to facilitate refugees' admission".<sup>124</sup> In a review of Phase 1 of the EMPP, the IRCC identified six main challenges: regulatory and legislative obstacles, operational accommodations; identification of refugee skills; access to information and awareness; job-matching with employers in destination countries; and financial requirements.<sup>125</sup> To this end, the IRCC's revisions to the EMPP announced by the Minister of Immigration, Refugees and Citizenship in 2021 specifically aim to counteract these barriers to accessibility associated with the AIP, PNP, RNIP, and EE pathways.<sup>126</sup>

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<sup>122</sup> Immigration, Refugees and Citizenship Canada, "The Economic Mobility Pathways Project"; Government of Canada, "Public policy to support the Economic Mobility Pathways Pilot (EMPP) – Phase 2", 14.08.2021, <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/public-policies/economic-mobility-pathways-pilot-phase-2.html>; Government of Canada, "Rural and Northern Immigration Pilot: about the pilot", 19.04.2022, <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/rural-northern-immigration-pilot.html>.

<sup>123</sup> Cortinovis and Fallone, "Country Report CANADA".

<sup>124</sup> United Nations High Commissioner for Refugees, "Complementary Pathways...Key Considerations".

<sup>125</sup> Immigration, Refugees and Citizenship Canada, "The Economic Mobility Pathways Project".

<sup>126</sup> Government of Canada, "Canada announces 3 new initiatives to welcome and support more refugees", 18.06.2021, <https://www.canada.ca/en/immigration-refugees-citizenship/news/2021/06/canada-announces-3-new-initiatives-to-welcome-and-support-more-refugees.html>; Government of Canada, "Public policy to support"; Cortinovis and Fallone, "Country Report CANADA".

### 5.3. Procedural Equity

The employer focus of the EMPP indelibly characterises the way in which its procedures function. While refugees utilizing the AIP, PNP, RNIP, and EE pathways should not encounter different experiences during the processing of their applications and during the local arrival and integration than other economic migrants, adequate attention must be paid to ensuring that the procedures involved can flexibly react to accommodate the needs of refugee participants. As explained by one interviewee, refugees participating in the EMPP “...don’t go through a full vulnerability assessment like you would for resettlement” because this pathway functions in addition to pre-existing state-led mechanisms, requiring specific effort in policy design to prevent the emergence of structural vulnerabilities.<sup>127</sup> Without such information, it can become difficult to recognise how the pathways operating procedures can be specially adapted to best serve individuals with physical disabilities, or who are victims of torture or sexual and gender-based violence.<sup>128</sup>

The design of the EMPP results in reception and integration procedures that largely depend on the employer for whom the project participant will work, in addition to local NGO and civil society partners. An interviewee recognised that the discretionary aspect of such procedures could result in differences in the level of support that EMPP participants receive, because “the extent to which they play a hands-on role in terms of helping to recruit and relocate people varies between the partners”, as revealed by an interviewee.<sup>129</sup> Implementing actors are aware of this potential for structural vulnerabilities to manifest and expressed that they are tracking the differences between EMPP participants, economic migrants, and resettled refugees in both the application and settlement processes.<sup>130</sup> Interviewed actors working on the EMPP further explained that they check in with both the employer and resettled employee at intervals of roughly six months to ensure their continued progress, enabling the potential identification of procedural shortcomings.<sup>131</sup>

Given that the labour market demands of Canadian employers often require quick solutions, the collaboration of federal and provincial government actors facilitates the expedited

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<sup>127</sup> Interview CAN4-5, 29.04.2021.

<sup>128</sup> Interview CAN4-11, 16.06.2021; Interview CAN 2-10, 22.06.2021.

<sup>129</sup> Ibid.

<sup>130</sup> Interview CAN2-9, 21.06.2021.

<sup>131</sup> Interview CAN4-5, 29.04.2021.

processing of some EMPP participants' resettlement so that they can remain competitive jobs applicants.<sup>132</sup> This accelerated processing of applications both on the federal and provincial level allows the EMPP to offer employers with expedited hiring timelines and contributes to the project's success, although potentially coming at the cost of attention to addressing applicants' vulnerabilities.

After application processing, the largest challenge to procedural equity lies in the quality of the reception and integration support provided by EMPP participants' employers. Employers' ability to provide such support is further modified by their capacity to rely on assistance from their local municipal authorities and community actors. Roughly half of the individuals participating in the first phase of the EMPP were resettled to places of employment in a rural location, leading to the development of a 'Rural Toolkit' to aid employers and civil society actors in providing an adequate level of procedural equity when supporting EMPP participants in communities where refugees have less personal connections.<sup>133</sup> Providing this support for equitable procedures in rural communities is of increased importance given the new inclusion of the recently launched RNIP in Phase 2 of the EMPP's implementation, potentially funnelling future participants to some of Canada's most rural areas.

In order to address the aforementioned potential for differences in provided support, Phase 2 of the EMPP currently undertakes two new support models that still align with the UNHCR's goal of easing pressure on host governments. A community-driven model of support provides IRCC Settlement and Integration Policy Branch funding to a larger network of civil society organisations to support EMPP participants to address, enhancing their pre-existing capacity to address challenges such as housing, social engagement, transportation, and childcare.<sup>134</sup> A sector-driven model unites larger groups of employers within the same industry to potentially expand the number of jobs open to EMPP participants by relying on these employers' pooled capacity to establish the necessary support structures for resettled refugees, while also dispersing the costs between each individual employer.<sup>135</sup> Both of these models provide promising potential to reduce the structural vulnerability that individuals face, yet the early stage of their implementation prevent conclusive findings on their success.

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<sup>132</sup> Interview CAN4-5, 29.04.2021.

<sup>133</sup> Interview CAN2-9, 21.06.2021; Interview CAN4-5, 29.04.2021.

<sup>134</sup> Interview CAN4-5, 29.04.2021; Interview CAN2-2, 30.03.2021; Elgersma et al., "Tapping the Potential"; Cortinovis and Fallone, "Country Report CANADA".

<sup>135</sup> Interview CAN4-5, 29.04.2021; Elgersma et al., "Tapping the Potential".

#### *5.4. Access to Justice and Recourse*

Individuals' ability to access justice and recourse systems to challenge their experiences applying for and participating in the EMPP system was noticeably absent from the majority of interviews concerning this mechanism. Indeed, there is currently no unique appeal mechanism or complaint system within the EMPP itself, beyond the contact between UNHCR representatives and EMPP participants to check their progress. In many ways, this feature can be attributed to the framing of the EMPP as an 'additional' or 'supplemental' mechanism for which the Canadian government has no legal obligation, because its designers made specific efforts to avoid the creation of new bureaucratic instruments that may become an institutional burden.<sup>136</sup> While this design seeks to adhere to the UNHCR's Key Considerations for complementary pathways of enhancing refugees' self-reliance during the resettlement process, individuals successfully doing so requires the inclusion of platforms to advocate for themselves if they feel their rights were not adequately or equitably upheld.<sup>137</sup>

Refugees participating in the EMPP go through a vetting and matching process that seeks to pair individuals with employers.<sup>138</sup> As previously established, individuals' selection relies on how closely their human capital profile aligns to the needs of participating Canadian employers. Yet, should an individual successfully lodge a job application with a potential employer and be rejected, they are afforded no way to challenge the logic of this decision. This stems from the employment-based focus of this complementary pathway for admission, for other Canadian job applicants similarly enjoy no right to contest a negative hiring decision, outside of when this decision is demonstrably due to an employer's prejudice.<sup>139</sup> The EMPP therefore provides the institutional infrastructure to circumvent the hiring obstacles presented by refugees' migratory status and to make them competitive on the Canadian job market, but it does not involve any novel ways for refugees to access justice for issues specifically related to the EMPP. The economic logic on which the EMPP operates assumes that existing worker protection and recourse mechanisms in the Canadian labour market and legal system will also function sufficiently for refugee workers, when combined with the support they receive from the UNHCR and other partner organisations.<sup>140</sup> Still, Cortinvois and Fallone raise important

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<sup>136</sup> Interview CAN4-5, 29.04.2021.

<sup>137</sup> United Nations High Commissioner for Refugees, "Complementary Pathways...Key Considerations".

<sup>138</sup> Interview CAN2-8, 27.05.2021; Interview CAN2-2, 30.03.2021.

<sup>139</sup> Interview CAN2-8, 27.05.2021.

<sup>140</sup> Interview CAN4-5, 29.04.2021; Interview CAN2-9, 21.06.2021.

questions regarding the potential for an inequitable power imbalance between employers and EMPP participants, given the importance of this first job in enabling individuals' access to a durable resettlement solution.<sup>141</sup> This highlights the importance of ensuring that complementary pathways heed the GCM's prioritisation of delivering decent work and addressing potential vulnerabilities.<sup>142</sup>

The short time span of implementation prevents the collection of significant evidence about the impacts of this lack of access to justice regarding hiring decisions in the EMPP and does not rule out the future development of endogenous recourse mechanisms. One EMPP participant during Phase 1 lost their job due to the outbreak of the Covid-19 pandemic, yet they were able to independently attain a new job.<sup>143</sup> This individuals' ability to navigate the Canadian labour market with requiring institutional support to challenge the loss of their first job is doubtlessly encouraging, but cannot be used to assume that no future individuals will require more robust access to justice and recourse. The need for built-in access to justice may also better serve refugees employed in Canada through the EMPP who struggle with their employment or lose their job due to their personal history as victims of torture or sexual and gender-based violence.<sup>144</sup>

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<sup>141</sup> Cortinovis and Fallone, "Country Report CANADA".

<sup>142</sup> International Organization for Migration, "Global Compact".

<sup>143</sup> Interview CAN4-5, 29.04.2021.

<sup>144</sup> Interview CAN4-11, 16.06.2021; Interview CAN 2-10, 22.06.2021.

## 6. Conclusion and Discussion

The evidence presented in Section 5 clearly demonstrates the numerous overlapping intersections between all three tested hypotheses in shaping the EMPP’s approach towards delivering equitable access to institutions and rights, procedural equity, and access to justice and recourse. Some may defend the revealed potential for structural vulnerability to arise from the EMPP’s design by asserting that complementary pathways were never intended to replace existing state-led resettlement systems, but following this research’s identification of the three intervening variables and verification of their relevance, policymakers can better work to counteract their influence during the design of future complementary pathways. The results of the nine hoop tests conducted through process tracing are summarised below in Figure 2.

**Figure 2: Hypothesis Testing for the EMPP’s Approaches to Structural Vulnerability**

	<i>Lack of legal obligation and focus on additionality</i>	<i>Nascent nature of the policy mechanism</i>	<i>Economic Oriented framing rather than humanitarian</i>
<b>Equitable Access to Institutions and Rights</b>	Confirmed	Confirmed	Confirmed
<b>Procedural Equity</b>	Confirmed	Confirmed	Confirmed
<b>Access to Justice and Recourse</b>	Confirmed	Confirmed	Confirmed

The utilised hoop tests establish that each of the three proposed hypotheses is relevant to the causal chain linking the creation of a new migration policy mechanism with the mechanism’s level of attention paid to structural vulnerability. The failure to eliminate even one of the hypotheses is indeed surprising, yet this should not be considered a negative outcome. Given that the hoop tests used herein establish only that each tested hypothesis is a necessary component of the causal chain, this research did not intend to establish a causal link because it could not irrefutably demonstrate that any single one or combination of the tested hypotheses was sufficient to affirm a causal inference.

The framing of complementary pathways as ‘additional’ and lacking a legal obligation resulted in differences in the EMPP’s accessibility, a lack of vulnerability assessment procedures for the EMPP, and an absence of EMPP-specific recourse mechanisms. While complementary

pathways can never replace state-led mechanisms, their design must exhibit equal attention to reducing potential structural vulnerability. Moreover, evidence emerged during interviews indicating that this framing created auxiliary outcomes potentially limiting the pathways' accessibility.

The nascent stage of EMPP implementation reduced the project's accessibility by constraining it to a limited geographic scope, although this does not rule out its future expansion to reach a wider geographic scope. The experiences during Phase 1 of the EMPP led to the creation of the community-driven and sector-driven models for delivering adequate reception and integration support, indicating that the lack of significant implementing experience can contribute to structural vulnerability while also promisingly indicating the potential for the mechanism's refinement to prevent structural vulnerability as it ages. The short duration of implementation also precluded inferences about the ability of existing Canadian worker protections to adequately meet the needs of refugee workers. This finding indicates the importance of future complementary pathways to adopt strategic plans for reducing structural vulnerability while institutional capacity and experience accrues during early implementation.

The framing of the EMPP as a predominantly economic pathway, rather than humanitarian, resulted in a largely subjective accessibility of the mechanism based on employer's desired skill profiles. It additionally resulted in the expediting of individuals' resettlement applications, which alone is not problematic, but heightens the potential for individuals' unique needs to be overlooked. This employer-focus finally resulted in a lack of independent recourse mechanisms within the EMPP if an individual felt they lost or did not receive a job for an undue cause. While this economically oriented framing can successfully operate in symphony with humanitarian objectives to expand resettlement, implementing actors cannot allow such economic logic to supersede the core humanitarian objectives of refugee resettlement.

Complementary pathways' goal of reducing the pressure on host states cannot come at the cost of increasing the potential for individuals resettled through complementary pathways to face structural vulnerability. The EMPP is a laudable expansion of refugee resettlement pathways, yet transnational efforts to expand complementary pathways would do well to avoid replicating the factors that this research established contribute to creating the potential for structural vulnerability. If unaddressed, there is a risk that complementary pathways for admission

become a global two-tiered system that specifically benefits refugees with higher human capital allotments, better international connections, or greater personal wealth.

Actors such as the European Union that intend to replicate the construction of complementary pathways such as the EMPP must devote specific attention to mitigating these three tested intervening variables. The established relevance of all three variables provides an agenda for future research that tests the comparative influence of each on policies' designs, to promote the development of complementary pathways to admission that expand resettlement opportunities while concurrently exercising the highest level of caution towards avoiding their co-creation of structural vulnerability.



## Appendix I: Interview Record

Interview Number	Interview Code	Date	Duration
1	CAN4-1	08.04.2021	48:46
2	CAN4-2	15.04.2021	52:55
3	CAN4-3	19.04.2021	49:24
4	CAN4-4	28.04.2021	76:10
5	CAN4-5	29.04.2021	44:45
6	CAN4-6	12.05.2021	50:20
7	CAN4-7	04.06.2021	36:08
8	CAN4-8	04.06.2021	46:15
9	CAN4-9	04.06.2021	53:21
10	CAN4-10	15.06.2021	45:42
11	CAN4-11	16.06.2021	64:48
12	CAN4-17	17.11.2021	55:29
13	CAN4-18	17.11.2021	55:29
14	CAN2-1	18.03.2021	59:58
15	CAN2-2	30.03.2021	70:08
16	CAN2-3	01.04.2021	42:21
17	CAN2-4	16.04.2021	43:17
18	CAN2-5	30.04.2021	25:41
19	CAN2-6	04.05.2021	38:00
20	CAN2-7	18.05.2021	53:31
21	CAN2-8	27.05.2021	53:58
22	CAN2-9	21.06.2021	37:17
23	CAN2-10	22.06.2021	42:49

## Appendix II: Access to Asylum and Resettlement in Canada

The IRPA outlines legal eligibility for resettlement mechanisms in subsections 95–97: it covers individuals displaced outside of their country of nationality, stateless individuals, and individuals facing targeted persecution in their country.<sup>145</sup> Yet, even individuals meeting these eligibility requirements can face exclusions according to IRPA subsection 98, which derives from the UN Convention relating to the Status of Refugees Articles 1E and 1F. Article 1E prevents the admission of individuals who do not require international protection or who already possess protected status in a third country. Article 1F prohibits the admission of individuals implicated in criminality, war crimes, or crimes against humanity.

The IRPA delineates specific grounds for inadmissibility to Canadian territory in subsections 34 – 42.<sup>146</sup> An interviewed member of Canadian civil society working specifically in refugee support critiqued that significant litigation existed related to these conditions for inadmissibility because “...people may be prevented from accessing refugee protection in Canada in ways that don’t align with the Refugee Convention” given that these requirements are “quite a bit broader than the grounds of exclusion under the under the Refugee Convention”.<sup>147</sup> The claim that Canada’s broad criteria for inadmissibility may contravene the Refugee Convention relates specifically to IRPA subsections 34 and 36.

Subsection 34 seeks to implement Refugee Convention Article 1F(a), with subsection 34(f) including the members of organisations involved in political violence.<sup>148</sup> This broad inadmissibility based on ‘membership’ risked precluding individuals who had no direct involvement in such activities from accessing protection in Canada. It further failed to stipulate the timeframe of ‘membership’, meaning that individuals could be punished for a group’s activities at some point either before or after that individual’s membership. As a result, the Supreme Court of Canada’s ruling in the 2013 *Ezokola v. Canada (Citizenship and Immigration)* case created a new test that evaluates if an applicant “voluntarily made a knowing

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<sup>145</sup> Parliament of Canada, “Immigration and Refugee Protection”.

<sup>146</sup> Ibid.

<sup>147</sup> Interview CAN4-8, 04.06.2021.

<sup>148</sup> Parliament of Canada, “Immigration and Refugee Protection”.

and significant contribution to the crime or criminal purpose of the group”, thereby significantly reigning in the Canadian approach to complicity.<sup>149</sup>

Subsection 36(1)(c) deems inadmissible on the grounds of serious criminality all individuals who committed an act outside Canada that has a maximum sentence of more than 10 years under Canadian law. This similarly risks extending beyond the Refugee Convention, for it relies on a maximum penalty rather than the unique evidence of an individual’s case. As a result, an individual given a conditional discharge who never served time in prison could automatically face inadmissibility if there was a sentence for their crime to receive a conviction longer than 10 years in the Canadian legal system.<sup>150</sup>

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<sup>149</sup> Supreme Court of Canada, *Ezokola v. Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40, 19/07/2013. <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13184/index.do>; Interview CAN4-8, 04.06.2021.

<sup>150</sup> Interview CAN4-8, 04.06.2021.

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## Glossary

AIP	Atlantic Immigration Program
CBSA	Canada Border Services Agency
ECtHR	European Court of Human Rights
EE	Express Entry
EMPP	Economic Mobility Pathways Pilot
EU	European Union
GCM	Global Compact for Safe, Orderly and Regular Migration
GCR	Global Compact on Refugees
IACtHR	Inter-American Court of Human Rights
IOM	International Organization for Migration
IRB	Immigration and Refugee Board of Canada
IRCC	Immigration, Refugees and Citizenship Canada
IRPA	Immigration and Refugee Protection Act
IRPR	Immigration and Refugee Protection Regulations
PNP	Provincial Nominee Program
PSR	Private Sponsorship of Refugees Program
RNIP	Rural and Northern Immigration Pilot
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees